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## **A Brief Primer on Doing Business Abroad: U.S. Laws that Affect GW's International Activities**

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Faculty and staff of The George Washington University (“GW or “University”) may engage in various activities overseas, including but not limited to attending conferences abroad, entering into academic agreements for services or agreements to do research or to provide goods outside the U.S., making payments to foreign entities or individuals, setting up overseas programs, and co-publishing scholarly articles.

A handful of U.S. laws apply to the University’s foreign business activities and to those who plan or implement them, even though those activities may be educational in purpose. Many of these laws carry monetary and/or criminal penalties, **for individuals and for corporate entities, like GW**. The University has prepared this Primer to explain the laws and how and when they may apply to your international activities. The checklist at the end of this Primer should help you ask the right questions as you engage in activities abroad for GW.

The U.S. laws that affect GW’s business overseas can be grouped as follows: economic sanctions and boycotts, export controls, antiterrorism, and corrupt practices. To illustrate the reach of some of these laws – in certain circumstances it may be a criminal offense to host a foreign government official or even to talk to him. This Primer will explain why. Other laws could apply to GW’s international business activities, such as environmental, employment, trade, tax, and antitrust laws. Laws of the host country and a few international treaties will also affect the University’s foreign business activity.

After reading this Primer, contact the Office of the VP and General Counsel (“OGC”) at (202) 994-6503 if you have questions regarding the applicability of these laws to activities you are planning or involved in for GW. **Please note that it is very likely that at least some of the laws discussed in this Primer will apply to any given GW international activity.** OGC is prepared, as quickly as possible, to help you understand and respond to the sometimes complex legal requirements.

## Economic Sanctions and Boycotts

### General Rule

**The U.S. has imposed economic sanctions against certain countries and persons. In most cases, the sanctions prohibit or severely limit imports, exports and transactions with these countries and persons who reside in them. Economic sanctions are currently in effect against: Burma (Myanmar), the Balkans (Serbia), Côte d'Ivoire, North Korea, Cuba, Liberia, Iran, Syria, Sudan, and Zimbabwe.**

**The U.S. also prohibits dealings of any kinds with persons and entities it designates as Specially Designated Nationals (SDNs) and maintains a list of such persons and entities.**

**GW, and its individual employees, may not participate in international boycotts not sanctioned by the U.S., such as the Arab boycott of Israel.**

### 1) Countries Sanctioned

U.S. economic sanctions are generally known as “embargoes.” They prohibit most imports, export and transactions with certain countries, absent a general or specific license from the Office of Foreign Assets Control (OFAC) of the U.S. Department of Treasury, which maintains and enforces the embargoes. Over the years, OFAC has moved away from broad embargoes to “targeted sanctions” that focus on the precise nature of the threat to the U.S. For example, the U.S. currently has only three comprehensive embargoes in effect – those against Cuba, Iran and Sudan, but there are also prohibitions that apply to the countries listed in the above box. GW faculty and employees must contact OGC before entering into negotiations with entities or persons in sanctioned countries to determine whether such negotiations may move forward in light of OFAC restrictions.

### 2) Persons, Companies, or Organizations Also Sanctioned

OFAC can also designate persons and companies as “Specially Designated Nationals” or “SDNs,” that is, persons and companies or other entities subject to the same prohibitions as the country to which they have been “specially designated.” Consequently, if a deal cannot be made with the Syrian government, the same deal cannot be made with an SDN from Syria. You may not have any dealings with persons or organizations who appear on the SDN list. The list appears on OFAC’s website at [www.treas.gov/offices/enforcement/ofac/sdn/](http://www.treas.gov/offices/enforcement/ofac/sdn/). The list is updated regularly. Even making a donation to a SDN is a violation. GW has business relationships in the Middle East and occasionally is presented with other opportunities in the region. Many – the number would be in the several hundreds at least – SDNs are persons with Middle Eastern names. When entering into discussions with a proposed non-US business partner, the first thing you should do is check the SDN list for his or her name. OGC can provide guidance on how to complete such checks.

