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## LEGAL CHECKLIST FOR INTERNATIONAL DEFENSE TRANSACTIONS

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The following is a Checklist of legal and business issues to be considered by a U.S. company (the “Company”) in planning the sale of products or services or licensing technology to a foreign military customer<sup>2</sup> through a direct commercial sale (the “Transaction”). As a direct commercial sale (“DCS”), the Transaction will not be conducted through the U.S. Foreign Military Sales (“FMS”) program, and this Checklist is not intended to be used in FMS transactions. This Checklist is intended as a planning tool only and is not an exhaustive assessment of all legal issues that might arise in the Transaction - other issues may be involved depending upon the facts of the Transaction, the parties and the countries in question.

## I. U.S. REGULATORY REQUIREMENTS

**Note Regarding Export Control Reform Initiative.** At the time of this writing, the Obama administration is in the process of amending portions of the U.S. export control laws, including transferring certain items from the U.S. Munitions List to the Commerce Control List and other proposed changes (the “Export Control Reform Initiative”).<sup>3</sup> It is expected that portions of these changes will become effective on October 15, 2013, with the remainder of these changes being completed by early to mid-2014. Parties reviewing this Checklist should use care to determine if any of the proposed amendments under the Export Control Reform Initiative have become effective since the date of this Checklist.

### A. Arms Export Control Act and International Traffic In Arms Regulations (“ITAR”)

1. Are the products involved in the Transaction listed on the U.S. Munitions List (“USML”)?<sup>4</sup> If yes, the Transaction will be regulated under ITAR and the Company will be subject to many of the requirements discussed below. (For a detailed discussion about determining if a product is listed on the USML and subject to ITAR, see “Is My Company Subject To ITAR” at <http://www.williamsmullen.com/news/my-company-subject-itar>).<sup>5</sup> If the Company is uncertain whether an item is on the USML, the Company can apply for a Commodity Jurisdiction Request from the Directorate of Defense Trade Controls (“DDTC”) in the State Department.
2. Is the Company required to register under ITAR to engage in the Transaction? See 22 CFR Part 122.

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<sup>2</sup> This includes a foreign government agency or a foreign private party through subcontracting, teaming or other agreements.

<sup>3</sup> See Revisions to the Export Administration Regulations: Initial Implementation of Export Control Reform, Bureau of Industry and Security, 78 Fed. Reg. No 73, p. 22660, April 16, 2013, and Amendment to the International Traffic in Arms Regulations: Initial Implementation of Export Control Reform, Department of State, 78 Fed. Reg. No 73, p. 22740, April 16, 2013. See also White House Fact Sheet on Export Control Reform, August 30, 2010 (at [http://www.bis.doc.gov/news/2010/white\\_house\\_fact\\_sheet.htm](http://www.bis.doc.gov/news/2010/white_house_fact_sheet.htm)) and various proposed regulations promulgated by the Bureau of Industry and Security and Directorate of Defense Trade Controls during 2010, 2011, 2012 and 2013.

<sup>4</sup> 22 CFR Part 121.

<sup>5</sup> Items included on the U.S. Munitions List often include items that are specifically “designed”, “developed” or “configured” for military use, specifically designed parts, components and accessories of such items, items “modified” or “adapted” for military use, items developed using Defense Department funding and/or under SBIR contracts, associated manufacturing and testing equipment, and classified technical data and services under USML Category XVII. In addition, end products that incorporate parts, components or accessories that are on the U.S. Munitions List are also themselves considered to be on the U.S. Munitions List under DDTC’s “See-Through Rule.”

3. Is the Company exporting an article that is listed on the USML? If yes, the Company will be required to obtain an export license or other authorization from DDTC unless an exemption applies. See 22 CFR Part 123.
4. Is the Company sending or taking ITAR-controlled technical data or software out of the U.S.? If yes, the Company will be required to obtain an export license or other authorization from DDTC unless an exemption applies. See 22 CFR Part 125.<sup>6</sup>
5. Is the Company transferring/disclosing ITAR-controlled technical data or software to a foreign person<sup>7</sup> or entity in the US? If yes, the Company will be required to obtain an export license or other authorization from DDTC unless an exemption applies. See 22 CFR Part 125
6. Is the Company performing services for a foreign person or entity related to USML items, either abroad or in the U.S.? If yes, the Company will most likely be required to enter into a Technical Assistance Agreement (“TAA”) approved by DDTC or other authorization from DDTC unless an exemption applies. See 22 CFR Part 124.
7. Is the Company performing services for a foreign military organization for an item regulated under the Export Administration Regulations (“EAR”)? If yes, verify that such services are not “defense services” under 22 CFR § 120.9 which require a Technical Assistance Agreement authorized by DDTC.<sup>8</sup>
8. Will the Company be disclosing ITAR-controlled technical data to foreign persons in marketing proposals, trade shows or other means? If yes, determine if an exemption will be available under 22 CFR §. 120.10(a)(5); if not the Company will be required to obtain an export license for such disclosure unless another exemption applies.
9. Is the Company licensing ITAR-controlled technical data to permit the manufacture overseas of an item on the USML? If yes, the Company will most likely be required to enter into a Manufacturing License Agreement (“MLA”) in the Transaction approved by DDTC unless an exemption applies. See 22 CFR Part 124.
10. Is the Company establishing a warehouse or distribution point abroad for defense articles exported from the U.S. for subsequent distribution to entities in a sales territory approved by DDTC? If yes, the Company will most likely be required to enter into a Distribution Agreement in the Transaction approved by DDTC unless an exemption applies. See 22 CFR Part 124.

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<sup>6</sup> Note: Technical data in the “public domain” as such term is defined at 22 CFR § 120.11 is excluded from this requirement.

<sup>7</sup> The term “foreign person” is defined at 22 CFR § 120.16 as follows: *Foreign person* means any natural person who is not a lawful permanent resident as defined by 8 U.S.C. 1101(a)(20) or who is not a protected individual as defined by 8 U.S.C. 1324b(a)(3). It also means any foreign corporation, business association, partnership, trust, society or any other entity or group that is not incorporated or organized to do business in the United States, as well as international organizations, foreign governments and any agency or subdivision of foreign governments (e.g., diplomatic missions).

<sup>8</sup> In a number of recent DDTC cases, parties that performed services for foreign military organizations related to items regulated under the Export Administration Regulations were determined by DDTC to have performed “defense services” regulated under ITAR which required a Technical Assistance Agreement authorized by DDTC. See United States Department of State, In the Matter of: Analytical Methods, Inc., Proposed Charging Letter, Order and Consent Agreement available on DDTC website, and United States Department of State, In the Matter of United Technologies Corporation, Proposed Charging Letter, Order and Consent Agreement, available on DDTC website.

