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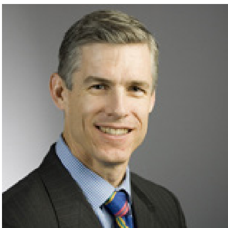

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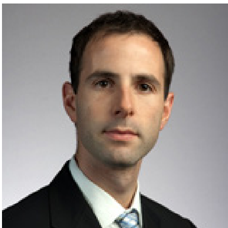

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Colombian Companies Face New Compliance Challenges as Nation Ascends to World Economic Stage

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When OFAC added Colombian sports franchise Envigado Fútbol Club to its sanctions list in June 2014,[1] the news conjured up echoes of past dark days of "narco-fútbol," when the tentacles of organized crime touched the country's business and social institutions at all levels. In a broader context, perhaps the most striking aspect of the Envigado designation was its diminishing importance amid the new array of compliance imperatives facing Colombian companies in a rapidly changing global environment. Trade compliance is quickly becoming not just a necessity but also a big plus factor that can work in Colombia's favor: a strong reputation for trade compliance and effective internal controls can provide an important competitive advantage for Colombian companies in the global marketplace.

Over the last decade, Colombia has made great strides toward shaking off the shadows of an era marked by corruption and violent internal conflict. By 2014, Colombia overtook Argentina to become Latin America's third-largest economy.[2] And, with the country's marked advances toward a peace agreement and a growing international economic presence, the relevance of U.S. export control and sanctions requirements for Colombian companies has changed: it has shifted from narrow concerns about being named as OFAC targets to a larger perspective that regards trade compliance as a key business principle to enhance competitive advantage and to expand opportunities for continued growth.

During this same period, U.S. sanctions and export controls also have undergone significant change. As Colombia emerges as an economic force, and begins a new phase in its trade partnership with the United States, Colombian businesses must address requirements of trade compliance that extend far beyond the realm of punitive economic sanctions, which were first imposed by OFAC's predecessor, the Treasury Department's Office of Foreign Funds Control (FCC), as part of the U.S. wartime effort in the 1940s. In the current environment, trade compliance is based on various, overlapping regulatory requirements that present as many opportunities for competitive gain as they do risks for the imposition of penalties and business harm.

The History of US Strategic Trade Controls

To understand the current U.S. sanctions and export controls regime, it is instructive to look back at the phases of its development and the competing domestic and global pressures that have shaped the compliance and enforcement landscape we know today.

After blocking the Axis powers' financial assets during World War II, the FCC became the Office of Foreign Assets Control (OFAC) during the Korean War, claiming its long-term role as the U.S. government's primary instrument of economic warfare. The U.S.-Colombia political and trade relationship was born during the same era, when, post-WWII, the United States became Colombia's primary market for exports, and Colombian soldiers fought alongside U.S. troops in the Korean War under the United Nations banner.

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In the more-than 60 years since—a period during which Colombia was to a large extent diverted from the world stage by a four-sided internal conflict involving drug cartels, right-wing paramilitaries, the leftist Revolutionary Armed Forces of Colombia (FARC), and government forces[3]—the U.S. sanctions regime has seen many incarnations. With the onset of the Cold War, U.S. sanctions authorized under the Trading with the Enemy Act (TWEA)[4] expanded into trade embargoes designed to restrict Soviet bloc access to sensitive technology. These embargoes were comprehensive in scope, broadly prohibiting U.S. persons, companies and foreign subsidiaries from doing any business at all with the embargoed countries. Penalties, however, were low and enforcement minimal.

The late 1970s brought a fresh spate of legislation, some of which sought to narrow and tailor the scope of U.S. economic tools of statecraft. The International Emergency Economic Powers Act of 1977 (IEEPA)[5] clarified and restricted presidential power to impose sanctions, limiting the competitive disadvantage to U.S. companies posed by broad unilateral sanctions and specifying conditions for the continued declaration of national security emergencies, which were the statutory bases for ongoing OFAC action. In addition, the Export Administration Act of 1979 (EAA)[6] invested the U.S. Department of Commerce's Bureau of Industry and Security with the authority to administer the Export Administration Regulations (EAR), separate from Treasury's OFAC. The 1976 enactment of the International Traffic in Arms Regulations (ITAR), administered by the Department of State, and 1977's Foreign Corrupt Practices Act (FCPA), which expanded the Department of Justice's extraterritorial reach, were also part of the shift to a constellation of related regulations affecting a broad range of transactions involving the United States.

In 1995, President Clinton issued an executive order under IEEPA prohibiting transactions with narcotics traffickers,[7] and OFAC implemented its narcotics sanctions program. By 2006, OFAC's SDN list expanded to include more than 500 companies and 800 individuals affiliated with Colombia's Cali, North Valle, and North Coast drug cartels,[8] and was the primary sanctions tool governing U.S. commerce with Colombia. These targeted measures reflected an underlying trend of using economic sanctions to further various sets of U.S. foreign policy objectives, including efforts to combat narcotics trafficking.