### **3) Boycotts**

Almost all of the activity associated with the two sets of American boycotts is in the Middle East. Because GW is active in this region, an understanding of the boycott laws is key to doing business in the many countries of this part of the world. For convenience, we call the first boycott law the “Commerce boycott,” after the government department which administers it, and the second one is the “Treasury boycott,” which is a tax law.

#### **a. The Commerce Boycott**

The Commerce Boycott prohibits the University or you from agreeing to participate in an unsanctioned boycott, such as the Arab boycott of Israel, and imposes fines, and in some cases prison terms, for violations. It prohibits you or the University from refusing to do business with a boycotted country, read Israel. It is a broad restriction. You cannot, for boycott reasons, refuse to do business, select one person over another, or engage in a course of conduct that constitutes a refusal to do business. “Blacklists” (a boycott-based list of persons with whom a U.S. person should not deal) or “whitelists” (a boycott-based list of persons with whom a U.S. person should deal) are prohibited. Specifically, you may not:

- refuse to do business with or in Israel or with “blacklisted” companies;
- discriminate against other persons based on race, religion, sex or nationality;
- furnish information about business relationships with or in Israel or with blacklisted companies, or about the race, religion, sex or national origin of another person; and
- implement letters of credit or documents containing “stamps,” sometimes in Arabic, requiring boycott compliance or containing prohibited boycott terms or conditions.

Be aware of how seemingly innocently a violation may occur. Here’s an example. Say you have just wrapped up a long negotiation with officials in Qatar to support an educational institution in their country. Your counterpart, who has become very friendly to you, asks this question: “Are you doing any work in Israel now?” Qatar is a country that supports the Arab boycott of Israel. The question may be boycott-related and therefore you cannot answer it. What you should do instead is ask him why he wants to know. If he replies, “because my cousin has a business there and he might like to meet you if you travel to Israel,” then you know the question is not boycott-related and you may answer it. But if instead he says, “our ministry won’t let me sign a contract with anyone who does business with the Israelis,” then you know it is boycott-related and your answer has to be “I refuse to answer your question.”

If you receive a request to take any action that has the effect of furthering or supporting an unsanctioned boycott, the request must be reported to the U.S. Department of Commerce on form BIS 621-P or BIS-6051P. The University, not you, should file the report, but you may initiate the process and transmit a draft to the OGC. For your information, the form can be found at: <http://www.bis.doc.gov/antiboycottcompliance/boycottrequestreportingform.htm>.

#### **b. The Treasury Boycott**

The Treasury Boycott is a tax law that prohibits the University, or you, from participating in an unsanctioned boycott and requires reporting activities in boycotting countries on annual federal tax returns. It denies some foreign tax benefits to persons who cooperate with an

unsanctioned boycott. It also requires annual reporting by GW (not the individual GW employee) of business activities in boycotting countries. Treasury publishes a list of these countries each quarter. The current list includes Bahrain(\*), Kuwait, Lebanon, Libya, Oman, Qatar, Saudi Arabia, Syria, United Arab Emirates and the Republic of Yemen. For your information, the form can be found at <http://www.irs.gov/formspubs/lists/0,,id=97817,00.html>.

\*Bahrain no longer participates in the Arab boycott of Israel, but still appears as a participating country in the Treasury Department's tax form filing instructions, and so must be treated as a participating country.

## Export Controls

### General Rule

**Certain exports of technical data (including technical programs in a GW laptop), defense articles and defense services may require a license from either the U.S. Department of State or the U.S. Department of Commerce. The release of technology to a foreign national (who is not a U.S. permanent resident) who is in the U.S. is considered a "deemed export" to the home country of that national. That technology is also subject to any license requirements that would apply to an actual transfer of that technology to that country. GW's policy on export control can be found at <http://my.gwu.edu/files/policies/ExportControlFINAL.pdf>**

The University and you are required by law to obey two federal export control laws, and you may assume that the more technical the scope of work, the more likely will be the application of these laws. It is entirely possible, moreover, that programs in your laptop may require an export license if you take your laptop on a trip abroad. It is also possible that allowing a foreign national access to technology within the U.S. will be a "deemed export" to the home country of that foreign national, which will subject the technology to the same licensing requirements that would apply to an actual transfer to the foreign national's home country.