11. Is the Company subject to the ITAR brokering regulations in the Transaction under 22 CFR Part 129?
- Is the Company engaging in activities that require it to register as a munitions broker? See 22 CFR §129.3. If the Company is required to register as a broker under § 129.3, it will most likely also be subject to other requirements under 22 CFR Part 129 including the requirement to obtain licenses or other authorizations for the Transaction from DDTC, provide prior notifications to DDTC, file annual reports under 22 CFR § 129.9 and recordkeeping requirements. In addition, parties are prohibited from engaging in brokering activities in transactions involving any of the “proscribed countries” set forth at 22 CFR §126.1 unless a license has been issued or an exemption applies.
  - Is the Company engaging other parties in the Transaction as marketing agents, representatives, teaming partners or other intermediaries that fall within the definition of munitions brokers under 22 CFR §129.3? If yes, such parties may be required to register as munitions brokers with DDTC and comply with the licensing, reporting and other requirements in Part 129.
  - Note: If the Company is owned by a foreign company, verify that activities performed by the Company’s foreign parent or other foreign affiliates related to the Transaction do not trigger requirements under the ITAR brokering regulations for the foreign affiliates including registration, licensing, reporting and other requirements.
12. Will the Company be reexporting or retransferring ITAR-controlled products, technical data or software as part of the Transaction? If yes, such reexport or retransfer will most likely require a reexport or retransfer authorization from DDTC unless an exemption applies.
13. Will the Company be engaged in any temporary imports of USML items, or the permanent import of items on the US Munitions Import List? If yes, the Company will most likely be required to obtain an import license from DDTC or the Bureau of Alcohol, Tobacco, Firearms and Explosives (“BATF”) for such import unless an exemption applies.
14. Will the Company be relying on exemptions from requirements under ITAR? If so, verify that it has complied with all of the applicable requirements for those ITAR exemptions. For example, in many instances use of exemptions under ITAR is not permitted in transactions: (i) involving “proscribed destinations” set forth at 22 CFR § 126.1; (ii) for which Congressional notification is required pursuant to 22 CFR §123.15; (iii) involving items designated as Significant Military Equipment (See 22 CFR §120.7); (iv) involving persons who are ineligible under 22 CFR § 120.1(c); (v) involving the establishment of offshore procurement arrangements or producing defense articles offshore; and (vi) by parties that are not registered with DDTC under 22 CFR Part 122. See 22 CFR §§123.16, 125.4, 125.6 and 124.3.
15. If the Company has obtained export licenses, import licenses, agreements or other authorizations from DDTC required in the Transaction, has it complied with all provisos, terms, conditions and limitations set forth in such licenses and agreements?

Has it followed all ITAR requirements for filing, decrementing, retention and return of export licenses? See 22 CFR § 123.22.

16. If the Company is transferring ITAR-controlled articles, technical data or software abroad or to foreign persons in the U.S., has the Company used destination control statements as set forth in 22 CFR §§ 123.9(b) and 123.9(a)(6), as well as warning notifications and legends on labels and shipping documents that state that such items contain ITAR-controlled articles or technical data? (If the Company is transferring ITAR-controlled articles, technical data or software to other parties in domestic U.S. transactions, the Company should also consider providing similar warning notifications and legends on labels and shipping documents.)
17. Has the Company made (i) payments to sales agents, Vendors (as defined at 22 CFR § 130.8) or Suppliers (as defined at 22 CFR § 130.7)), or (ii) political contributions, that exceed the reporting thresholds set forth at 22 CFR § 130.9? If so, determine if the Company is required to file the requisite reports and comply with the other requirements under 22 CFR Part 130.
18. Is the Company required to provide Congressional notification related to the Transaction under 22 CFR § 123.15?
19. Has the Company maintained copies of its records related to ITAR activities for the requisite holding periods under 22 CFR § 122.5?
20. Has the Company transferred any ITAR-controlled products, technical data or software to its foreign affiliates, or engaged in joint development, testing or other activities with affiliates that require export licenses, TAA's or other authorizations from DDTC?
21. Do any foreign-made products incorporate any parts, components or accessories that are listed on the USML, or are foreign-made products developed or manufactured based on technical data that is on the USML? If yes, such foreign-made products are most likely on the USML and subject to ITAR under DDTC's "See-Through Rule."
22. Has the Company conducted denied party list screening related to the Transaction, including for parties listed on DDTC's Statutory Debarment List and Administrative Debarment List?<sup>9</sup> The Company should screen all parties to the Transaction, including the purchaser, end-user, consignees, intermediaries, brokers, prime contractors, subcontractors, freight forwarders and transportation carriers.
23. Note: special heightened restrictions exist under ITAR for transactions involving: (i) the "proscribed countries" set forth at 22 CFR 126.1, including China (and will be subject to a policy of denial for license applications); (ii) items that are designated on the U.S. Munitions List as "Significant Military Equipment" (See 22 CFR 120.7); (iii) Major Defense Equipment (See 22 CFR § 120.8); and (iv) classified technical data and services (See USML Category XVII – Note that for classified technical data the Company will be subject to requirements under ITAR as well as under NISPOM).

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<sup>9</sup> See [http://www.pmdtc.state.gov/compliance/debar\\_intro.html](http://www.pmdtc.state.gov/compliance/debar_intro.html)

24. If the Company is working with subcontractors, teaming partners or other independent parties in the Transaction, coordinate with such parties regarding ITAR compliance in performing the Transaction. Prime contractors should verify that subcontractors are conducting their operations involving the Transaction in compliance with ITAR requirements, including complying with registration requirements, obtaining licenses and TAA's, reporting and recordkeeping requirements.
25. For Foreign Military Sales transactions, consider the applicability of the exemption under 22 CFR § 126.6.
26. If ITAR-controlled technical data or software is stored in the Company's data system, adopt controls in the system to restrict access to such items by foreign persons (including foreign national Company employees). Avoid the disclosure of ITAR-controlled technical data or software through (i) posting on websites or (ii) e-mails to foreign persons.
27. If storing ITAR-controlled hardware and other physical items in Company facilities in the US or overseas, adopt physical security measures to prevent unauthorized access or observation by foreign persons, including foreign national Company employees (for example, store in locked rooms, do not leave out in public areas of Company's office facilities where foreign nationals might have access, utilize facility physical security measures, etc.).
28. Has the Company engaged in ITAR violations that relate to the proscribed countries set forth in 22 CFR 126.1? If so the Company will be required to submit mandatory disclosures of such violations to DDTC under 22 CFR § 126.1(e). For other ITAR violations, consider a voluntary disclosure under 22 CFR § 127.12).
29. Has the Company adopted an ITAR Compliance Program, technology control plan and other compliance documents? (See Section I.J. below.) Has the Company adopted procedures to reduce the risk of the unlawful diversion, transshipment, reexport or retransfer of its products to prohibited countries or prohibited parties? Has it followed the requirements set forth in these compliance documents?
30. Penalties for violations of ITAR include up to 20 years imprisonment and financial fines of up to \$1,000,000 per violation.