The attacks of 9/11 and the growth of renewed tensions with Iran ushered in a "sanctions revolution,"[9] as the United States implemented a new wave of market restrictions, penalties and terrorist finance measures to address growing concerns about international terrorism. These steps were augmented with efforts to gain multilateral support for sanctions against Iran and terrorist groups, as U.S. policymakers recognized the limited effectiveness and collateral harm of unilateral action.

As the new millennium advanced, regulatory scrutiny zeroed in on global flows of capital being illegally funneled through the U.S. financial system by and for the benefit of sanctioned countries and entities. In response, the U.S. government stepped up enforcement against foreign financial institutions with correspondent banking relationships or operations in the United States. Major prosecutions of banks such as ABN AMRO, Lloyds and Credit Suisse, with fines reaching the hundreds of millions of dollars, punctuated this trend and elevated sanctions risks to a higher level than ever before.

During this same period, the IEEPA Enhancement Act of 2007[10] increased penalties for sanctions violations to the greater of (a) $250,000, or (b) two times the value of the transaction. This legislation also expanded the extraterritorial jurisdiction of U.S. sanctions by making it unlawful for any person to cause or attempt to cause a U.S. person to commit a violation of U.S. sanctions. Faced with potential legal liability, business disruption and reputational harm, many foreign financial institutions and companies chose to pursue a "de-risking strategy," stepping away from transactions that bear a heightened sanctions risk.

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The trend of extraterritorial application of U.S. trade compliance has continued an upward swing in recent years. For example, since 2012, the United States has imposed secondary sanctions against foreign entities that do business with Iran in critical sectors (though such secondary sanctions will be lifted as part of the recent Iran nuclear deal), and more recently U.S. sanctions and export restrictions imposed in response to Russian incursions into Ukraine also have had an intended extraterritorial dimension. The same is true for U.S. enforcement actions, as more and more non-U.S. persons are the targets of civil and criminal penalties for activities involving the unauthorized re-export of U.S. goods and services outside the United States.

The Current Sanctions and Export Control Climate

Colombia's emergence as a major economic force, and its rising prominence as a trade partner with the United States, comes at a time when the U.S. has more than two dozen sanctions programs in place,[11] and is pursuing extraterritorial enforcement with continued zeal.

Hundreds of names have been removed from OFAC's SDN list in recent years,[12] as narcotics trafficking has receded in relevance to the country's business community and to dealings with the United States in an era of expanding peace and prosperity.

Current trade compliance imperatives for Colombian companies stem instead from the complex regulatory regimes governing U.S. financial and commercial transactions. These requirements arise from the rules imposed by various U.S. government agencies (i.e., not just OFAC, but also the maze of transaction and export restrictions from the U.S. State, Justice and Commerce Departments)—each with their own respective mandates, procedures and areas of authorization. These types of trade compliance requirements can change quickly, as new U.S. executive orders and implementing regulations are established in response to ongoing geopolitical exigencies. In this environment, it is critical for companies to monitor developments, assess relevant risks and put into place proper internal controls to maintain trade compliance. A failure to do so not only means possible enforcement penalties but also lost business opportunities.

As Colombia becomes an increasingly attractive target for foreign investment, and Colombian businesses become enmeshed in ever more complex global distribution and supply chains—with more counterparties and more jurisdictions presenting varying levels of risk—these touch points are likely to trigger higher trade compliance obligations. In addition to the necessity of maintaining their own internal controls, Colombian companies are now more dependent upon the compliance of others.

Trade compliance requirements are of particular relevance to companies that import, re-export or rely on the incorporation of U.S.-origin goods, software or technology in the development of their own products, or that partner with U.S. original equipment manufacturers, exporters or service providers. Ongoing compliance responsibilities are also likely to weigh more heavily on companies operating in high-risk sectors, such as defense, financial services, technology and energy—and they also extend to other areas of operation that make or incorporate "dual use" items. In addition, maintaining adequate trade compliance is critical for transactions that present a financial nexus to the United States—a connection that is often unavoidable in a world where so many dealings are U.S.-dollar denominated.

In the current sanctions climate, financial services companies occupy a particularly fraught place. Often it is assumed that such firms are better positioned than the regulators themselves to know where illicit activity occurs or may ensue, so that—like it or not—financial institutions have been effectively

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"deputized" to serve on the front lines of compliance. Any bank or other financial institution with branches, correspondent accounts, or other banking relationships in the United States or with U.S. banks, or those exposed to global financial markets, is responsible for maintaining stringent anti–money laundering and sanction compliance controls. Compliance lapses can bring stiff penalties, as seen in the May 2015 BNP Paribas case, which resulted in an order for the bank to forfeit $8.83 billion, pay a $140 million fine, and strengthen its compliance policies and procedures.[13]

But it is not just the risk of reputational harm and financial penalties that should spur Colombian companies and financial institutions to embrace compliance. Rather, trade compliance is rapidly becoming a competitive differentiator, which can work to Colombia's significant advantage in developing new international business opportunities. A strong commitment to trade compliance and effective internal controls can be critical for Colombian companies in winning the confidence of investors and counterparties, serving as a catalyst for growth and demonstrating a new readiness to become key players on the global economic stage.

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