One of the export control laws is administered by the U.S. Department of State ("State Department" or "DOS"); the other by the U.S. Department of Commerce ("Commerce Department" or "DOC").

### 1) **International Traffic in Arms Regulations (ITAR)**

The State Department export control law is commonly called ITAR, which stands for International Traffic in Arms Regulations. These regulations govern the export of any defense articles and services. "Defense services" is very broadly defined. It includes furnishing assistance to foreign persons in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of a defense article. DOS maintains a list of defense articles called the United States Munitions List, and it can be found at [http://www.access.gpo.gov/nara/cfr/waisidx\\_99/22cfr121\\_99.html](http://www.access.gpo.gov/nara/cfr/waisidx_99/22cfr121_99.html). A license from the DOS is required before any defense service or article may be exported. Fines and prison terms are the

sanctions for violations. Space technology, for example, will frequently be subject to ITAR limitations.

## 2) Export Administration Regulations (EAR)

The Commerce Department export control law is known as EAR, Export Administration Regulations. EAR governs U.S.-origin, dual-use items that can be used for both commercial and military applications. These regulations apply to the transfer of all such products, data, and services. There are, however, no controls on technical data in the public domain. The term “technical data” is broadly defined as information necessary for the development, production, or use of a product. Many types of information are considered technical data. Blueprints and technical drawings are technical data, as are instruction manuals. Technical data need not be tangible: training the police force in the United Arab Emirates might be the export of technical data.

The export controls imposed by EAR depend on two variables: the sophistication of the exported product or technology and its intended destination. EAR requires an exporter to obtain an individually validated license to export certain items, especially when they are exported to targeted countries. To find out if a license is required, you can check the Commerce Control List. If the export has been assigned an Export Control Commodity Number on the CCL, you should cross reference the item with its intended destination on the Commerce Country Chart. Both the list and the chart are available at [http://www.access.gpo.gov/bis/ear/ear\\_data.html](http://www.access.gpo.gov/bis/ear/ear_data.html). In many cases, exports fall under a license exception, which means no license is needed. EAR also prohibits exports to persons or companies whose names appear on one of four lists of sanctioned entities. These are the Denied Persons List, the Entities List, and the Unverified List, each of which can be seen at <http://www.bis.doc.gov/ComplianceAndEnforcement/ListsToCheck.htm>. The fourth is the SDN list, for which see <http://www.treas.gov/offices/enforcement/ofac/sdn/>.

The DOC has published "Know Your Customer" guidelines (available at <http://www.bis.doc.gov/complianceand enforcement/KnowYourCustomerGuidance.htm>) that list the type of abnormal circumstances, *i.e.*, "red flags," that might indicate that an exported item could be destined for an inappropriate end-use.

## Antiterrorism

### General Rule

**It is a crime to provide material support to a foreign organization engaged in terrorist activity. “Material Support” is defined broadly. Some organizations with innocent-sounding names may mask terrorist bearings.**

Two principal laws, the 1996 Antiterrorism and Effective Death Penalty Act and the 2001 USA Patriot Act, make it a crime for the University or you to provide material support to a foreign organization engaged in terrorist activity. Material support is broadly defined and

includes training and may include other services. The State Department maintains a list of foreign terrorist organizations at <http://www.state.gov/s/ct/rls/45394.htm>. You would not think that a university would even think to do business with a terrorist organization, and it would not, but some organizations with innocent sounding names mask their terrorist bearings. One is a hospital in Palestine, just as an example.