B. Export Administration Regulations

1. At the outset, the Company should determine if the products in the Transaction are "Subject to the EAR" (See 15 CFR Section 734.2(a)) and if so determine the export classifications of such items. The export classification is determined by reviewing the Commerce Control List ("CCL")<sup>10</sup> and identifying the Export Control Classification Number ("ECCN") for such item; items that are subject to the EAR but not specifically listed on the CCL are classified as "EAR99." If the Company is uncertain regarding the export classification number for an item, consider applying to BIS for a Classification Request.

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<sup>10</sup> The Commerce Control List is set forth at 15 CFR Part 774, Supplement No 1.

2. Are the products involved in the Transaction listed on the Commerce Control List (other than EAR99)? If so, review the Commerce Country Chart<sup>11</sup> to determine if the export will require an export license from BIS, and, if so, determine if an exception is available.
3. Are technology or software subject to the EAR intended to be exported or transferred to foreign parties in the Transaction? If so, determine the export classification of such items and determine if an export license is required or if a license exception is available as in B.2. above.
4. Is the Company transferring/disclosing technology or software subject to the EAR to a foreign party in the U.S. (including to the Company's employees)? If so, determine the export classification of such items and determine if an export license is required or if an exception is available as in B.2. above.
5. Will the Company be reexporting any EAR-controlled products, technology or software in the Transaction? If so, determine if an export license is required or an exception applies.
6. Will products be manufactured abroad that contain controlled US-origin parts, components or technical data that are subject to the EAR? Review 15 CFR § 734.4 to determine if the value of such products is in excess of the de minimis threshold and determine if a license will be required or an exception applies. (For Foreign-Produced Direct Products of U.S. Technology and Software see 15 CFR § 736.2(b)(3)).
7. Will products, technology or software involved in the Transaction be involved in a "prohibited end-use" or transferred to a "prohibited end-user" identified in 15 CFR Part 744? If yes, such activities are prohibited unless a license is obtained or an exception applies. In addition, U.S. persons are prohibited from performing contracts, services or employment related to certain of the prohibited end-uses (See 15 CFR § 744.6). Further, US persons are prohibited from entering into transactions with parties identified on the "Entities List" set forth in 15 CFR Part 744, Supplement No. 4 unless a license is issued (licenses for most of such entities are subject to a policy of denial). Part 744 prohibits certain defense-related transactions such as under Section 744.17 (microprocessors for "military end-uses" and "military end-users"). Items listed on Supplement 3 of Part 744 are prohibited from being exported, reexported and transferred to the People's Republic of China if such items are intended for a "military end-use" or "military end-user" in China. See 15 CFR § 744.21.
8. Will the Transaction involve countries subject to any of the U.S. embargoes set forth at 15 CFR Part 746? Transactions with such countries will most likely be prohibited unless a license is issued or an exception applies.
9. Will the Transaction involve chemicals covered under 15 CFR Part 745 – Chemical Weapons Convention? If yes, review Part 745 to determine if export restrictions apply or other requirements will apply to the Transaction.

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<sup>11</sup> See 15 CFR Part 738, Supplement No. 1.



10. Will the Transaction be subject to special restrictions under the Wassenaar Arrangement? See 15 CFR Part 743.
11. Will the Transaction require a Special Iraq Reconstruction License? See 15 CFR Part 747.
12. If an export license is required in the Transaction, are any license exceptions available as set forth in 15 CFR Part 740? Note the recently adopted license exception “Strategic Trade Authorization” which provides a limited license exception for exports to countries considered to present a low risk of diversion. See 15 CFR § 740.20. Note that certain restrictions apply on the use of license exceptions – See e.g., 15 CFR § 740.20.
13. Note that Validated End-User Authorization pursuant to 15 CFR 748.15 is restricted to civil end-uses only and not permitted for activities under Part 744 (prohibited end-uses and end-users) or for military end-use.
14. Even if no export license is required in the Transaction, has the Company conducted its due diligence review under the BIS “Know Your Customer Guidance and Red Flags” pursuant to 15 CFR Part 732 Supplement No. 3?
15. Are any of the parties involved in the Transaction listed on any of the US Government restricted parties lists, including the BIS Denied Persons List, Entities List or Unverified List? The Company should screen all parties to the Transaction against such lists, including the foreign purchaser, end-user, foreign consignees, intermediate consignees, prime contractors, subcontractors, teaming partners, marketing intermediaries, brokers, freight forwarders, transportation carriers and shipping vessels.
16. Has the Company maintained records of the Transaction for the requisite record retention period under the BIS export recordkeeping requirements at 15 CFR Part 762?
17. If the export requires an export license, has the Company complied with all terms, conditions and limitations set forth in the license?
18. Has the Company complied with all export clearance requirements under 15 CFR Part 758 including filing Automated Export System (AES) submissions and use of destination control statements? If required, has the Company complied with requirements related to transaction documentation such as End User Statements, Statements By Ultimate Consignees and Purchasers, and Import Certificates?
19. Are the Company’s foreign affiliates in compliance with applicable provisions of the EAR (including foreign subsidiaries, branch offices, foreign parent company, joint ventures)?
20. Has the Company received any boycott requests or communications? If yes, has the Company complied with all applicable requirements regarding restrictive trade practices and boycotts under 15 CFR Part 760?
21. The Company should avoid any activities prohibited by BIS Denial Orders, that violate the terms and conditions of export licenses or involve persons that have been

denied export privileges. The Company should refrain from engaging in any transactions with the knowledge that a violation has occurred or is about to occur.

22. Has the Company adopted procedures to reduce the risk of the unlawful diversion, transshipment or reexport of its products to prohibited countries, prohibited parties or prohibited end-uses as set forth in the BIS “Best Practices To Guard Against Unlawful Diversion Through Transshipment Trade”?<sup>12</sup>
23. Has the Company adopted an Export Compliance Program addressing obligations under the EAR? See Section I.J. below.
24. Penalties for EAR violations include up to 20 years imprisonment and financial fines of up to \$1,000,000 per violation.

