Internal compliance and external optics

A look at the changing landscape of export control and sanctions compliance policies in light of growing ESG commitments.

The US government has long emphasized the importance of sanctions and export control compliance policies to guard against violations of sanctions or export control laws. Historically, companies have implemented these policies internally to provide guidance and direction to employees on the conduct of day-to-day business. Increasing focus on sanctions and export controls both in media and in the context of Environmental, Social and Governance ("ESG") goals, especially in light of current events, has led many companies to consider making internal policy commitments public information. As a result, compliance managers will need to carefully navigate compliance, as well as publicity around the companies' public ESG commitments – all the while taking the steps necessary to avoid greenwashing and ensure determined ESG goals are meaningful.

Importance of compliance policies

As readers will know, both the US Department of the Treasury's Office of Foreign Assets Control ("OFAC") and the US Department of Commerce Bureau of Industry and Security ("BIS") provide guidance to industry, setting forth expectations for internal compliance programs. BIS and OFAC issued these documents to assist companies in conducting activities in accordance with applicable laws and minimizing the risk of violations. The substance of the guidance documents focus on the internal framework of a compliance program, such as senior management commitment, risk assessment, internal controls, testing and auditing, and training. As such, companies have carried out their sanctions and export control compliance programs with a view towards internal operations, and historically have not made the details of internal compliance programs public information.

The complexity of current sanctions and export control regimes comes at a cost. Once-simple compliance programs now require significant effort to determine whether a particular transaction may be permissible under the many new regimes applicable today, from sectoral and directive-based sanctions to the various foreign direct product rules. A consequence of this shift is a trend towards "over-compliance" – taking an internal policy stance to avoid certain business where the costs of managing compliance risks are too great.

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Increased public focus on sanctions and export controls

Along with the rising complexity of sanctions and export control laws, there has been an increased public focus on sanctions and export controls relating to (1) governments' increasing use of export controls and sanctions to protect human rights and address ESG issues; and (2) businesses' increasing commitment to ESG principles and stakeholder demand for that commitment. These shifts are evolving compliance programs from strictly the actions needed to comply with applicable law, to a broader commitment to ESG that goes beyond the requirements of applicable laws.

Additionally, with export controls and sanctions increasingly targeting human rights abuses, forced labor, and corruption, more and more companies have taken a public-facing approach to export controls and sanctions. Where sanctions and export control compliance may once have been viewed as a strictly technical matter of internal operations, it now has come front and center as companies take an outward-facing approach with accountability not just to the law, but to all the company's stakeholders – consumers, shareholders, employees, vendors, and others.

Benefits and risks of a public compliance stance

As the focus intensifies on export controls, sanctions, and ESG issues, companies may find it helpful to take clear public stances on sanctions and export control policies. Doing so may provide investors and the public confidence that the company is operating in a lawful manner and in a manner consistent with ESG principles.

At the same time, companies may need to navigate potential risks, including the commercial risks of "over-compliance," and the potential failure of a company to live up to its compliance commitments.

A company may truly intend to comply with its publicly announced ESG commitments and even be willing to forego some profit and opportunity in so doing, yet face grey areas and tricky decisions when actually living out the commitments, such as winding down all business activities in a particular region. These realities risk making the company appear as though it is non-compliant or insincere with regard to its own commitments. Further, public positions on certain sanctions and export control programs could make operations in certain jurisdictions politically challenging even when the company is trying to increase ESG practices.

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The effect of such ESG commitments and the increasing public focus on sanctions and export controls means that compliance managers have increasing responsibilities. Although many of the commitments are not required by the law or necessarily binding, compliance managers will need to manage how they are carried out and measured. On the one hand, measurement should be meaningful and avoid greenwashing in order to maintain credibility and potential liability for misleading information. On the other hand, a company may need to express some commitments in an exploratory way so that the company has the flexibility to adjust its practices and learn as it goes. One idea is to express these policies as intentions the company is striving toward — rather than committing to. Overall, the changing landscape is providing compliance managers with an opportunity to play a key role in their company's mission and — if we may be so bold — in shaping the rules of the world economy. ■

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