

# Higher Education Risk Management Conference

## *Establishing International Programs: Risks and Due Diligence*

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# Globalization

- reshaping the world in the past several decades ---
  - continued growth of multinationals
  - increased cross-border workers and consumers
  - increased imported goods and services
  
- effect on higher education institutions
  - challenge to become more transnational
  - students, faculty & staff more involved in international travel/ activities
  - institutions prepare students for inter-dependent world, global competence skills.

*Renewing the Covenant: Learning, Discovery, and Engagement in a New Age and Different World, Kellogg Commission's Final Report; Expanding the International Scope of Universities, A Strategic Vision Statement for Learning, Scholarship, and Engagement in the New Century, National Association of State Universities and Land-Grant Colleges*

# Study Abroad Trends

1996/1997 - U.S. sending < 100K students abroad, mainly UK, Italy, Spain, France (Institute of International Education)

2008/2009 - > 260K U.S. students studied abroad. (*Open Doors 2010 Report*, Institute of International Education)

2011/2012 – 283K+ students studied abroad (*Open Doors Report on International Educational Exchange*, Institute of International Education. 2013)

# Study-Abroad Facts

Though UK, Italy, France & Spain were still the leading individual destinations in 2011/12, there is also a trend for American students to head to less traditional places:

## Host Region – Percentage of total

	2000/01	2008/09	2011/12	11-yr Chg
<b>Africa*</b>	2.9	5.3	4.5	55.1 %
<b>Asia</b>	6.0	11.4	12.4	106.6 %
Europe**	63.1	54.5	53.3	- 15.5 %
Latin America	14.5	15.4	15.8	8.9 %
<b>Middle East*</b>	1.1	1.4	2.5	127.0 %
North America	0.7	0.5	0.6	- 14.2 %

\* North Africa was moved from the Africa category to the Middle East category in 2010/11.

\*\* **Cyprus and Turkey were previously classified in the Middle East category but were moved to the Europe category in 2004/05.**

*(Host Regions of U.S. Study Abroad Students, 2000/01-2011/12, Open Doors Report on International Educational Exchange, Institute of International Education. 2013)*

# Study-Abroad Facts

- Within the Middle East
  - Israel still hosts the largest number of U.S. students in region (3,189 in 2011/12)
    - But, its percentage actually decreased by 7.3% in 2011/12
  - Whereas, the following saw significant increases:

– Jordan --	33.5%
– Oman --	41.7%
– Qatar --	125.4%
– Saudi Arabia --	38.9%
– United Arab Emirates --	39.5%

*(Open Doors 2013 Report)*

# International Delivery Alternatives

International programs being delivered to students by alternate methods; faculty members obtain greater internationalization:

- Independent study, service learning, & internships
- Faculty / student exchange programs
- Direct enrollment into foreign institutions
- Research partnerships
- Faculty research & sabbaticals
- Joint ventures with foreign institutions
- Home campuses abroad

# Risk Management

**ALL** international programs bring increase in risks that must be managed.

Colleges & universities must:

- understand risks of international education programs,
- adopt policies & procedures to manage risks, while promoting and encouraging travel abroad

*(Managing the Risks, at Preface, Pg. 2 ,College & University International Education Programs, Gallagher Higher Education Group, 2007)*



# Risk Management

Recent incidents illustrate risks:

- Civil war closed university
- Student kidnapped
- Kerosene lamp injures student
- Students contract severe disease
- Death of faculty lead
- Students harassed & assaulted
- Fire in overcrowded dormitory



# Risk Management

Should schools allow programs in high travel-risk areas?

Topic continues to be carefully considered throughout the nation.