C. U.S. Economic and Trade Sanctions

1. Will the Transaction involve a country that is subject to an economic or trade sanctions program administered by Office of Foreign Assets Control (“OFAC”) within the Treasury Department or will the Transaction otherwise be restricted under such a program? Such Transaction may be prohibited unless an exemption is available or a license has been issued by OFAC. The provisions of the OFAC Sanctions Programs are set forth at 31 CFR Subtitle B, Chapter V, Section 501 et seq., pursuant to various executive orders and various statutory provisions, and summaries of the programs are available at OFAC’s website.<sup>13</sup> As of the date of this Memorandum, OFAC maintained the sanctions programs set forth below.<sup>14</sup> The terms of each sanctions program are different. In addition, the sanctions programs are amended frequently and new programs adopted periodically. If the Company suspects that the Transaction will be subject to a particular sanctions program, it should review the terms of the sanctions program carefully to determine the applicable legal requirements and monitor amendments of the programs during the Transaction.
2. Will the Company be entering transactions with or making payments to persons or entities listed on the Specially Designated Nationals (“SDN”) list promulgated by OFAC? (See <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>) Such transactions are prohibited unless a license is issued or an exemption is available. The Company should conduct a review of all parties to the Transaction to confirm that none of the parties to the Transaction is listed on the SDN List. In conducting the prohibited party check against the SDN List, the Company should check all parties to the Transaction including the purchaser, end-user, foreign consignees, intermediate consignees, prime contractor, subcontractors,

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<sup>12</sup> See [http://www.bis.doc.gov/news/2011/bis\\_press08312011.htm](http://www.bis.doc.gov/news/2011/bis_press08312011.htm)

<sup>13</sup> The OFAC website can be found at: <http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx>

<sup>14</sup> As of the date hereof, OFAC maintained the following sanctions programs: Balkans, Belarus, Burma, Cote D’Ivoire (Ivory Coast), Cuba, Dem. Republic of the Congo, Iran, Iraq, Lebanon, Liberia (Taylor Regime), Libya, , North Korea, Somalia, Sudan, Syria, Yemen, Zimbabwe, Counter-terrorism Sanctions Program, Magnitsky Sanctions Program, Non-Proliferation Sanctions Program, Narcotics Trafficking Sanctions Program, Diamond Trading Sanctions Program, Persons Undermining the Sovereignty of Lebanon or Its Democratic Processes and Institutions, and Transitional Criminal Organizations Sanctions Program.

teaming partners, sales agents, brokers, freight forwarders, transportation carriers and shipping vessels.

3. In most cases sanctions programs will apply to US persons (including US companies and their foreign branches), regardless of whether products in the Transaction originate in the United States or are based upon U.S. parts, components or technology. Under certain sanctions programs, restrictions apply to the foreign subsidiaries of U.S. companies (such as under the recently amended sanctions program involving Iran) and to foreign companies (Id.)
4. The Company should include a section in its Export Compliance Program that addresses the OFAC Sanctions Programs (See Section I.J. below). In addition, the Company should also adopt a specific compliance procedure to reduce the risk of illegal diversion, transshipment, reexport or retransfer involving countries subject to OFAC sanctions and parties on the SDN list. See Section I.I. below.
5. In certain instances (e.g., Iran), a U.S. Company may also be subject to separate SEC disclosure obligations related to transactions involving Iran. (See, e.g., Section 219 of the Iran Threat Reduction and Syria Human Rights Act of 2012.)

D. Foreign Corrupt Practices Act

1. The Foreign Corrupt Practices Act (“FCPA”) contains two sets of provisions: (i) Prohibited Payments – the prohibition against the payment, offer to pay, promise to pay, or authorization to pay money or anything else of value to a foreign official to influence any act or decision of the foreign official to obtain or retain business or to secure an improper advantage; (ii) Accounting Provisions – for U.S. and foreign public companies listed on U.S. stock exchanges or that are required to file periodic reports with the SEC (“Issuers”), the requirement to make and keep accurate books and records, devise and maintain adequate systems of internal accounting controls and the prohibition on knowingly falsifying books and records or circumventing or failing to implement a system of internal controls. See 15 U.S.C. Sections 78dd-1, 78dd-2, 78dd-3, 78m, 78ff.
2. Prohibited Payments: Generally the Prohibited Payments provisions prohibit the payment, offer to pay, promise to pay, or authorization to pay money or anything of value to a foreign official, official of a political party or candidate for political office in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business.<sup>15</sup>
3. Parties covered under the Prohibited Payments provisions include U.S. persons and businesses, U.S. and foreign public companies listed on stock exchanges in the U.S. or that are required to file periodic reports with the SEC and certain foreign persons and businesses acting while in the territory of the United States. See The Resource Guide, p. 2. The FCPA also applies to foreign branches, subsidiaries and joint ventures of U.S. companies.

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<sup>15</sup> See A Resource Guide to the U.S. Foreign Corrupt Practices Act, published jointly by the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, November 14, 2012 (the “Resource Guide”).

4. The prohibited payments provision covers more than just payments to influence the award of a contract but also payments to reduce customs duties, payments to issue building permits, certain charitable contributions to government entities and payments to influence other government actions. Examples of “Actions Taken to Obtain or Retain Business” provided in the Resource Guide include:
  - Winning a contract;
  - Influencing a procurement process;
  - Circumventing the rules for importation of products;
  - Gaining access to non-public tender information;
  - Evading taxes or penalties;
  - Influencing the adjudication of lawsuits or enforcement actions;
  - Obtaining exceptions to regulations; and
  - Avoiding contract termination.<sup>16</sup>
5. Improper payments can also include improper gifts to government officials and improper payment or reimbursement of travel and entertainment expenses of government officials.<sup>17</sup>
6. The term “government official” is broadly defined to include “any” officer or employee of a foreign government and those acting on the foreign government’s behalf, including high level officials and low-ranking employees. A “foreign government” includes departments, agencies or instrumentalities of a foreign government and, in certain cases, state-owned or state-controlled entities such as in the aerospace, banking, healthcare, energy, mining, telecommunications and transportation sectors.<sup>18</sup> The term “government official” also includes officials of public international organizations such as the World Bank and the International Monetary Fund.
7. The prohibition covers both actual payments as well as the mere promise to make payments, authorizations to make payments and offers to make payments. Thus, violations can occur even if no payments are actually made by the Company.
8. A very narrow exception exists for certain “facilitating payments” made in furtherance of routine government actions. See Resource Guide p. 25. However even in instances in which a facilitating payment may be permissible under the FCPA, such payments might violate foreign local law and are required to be recorded in the Company’s books and records under FCPA accounting provisions.
9. Indirect Payments – In certain instances, if a U.S. Company’s foreign agent, marketing representative or distributor makes a prohibited payment, the U.S. Company can be liable; this also applies to foreign subcontractors, teaming partners and joint venture partners. Common “Red Flags” identified by the Justice Department for improper payments through intermediaries include:

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<sup>16</sup> See Resource Guide p. 13.

