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Congressional Oversight, Foreign Companies & Export Controls

Jason I. Poblete

In addition to seeking advice on compliance with U.S. trade security regulations such as export controls or economic sanctions, or on defending administrative actions before federal agencies, clients frequently ask us what to do if a Member of Congress requests information from them. These inquiries can range from basic inquiries about company activities to subpoenas to appear before a Congressional Committee. This process can be particularly daunting for a foreign company not accustomed to navigating the halls of Congress.

When a foreign company seeks to enter the U.S. market, is already doing business in the United States, or employs U.S. persons, it should consider how the U.S. federal regulatory laws will impact the business as well as the potential political exposure of engaging in activities that run contrary to U.S. laws—that is, the extraterritorial public policy exposure. There have been cases where everything is intended to be in accordance with the laws, or done by the book, yet U.S. lawmakers investigate the activities of a company because the activities may violate U.S. foreign policy priorities or national security aims.

The United States imposes economic sanctions on about thirteen (13) of the world's 195 independent states. The U.S. also targets thousands of foreign persons and entities for activities such as gross human rights violations, and weapons of mass destruction proliferation, to name a few. With export controls, these issues become somewhat more nuanced and must be considered and handled on an individual basis, but the same overall advice applies. In fact, the

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Taxpayers Need an Iraq Claims Program

Mauricio J. Tamargo

We are all familiar with the old adage; "the squeaky wheel gets the grease". Well, nowhere is that old saying more true than when dealing with the federal government helping Americans with claims against Iraq.

The U.S. Government announced last year that the government of Iraq had agreed to settle some outstanding Iraqi obligations to certain American victims of terror—to a tune of $400 million. This class of claims is just a fraction of the total American claims pending against Iraq. For that very reason, the the Foreign Claims Settlement Commission at the U.S. Department of Justice should be authorized to conduct an Iraq Claims Program to resolve the many unresolved claims.The primary reason that specific victims of terrorism claims were addressed by this preliminary U.S.-Iraq agreement is because their attorneys repeatedly made it clear to the U.S government that their clients should be compensated. Their attorneys successfully worked with the Department of State and the U.S. Congress in order to find closure and justice for their clients.

In the period running up to the first Gulf War, and to a lesser extent after that war, many U.S. citizens and companies suffered injuries as well as economic losses caused by the Saddam Hussein regime. As a result, in 1991, the Department of the Treasury conducted an Iraq Claims Census. Major U.S. corporations, as well as many non-commercial claimants, have claims with an estimated total value of between seven and ten billion dollars. These claims represent money owed to U.S. taxpayers as a result of numerous types of offenses committed by Iraq, such as hostage taking, human rights abuses, expropriations, and a multitude of commercial claims.

Customary international claims law and the International Claims Settlement Act of 1945 govern the resolution of these

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Federal Agency Enforcement Highlights

Late this summer, U.S. Immigration and Customs Enforcement (ICE) announced the results of a seven-day **national "Cross Check" enforcement** operation which led to the arrest of more than 2,900 convicted criminal aliens. According to ICE, the seven-day operation, the largest of its kind, involved the collaboration of more than 1,900 ICE officers and agents from all of ICE's Enforcement and Removal Operations' (ERO) 24 field offices, as well as coordination with federal, state and local law enforcement agencies throughout the United States. Arrests occurred in all 50 states and four U.S. territories.

In August 2011, **JP Morgan Chase Bank** settled apparent violations of the Cuba, Sudan, Iran, Liberia non-proliferation and global terrorism sanctions laws. Total potential penalties in this case were mitigated because of the bank's substantial cooperation in the investigation. JP Morgan Chase agreed to pay $88 million in penalties. The penalties could have been much higher.

A Philippine national, **Henson Chua**, pled guilty this summer to charges of **illegally importing an unmanned aerial vehicle** (UAV) into the U.S.—an item on the U.S. Munitions List. Immigration and Customs Enforcement (ICE) said that Chua initially listed the item for sale on eBay Inc. and then engaged in communications with undercover agents from ICE Homeland Securities Investigations, which culminated in the recovery of the item by U.S. officials.