## **Corrupt Practices**

### **General Rule**

**The offer or payment, or even the promise to pay, anything of value – *anything* of value – to a foreign official for the purpose of doing business or gaining an unfair advantage is a violation of the Foreign Corrupt Practices Act.**

#### **1) The Foreign Corrupt Practices Act (“FCPA”)**

This is not just about bribery. You would not think to ever pay a bribe. But you might consider taking the education minister of a foreign government to dinner. Before you do, you should become better acquainted with the FCPA. This 1977 law, passed by a unanimous vote of the Congress, is aptly described by its title – the FCPA makes *foreign corrupt practices* federal crimes. What are these corrupt practices? In a sentence: the offer or payment, or even the promise to pay, anything of value – *anything* of value – to a foreign official for the purpose of doing business or gaining an unfair advantage is against the law. The FCPA, in effect, is really two laws. The first is the law’s bribery provisions. They apply to all Americans and American entities and to persons acting on their behalf: you and GW are covered. These bribery provisions will be explained below. The second law is the FCPA’s accounting provisions, which apply to entities subject to the Securities and Exchange Commission. Although GW is not subject to SEC regulation, GW’s books and records would almost certainly comply with these provisions anyway, so those accounting provisions will not be further discussed in this Primer.

To state the FCPA more completely, the bribery provisions prohibit any officer, director, employee or agent of GW “to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization for the giving of anything of value” to: (1) any foreign official; (2) any foreign political party or official thereof or any candidate for foreign political office; or (3) any person, while knowing such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, foreign political party or official thereof, for purposes of influencing any act or decision of such person in his or her official capacity or to secure an improper advantage to obtain or retain business. The FCPA breaks down into the following elements:

- **Who.** The FCPA applies to GW, its officers, directors, employees and agents; it also applies to you.
- **How.** Any use of the mails or any means or instrumentality of interstate commerce establishes jurisdiction. This is very easily done. A fax or e-mail sent from the United

States can establish jurisdiction. Recent amendments to the FCPA virtually eliminate this barrier to finding a violation.

- Corruptly. This means that you have an intent to influence the recipient of the gift in the conduct of his or her official duties. It includes an element of “quid pro quo,” meaning that the person giving the thing of value expects some official action, no matter how general, in return. Conscious disregard or deliberate avoidance of the facts can also trigger liability.
- Thing of Value. This includes an offer to pay, promise to pay, or authorization of the payment of money or anything of value. Anything of value means anything of value to the recipient. This could be a loan, contract, and sometimes even benefits to family members of foreign officials. It also includes an offer to give a gift.
- To Whom. You cannot offer or pay anything of value to any foreign official, foreign political party, party official, or any candidate for foreign political office. You cannot offer anything of value to any other person while knowing that any portion of the thing of value will be given to a foreign official, foreign party, party official, or candidate. Foreign officials include anyone holding a legislative, administrative, or judicial office, whether appointed or elected, at any level or subdivision of government, from national to local. Officials and agents of public international organizations are also considered foreign officials. A local tax auditor, a customs agent, a World Bank employee – all are covered. Also covered is anyone exercising a public function for a foreign country.
- For a Business Purpose. The Act prohibits offers or payments for the purpose of influencing an official in order to obtain or retain business or secure an improper advantage. If your offer or payment to a public official or candidate is tied in any way to a business purpose, you cannot make the offer. Even the vague hope that something beneficial along business lines might develop is suspect. The FCPA applies not only to getting business, but also to other areas, such as environmental and regulatory permits, taxation, and judicial and legislative proceedings.

Can this law mean what it says – that it is a crime merely to take a foreign official to dinner? Yes, if your intent is to nudge him to give you business or help you in the business you have. If the purpose of the dinner is to discuss the pending contract with the University, better not to have the meal. You may appreciate the tenor of this law when you understand that it was passed in an environment much like today’s Enron and WorldCom debacles, which gave us Sarbanes-Oxley. It is a tough law with few exceptions. There is, in fact, only one exception to the law, and that is for what is commonly called a “grease payment.” There are also two affirmative defenses, which are, in effect, exceptions.

The grease payment exception means you may make a facilitating payment to a foreign official if the purpose of the payment is to obtain the performance of a “routine governmental action.” Routine governmental action includes obtaining permits, licenses, or other official documents or processing governmental papers such as visas or drivers’ licenses. To determine whether the exception applies, it is helpful to look at the job function of the official receiving the payment. For example, a payment to an official to perform a ministerial task that is within his or her general day-to-day duties will usually be covered by the exception, but a payment to an official with discretionary power to make a decision that benefits GW will usually not fall within



the exception. Any GW employee considering making a grease payment should first confer with OGC to determine whether it is appropriate under the FCPA.