<sup>17</sup> See Resource Guide p. 15.

<sup>18</sup> See Resource Guide p. 20.

- Excessive commissions to third-party agents or consultants;
- Unreasonably large discounts to third-party distributors;
- Third-party “consulting agreements” that include only vaguely described services;
- The third-party consultant is in a different line of business than that for which it has been engaged;
- The third-party is related to or closely associated with the foreign official;
- The third party became part of the transaction at the express request or insistence of the foreign official;
- The third party is merely a shell company incorporated in an offshore jurisdiction; and
- The third party requests payments to offshore bank accounts.<sup>19</sup>

10. Steps to reduce risk of liability from indirect payments made by marketing intermediaries, distributors and other third parties include:

- Use of an FCPA anticorruption clause in the contract with the marketing agent;
- Obtain a representation from the agent that the agent is not a government official, or if the agent is an entity, that none of its officers, directors, shareholders or principals are government officials;
- Obtain an annual agent certification of the above two points to assure ongoing compliance during the life of the agreement with the intermediary;
- Conduct a careful due diligence review of the agent prior to entering the agent agreement;
- Conduct annual FCPA compliance training for the Company’s employees and its overseas marketing agents;
- Adopt a written provision in the agency agreement addressing the Company policy against providing gifts or reimbursement of travel expenses for government officials; and
- Include FCPA provisions in the Company’s export compliance program.

11. Other antibribery laws may also apply to the Transaction including U.K. Bribery Act 2010, foreign statutes under the OECD Antibribery Convention and antibribery laws in the foreign country where the Transaction is taking place. Other areas of potential legal exposure under U.S. law for corrupt payments include under the Travel Act, anti-money laundering laws, federal mail and wire fraud statutes, certification and reporting violations and tax violations.

12. Accounting Provisions: For U.S. and foreign public companies listed on U.S. stock exchanges or which are required to file periodic reports with the SEC (“Issuers”), the accounting provisions set forth the requirement to make and keep accurate books and records, devise and maintain adequate systems of internal accounting controls and the prohibition on knowingly falsifying books and records or circumventing or failing to implement a system of internal controls. For detailed discussion of Accounting Provisions See Resource Guide - Chapter 3.

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<sup>19</sup> See Resource Guide p. 22, 23.

13. Penalties for violations of FCPA: Prohibited Payments – imprisonment of up to five years and financial penalties of up to \$2,000,000 per violation. Accounting Provisions – imprisonment of up to 20 years and financial penalties of up to \$25,000,000 per violation.

#### E. Anti-boycott Laws

1. Has the Company received any boycott requests or communications? If yes, has the Company complied with all applicable requirements regarding restrictive trade practices and boycotts under the Commerce Department anti-boycott regulations set forth at 15 CFR Part 760?
2. The Company may also have obligations under the Treasury Department International Boycott requirements set forth at Section 999 of the Internal Revenue Code and accompanying Treasury Department Guidelines.

#### F. Foreign Military Sales and Foreign Military Financing

1. The U.S. Government facilitates the sale of certain U.S. origin defense articles, technical data and services to foreign governments under the Foreign Military Sales (“FMS”) program and Foreign Military Financing (“FMF”) program. See Arms Export Control Act, 22 USC Chapter 39, Subchapter II and 48 CFR Subpart 225.73. Under such programs, the Defense Security Cooperation Agency (“DSCA”) within the U.S. Department of Defense purchases military hardware and services from U.S. suppliers and resells such items to the foreign government purchasers. Such purchases by DSCA are undertaken using conventional U.S. government procurement acquisition and program management practices used for other U.S. defense purchases. Sales through the FMS program are separate types of transactions than direct commercial sales (“DCS’s”) by U.S. suppliers to the foreign government customers. This Checklist is intended to apply to DCS transactions only and not to FMS transactions. For further information regarding the Foreign Military Sales Program See 48 CFR Subpart 225.73.

#### G. Transactions Involving Classified Technical Data

1. The Company may be requested to transfer items in the Transaction that are classified under U.S. national security laws. In such instances the Company will be required to: (i) obtain export license authorization for such transfers from DDTC; (ii) comply with other ITAR requirements related to such transfers such as adopting technology control plans and other procedures to restrict the retransfer of controlled items; and (iii) comply with the provisions of the National Industrial Security Program administered by the Defense Security Service (“DSS”) within the U.S. Department of Defense, including requirements under the National Industrial Security Program Operating Manual (“NISPOM”).
2. In certain instances a foreign company may seek to acquire an interest in the Company or the right to control the management of the Company. If the Company handles classified information as part of its business, the Company may be required to operate under Foreign Ownership Control or Influence (“FOCI”) requirements as administered by the DSS. In addition, if foreign parties seek to acquire interests in the Company, either through the purchase of stock, assets or merger, the Company

may be required to obtain approval of the Committee on Foreign Investment In the United States. (“CFIUS”). See 31 CFR Part 800.

#### H. Procedures to Limit Illegal Diversion, Transshipment and Reexports

1. One of the most significant legal risks arising in export transactions for U.S. companies is the risk of illegal diversion, transshipment, reexport or retransfer. Under such transactions, a U.S. exporter will lawfully export an item to a foreign party, and the foreign party, without the knowledge of the U.S. exporter, will then transfer the item to a prohibited country or prohibited party or use it for a prohibited or unauthorized end-use. In certain instances, U.S. exporters can have liability in such transactions for violations under U.S. export control laws. The Company should conduct a risk analysis and consider adopting a compliance procedure to reduce the risk of illegal diversion, transshipment, reexport or retransfer. For further information regarding such procedure, as well as a BIS advisory regarding illegal diversion, See “Illegal Diversion Emerging as Top Export Issue” at [www.williamsmullen.com/printpdf/42787](http://www.williamsmullen.com/printpdf/42787).