A small business airplane turbine maintenance company, **Heritage Turbines**, located in Massachusetts, paid $4,500 to settle an alleged violation of the **Sudan sanctions** (the base penalty was $10,000). The U.S. Government alleged that Heritage Turbines attempted to ship two fuel nozzle kits to Sudan without a license from the Department of the Treasury Office of Foreign Assets Control (OFAC). While the matter was not voluntarily self-disclosed to OFAC, the U.S. Government deemed the alleged violation non-egregious.

This summer, the Bureau of Industry and Security (BIS) announced that **Applied Technology Inc** (ATI) from Raleigh, NC, agreed to pay a civil penalty of $10,000 to settle two allegations that it violated the anti-boycott provisions of the Export Administration Regulations (EAR). The government alleged that ATI furnished prohibited information to a Libyan company when it stated that goods did not contain any components of Israeli origin. ATI failed to report to BIS the receipt of a request to engage in a restrictive trade practice or boycott. In separate incidents, two other companies also paid penalties for similar violations: **Lynden Air Freight** of Seattle, Washington, and **Smith International** of Houston, Texas.

A Missouri-based freight forwarder settled charges that it aided and abetted the **unlicensed export of controlled items to Pakistan**. **Ram International** of St. Louis, Missouri, agreed to pay a $40,000 civil penalty for the unlicensed export of salvage scrap electrolytic tin plate steel to a Pakistan company listed on a Department of Commerce watch list.

Worksite Enforcement & Immigration Compliance

Irene M. Recio

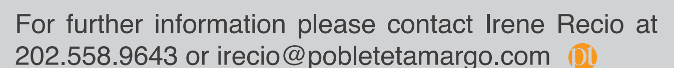
Various federal agencies enforce U.S. immigration policy and, on several occasions during the past few years, the Obama Administration has made clear that it is committed to robust employer-based immigration enforcement.

Enforcement efforts evaluate immigration employment compliance and frequently result in significant civil fines and criminal penalties being assessed.

How you could benefit from our worksite enforcement and immigration compliance counsel ... **we can**

- Help you develop and implement a worksite enforcement plan.
- Conduct an internal immigration compliance audit.
- Develop compliance policies and procedures for dealing with H1-B, I-9, and E-Verify, among others.
- Help develop policies and procedures for implementing I-129 Deemed Export Attestation or "Part 6" certification statements related to compliance with export control laws.

Our firm advises individual and corporate clients impacted by immigration laws and compliance programs.



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Congressional Committee Approves Bill Mandating Use of E-Verify

Emily B. Hollenberg

Recently, the House Judiciary Committee approved Chairman Lamar Smith's *Legal Workforce Act* (H.R. 2885). If it becomes law, the *Legal Workforce Act* would require businesses to authenticate employees' legal work status using a government run internet database verification program.

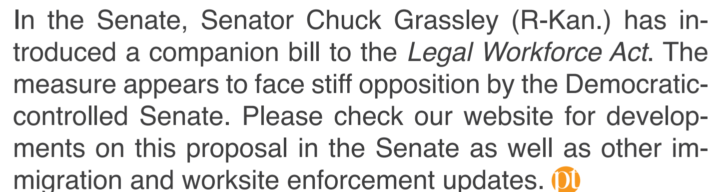
Created fifteen years ago as a voluntary program, E-Verify has been touted by supporters as an advanced web-based tool intended to replace the paper-based I-9 verification procedures currently used by businesses when they hire new employees. Supporters argue that this system will not only help employers ensure better compliance with U.S. immigration laws, but it will also open up millions of jobs for Americans that are currently unemployed.

> If it becomes law, the Legal Workforce Act would require businesses to authenticate employees' legal work status using a government run Internet database verification program.