There are two affirmative defenses to a violation of the FCPA. (An affirmative defense allows a defendant in court to avoid liability for a *prima facie* violation of the statute for an acceptable reason.) The first is a payment that is lawful under the written laws and regulations of the foreign official's country. There must be a written law, that is, statute or regulation – not a court decision – that specifically says you can make the exact payment you are proposing to make. You will rarely find such a law. The second is a payment that is a reasonable and bona fide expenditure directly related either to the promotion, explanation, or demonstration of the University's services, or the execution or performance of a specific contract. Again, consult with OGC for any questions regarding the availability of one of these defenses in a particular situation.

**a. Examples**

Here are some examples of permissible and non-permissible payments, but remember two things. First, examples are not legal advice; seek advice in case of doubt. Second, if your intention is corrupt, and only you would know that, these examples would not apply. GW may:

- Host a foreign official at GW if the purpose is to show off the campus;
- Honor a foreign country or one of its officials if the purpose is not to get or retain business but to acknowledge with gratitude the assistance of the country in GW's academic programs; and
- Pay the reasonable travel and subsistence costs of a foreign official if GW is required by contract to pay these costs.

But note:

- Because of the risk that a meal away from GW's campus is not directly related to the promotion, demonstration or explanation of products and services, GW should not pay for a meal for a foreign official in the foreign official's home country.

**Other Laws of Possible Concern**

**General Rule**

**Other U.S. laws may apply to you and to GW as you pursue international activities for the University.**

The following U.S. laws are less likely to apply to the international activities of U.S. higher education institutions, but GW could be held liable under:

- U.S. **employment laws**, some of which apply abroad, but most do not. Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act of 1967 cover American citizens who work abroad for an American



employer or a foreign employer controlled by an American employer. Foreign nationals working outside the United States are not protected by these laws, even if they work for an American employer;

- **U.S. environmental laws**, which regulate how a U.S. company exports toxic and hazardous materials and distributes products in a foreign country;
- **U.S. trade laws**, which impose trade sanctions such as tariffs or import restrictions on countries that violate U.S. and international trade laws. These sanctions are different from the economic sanctions discussed above in this Primer;
- **U.S. tax laws**, which apply abroad, but are likely not applicable to GW. GW, of course, will have to make sure that its foreign activities do not conflict with its U.S. tax status. As an individual, you should know that if you work abroad for an uninterrupted period of 330 days each year, you may be entitled to a tax exemption on income up to \$80,000; and
- **U.S. antitrust laws**, because the U.S. asserts **antitrust** jurisdiction over actions or disputes which take place outside its borders if they have “intended or actual,” “substantial or foreseeable” effects within the U.S.

### **Applicable Treaties**

Two treaty regimes provide that a foreign actor or person doing business in a foreign country (such as GW) will be treated equally with host country nationals. Both are series of bilateral treaties, so you should inquire about their availability in the country of interest by checking this website: <http://www.state.gov/s/1/38294.htm>. The first of these is a **Treaty of Friendship and Commerce**, or FCN, and many date back to the time when Daniel Webster was the U.S. Secretary of State. They have been superseded in recent years by the more up-to-date Bilateral Investment Treaty, or BIT. The same website will inform you if the targeted country has signed a BIT with the United States. Many countries, especially in Latin America, have FCNs and not BITs.

Equal treatment is an important goal of any foreign business activity. So is the enforcement of any dispute settlement, but, unfortunately, not many countries outside the developed world have fully independent judiciaries. Foreign arbitration is therefore an attractive option, and there is a multilateral treaty that supports the enforcement of arbitral awards for those countries that are signatories to the **Convention on the Recognition and Enforcement of Foreign Arbitral Awards**, known in short as the New York Convention. The website noted in the preceding paragraph will tell you if the country in interest has signed this treaty.