#### I. Prohibited Party List Screening

1. As part of the Company’s export compliance activities it should conduct denied party list screening to avoid entering transactions with parties on one of the U.S. Government’s prohibited parties lists. Recommended lists to check as part of the screening process include:
  - List of Specially Designated Nationals (“SDN”) published by OFAC;
  - Denied Persons List published by BIS;
  - Entity List published by BIS;
  - Unverified List published by BIS;
  - Statutory Debarred Parties List published by DDTC;
  - Administrative Debarred Parties List published by DDTC; and
  - The Nonproliferation Sanctions List published by the State Department.

Such lists can be obtained from the relevant agencies or on the Consolidated Screening List set forth at: [http://export.gov/ecr/eg\\_main\\_023148.asp](http://export.gov/ecr/eg_main_023148.asp).

2. The Company should screen all parties to the Transaction against such lists, including the foreign purchaser, end-user, foreign consignees, intermediate consignees, prime contractors, subcontractors, teaming partners, marketing intermediaries, brokers, freight forwarders, transportation carriers and shipping vessels.

#### J. Export Compliance Program

1. The Company should adopt an export compliance program to improve the effectiveness of its compliance practices and reduce the risk of export liability. Such program should cover the legal obligations of the Company under ITAR, EAR, the OFAC Sanctions Programs, the Foreign Corrupt Practices Act and the anti-boycott laws. The program should include the following elements:
  - Risk assessment to identify the area of highest export compliance risk for the Company;
  - Appointment of an Export Compliance Administrator within the Company;

- Written policies and procedures for compliance activities (obtaining licenses, disclosure of controlled technical data to foreign nationals, receipt, marking and storing of export-controlled items, procedures for storage and transfer of export-controlled technical data and software in the Company’s data system and other requirements);
- Procedure for classifying the Company’s products under ITAR and EAR;
- Procedure for screening transactions against the denied parties lists;
- Procedure to reduce risks from illegal diversion, transshipment, reexport and retransfers;
- Procedure for training for employees, agents and distributors;
- Procedure for compliance with export recordkeeping requirements;
- Procedure if violations are discovered; and
- Provisions for updating the compliance program for changes in the law and the Company’s business.

## II. COMMERCIAL LAW ISSUES

### A. Overlap of Foreign Government Procurement Law and Private Commercial Law

Contracts with foreign military organizations such as ministries of defense will most likely be subject to specialized laws in the foreign country such as government procurement laws, national security laws, ethics laws, anticorruption laws and other specialized local legal requirements. Such laws could include requirements that are adverse to the normal commercial interests of the Company such as termination for convenience, requirements to use local subcontractors or local content, limitations on remedies in the event of breach by the foreign government party and severe civil and criminal liability for improper practices in the procurement process. Similarly, if the Company is entering contracts with foreign private companies in a foreign defense transaction, such as in subcontracting or teaming relationships, such specialized legal provisions could apply to the Company pursuant to local statutory requirements, “flow down” clauses in subcontracts and similar means. The Company should recognize that such laws may limit/override normal commercial law remedies and protections for the Company, thus making it difficult for the Company to protect its commercial interests as in normal business transactions.

### B. Major Contract Terms

A foreign government defense agency will most likely have its own government procurement process and standard contract documents, terms and conditions for purchasing defense products and services. However, if the Company has the opportunity to add provisions to the contract documents, it should attempt to address as many of the following issues as possible. In addition, if the Company will be entering an agreement with a foreign private party (such as under a subcontractor or teaming relationship), it should address as many of the following issues as possible.

1. Identify type of contract vehicle (fixed-price, cost reimbursement, incentive, indefinite-delivery, time and materials, other specialized procurement vehicles);
2. Description of hardware, software, technical data and services provided;
3. Price; timing and other terms of payment;
4. Delivery requirements;



5. Terms of Sale - Will Incoterms apply for defining principal terms of sale including obligations of the parties, passage of title, risk of loss? If so, this should be referenced in the agreement;
6. Method and security for payment (letter of credit, open account, etc.);
7. Specifications, performance standards;
8. Testing and acceptance procedure; procedure if disputed test results;
9. Warranties of qualities, performance;
10. Requirements for packing, crating, labeling, specialized handling, storage, other logistics issues;
11. Training;
12. Maintenance, follow-on service and support;
13. Spare parts;
14. Will financing be provided by seller? Provide terms, financing agreements, security interest, guarantee, etc.;
15. Currency of payment;
16. Penalties for breach;
17. Will product localization be required to comply with local technical standards (electrical current, engineering standards, metric system, safety standards)?
18. Will there be offset requirements in the transaction? If yes, they should be factored into the transaction planning process early in the transaction (See Section III.G. below);
19. Language – If written materials will be provided under the contract, specify language requirements. If oral communications are required under the contract (e.g., for training or dealing with foreign nationals) specify language requirements. Will the Company’s standard product documentation, labeling and packaging need to be changed for foreign language requirements? Specify which language will be the official language for the agreement;
20. Disclaimer of implied warranties that arise under local law; exclusion of consequential damages;
21. Will the U.N. Convention on Contracts For the International Sale of Goods (“CISG”) apply to hardware sales? (Note: while CISG might apply to sales of hardware, CISG does not apply to licensing software or performance of services.)
22. Sovereign Immunity – Will the Company be permitted to initiate an action against the foreign customer for breach of contract or misappropriation of its intellectual property? If the foreign customer is a government defense agency, will suit be barred

by the doctrine of sovereign immunity? Consider requiring customer to execute a waiver of its sovereign immunity.

23. Will a Bilateral Investment Treaty apply to the country in question and will this provide benefits to the Company in enforcing its rights under the contract?
24. Dispute Resolution – Consider arbitration as an alternative to litigation due to benefits afforded under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Will the Convention apply automatically? If not, consider clause whereby the foreign customer agrees that the provisions of the Convention will apply to arbitral awards awarded in connection with disputes arising under the contract;
25. Choice of Law – Note: if using the foreign country’s law as the choice of law under the contract, does this permit suits in the foreign country for damages for breach by foreign customer and injunctive relief for misappropriation of the Company’s intellectual property?
26. Force Majeure – Verify that force majeure clause is included and specify that failure to obtain export licenses, import authorizations or similar authorizations are included as force majeure events;
27. Provisions addressing intellectual property – ownership of IP, license rights and terms of any licenses, confidentiality and treatment of proprietary information (See Section II.C. below);
28. Insurance;
29. Use of Subcontractors;
30. U.S. export control clause:
  - Customer will comply with all applicable provisions of US export control laws;
  - No reexports without export licensing authority;
  - No retransfer without export licensing authority;
  - No transfers to dual/third country nationals without export licensing authority;
  - No transfers to parties on SDN list or any other US prohibited party lists;
  - Customer will adopt and comply with Technology Control Plan or similar internal export compliance program;
  - Customer will maintain adequate security measures to safeguard articles, software and hardware subject to US export controls, including physical security for storage of defense articles and controls in computer system for controlled technical data; and
  - Customer will provide requisite information to permit Company to comply with reporting requirements under US export laws.
31. If agreement is entered with a private party (such as subcontract, teaming or marketing agreement), include anticorruption clause:

- Parties will comply with FCPA and other applicable anticorruption statutes (such as under the foreign country laws);
- No payment or promise, offer or authorization to pay anything of value to any (i) government official; (ii) official of political party; or (iii) candidate for political office;
- No party identified in (i), (ii) and (iii) above will own an interest in marketing intermediary, subcontractor, teaming partner or joint venture entity;
- Restrictions on reimbursement of travel and entertainment expenses;
- Annual recertification of the above representations to be executed by foreign party; and
- Right to terminate contract in event of breach of above obligations;

32. Local government contract clauses, i.e., local government security requirements, government licenses, permits, etc.

### C. Protection of Intellectual Property

1. Does the Company contemplate utilizing intellectual property as part of the Transaction (e.g., trademarks, patents, copyrights, trade secrets, domain names/URLs, proprietary designs, business processes, trade dress)? If yes, review the provisions in sub-sections 2-7 below.
2. Register primary intellectual property in the country immediately (this should be one of the first steps in entry into the country market – even before the Company begins initial discussions with customers in the country). Primary intellectual property is property that is fundamental to the operation of the business or of high value. This includes registration of trademarks, domain names, patents and, in certain countries, copyrights. Trademarks and domain names should be registered in the local country language as well as the Company’s home language. This is especially necessary if the Company’s marks are well known, or if technology is easily susceptible to theft or reverse engineering.
3. Develop strategy for registration of secondary IP during the course of the Company’s engagement in the Transaction.
4. Develop strategy for other steps for protection of the Company’s IP in the country besides registration, such as use of Confidentiality Agreements, use of other trade secret protections (marked as proprietary, store in secure location, etc.), dissemination only to limited parties after due diligence review, disclosure of only partial portion of IP or no disclosure at all in the country, use of security devices, encryption, etc. Such strategy should be developed based upon the level of risk of illegal misappropriation of IP in the country.
5. Does the country have a reputation for weak intellectual property laws, weak enforcement of such laws or high rate of IP piracy? If yes, adopt heightened strategy for protection of IP due to high level of risk.
6. For countries with the worst reputation for protection of IP, consider not conducting business in that country or not introducing Company products that utilize the Company’s most valuable IP.

7. Localization Content – Content and work product generated in localizing the product and/or business model to the country (such as design modifications, changes in advertising slogans or copy, translations of key documents and business process changes) are valuable intellectual property called “Localization Content.” Company should apply same level of protection to this material as it does to its other intellectual property.

D. Entity Selection

1. Determine the most advantageous entity structure for operation in the local country.
2. Factors to consider: (i) limitation of liability of parent company; (ii) projection of a “local face” to customers in local country; (iii) efficiency in repatriating profits and other payments out of the country; and (iv) tax planning (including minimization of tax in local country, minimization of tax in home country and third countries, avoidance of double taxation, utilization of applicable tax treaties, etc.).
3. Foreign Entity Selection - type of legal presence in the foreign country: (i) subsidiary; (ii) branch; and (iii) representative office.
4. Commercial law goals in entity planning: (i) protect parent company from legal liability in target country; (ii) project a “local company” image in target country; and (iii) local entity may be required to comply with local regulatory and legal requirements; and tax planning.
5. It is often desirable to operate through a subsidiary in each foreign country to protect parent Company from legal liability – use of a “branch” will not achieve this and will often expose assets of the parent Company. In selecting type of entity, be sure to select type that has limited liability of shareholders.
6. In certain countries, local law requires that entities formed under local law have at least one shareholder that is a citizen of that country. This may be undesirable for many companies so care must be used in selecting the proper type and jurisdiction of entity.

E. Currency and Repatriation of Funds

1. What is the predominant currency in use in the country? Will the Company be required to conduct business in the Transaction in such currency?
2. Convertibility – Inbound – If the Company is required to invest capital (either through loans or equity) or make payments in the local currency, will the Company be permitted to convert funds from its home currency into the foreign currency? Are there any legal restrictions or approvals required? How long will it take to obtain such approvals? Are there any fees, charges, taxes or similar costs required?
3. Convertibility – Outbound – If the Company wishes to repatriate funds from the local country back to the home country (such as payment of dividends, repayment of loans, payment of management fees, etc.), will the Company be permitted to convert funds from the foreign currency to its home currency? Are there any local legal restrictions or approvals required? How long will it take to obtain such approvals? Are there any fees, charges, taxes or similar costs required?

4. Repatriation – If the Company wishes to transfer dollars or local currency from the host country to the U.S.: (i) are any approvals required? (ii) are any taxes, charges or other levies applied? (iii) how long?
5. Currency Exchange Risk - How does the price of the foreign currency compare to the price of the Company’s home currency? What is the Company’s strategy for mitigating foreign exchange risk?

#### F. Tax Planning Issues

1. Tax planning goals: (i) reduce tax liability in individual countries; (ii) avoid double taxation in multiple countries; and (iii) reduce Company’s overall worldwide tax rate.
2. Types of taxes: (i) Income, profits or operating taxes; (ii) VAT, sales taxes, other taxes at point of sale; (iii) employment taxes; (iv) import, export, harbor, transfer taxes; (v) taxes on repatriation of dividends, capital, repayment of loans, etc.; (vi) withholding requirements. Analysis should be conducted on a national, state/province and local level.
3. Income Tax – Local Presence – Does Company have a sufficient “presence” in the foreign country to trigger payment of income tax there, filing tax returns?
4. Tax planning factors to consider:
  - Selection of entities in low-tax jurisdictions whenever possible;
  - Maximize use of foreign tax credits;
  - Use of tax treaties and regional holding companies to avoid double taxation;
  - Capture of flow – through losses in start-up stages;
  - Special strategies for IP development and licensing;
  - Tax-efficient internal debt when parent Company is providing capital to foreign subsidiary;
  - Optimize E&P and E&P deficit utilization;
  - Optimize NOL utilization/valuation;
  - Facilitate basis planning;
  - Transfer pricing strategies;
  - VAT tax planning; and
  - Tax efficient acquisitions and dispositions.