The Smith legislation would require companies to use E-Verify. E-Verify uses Social Security numbers to check if job applicants are authorized to work in the U.S. by checking their social security number against Social Security Administration and Homeland Security records. Currently, E-Verify is a voluntary program; however, if the *Legal Workforce Act* is enacted, it would mandate the use of E-Verify for all employers.

According to Chairman Smith, the compliance rate with E-Verify is high and "nearly 300,000 American employers voluntarily use E-Verify and over 1,000 new businesses sign up every week." More than a dozen states or about 4% of all U.S. businesses have mandated employers use E-Verify. However, Chairman Smith's bill still has its detractors.

In fact, the *Legal Workforce Act* is opposed by a diverse ideological cross section of interest groups including conservatives, liberals, agriculture organizations, and even businesses associations. As, according to its opponents, the *Legal Workforce Act* will create a de facto national ID card system, even for U.S. citizens; would violate civil liberties such as the right to work; and would mandate regulations that will hurt small business growth —among other things.



In the Senate, Senator Chuck Grassley (R-Kan.) has introduced a companion bill to the *Legal Workforce Act*. The measure appears to face stiff opposition by the Democratic-controlled Senate. Please check our website for developments on this proposal in the Senate as well as other immigration and worksite enforcement updates.

More Federal Agency Enforcement Highlights

- The Justice Department announced late this summer that **Davoud Baniameri**, an Iranian national who maintained a residence and business in California, was sentenced to 51 months in federal prison after pleading guilty in May to two felony charges stemming from his efforts to **illegally export missile components and radio test sets** from the United States to Iran, via the United Arab Emirates.

- On October 7, New York resident **Jeng "Jay" Shih** and his company, **Sunrise Technologies and Trading Corporation** ("Sunrise") each pled guilty to defrauding the United States and conspiring to violate the International Emergency Economic Powers Act (IEEPA). Shih and Sunrise tried to illegally export **computers with U.S. origin** to Iran through the United Arab Emirates (UAE). Shih conspired with a company operating in the UAE and Iran to secure U.S.-origin computers in a way designed to avoid U.S. export control laws and regulations. According to the U.S. Government, Shih and Sunrise have agreed to a forfeiture penalty of $1.25 million. They have also been denied export privileges for ten (10) years, but this denial of privileges will be suspended provided that neither commits any export violations.

- The **Flowserve Corporation** ("Flowerserve") and ten of its foreign affiliates agreed to pay a civil penalty of $2.5 million to settle 288 charges for violating the Export Administration regulations (EAR). Headquartered in Irving, Texas, Flowserve is a leading global provider of pumps, valves, seals, and components to various companies in the oil, gas, chemicals, and related businesses. The settlement "reflects the serious consequences that result when companies do not comply with sanctions against trading with Iran and Syria," said Assistant Secretary of Commerce for Export Enforcement, David W. Mills. "U.S. companies must maintain a vigilant compliance program that extends to affiliates wherever they do business," added Mills. The Bureau of Industry and Security alleged that between 2002 and 2008, Flowserve and six of its foreign affiliates made unlicensed exports and reexports to a variety of countries, including **China, Singapore, Malaysia and Venezuela**, of items classified and controlled for reasons of chemical and biological weapons proliferation. In addition to the civil penalty imposed, the company will be required to conduct external audits of their compliance programs and submit the results of this audit to the federal government.

Congressional Oversight, *Continued from front page*

following guideposts apply to just about any public policy issue that a foreign or U.S. company needs to deal with when facing the U.S. Congress.

In cases where the extraterritorial application of U.S. law may not be clear, the U.S. Congress has probed for suspicious activities by foreign companies. Members of the U.S. Congress can, and routinely will, issue letters and other less formal communications to federal agencies, other Congressional Committees, or the White House, asking for additional information about activities in sanctioned countries. These inquiries are not limited to foreign companies. In some cases, these communications can form the basis for Congressional oversight hearings, or referrals to the Departments of Justice, Treasury, Commerce, or State, or a combination of agencies.

