Brexit and Beyond: A New Cross-Border Landscape

Compliance and Ethics

CHEAT SHEET.

- ***Shifting Brexit***. Between the United Kingdom and the United States alone, there are about 200 trade agreements that will have to be affirmed or renegotiated as a result of the United Kingdom's exit from the European Union. In-house counsel should create opt-out clauses that allow the company to reset relationships if laws or treaties change.
- ***Fate of the FCPA***. Under the new US administration, the future of the Foreign Corrupt Practices Act (FCPA) is increasingly uncertain. Enforcement is likely to become more selective with countries perceived to be a threat.
- ***The digital border***. For businesses, the greatest cross-border danger may lie in not understanding the digital privacy laws of a foreign jurisdiction. This is especially true in the European Union, where new laws restrict the transfer of personal information overseas.
- ***Follow the leader***. Designate a cross-border manager who can monitor the changing developments of international matters, update best practices as a result of such changes, and consider the company's interests abroad.

As many nations embrace a new strain of isolationism, recognition of international borders will become increasingly top of mind for in-house counsel in ways that most have never contemplated before. From international acquisitions to matters as mundane as sending an email, companies will encounter new rules, fresh enforcement of old rules, and an assortment of unintended consequences as nations become more conscious of sovereignty. Trust may erode and relationships will be tested due to redefining standards. As such, it is more important than ever to make sure that both the business and the legal department are constantly collaborating as they communicate and manage the flow of goods, services, and personnel across borders.

Whether this is good public policy will be debated, but one effect of tighter borders is indisputable: It will slow down global commerce. The types of goods and services that are allowed to cross borders, how funds are exchanged, trade rules, immigration status, and how national security interests will be defined are all expected to change in the years ahead and will impact the commercial success of the business as a result. The cost of being unprepared will be high, from botched deals to fines and imprisonment. For example, we [the authors] once represented a US client who unknowingly brought a forbidden item to a trade show in a foreign country and faced 10 years in prison. Fortunately, we negotiated a favorable outcome for both the company and for their employee, but these types of unexpected violations, with potentially severe consequences, will become more common as border policies become increasingly stringent.

When thinking about borders, it is important to remember that they are man-made concepts that have evolved over time while ultimately serving the same effective purpose — defining whether you belong in the physical location that you stand; what goods and services are permissible; how you can trade and accept funds from a foreign entity whether inbound or outbound; what legal jurisdiction governs your actions; how you define national security interests; and what legal rights you are entitled to based on your immigration status. After the events of September 11, 2001 (9/11) in the United States, borders became much more a matter of national security.

Furthermore, to conceptualize the powers of borders, consider a border that no longer exists and how

that has changed the political, defense, intelligence, and trade landscape. Think back to Germany in the 1980s and how the border between East and West Germany eroded almost overnight due to a decision made by the world order. As you imagine how much has changed, think specifically about how it affected the practice of law, altered local neighborhoods, mixed family relations, disrupted international and domestic commerce, and impacted diplomatic affairs. As this one situation demonstrates, borders are powerful and can define lifestyle, business opportunities, corporate structures, and the fate of nations.

Borders can also be changed simply by legislation even if the physical border remains intact. “Brexit” is a perfect example of how one of the busiest borders in the world can change almost overnight. The United Kingdom’s decision to leave the European Union has fundamentally changed not only the way the United Kingdom and the European Union will interact with one another, but also how the rest of the world will interact with each entity. This change also means that there will be new policies and legal regimes that will require compliance.

Furthermore, if you are a person traveling in parts of the world right now as a US citizen, for example, what side of the border you are on can become a life or death situation for a multitude of reasons. And depending on where you are, the legal system that determines your fate will ultimately be defined by such a border. For businesses, borders are also becoming increasingly virtual with the advancement of technology, creating the opportunity for business to be conducted in cyberspace. As such, it is important to make sure that you think about complying with foreign laws even if your business is not physically located in another country but is technically “crossing the border” by doing business over the internet with an entity located in another country.

