

Compliance 101: Managing Trade



Customs and Trade Conference, Houston, 2011

Ground Rules

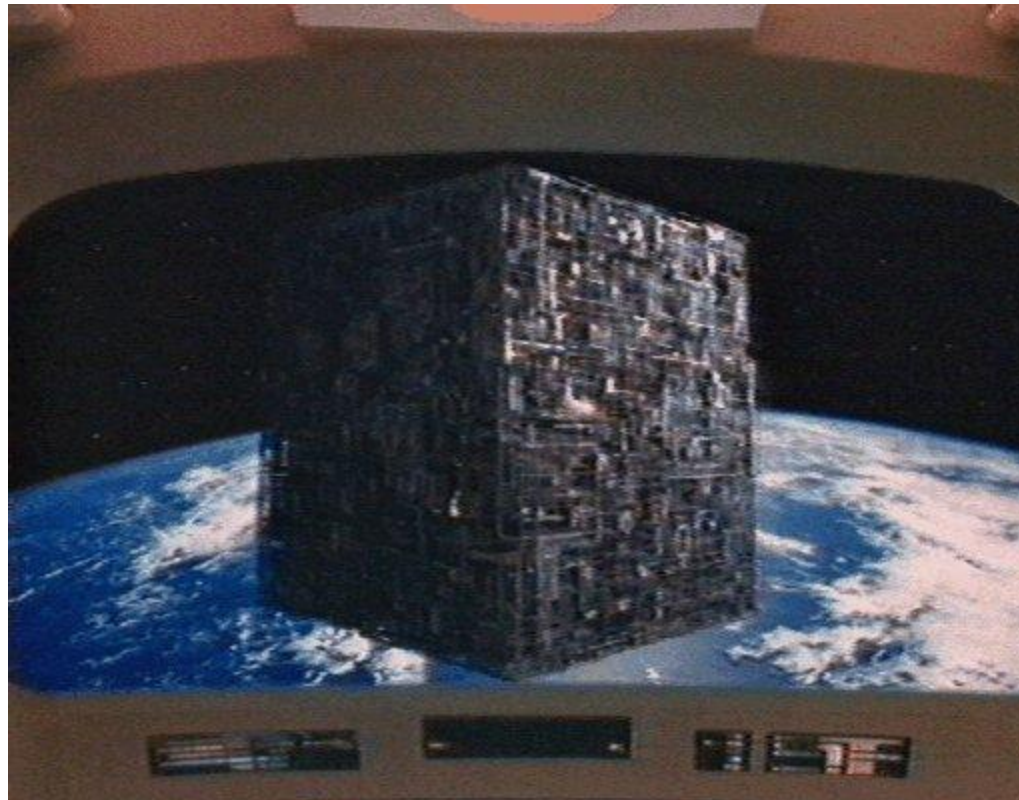
- > Ask whatever you want, whenever
- > I have prizes for good questions and good answers
- > No one should leave more confused than they are right now

ADDED MATERIAL: THE PERILS OF BEING LAST

Family Photos?