Public statements in the form of letters and press releases, Congressional hearings, or unpublished requests for information from the U.S. Congress can also form the basis for a more formal investigation initiated by the U.S. Government. Even if a matter does not result in a referral to a federal agency, they present special challenges for companies. Managing this process is not the same as managing a trial. The Congressional rules and culture are very different. The following are a few suggestions on how to generally work with a Member of Congress or Congressional Committee that has locked their sights on your company for alleged violations of U.S. trade security laws.

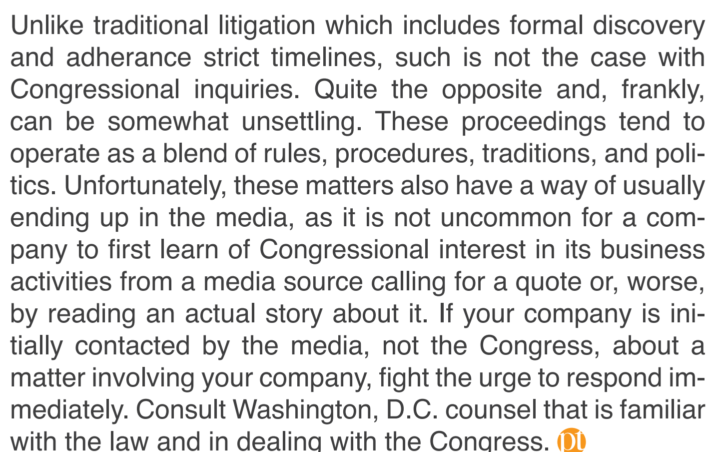
> The most crucial step any company must take is to ensure that it has implemented a robust regulatory enforcement regime consistent with its business activities.

First, know your customers and asses your legal risks, as well as the potential political exposure in the United States. Regardless of how minimal, review each transaction on a case-by-case basis and, if there are any doubts about a potential transaction or person, you should seek legal counsel for further review. This is an especially sensitive area for foreign companies that conduct business in the United States. A foreign company with U.S. subsidiaries can be an especially high-priority target for Congressional investigators. Iran, Cuba, North Korea, and Burma are very closely monitored by Capitol Hill.

Second, a political risk assessment goes hand-in-hand with a robust corporate regulatory regime. You might wonder why a foreign company should bother creating a U.S. corporate regulatory regime. The typical Congressional rationale is that if foreign companies are availing themselves of the U.S. market and tax laws, then they should abide by, or pay some deference to, U.S. sanctions, even if they are abiding by other U.S. regulations. These rules apply to U.S. companies, which are also closely monitored by oversight committees, but foreign companies make for easy political targets. Think ahead and perform a legal/political risks cost-benefit analysis so that you have an idea of what issues could arise by transacting business in areas targeted by U.S. trade security laws.

Third, the most crucial step any company must take is to ensure that it has implemented a robust regulatory enforcement regime consistent with its business activities. This should be in place and operational even before a problem arises. There is no one-size-fits-all approach to these regiments. And, even if the business's parent company is foreign, if it has U.S. subsidiaries, it may be legally exposed. Any contact with U.S. persons, transactions with U.S. entities, or purchasing of certain U.S. goods or services can potentially expose a foreign company to legal risk in the United States, as well as political loss. A good compliance program should include personnel training as well as frequent notification about the new rules, regulations, and corporate best practices. A culture of published regulatory compliance goes a long way in keeping a business out of trouble and out of the Congressional crosshairs.

Fourth, if your company is contacted by the U.S. Congress, or is the target of a Congressional inquiry, take affirmative steps and develop a plan before engaging in any formal discussions with or formal responses to the Congress. While preferable to maintain ongoing relationships with key Congressional offices that may impact your business, this may not always be a cost-effective or necessary option for your company. However, legal and political advice should be sought before any information is shared with the Congress, as it could form the basis for a more formal oversight committee investigation or referral to a federal agency. You need a plan.