As multinational corporations regularly have cross-border transactions, why should this subject matter? Particularly if you are primarily trading with US allies? It’s because every time you cross a border, you enter into a new legal jurisdiction. For each jurisdiction, you have a new governance system, complete with laws and regulations that you must comply with — in addition to the numerous domestic laws that are triggered as a result of your working outside of the United States. The sector you operate in also makes a difference. For example, if your company is located in the United States and exports a product in the defense sector, it will face industry-specific laws that apply to foreign engagement (who are categorized by their status according to which side of the border they belong).

If your business has any international reach — and few businesses aren’t touched by a cross-border component — you must filter every decision through a new lens that acknowledges the changing landscape, where every nation will place a renewed emphasis on asserting its own interests over those of international comity.

While global commerce is more important than it has ever been, it is becoming increasingly more challenging to operate globally because of the evolving legal compliance landscape governing cross-border activity. Thus, now more than ever, one has to develop a sophisticated understanding of how borders are managed, and learn how to navigate both existing and evolving legal compliance regimens affecting businesses that cross multiple jurisdictions. The changing landscape will greatly impact any business that engages in any of these particular activities, especially those based in the United States: (1) traveling to another country for work or leisure; (2) sending US citizens to other countries for work; (3) hiring foreigners; (4) accepting foreign direct investments; (5) exchanging information with a foreign person; (6) buying a foreign good or service from a foreign person living outside of the United States; (7) transferring money to a foreign jurisdiction; (8) accepting money from a foreign jurisdiction; (9) trying to influence the laws or policies of a foreign government; (10) trying to influence US law for a foreign entity; and (11) buying goods or services from a third party supplier

who is not complying with US laws and regulations.

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US compliance rulebook for cross-border transactions

In a time of isolationist tendencies, it is expected that the government will become more proactive in both prosecuting violations of existing national security standards and adding regulations that monitor foreign activity. In addition, it would be normal to expect the introduction of new national security legislation and the creation of amendments to existing policies. Furthermore, relationships with countries are likely to shift in certain circumstances and trust between nationals and foreigners is likely to erode. The best way to manage and enact new national security strategies is through the management of borders.

Before discussing the compliance regimen, it is first important to take note of the primary institutions that exist within the US government that either encourage or monitor cross-border transactions. These include the following: (1) the US Department of Defense; (2) the US Department of Homeland Security; (3) the US Department of State; (4) the US Department of Justice; (5) the US Export-Import Bank; (6) the US Office of Private Investment Corporation; (7) the US Department of Commerce; and (8) the US Small Business Administration.

Brexit will be long and complicated

The United Kingdom has about 200 trade agreements affecting the United States that will have to be affirmed or renegotiated as the result of its exit from the European Union. Some of these changes could affect contracts, finance agreements, business structures, and other matters that many businesses have long taken for granted. If you're entering into any contractual relationship with a UK entity during this transition, you should write contracts that provide for contingencies. You may also want opt-out clauses that allow you to reset relationships if laws or treaties become adverse to your business.

US businesses that have operations in the United Kingdom face another layer of complexity. You may have employees who are no longer legal in the United Kingdom after the European Union's common borders are suspended. Employees who have routinely traveled to offices in Belgium or Germany may now need passports or another form of documentation. You may no longer have easy access to some EU markets, and there is the possibility that the European Union will retaliate with a less-than-fully cooperative response to the United Kingdom's efforts to build new trade relationships. In short, it's a full reset, and you should be in full planning and contingency mode.

Here are some of the US laws that in-house counsel may be surprised to learn require more time analyzing in light of their company's interests in 2017 and beyond.

Exon-Florio Amendment/Committee on Foreign Investments in the United States

Expect more scrutiny of proposed foreign acquisitions of US businesses.

Since the passage of the Exon-Florio Amendment in 1988 to the US Defense Production Act, the US president has had the authority to investigate the impact on national security for foreign acquisitions, mergers, or takeovers of US businesses. The president can block any acquisition that threatens US security, and this is not appealable. US President Ronald Reagan delegated that authority to the Committee on Foreign Investment in the United States (CFIUS), which is comprised of numerous agencies that have a role in national security.

In recent years, it has been the US Congress that has raised objections to several high-profile acquisitions deemed to make US assets more vulnerable. In 2006, both Democratic and Republican leaders of Congress opposed a deal in which the state-owned Dubai company, DP World, would manage port terminal operations in New York after a proposed acquisition of then-operator Peninsular & Oriental Steam Navigation.