School administrators, general counsels, and risk managers have difficult task of balancing risk with learning opportunities

First, most important step – make sure schools sponsoring study abroad programs have a ***comprehensive travel risk management program in place.***

*Real-World Lessons No Classroom Can Duplicate: Study Abroad Programs in an Unstable World, Katie McGrath, SVP, Educational Markets, AIG*

# Travel Risk Management Program

Key features of a comprehensive travel risk management program:

- Out-of-country medical care access
- Pre-trip orientation
- Real-time information
- Pre-trip security training
- Pre-departure orientations

*Real-World Lessons No Classroom Can Duplicate: Study Abroad Programs in an Unstable World*

# Travel Risk Management Program

Key features of a comprehensive travel risk management program:

- Due diligence & reasonable care
- Defined housing standards & policies
- Institutionally purchased insurance policies containing desired coverages & limits
- Post-incident or accident reporting procedures & mechanisms
- Emergency preparedness & crisis response plans
- Legal referral assistance procedures

# Higher Risk International Programs

Some international programs present higher risk than others. For example:

- *Joint ventures with foreign institutions*
  - *Home campuses abroad*
- Currently: 200 international branch campuses, a 23 percent increase from just three years ago.
  - Within the next two years, 37 more such branches are expected to open.

*(Should Top U.S. Colleges Expand Overseas? By Anya Kamenetz, 3/19/2013  
www.newsweek.com/education)*

## • Some examples:

- NYU Abu Dhabi - Research university
- NYU Shanghai - 1<sup>st</sup> Chinese/Am. Jt. Venture Univ.
- NYU - Additional global academic centers (Accra, Berlin, Buenos Aires, Florence, London, Madrid, Paris, Prague, Tel Aviv, Sydney)
- Education City in Doha, Qatar hosts mini-branches of Weill Cornell Medical College, Georgetown, Northwestern, Texas A&M, Carnegie Mellon & several others
- Duke - Kunshan, China, Ministry of Ed approved 09/2013
- Yale-NUS College: “autonomous liberal-arts college” (rather than branch campus) with Nat’l Univ. of Singapore
- Nat’l Univ. of Singapore has also had joint ventures with Duke, NYU, and Johns Hopkins
- Arab Emirates hosts 39 foreign university branches - more than any other country.

*(Should Top U.S. Colleges Expand Overseas? By Anya Kamenetz, 3/19/2013*

*www.newsweek.com/education)*

# Branch Campuses / Jt. Ventures

In an era of ever-increasing budgetary pressures, foreign source funding may be difficult to turn down.

Nonetheless, must devote sufficient time to the investigation and analysis of legal issues & risks presented.

# Branch Campuses / Jt. Ventures

## Some Key Policy Considerations...

- Should the properties abroad be owned or leased?
- Should the international education programs be self-managed or should they be managed by a contract party?
- What human resources will be required – and how will those needs be met?

*(Managing the Risks, at Appendix A, College & University International Education Programs, Gallagher Higher Education Group, 2007)*



# Additional Considerations

## *Risk: Running Afoul of U.S. Laws Extra-Territorially Applied*

- Foreign Corrupt Practices Act
- U.S. Export Controls
- U.S. Embargo / Sanctions Programs
- Anti-Boycott Regulations
- Anti-discrimination & ADA
- Data Privacy
- Numerous others

# Foreign Corrupt Practices Act (FCPA)

Giving anything of Value (including a promise or authorization) to a Foreign Official with Knowledge of or Intent that some or all of the gift is for the purpose of Influencing the Foreign Official to assist in obtaining a Business Advantage for the Covered Person making the payment.

(15 U.S.C. § 78 dd-1 et seq. (Enforced by the SEC & Department of Justice))

# Foreign Official

Officer, employee or other person acting *in an official capacity* for:

- A foreign government
- Any department, agency or instrumentality of a government
- Any quasi-governmental entity and corporation owned or controlled by a foreign government (parent corporations)
- Any Public International Organization (i.e. UN, etc.)
- Any Foreign Political Party
- Candidate for Foreign Political Office

# Covered Persons

- U.S. Citizens
- U.S. Residents
- U.S. Visitors who commit bribery while in U.S.
- U.S. Corporations, Partnerships or other Businesses
- Foreign Subsidiaries of U.S. Businesses if U.S. Company owns 50% or More

# Additional Covered Persons

- Other Corporations & Business Organizations with a Principal Place of Business in the U.S.
- Other persons if they participate in a prohibited activity as an officer, director, employee, representative (including stockholder acting on behalf of the company) or agent of any U.S. business.