### III. FOREIGN LAW ISSUES

The Company may be required to comply with a number of local legal requirements in the foreign country as follows:

#### A. Foreign Country Government Procurement Law

Contracts with foreign military organizations such as ministries of defense will most likely be subject to specialized laws in the foreign country such as government procurement laws, national security laws, ethics laws, anticorruption laws and other specialized local legal requirements. Such laws could include requirements that are adverse to the normal commercial interests of the Company, such as termination for convenience, requirements to use local subcontractors or local content, limitations on

remedies in the event of breach and severe civil and criminal liability for improper practices in the procurement process. Similarly, if the Company is entering contracts with foreign private companies in a foreign defense transaction, such as in subcontracting or teaming relationships, such legal provisions could apply to the Company pursuant to local statutory requirements, “flow down” clauses in subcontracts and similar means. The Company should recognize that such laws may limit/override normal commercial law remedies and protections, thus making it difficult for the Company to protect its commercial interests as in normal business transactions.

**B. Local Registration, Licensing Laws**

1. Is the Company permitted to engage in the proposed business and Transaction under the laws of the foreign country? Are there any special registration or licensing requirements? Are there any restrictions due to foreign ownership?
2. Will the Company be subject to any special foreign legal requirements in connection with sales of military products and services, handling classified information, import controls regarding defense products, technologies, software and/or services?
3. Are there any special legal requirements related to the marketing of defense products – is the Company required to have a local marketing agent? Do agent termination laws exist?

**C. Enforceability of Agreements**

1. Are the contract documents enforceable under the laws of the foreign country? If the Company is required to engage in litigation or arbitration to enforce its rights in local courts or in arbitral tribunals, will it be able to adequately protect its rights?

**D. Local Content/Local Preference Laws**

1. Is the Company subject to any local content requirements such as hiring local subcontractors, local marketing agents, use of local content in hardware sold under the agreement or offset requirements?

**E. Tariffs, Customs and Import Laws**

1. Will the Company be required to import products into the foreign country as part of the Transaction? If so, are there local Customs, import and trade laws? Will import tariffs or other import fees, duties, or quotas apply? Will import inspections delay delivery? If yes, this should be factored into the pricing of the product.

**F. Foreign Contractor Immunity For Performance of Services**

1. If performing services such as security services in the foreign country, will the Company’s employees be subject to potential liability under the foreign country’s laws (e.g., if contractor is performing security services in the country and in performing such services its personnel cause physical injury to citizens of the foreign country or damage to property there, can the Company or its employees be subject to potential civil or criminal liability under local law)? Consider obtaining releases or indemnifications under the contract. Also consider use of insurance, careful entity planning and asset protection.

#### G. Offset Requirements

1. Will any offset requirements apply? Consider the following in offset contracts:  
(i) Company should be permitted to assign the offset obligation to a third party, and the offset obligation should be set forth in a separate document to facilitate the assignment to the third party; (ii) provision that if the sale of the Company's products or services by the Company under the contract is reduced or cancelled by the purchaser, the offset obligation is also cancelled; (iii) detailed provisions regarding the quality and specifications of the offset products purchased under the offset obligations; (iv) provision that the foreign government is to provide products under the offset arrangement at commercially reasonable price, quality and other terms or the offset obligation is cancelled; and (v) provision that the foreign government will provide all licenses, approvals and authorizations imposed on the Company in purchasing/exporting products as part of the offset obligation. In addition, factor the potential costs to the Company of fulfilling the offset obligation into price structure under the main contract.

#### H. Sovereign Immunity

1. Will the Company be permitted to initiate an action against the foreign customer, such as for breach of contract or misappropriation of its IP? If the foreign customer is government defense agency, will suit be barred by doctrine of sovereign immunity? If customer is a government entity, consider requiring customer to execute a waiver of its sovereign immunity.

#### I. Choice of Law and Dispute Resolution

1. Will Company be able to avail itself of the courts in the foreign country? If Company is a litigant in the country's courts (either as plaintiff or defendant), will it receive unfair treatment as a foreign party? If Company obtains a judgment (for damages, injunctive relief or other remedies), will it be able to enforce it in the target country? Consider choice of forum clause, including for litigation outside of foreign country. Consider arbitration as exclusive remedy for dispute, with international arbitration rules and location in neutral country. Note – under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, if Company obtains an arbitral award in one country, it will be permitted to domesticate it and enforce it in any other foreign countries provided both countries are parties to the convention (this is not the case with foreign judgments).

#### J. Local Taxes, Repatriation of Funds

1. Are there restrictions on the repatriation of funds or the conversion of local currency into U.S. dollars? Will licenses be required, or taxes or fees be imposed to repatriate funds out of the foreign country back to the United States?

#### K. Other Local Law Issues

1. Will the Company be subject to local employment, termination laws?
2. Any special local labeling laws, safety standards, building codes?
3. Immigration authorization required?

4. Privacy laws?
5. Are there any routine government registrations or permits?

#### IV. DEALING WITH MARKETING INTERMEDIARIES

##### A. Selection Criteria – Consider the following criteria in selecting the marketing agent:

1. Experience in defense industry and Company's product or services;
2. Track record and previous marketing results for other customers;
3. Resources available to focus on your products/services; and
4. Reputation and due diligence review.

##### B. Key Terms In Marketing Consultant Agreement

1. Obligations of agent;
2. Territory;
3. Exclusive or non-exclusive;
4. Minimum performance standards;
5. Compensation;
6. Non-competition;
7. Protection of IP, confidentiality;
8. Company has exclusive rights to localization content;
9. National/international accounts/ channel conflict;
10. Anti-corruption provisions under Foreign Corrupt Practices Act; and
11. Right of Company to terminate agent.

##### C. Exit Strategy – Termination of Marketing Agent

Have pre-existing strategy and established legal rights to:

1. Terminate agent if things are not working out; and
2. Change business model in country (e.g., shifting from marketing through independent marketing agents to direct marketing by the Company's employees).



D. Application of ITAR Brokering Regulations

1. See Section I.A.11 above.

E. Foreign Corrupt Practices Act/Anticorruption Laws

1. See Section I.D above.

V. ESTABLISHING A LEGAL PRESENCE IN FOREIGN COUNTRY

For legal issues to consider in establishing a presence in the foreign country, such as through a subsidiary, branch office, marketing office, representative office or manufacturing facility, See <http://www.williamsmullen.com/sites/default/files/wm-url-files/04-Country-Localization-Checklist.pdf> Part II.

**Please note:** This article contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. For more information, please visit our website at [www.williamsmullen.com](http://www.williamsmullen.com) or contact Thomas B. McVey, 202.293.8118 or [tmcvey@williamsmullen.com](mailto:tmcvey@williamsmullen.com).

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