Unlike traditional litigation which includes formal discovery and adherance strict timelines, such is not the case with Congressional inquiries. Quite the opposite and, frankly, can be somewhat unsettling. These proceedings tend to operate as a blend of rules, procedures, traditions, and politics. Unfortunately, these matters also have a way of usually ending up in the media, as it is not uncommon for a company to first learn of Congressional interest in its business activities from a media source calling for a quote or, worse, by reading an actual story about it. If your company is initially contacted by the media, not the Congress, about a matter involving your company, fight the urge to respond immediately. Consult Washington, D.C. counsel that is familiar with the law and in dealing with the Congress.

Poblete Tamargo Attorneys have noted an increased interest in the past few years by the U.S. Congress undertaking very targeted inquiries or investigations in the trade security arena. We expect this trend to continue for years to come as the federal government makes increased use of economic sanctions and export controls to advance foreign policy and national security goals.

Taxpayers Need, *Continued from front page*

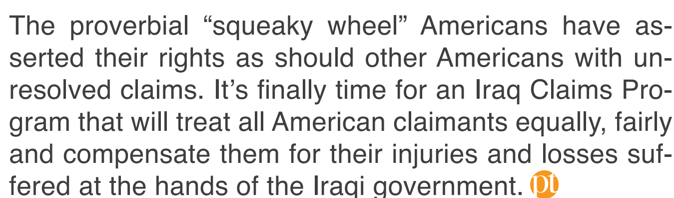
disputes. Under these laws and legal doctrines, the Iraqi government is liable to U.S. citizens, including corporations and companies, for internationally recognized damages caused by the Hussein government. Due to the lapse of time, mergers, and acquisitions, many of these companies may not even know that they are owed this money.

In order to complete the normalization of trade relations between the U.S. and Iraq, a claims settlement agreement must be signed by both governments which would be binding on all of their citizens. This agreement is essential to resolving the outstanding claims as it will settle certain pending claims that each country has against the other. However, more importantly, it will surely contain a clause that relieves each country of further liability. This clause is typically a required element of these types of agreements designed to entice the offending country to sign, knowing that this will be the last time the country will be forced to pay for claims.

It is now time for these pending commercial claimants to come forth and alert the U.S. Government that they are owed money for losses and damages that suffered at the hands of the government of Iraq. In the case of U.S. corporations, these claimants may even have a legal obligation to their shareholders and a moral obligation to their employees requiring them to pursue compensation for their claims.

At a time in history defined by great economic suffering and high unemployment in the U.S., it should be the obligation, as recognized under international law, for this Administration to stand up for the rights of its own citizens and resolve the wrongs committed against them. Some of these claims are owed to companies that have received federal bailout money over the past few years. The monies recovered from claims could go a long way towards putting Americans back to work, retiring national or corporate debt, or even modernizing outdated factories.

Although it seems logical that the Administration would espouse the claims of all of its citizens, we should not take anything for granted. As, although the U.S. Government has the jurisdiction to stand up for the rights of its own citizens, it has not always done so. The U.S. espousal of these claims is less likely to occur if the injured U.S. citizens have not demanded compensation or even asked for assistance.



The proverbial "squeaky wheel" Americans have asserted their rights as should other Americans with unresolved claims. It's finally time for an Iraq Claims Program that will treat all American claimants equally, fairly and compensate them for their injuries and losses suffered at the hands of the Iraqi government.

Spotlight

Proposal Would Require Political Donation Disclosure by Public Companies

This summer, the Committee on Disclosure of Corporate Political Spending submitted a Petition for Rulemaking to the Securities and Exchange Commission ("SEC") pursuant to *Section 14 of the Securities Exchange Act of 1934*. The proposal would require certain publicly traded companies to disclose their political contributions.