# Exceptions / Affirmative Defenses

- Limited exception for “Grease” Payments for “Routine Government Action”
  - Only if lawful under written laws and regulations of the foreign country
- Reasonable expenses to promote performance of contract or display services

# FCPA Whistleblowers => Increased Exposure

In 2013: Continued expansion of FCPA enforcement by the DOJ & the SEC.

- Increase in FCPA compliance violations reported likely to lead to increased exposure for export violation prosecutions if reveal weak compliance in other areas such as *export control compliance*.



# U.S. Export Controls

- Export controls govern the *shipment, transmission, transfer and re-transfer* of *regulated items, information and software* to foreign countries, persons or entities.
- Under current export control system, several different US agencies regulate exports and issue export licenses the:
  - Department of State
  - Depart of Commerce
  - Department of the Treasury
  - Nuclear Regulatory Commission
  - Department of Energy

# U.S. Export Controls

- Department of Commerce (Bureau of Industry and Security) [Export Administration Regulations](#) (EAR) = dual use items and information predominately civilian in character but having military applications.
- Department of State (Directorate of Defense Trade Controls) Arms Export Control Act (AECA) = cornerstone of U.S. munitions export control law. The Department of State implements through [International Traffic in Arms Regulations](#) (ITAR). ITAR governs "defense articles and services" (items and information specifically designed or adapted for military use. State Department also provides guidance on defense services and fundamental space science research.

# Activities that might trigger export control issues

- Engaging in “Exports” -- which can include both the *shipment* or *hand-carrying* to another country by:
  - **Shipping Overseas**: The transfer of project information, equipment, materials, or technology by whatever means
  - **Traveling overseas with high tech equipment, confidential, unpublished, or proprietary information or data**: Traveling with certain types of high tech equipment, such as scientific equipment, or controlled, proprietary or unpublished data in any format
  - **Traveling with laptop computers, web-enabled cell phones and other personal equipment**: Laptop computers, web-enabled cell phones, other electronics containing encryption hardware or software and/or proprietary software, and biologicals

*Each* international shipment is subject to export regulation, *even in the conduct of fundamental research*, and may require an export license -- *depending on the item, destination, recipient, and end-use*.

- Fundamental research = openly-conducted basic and applied research in science and engineering that is not subject to access, dissemination, or participation restrictions.
  - *Fundamental research conducted outside of the US, however, remains subject to export controls.*
  - **International Field Work**: Research projects where any part of the research will take place outside the U.S. may not qualify under the fundamental research exclusion.

- Although most items that are hand-carried overseas temporarily, such as laptops, research equipment and materials will fall under a “No License Required (NLR)” or “Temporary Export (TMP)” certification --
  - **ALL** exports, *including items hand carried abroad, should first be “classified” and documented appropriately, as either:*
    - *No license required*
    - *License exception applies*
  - **Being able to demonstrate due diligence important.**

# Activities that might trigger export control issues

- **Use of 3rd Party Export Controlled Technology or Information:** Export-controlled items, software code, or information provided by a third party may not be eligible to be openly shared with certain foreign nationals, even though important contributors to the performance of the fundamental research.
- *Therefore very important to understand **when information, items or technology are controlled.***
- And understand **disclosure** of export-controlled information to foreign persons outside of the U.S. – even when employed by the university – constitutes an **“Export.”**



**When export controls apply, they are frequently associated with items, information, and software code within the following general areas:**