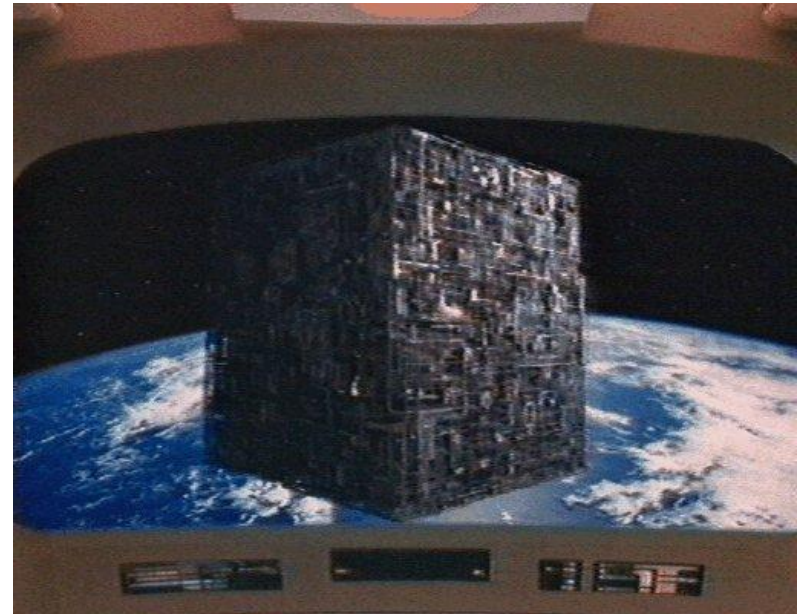
COSO Cubes: Resistance is futile



CIT Litigation/Architecture



Houston: We may have a problem



Objectives

- > Defining compliance
- > Creating compliance
- > Managing compliance
- > Making your flight home

DEFINING COMPLIANCE

Defining Compliance: Generally

- > “Conformity: acting according to certain accepted standards” Websters
- > “The goal that corporations or public agencies aspire to in their efforts to ensure that personnel are aware of and take steps to comply with relevant laws and regulations.” RegulatoryCompliance.org

Customs Compliance

- > The exercise of “reasonable care” with respect to . . .
- > Making entry by providing information necessary for Customs to determine whether merchandise should be released,
- > And . . .

Reasonable Care: 19 USC § 1481(a)(1)

- > Filing with Customs the
 - > Value
 - > Classification
 - > Rate of duty
- > Allowing CBP to
 - > Properly assess duties
 - > Collect accurate statistics
 - > Determine whether any other applicable requirement is met

Value: 19 USC § 1401a

- > Price paid or payable
- > For the merchandise
- > When sold for export to the US
- > Plus . .

Additions to Value (CARPP)

- > Commissions to the seller's agent
- > Assists
- > Royalties paid to the seller or a third party that are necessary for the sale and relate to the production of the goods
- > Proceeds of subsequent resale
- > Packing for international transportation

Classification

- > Harmonized Tariff Schedule of the US
- > Proper application of GRI 1 leads to correct classification in most cases
- > Reference CBP rulings (rulings.cbp.gov)
- > Reference Explanatory Notes
- > Court cases

Rate of Duty

- > Proper statement of applicable MFN rate
- > Backup documentation for reduced rates of duty
 - > NAFTA claims
 - > Other FTA claims
 - > GSP, AGOA
 - > Use of FTZ

Other Applicable Requirements

- > Record retention 5 years +
- > Marking
- > Duty on foreign ship repairs
- > Other agency requirements
 - > EPA
 - > Pipeline and Hazardous Materials Safety Admin
 - > CPSC

Consequences of Non-Compliance

- > 19 USC § 1592 Penalties
- > Negligence: 2x withheld duties
- > Gross Negligence: 4x withheld duties
- > Fraud: Forfeiture value of merchandise

More Consequences

- > Liquidated damages for bond violations (e.g., late filing, failure to redeliver)
- > Special marking duties (10% of value)
- > Inspections, Detentions, and Seizures
 - > IPR violations
 - > Other agency violations

Non-Customs Compliance

- > FCPA, UK Bribery
- > Anti-boycott
- > OFAC
- > BIS EAR
- > State Dept. ITAR

More consequences

- > Loss of export privileges
- > Disgorgement of profits
- > Criminal fines
- > Prison

CREATING COMPLIANCE

Five Steps

- > Create an environment of control
- > Conduct risk assessment
- > Control regulated activities
- > Communicate and educate
- > Monitor compliance

The Environment of Control

- > Identify the top responsible management
 - > Legal or CCO
 - > Tax
 - > Logistics
 - > Operations
- > Must be knowledgeable of requirements

Creation of Compliance Team

- > Legal/Compliance (Risk assessment, priority setting, response to risks, training)
- > Operations (Day to day compliance)
- > Human Resources (Publish and enforce policies and procedures company-wide)
- > Internal Audit (reviews, reports to Audit Committee)

Risk Assessments

- > Understand your business
 - > Duty reduction programs (NAFTA, AGOA, FTZ)
 - > Drawback
 - > Record retention
 - > C-TPAT, cargo security generally
- > ITRAC/ACE data

Things to Consider

- > For what businesses are you responsible?
- > Identify a point person for compliance in each business
- > Determine level of visibility to compliance systems for each business (e.g., ERP, A/R, A/P, etc.)