An international set of commercial rules, somewhat like our on U.C.C., is codified in a treaty called the **United Nations Convention on Contracts for the International Sale of Goods**, or CISG. It will automatically apply to private contracts between nationals of states that have acceded to the treaty. You should check to see if the country of interest has signed and ratified the CISG. If it has, the CISG terms will apply, as the United States is also a signatory. If it does apply, you might ask OGC if you should specifically waive the CISG’s application in the

contract you will prepare with the host country. The treaty permits this kind of contractual waiver.

### **Host Country Laws**

Without a FCN or BIT, you will first want to check the laws of the host country to see if foreign investors have rights similar to local citizens. Your first inquiry should be to find out if there is a foreign investment law. Many lesser developed countries have such a law, which typically prescribes rights and duties of foreign investors and often offers incentives to them.

In addition, depending upon the nature of the GW activity, GW will want to examine, and take local host country counsel's advice on, laws pertaining to contracts, forms of business organization, and employment, and other areas. Some countries, prominent among them those in the Middle East, require foreigners to retain local agents, and you may find that GW's ability to enter into contracts and establish a local business presence will be subject to its affiliating with a local agent. Labor laws of many countries – again the Middle East is a good example – may trump GW's employment contracts. GW's OGC will work with you to identify and understand how such laws may affect your GW international activity, seeking the advice of host country counsel as needed.

### **GW Policies Related to the Laws Described in this Primer; Other Relevant GW Policies**

GW policies of which you should be aware when you engage in international activities for GW include:

- Export Control at <http://my.gwu.edu/files/policies/ExportControlFINAL.pdf>
- International Contract Compliance at <http://my.gwu.edu/files/policies/InternationalContractComplianceFINAL.pdf>
- Academic Agreements at <http://my.gwu.edu/files/policies/AcademicAgreementsFINAL.pdf>
- International Travel Insurance at <http://my.gwu.edu/files/policies/IntlTravelFINAL.pdf>

**Special requirements may apply to international sponsored research activities.** Please consult with the Office of the Chief Research Officer at (202) 994-6522 or refer to their website at [www.gwu.edu/~research/index.htm](http://www.gwu.edu/~research/index.htm).

## **A Checklist of Legal Concerns When Doing GW Business Overseas**

GW faculty and other employees who are beginning the process of planning for GW overseas activities should use this Checklist to identify potential areas of concern. If you can respond “yes” or “maybe” to any of these questions, please contact OGC immediately for guidance.

1. Are any of the people or companies I’m talking to on the SDN list or the State Department’s terrorist organization list?
2. Do we contemplate doing business in or with Burma (Myanmar), the Balkans (Serbia), North Korea, Cuba, Liberia, Syria, Sudan, or Zimbabwe?
3. Have I been asked to discriminate against any person based on race, religion, sex, or nationality?
4. Have I been asked to refuse to do business with or in Israel? With a blacklisted company? With a whitelisted company?
5. Have I been asked to furnish any information about GW’s or my business activity in Israel?
6. Have I been presented with any bank documents, such as letters of credit, which have language relating to the boycott of Israel?
7. Have I received any request to further or support the Arab boycott of Israel or any other boycott not sanctioned by the United States government?
8. Is GW, or am I, doing business in Bahrain, Kuwait, Lebanon, Libya, Oman, Qatar, Saudi Arabia, Syria, or the United Arab Emirates?
9. Does our business require the export of any defense articles or services?
10. Will any of our exports require a license from the Commerce Department as described in the University’s Export Control policy?
11. In the expectation of getting business or gaining an improper advantage, have I offered, paid, or promised to pay anything of value to a foreign official? To a foreign political party? To a candidate for foreign political office? To any other person, believing that he or she might pay a foreign official, and my act was not expressly approved by a GW Dean or VP and OGC as falling within the “grease” exception to the FCPA?
12. Do I need to obtain more information as to whether the laws of the country of interest protect GW as a foreign actor and/or require GW to retain an agent?
13. Does my activity involve a desire to hire or subcontract to hire employees in the foreign country?

**This list is not exhaustive. For any questions about the applicability of U.S. laws discussed in this Primer to your GW overseas activity, contact OGC at (202) 994-6503 or [gwlegal@gwu.edu](mailto:gwlegal@gwu.edu).**