- Navigation, Avionics, and Flight Control
- Nuclear Technology
- Space Technology & Satellites
- Medical Lasers
- Laser and Directed Energy Systems
- Marine Technology
- Materials Technology
- Robotics
- Propulsion System and Unmanned Air Vehicle Subsystems
- Telecommunications/Networking
- Information Security / Encryption Technology
- Sensors and Sensor Technology
- Advanced Computer/Microelectronic Technology
- High Performance Computing
- Missiles & Missile Technology
- Select Agents & Toxins
- Chemical/Biological Weapons
- Chemical, Biotechnology, and Biomedical Engineering
- Military or Defense Articles and Services
- Rocket Systems
- Remote Sensing, Imaging, and Reconnaissance



***BUT NOT EXCLUSIVE.*** Although area of technology export controls is complex, organizing and approaching methodically can help avoid many violations. ***Methodical organized approach is the key:***

- **Identify & “classify”** technology & technical data. (ITAR term = “technical data”; EAR term = “technology”)
  - EAR Part 732, Supp. Nos. 1 & 2 contain useful decision trees on determining whether an item is subject to the EAR & how to determine EAR licensing requirements.
- **Mark** controlled items/information appropriately
- **Identify countries & nationalities controlled** for involved technology or technical data
- **Identify the vectors for release** of controlled technology or technical data
- **Identify universe of foreign nationals** with potential access, including faculty, students, employees, contractors, research subjects, etc.
- **Obtain necessary approvals/licenses**

# Key to Compliance (con'td)

- **Design & implement a Technology Control Plan (TCP)** to restrict access to controlled technology unless a license is obtained or a license exception / exemption is available
  - Train faculty, students, employees, contractors, research subjects, on export compliance and the TCP
- **Audit** compliance on a regular basis
- **Upgrade and revise TCP** periodically & as needed

# Activities that might trigger export control issues

Even when not dealing with “controlled” information or technology, **trade embargos** and **sanction programs** restrict with whom can engage. Engagement may arise in connection with:

- **International Collaborations & Presentations:** If any of the foreign nationals are from embargoed or sanctioned countries
- **International Consulting:** To embargoed or sanctioned countries, entities or individuals

# U.S. Embargo / Sanctions Programs

- Department of the Treasury (Office of Assets Controls) - Office of Foreign Assets Control Regulations (OFAC) administers and enforces trade embargoes and economic sanctions.
  - *Extent of embargo / prohibited transactions differ by specific program*
    - *Comprehensive* prohibit virtually ALL exports/imports and other transactions unless have a license or other US Government authorization.
    - *Targeted* prohibit trade in specified goods, technologies, and services with specific organizations (including foreign governments) and persons.

# Embargoed and Sanctioned Countries

## *Comprehensive – OFAC & ITAR:*

- Cuba
- Syria
- Iran\*

(\* has experienced recent temporary liberalization)

## *Targeted - EAR*

- North Korea
- Iraq

## *Targeted – OFAC:*

- Balkans
- Belarus
- Cote d'Ivoire (formerly Ivory Coast)
- Democratic Republic of the Congo Sanctions
- Iraq
- Former Liberation Regime of Charles Taylor Sanctions
- Lebanon
- Liberia
- Libya
- Myanmar (formerly Burma)
- North Korea
- Russia (the Magnitsky Sanctions)
- Somalia
- Sudan
- Ukraine
- Yemen
- Zimbabwe

# Footnote: Recent Developments regarding Iran

March 19, 2014 - OFAC issued General License G which authorizes:

- exports in connection with filing & processing of applications & acceptance of payments for submitted applications & tuition from individuals located in Iran & outside of Iran who are ordinarily resident in Iran;
- recruitment, hiring or employment in a teaching activity - provided required visas are in place;
- permits signing up for and participation in undergraduate online courses, coursework not part of a degree-seeking program and fee-based courses provided by U.S. academic institutions;
- U.S. persons who are actively enrolled in a U.S. academic institution to participate in educational courses or engage in noncommercial academic research at Iranian universities at the undergraduate level, as well as in certain graduate-level non-commercial academic research at Iranian universities in the humanities, social services, law or business at levels above the undergraduate level;
- U.S. persons to export services to Iran in support of certain not-for-profit educational activities in Iran: combating illiteracy, increasing access to education and assisting in educational reform projects;
- U.S. persons to administer professional certificate examinations & university entrance exams, including those services that are necessary or required for admission to U.S. academic institutions, to individuals who are located in Iran or located outside of Iran but who are ordinarily resident in Iran;

***But, there are still specific prohibitions covering the release of software & technology that are covered by OFAC's regulations, as well as the EAR. There are also limitations regarding coverage for persons who are blocked in accordance with OFAC regulations.***

# Embargoed and Sanctioned Countries

## ITAR Prohibited Countries

- Afghanistan
- Belarus
- Cuba
- Cyprus
- Eritrea
- Fiji
- Iran
- Iraq
- Cote d'Ivoire
- Kyrgyzstan\*
- Lebanon
- Libya
- North Korea
- Syria
- Vietnam
- Myanmar (formerly Burma)
- China
- Haiti
- Liberia
- Rwanda
- Somalia
- Sri Lanka
- Sudan
- Yemen\*
- Zimbabwe
- Venezuela
- Democratic Republic of the Congo

\* Applications reviewed on case- by-case basis.



# Additional Sanctions Programs

OFAC, State & BIS administer and enforce economic & trade sanctions against:

- targeted foreign terrorists, international narcotics traffickers,
- those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States.

*A number of lists are maintained for that purpose ...*

# **“Bad Boy” Lists (Persons & Organizations)**

## **Specially Designated Nationals List & Blocked Persons**

List compiled by OFAC. In addition, EAR require a license of exports or re-exports to any party in any entry on this list that contains certain suffixes.

## **Debarred List**

List compiled by State Department of parties who are barred by §127.7 of the ITAR (22 CFR §127.7) from participating directly or indirectly in the export of defense articles, including technical data or in the furnishing of defense services for which a license or approval is required by ITAR.

## **Nonproliferation Sanctions**

Several lists compiled by State Department of parties that have been sanctioned under various statutes. The Federal Register notice imposing sanctions on a party states the sanctions that apply to that party. Some sanctioned parties are subject to BIS's license application denial policy described in §744.19 of the EAR (15 CFR §744.19).

# Some Other “Bad Boy Lists”

## Denied Persons List

List of individuals and entities that have been denied export privileges. Any dealings with a party on this list that violate the terms of its denial order is prohibited.

## Unverified List

List of parties where BIS has been unable to verify the end-user in prior transactions. The presence of a party on this list in a transaction is a “Red Flag” that should be resolved before proceeding with the transaction.

## Entity List

List of parties whose presence in a transaction can trigger license requirement under EAR. List specifies the license requirements that apply to each party. License requirements are in addition to any license requirements imposed on transaction by other provisions of EAR.

# Embargoed and Sanctioned Countries

Countries that have had Restricted Entities on the [EAR Entity Chart](#)

- China
- Canada
- Germany
- Iran
- India
- Israel
- Pakistan
- Russia
- Egypt
- Malaysia
- Hong Kong
- Kuwait
- Lebanon
- Singapore
- South Korea
- Syria
- United Arab Emirates
- United Kingdom

# Due Diligence / Policies / Procedures

Important to conduct Restricted Party Screenings in the context of:

- Transfers of equipment or materials
- Transfers of any controlled technology / research
- Before entering into any Financial Support / International Financial Transactions
  - to ensure that the university is not inadvertently transferring controlled technology or information, doing business with sanctioned entities, persons, or countries, or providing financial assistance to a blocked or sanctioned entity

# Due Diligence

## *Should Encompass:*

- *foreign universities*
  - *research institutes*
  - *research sponsors*
  - *subcontractors*
  - *research subjects in other countries*
- and --*