Conduct an Internal Audit through Counsel

- > Written questionnaires
- > Interviews
- > Entry review
- > Use a judgmental sample for known risks
- > Use random sample too
- > Maintain attorney-client privilege

Internal Audit for Imports

- > Identify open POA for brokers
- > Identify all active bonds
- > Macro check imports against receipts and payables
- > Macro check exports against shipments and receivables
- > Reconcile large discrepancies

Internal Audit for Imports

- > Gather all rulings, legal advice
- > Review communications w/ CBP

Internal Audit for Exports

- > Identify all open licenses
- > Find all jurisdiction rulings or advice
- > Confirmed denied party screening
- > Review government/military contracts
- > Sample products for CCL/USML classification

Prioritize Risks and Allocate Resources

- > Ongoing entries
- > Prior communications from CBP
- > Large duty liabilities
- > Supply chain disruptions
- > But: Do not let prioritizing become an excuse not to act

Control Regulated Behavior

- > Document policies and procedures
- > Policies: broad statements of aspiration (“tone from the top”)
- > Procedures: step-by-step instructions
- > Different from manuals or references

Policies

- > Identify appropriate “speaker”
- > Higher up is better
- > Put it in writing
- > Communicate widely
- > Include a statement of authority to enforce and consequence for violation

Procedures

- > Identify existing process
- > Document it
 - > Process map/Flowchart
 - > Numbered outline
- > Revise as needed to improve compliance

Drafting Procedures: Include

- > Title and number
- > Policy statement
- > Purpose
- > Scope
 - > Who is covered
 - > Transactions covered
- > Necessary definitions
- > Organizational responsibilities
 - > Finance must
 - > Receiving must
- > The actual steps in the procedure
- > Date procedure w/ rev. number
- > Set review period

COMMUNICATE AND EDUCATE

Publish Procedure

- > Use corporate process
 - > Intranet
 - > Sharepoint
 - > Manuals

Training: Identify appropriate audience

- > Operational staff (customs, FTSR)
- > Sales (FTA, Incoterms, EAR, ITAR, OFAC, FCPA, Anti-Boycott)
- > Purchasing (Incoterms, OFAC, value, rate of duty)
- > Engineers (classification, EAR, ITAR, R&D)

Conduct Training

- > Sign in
- > Retain set of materials
- > Distribute policy and procedure
- > Attendees sign off on policy and procedure
- > Provide a follow up channel for questions
- > Include H.R. in process (must be part of job)

Contents of Training

- > All relevant policies, procedures
 - > Customs: HTSUS, value, FTA, digital media, etc.
 - > Export: EAR, ITAR, plant visitors, hand carried products, deemed exports, etc.
 - > Other trade: FCPA, Anti-boycott, OFAC sanctions
- > Follow up procedures
 - > Questions go to . . .
 - > Anonymous phone box . . .

MONITOR COMPLIANCE

Monitoring should include

- > Request from counsel to create privilege
- > Scheduled internal audits
- > Extra focus on risky areas
- > Report should be held in control group
- > Periodic re-training

EXAMPLE 1: CLASSIFICATION

You Tell Me: How do you

- > Identify products in need of classification?
- > Gather details needed to classify?
- > Classify the product?
- > Document results?
- > Provide training to classifier?
- > Maintain open channel with technical staff?
- > Test results?
- > Communicate to broker?

EXAMPLE 2: NAFTA CERTIFICATION

How Do You . . .

- > Identify products to review?
- > Identify suppliers to solicit for CO's?
- > Review incoming CO's?
- > Complete the NAFTA analysis?
- > Store backup documentation?

EXAMPLE 3: CBP COMMUNICATIONS

How Do You . . .

-
- > Log receipt of US CBP documents?
 - > Determine who should respond?
 - > When it is important enough to elevate to legal?
 - > Is it relevant to the Audit Committee?
 - > Calendar the due date?
 - > Prepare the response?
 - > Approve the response?
 - > Send the response?

Questions?

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