Following DP's withdrawal from the deal, Congress passed the US Foreign Investment and National Security Act of 2007 (FINSA), which requires CFIUS to review whether foreign acquisitions of US assets threaten national security.

While the DP deal was of such high visibility that it was bound to attract attention, it's likely that the government will scrutinize many lower-profile deals in the future. A key question is how to define national security in this context. While it's easy to argue that a port is a national security asset, other businesses are not so easily defined for those purposes. You could make a case that almost any business asset could be used against the United States if it fell into the wrong hands.

Any organization considering selling a company or a subsidiary to a foreign interest should start early. A process that could have required six months to get through government approvals in the past may now take two or three years. Adjust your business priorities accordingly.

Second, be proactive in disclosure and transparency. Companies will do themselves no favors in dragging out this process and we suspect that some disclosures that are now voluntary will become mandatory in the future.

Third, like some other topics we will discuss, watch out for indicators of the government's policy direction. It's possible that the government will be less concerned with the nature of the transaction than it will be with the politics and security posture of the acquiring nation.

Foreign Corrupt Practices Act

The future of the US Foreign Corrupt Practice Act (FCPA) is a tough call.

US President Donald Trump criticized the FCPA during his campaign, but has not made any policy pronouncements about the law that forbids bribery of government officials.

Following amendments to the original law, the FCPA now applies both to US citizens or companies seeking business overseas, and to foreign entities seeking business in the United States. Among other things, compliance requires public companies to follow certain accounting practices that make it easier to detect bribery payments.

The FCPA took on new life following the 9/11 terrorist attacks under the Bush administration, and the

Obama administration continued to enforce it. In fact, an entire office of the US Department of Justice is dedicated to its enforcement.

While the Trump administration could dilute enforcement, we think it's more likely that enforcement will become more selective with nations that are perceived as a threat or with companies that are out of favor.

Be sure you have sound legal advice on what constitutes as a bribe under the law. Concert tickets or a dinner could be considered a bribe in certain circumstances, as could offering a summer internship to a foreign government official's child. Penalties under this law are severe, and it is essential that every company carries a code of ethics with explicit detail on what gifts can be given or accepted. Don't rely on what you regard as good judgment; be sure that you have the best legal advice in order to avoid trouble.

Logan Act

There has never been a conviction under the Logan Act. In fact, there has only been one indictment under the law. In 1799, anti-France federalists became enraged that a private citizen — Dr. George Logan — smoothed over a volatile maritime dispute with France on what was essentially a private diplomatic mission. The Logan Act makes it a crime to attempt to influence the official relationship between the United States and another nation. In other words, it prohibits freelance diplomacy.

Political commentators occasionally cite the law, especially when an American, usually a politician or celebrity, meets with the head of a "hostile" nation. Despite the lack of prosecutions, Congress thought it was important enough to amend in 1994 — making it a felony offense.

Most recently, the law was dusted off when it was discovered that Michael T. Flynn, an aide to President Trump, held policy discussions about lifting sanctions with the Russian ambassador during the campaign. Flynn then resigned, but as of publication, no charges have been filed.

We suggest that it would be prudent to take this law seriously in an era when the White House is sharpening the lines between friends and enemies abroad. If your company is contemplating discussions that could be misconstrued as interference in foreign relations, get clearance from appropriate US government officials in writing first.

Foreign Agents Registration Act

If you have a foreign client or subsidiary that lobbies the US government, even indirectly through a trade association, beware of the Foreign Agents Registration Act (FARA). We're quite sure that FARA will be aggressively enforced in the coming years.

Essentially, FARA requires anyone representing the political interests of a foreign government to register with the US government. There have only been a couple of convictions under the act over the years, and almost always for people representing unpopular causes, political movements, or out-of-favor nations.

International Traffic in Arms Regulations

Arms trafficking is serious business, and there is no excuse for not understanding the International

Traffic in Arms Regulations (ITAR) that govern the import and export of defense-related products. Not everything covered under the law is going to look like an armament — it could be a computer chip or a small piece of hardware that is used in assembling a tank. If you're in this business already, you should know the rules. But if you contemplate getting involved in any work like this for the first time, get competent legal guidance. The penalties are severe.