## *Should Comprise a component of the:*

- *Employee hiring process*
- *Student enrollment process*
- *Contest-related activities*

## *And, in the case of traditional export transactions, such as the shipment of equipment or materials to a research partner, should include:*

- *foreign & intermediate consignees,*
- *end-users,*
- *agents,*
- *brokers & other intermediaries,*
- *joint venture partners*
- *freight forwarders & other transportation parties*

# Due Diligence / Policies / Procedures

- *Challenge* of the “50 percent rule” used by OFAC in enforcing sanctions programs.
  - Any entity controlled by a designated individual or entity, or in which a designated entity or individual owns a 50 percent or greater interest, is deemed to be designated -- *even though such entity is not specifically named or designated*
    - Effect is to require U.S. persons to block such entity's assets and to refrain from engaging in transaction.

# Due Diligence / Policies / Procedures

- Which means compliance requires: **tracing all the way back up the ownership structure of any entity with which dealing** to determine that a designated party does not have an ownership interest that would cause the entity with which dealing to also be subject to sanctions.
  - The designated entity or person could be several layers up.
  - As long as each company or person in the chain has at least 50 percent of the company below, the bottom layer company will also be designated.



# Violations can be costly

- Case involving the University of Massachusetts at Lowell illustrates the importance of prohibited party list screening as a mandatory part of export compliance.
- In that case, the University *itself* was charged by the BIS for violating export control laws in connection with the export of an atmospheric testing device and related equipment classified as EAR99 to a party on the BIS **Entity List**, without first obtaining a license
- **Case highlights importance government is placing on restricted party screening – as well as fact that universities themselves are enforcement targets.**

# Violations can be costly

A Research Fellow in the Neurology Department of the University of Michigan at the time of his arrest is being criminally prosecuted for sending a medical device (a coil for a magnetic resonance imaging (MRI) machine) to Iran.

- Although a part for an MRI machine is, under the Trade Sanctions Reform and Export Enhancement Act of 2000, eligible for an export license in the case of Iran, despite the continuing embargo on such country, **failure to obtain a license is a violation of the embargo.**

This case highlights a common misunderstanding of the regulations:

- *The initial shipment of a controlled item to a country that is not subject to an embargo or sanction program, does not cure the violation.*

# Violations can be costly

March 6, 2014: OFAC announced a CA company had agreed to pay **\$504,225** to settle potential civil liability for apparent violations of the Iranian Transactions and Sanctions Regulations resulting from a pattern of conduct over a 5-yr period of exports to the UAE and Greece, **when it knew its goods for broadband wireless connectivity were intended specifically for supply, transshipment or re-exportation, directly or indirectly, to Iran.**

- Unfavorable factors: Company had **no OFAC compliance program** in place at the time of the apparent violations, and did not voluntarily disclose the apparent violations.
- Mitigating factors: Company had no prior sanctions history, cooperated with OFAC during its investigation & took remedial action. OFAC determined conduct constituted a non-egregious case.

# Penalties

## Under the EAR:

- **Criminal Sanctions - Willful Violations**

- *University*: A fine of up to the greater of \$1,000,000 or five times the value of the exports per violation.
- *Individual*: A fine of up to \$250,000 or imprisonment for up to ten years, or both, per violation.

- **Criminal Sanctions – Knowing Violations**

- *University*: A fine of up to the greater of \$50,000 or five times the value of the exports per violation.
- *Individual*: A fine of up to the greater of \$50,000 or five times the value of the exports or imprisonment for up to five years, or both, per violation.

- **Civil (Administrative) Sanctions**

- The imposition of a fine of up to \$12,000 per violation / \$120,000 per violation for violations involving items controlled for national security reasons.
- Additionally, per violation any or all of the following may be imposed:
  - Denial of export privileges; and/or
  - Exclusion from practice; and/or
  - Seizure/Forfeiture of goods.