According to the Committee, "[s]ince 2004, responding to shareholder demand for information about political spending, large public companies have increasingly agreed voluntarily to adopt policies requiring disclosure of the company's spending on politics … [a]bsent disclosure, shareholders are unable to hold directors and executives accountable when they spend corporate funds on politics in a way that departs from shareholder interests."

For more information please visit our website, pobletetamargo.com, and enter the search terms "political spending" in the search box located in the upper right hand corner of the main page.

Iran and Sudan Sanctions Regulations

The Department of the Treasury, Office of Foreign Assets Control (OFAC), has amended the Iran and Sudan sanctions regulations to allow food to be exported and re-exported to these countries under a general license.

According to the final rule published by OFAC in mid-October, "food" is defined as "items that are intended to be consumed by and provide nutrition to humans or animals in Sudan or Iran — including vitamins and minerals, food additives and supplements, and bottled drinking water — and seeds that germinate into items that are intended to be consumed by and provide nutrition to humans or animals in Sudan or Iran. The definitions also specify that food does not include alcoholic beverages, cigarettes, gum, or fertilizer."

Prior to this change, under the Trade Sanctions Reform and Export Enhancement Act of 2000 (TSRA), these types of food exports required exporters subject to U.S. laws and regulations to apply for a specific OFAC license that was valid for one year.

Wondering why OFAC excluded items such as fertilizer, alcoholic beverages, and chewing gum for export and re-export? For further information please visit our website, pobletetamargo.com, and enter the search terms "Iran alcoholic" in the search box located in the upper right hand corner of the main page.

ask

When should I contact my Members of Congress?

If there is a federal question at issue that does not involve the courts or require federal administrative agency action, generally, the earlier you contact your representatives in Congress in the process, the better.

How do I prepare?

Before reaching out to a Congressional office to meet with a Member or their staff, familiarize yourself with your issues, and know them well. Good preparation requires a clear and concise review of the facts, federal laws, and regulations of your matter. Write all of this background information down and, most importantly, think about the possible solutions that could help address and resolve your issue. Always have a solution in mind when you meet with a Member of Congress.

What can Congress do for me?

If you have followed the steps in the previous Q&A, you may discover that approaching the Congress with your issue is not the best idea for you, at this time. Sometimes, during this review, we find solutions for our clients. Each case is unique and, for those times when a Congressional contact becomes necessary, the possible solution will dictate your expectations for what a Representative or Senator is able to reasonably do, given the specific matter with which he or she is presented.

How long will this process take?

The legislative process, by design, is slow and unpredictable. A great deal will depend on the facts and circumstances of your particular matter. If you are in a hurry, it's a sure thing that, in all likelihood, a federal legislative solution may not be the most efficient process to follow or avenue to pursue.

My case is before a federal court or administrative agency, should I approach my Members of Congress for help?

That depends. A Member of Congress, unless doing so through a formal process allowed under the rules of a court or administrative agency, cannot intervene in matters before a judicial or administrative body to offer assistance. However, if there is a political or public policy reason that impacts you, your company, or something in a state or Congressional district, you could brief Members of Congress and their staff about the matter. However, the answer to this question depends on the specific facts and circumstances of your case as well as whether your matter is before a federal court or an administrative agency and their rules.

Did you know?

Many people believe that there are no skyscrapers in DC because of a law requiring the Capitol to be the tallest building in the city. In fact, in 1894 the fire department put limits on building heights because firefighting equipment at the time could not reach high enough to keep tall buildings safe from fire. Congress later set height limits: homes and apartments (90 feet) and office buildings (110 feet). In 1989, the Height of Buildings Act became law ensuring that DC's skyline would remain skyscraper-free. *Source: Destination DC*

About PobleteTamargo

The law and public policy office of Poblete Tamargo is a Washington, DC based firm offering its clients premium legal and public policy solutions. We offer our clients a wide-range of services in unique practice areas with a concentration in providing commercial, regulatory and international litigation counsel as well as federal government relations. We are committed to resolving your legal, public policy, and information analysis needs and have extensive experience in law, the federal government, as well as the private sector.

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