Office of Foreign Assets Control

Economic and trade sanctions are nothing new, but it's clear that in the United States, the Trump Administration may expand restrictions to advance its foreign and economic policy objectives. Your staff — or outside law firm — should have a resident expert on the Office of Foreign Assets Control (OFAC), which administers trade sanctions, if you do business in parts of the world where the United States has enemies.

OFAC maintains a list of organizations and people that it places off limits to US citizens and companies. If you exchange funds with anyone on the list, you are in violation of the law. Most are terrorist-related organizations, but some are not so obvious and are subject to the whims of foreign policy. An organization operating in Turkey, a US ally, might stay off the list. The same organization in Yemen, however, could possibly be placed on the list.

The law grants emergency powers to the president to alter this list at the stroke of a pen, so it's imperative to watch it closely as the foreign policy of the new administration unfolds.

Immigration

Border security is a big issue in the United States, but many companies are more concerned with the future of legal immigration. Several types of work visas bring in thousands of talented foreign nationals to the United States each year, and many industries are dependent on these workers. However, the US president said in his February address to Congress that one of his goals for immigration reform is to "improve jobs and wages for Americans."

While the details of changes in immigration policy will take some time to roll out, and no doubt visa programs will be the target of intense business lobbying, you can assume it's going to become more difficult to bring in foreign workers. For some industries, this will be a transformative change.

Human trafficking

Human trafficking has received a lot more attention in recent years, and there is a bipartisan commitment to reducing this terrible abuse of human rights. For US companies, the danger is running afoul of regulations that forbid doing business with an entity that engages in human trafficking.

A 2015 amendment to the Federal Acquisition Regulation (FAR) requires federal contractors and subcontractors to implement trafficking compliance plans. Under the law, they must meet annual certification requirements.

The United Kingdom has gone further, and in 2015 passed the Modern Slavery Act. While the law doesn't require businesses to police their vendors for illegal activity, it does encourage them not to turn a blind eye and to adopt best practices that disclose their commitment to avoiding relationships with such suppliers. It's reasonable to speculate that the law will evolve with tighter compliance

restrictions and that the United States will adopt its own version of this legislation. Get ahead of possible increased compliance by developing best practices that include asking suppliers to affirm that they abide by laws in this area.

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Customs laws

US President Trump has said he wants to hire 15,000 more border patrol and customs agents. While some of these new hires will police remote areas of the Texas-Mexico border, it's reasonable to suspect that a number of them will be used to increase monitoring at airports and other points of legal entry.

For businesses, one primary area of risk is the possibility that employees will inadvertently violate restrictions on what can be brought into — or taken out of — the United States. We're not just talking about Cuban cigars. Information on a laptop or cell phone can fall under the list of forbidden items, as well as documents and hardware transported to support sales presentations. Many things that may have slipped through in recent years — large amounts of currency, for example — may become problematic when US Customs and Border Protection has more agents. Any company whose business revolves around sensitive technology should be especially cautious.

Not all borders are geographic

Hacking has grabbed headlines in recent months — both the state-sponsored variety and for individuals who want to create disruption. Ordinary theft of financial information, which is starting to seem rather quaint in an atmosphere where governments are hacking each other and their citizens, continues unabated, too.

Expect a reaction to these activities in the governing bodies of many nations. Privacy is suddenly becoming an issue in the United States, while Europe has long guarded its citizens' privacy. In the European Union, "the right to forget" has even sought to erase the public record of embarrassments, something that may seem odd in the United States — where public record is seldom restricted.

For businesses, the greatest danger at present may be in not understanding the digital privacy laws in foreign jurisdictions. This is especially true in the European Union, where there are laws that restrict the types of personal information that can be transmitted to servers overseas. Add this to the list of expertise that you're going to need to stay compliant in the future.

Consider a cross-border legal manager

There is a lot to keep up with in cross-border matters and remember — borders go both ways. Using the United States as an example, as that country becomes more vigilant, expect other nations to do the same. In some cases, US travelers, for example, may be scrutinized in response to what some countries perceive as unfair monitoring of their citizens who come into the United States.

We recommend designating a cross-border manager, either someone in your legal department or an outside lawyer, who can monitor the fast-changing developments in cross-border matters, regularly update best practices and employee training, and pay special attention to your interests in those parts of the world.

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The views expressed are those of the authors and not those of the authors' organizations or ACC.

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