# Penalties

## Under the International Emergency Economic Powers Act (IEEPA):

- **Criminal Sanctions - Willful Violations**
  - *University*: A fine of \$1,000,000 per violation.
  - *Individual*: A fine of up to \$1,000,000 or imprisonment for up to twenty years, or both, per violation.
- **Civil (Administrative) Sanctions**
  - *University* - A fine of up to \$250,000 per violation, or twice the value of the transaction, whichever is greater.
  - *Individual* - A fine of up to \$250,000 per violation, or twice the value of the transaction, whichever is greater.
  - Additionally, per violation of the IEEPA any or all of the following may be imposed:
    - Denial of export privileges; and/or
    - Exclusion from practice; and/or
    - Seizure/forfeiture of goods.

# Penalties

## Under the ITAR:

- **Criminal Sanctions - Willful Violations**
  - *University*: A fine of \$1,000,000 per violation.
  - *Individual*: A fine of up to \$1,000,000 or imprisonment for up to ten years, or both, per violation.
- **Civil Sanctions**
  - *University*: A fine of up to \$500,000 per violation.
  - *Individual*: A fine of up to \$500,000 per violation.
  - Additionally, per violation of the ITAR any or all of the following may be imposed:
    - Denial of export privileges; and/or
    - Seizure/forfeiture of goods.

# Anti-Boycott Regulations

U.S. law prohibits any activity that might be deemed to support an unsanctioned boycott. (This prohibition is most often raised in the context of Arab nations boycotting Israel, but the anti-boycott laws apply to all boycotts imposed by foreign countries that are unsanctioned by the U.S.)

“Anti-boycott regulations” = collective reference to regulations by which the Commerce Department through the EAR and the Treasury Department through the Internal Revenue Code enforce two anti-boycott laws.

(§999 of the Internal Revenue Code; Export Administration Act, 15 CFR §§730-774; Tax Reform Act of 1976)



# Anti-Boycott Regulations

Under the anti-boycott provisions of the EAR, Prohibited activities:

- Agreements to refuse - or actual refusal - to do business with or in Israel
- Agreements to refuse - or actual refusal - to do business with blacklisted companies.
- Agreements to discriminate - or actual discrimination - against other persons based on race, religion, sex, national origin or nationality.
- Agreements to furnish - or actual furnishing - of information about business relationships with - or in - Israel -- or with blacklisted companies.
- Agreements to furnish - or actual furnishing - of information about the race, religion, sex, or national origin of another person.
- Implementing letters of credit containing prohibited boycott terms or conditions

# Anti-Boycott Regulations

- Request may be found in:
  - Bid invitations, POs, contracts, MOUs, or verbal representations
  - Conditions for funding, financing, endowments, etc.
  - Conditions of letters of credit
  - May take the form of affirmative statement requirements, as well as negative declarations

**“We are fully aware of the Syrian legislation concerning the boycott of Israel and undertake to comply with it.”**

**“We are not owned or controlled by any Israeli person or interest.”**

# Anti-Boycott Regulations

- EAR require U.S. persons to **report on a quarterly basis** requests they have received to take certain actions to comply with, further or support an unsanctioned foreign boycott.
  - Feb. 12, 2014 - BWI Corporation, filed voluntary self-disclosure & charged with 1 violation of 15 CFR 760.2(d) (Furnishing Information about Business Relationships with Boycotted Countries or Blacklisted Persons) & 6 violations of 15 CFR 760.5 (Failing to Report the Receipt of a Request to Engage in Restrictive Trade Practice or Foreign Boycott Against a Country Friendly to the United States)
  - Civil settlement reached – fined \$9,000; debarment/suspension from export transactions will not apply if penalty is paid as agreed
- Penalties When the EAA is in lapse are governed by the International Emergency Economic Powers Act (IEEPA) which provides:
  - Civil penalties = the greater of \$250,000 per violation or twice the value of the transaction for administrative violations; and
  - Criminal violations = up to \$1 million and/or 20 years' imprisonment

