

Review of Export Control Issues is Necessary Due Diligence

Articles January 16, 2019

Successful mergers and acquisitions require a substantial amount of due diligence. Before committing to the transaction, the buyer needs to understand the obligations and risks that will be assumed. One area that is frequently overlooked is the selling company's export control exposure. The results can be devastating for both the seller and the buyer if export control compliance is not taken into account.

For example, an aerospace and defense technology company was hit with \$20 million dollars in civil penalties for its failure to oversee the actions of various subsidiaries. In that case, at least two subsidiary companies illegally transferred technical data to foreign nationals. In one of those cases, the illegal transfers occurred over a period of thirteen years. The State Department concluded that the violations occurred because of inadequate corporate oversight and record-keeping, both of which require the existence of a robust export control program.

Export control liability should be factored into the due diligence process. At the very least, a buyer should know the answers to the following questions before making the deal:

- Does the selling company manufacture products listed on either the U.S. Munitions List or Commerce Control List?
- Does the selling company have foreign customers? If so, where?
- Does the selling company deal with re-exports or foreign based products that incorporate U.S. parts or technology?
- Does the selling company make informational exports via training or seminars abroad?
- Does the selling company's employment of foreign nationals require an export license or the adoption of appropriate screening measures?
- What sort of export controls, if any, does the selling company have in place?
- Is the selling company registered with the Directorate of Defense Trade Controls?
- Does the selling company have any existing export licenses? (Note: licenses cannot simply be assigned to a buyer without government approval)

When it comes to export controls, an ounce of prevention is truly worth a pound of cure. Do not overlook this critical due diligence issue during your next M & A deal.

For additional information contact Mark Hamilton.