# Anti-Boycott Regulations

- Internal Rev. Code anti-boycott provisions require U.S. taxpayers to **report annually** to the IRS their operations in boycotting countries. (The Treasury Department publishes a quarterly list of "boycotting countries.")
- Penalties under the IRC for participating in or cooperating with unsanctioned foreign boycott:
  - Denial of right to claim certain tax benefits, foreign subsidiary deferral benefits, & exclusion of extraterritorial income from gross income
  - Criminal violations = If willful, up to \$25,000 and/or imprisonment for one year

# **Risk: Host Country Laws & Regulations**

- Anti-bribery Statutes
- Blocking Statutes
- Labor Obligations
- Immigration & Work Permits
- Expatriate Taxation & Equalization
- Data Privacy
- Transfer Pricing Regulations
- Liability Regimes
- Dispute Resolution
- Governing Law Choices

# Selection of Business Structure

Host countries' domestic laws may limit business structure options when real estate investment involved

- Ex: Some countries – like Mexico - **REQUIRE** entity establishment before allowing purchase of real estate by foreign investors in that country
- Ex: Other countries – like South Korea – may require establishment of host country Foreign Direct Investment Company or registration of Branch Office if real estate acquired for profit-making activities, *though not in the case of non-profit business activities*

# Business Structure Issues

- Investment Treaties addressing real estate investment may modify domestic laws
  - Providing safe haven against creating “Permanent Establishment” (i.e., a tax presence) resulting from certain activities (including owning real estate for commercial purposes)
  - Also may provide for National Treatment, Due Process, etc.
- Free Trade Agreements may contain Investment chapter



# Foreign Investment Company

- Required by various countries
- Could require a large investment to begin
- May need funds to continue
- Company registration tax may apply (rates may vary by region within host country)
- Legal fine print must be examined carefully
- Depends on political and economic landscape of the involved country

# Risk: Host Country Political Instability

- Changes in host country laws

- This occurred several years ago when several U.S. institutions owned and operated campuses in Israel, and the government passed a sudden and unexpected law severely restricting foreign institutions' ability to educate Israeli students.

*(Managing the Risks, at Appendix B, College & University International Education Programs, Gallagher Higher Education Group, 2007)*

- Changes in host country funding for financial or ideological reasons

- In Singapore, several universities have found continuing their operations to be unsustainable after the initial government incentives ended.
- In the wake of the Arab Spring, Abu Dhabi has shuttered several foreign research institutions and think tanks because of fears of the influence of democratization.

*(Should Top U.S. Colleges Expand Overseas? By Anya Kamenetz, 3/19/2013  
[www.newsweek.com/education](http://www.newsweek.com/education))*

# Risk: Host Country Political Instability

- Domestic politics can get in the way, too:
  - Cambridge, Massachusetts-based MIT was being paid \$300 million by Russia's government to help develop the Skolkovo Institute of Science and Technology as part of a \$2.7 billion innovation hub on the outskirts of Moscow.
  - Its viability was threatened by a feud between Skolkovo's founder, former Russian President Dmitry Medvedev, and current President Vladimir Putin, who vetoed special benefits for the project's technology park last year. In April, the offices of the foundation overseeing the university were raided by government agents as part of a corruption probe.

*(Duke to NYU Missteps Abroad Lead Colleges to Reassess Expansion By Oliver Staley Oct 3, 2013, [www.bloomberg.com](http://www.bloomberg.com))*

# Best Practices – International Expansion

## *In general:*

- Establish Central Clearing House
- Develop Necessary Policies & Procedures

## *On a case-specific basis:*

- Conduct Adequate Advance Consultations & Planning
- Comprehensive Research (U.S. & Host country laws & practices)
- Robust Due Diligence
- Obtain Internal and External Approvals
- Structure Appropriately

# Establishing International Programs – Risks and Due Diligence

## Questions

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