

Season 3- Episode 2

Olga Torres: And with that, because I know Don, is looking really serious, I want to move to more of the export controls. I know Don you were in the field, you were in Singapore and at some point you were in in Russia. What are your thoughts on some of what we're seeing? Specifically with respect to, for example, BIS is basically right now. . .we're dealing, I just said, a flurry of actions, right, executive actions, a lot of changes, a lot of unconventional methods sometimes to deliver the message. At the same time, we're also facing one of the longest government shutdowns. And for example, some of the agencies are sort of working, but obviously with less staff and just processing certain things, not everything. At the beginning of the Trump administration, we started seeing licenses not being processed and then they were processed and then they were not processed again. And now we're in shutdown. Just all this uncertainty and chaos. You've been with the government, Don, or you were with the government for a long time. What are your recommendations? What do you think industry should be doing right now to sort of to cope with the new environment, and what are those industries that you think are going to be the most at risk?

Don Pearce: First of all, welcome to interesting times, and it does not seem to be changing. I will give a nod to Douglas Adams and say that in his - probably a great read for you over the weekend or a grab it for Audible for your commute - the Hitchhiker's Guide to the Galaxy, where the first page is "Don't panic." Yes, export controls have always been complicated, and they have always been influenced by geopolitics. We just haven't seen it at this speed, really. And perhaps the first Trump administration was a warning. The Biden administration, particularly the last two years of the Biden administration, we did see a marked increase in regulatory changes that were rather than the traditional advanced notice of proposed rulemaking with a 30-to-60-day comment period and maybe some significant back and forth with industry to the now very quick interim final rules literally being put into effect before they're actually published, citing the fact that they have been put on to the website as good enough. So yeah, first, again, don't panic. Yes, this means that for those of us in the compliance field, we have to be a lot more alert on these changes. But luckily for us, they're making the news. This is also something that's kind of recent. I joked around that after I retired, it was the first time in my entire customs and export controls career that I didn't have to explain what I did for a living. Prior to that, if I said I worked for customs, they thought I was working on a magnetometer at the airport. No, the other way. Or when I was with BIS, my brother would joke that my job as a criminal investigator with the Bureau of Industry and Security was "That label under the mattress if you rip it off, you go to jail for 20 years. Yeah, that's what he does." No, it's not what I did. But the sad part is people bought it. Now if you say you're with the Bureau of Industry and Security, most people will go, oh, those

are the sanctions people, the semiconductor controls people. It's that heightened level of awareness in the general public works to your advantage because it means you might actually see this in the newspapers. Reuters seems to be the on this beat. Wall Street Journal and Bloomberg have for years, but even [in] those papers, these stories have gone from like page six or seven - very niche - to page one or two because it's driving the news. These are interesting times, but I do think that you know the enhanced profile of these actions actually work in your favor.

Olga Torres: Yeah, and it's really interesting when you say geopolitics. When I started my career, of course, sanctions, export controls, it's all tied to national security, foreign policy objectives and you didn't see it as much on the import side. And I think that's so unique to the Trump administration. And I think it starts with IEEPA tariffs, right? Being used the way it's been used and that's a bit up in the air whether that's going to be ok to do at least until we get some guidance next week, hopefully from the Supreme Court. But imports are really more tied to geopolitics. I think what makes President Trump so unique it's like he had this tool, sanctions, export controls and he's like, "Hey, I got all this commerce here and I'm going to use that instead. Yeah, I'm going to keep using export controls and I keep using sanctions, but I'm going to target every, literally every country on the planet and I'm going to say I don't think you're being fair. And there's an emergency here and trade deficits and geopolitics." We're using it against China. We're using it against Mexico, Canada. A lot of it is related to national emergencies, but a lot of it is also very geopolitics, a lot of involvement there. In terms of the investigation side, Don, BIS is so unique because BIS has the criminal investigators at OEE. I've been attending several conferences and a lot of it was with the US Attorney's offices, et cetera. And there's a lot of emphasis now on the FBI cooperating for other types of cases. One of them was the immigration side, with all the deportations and all of that. And some people were saying, "It's going to be interesting to see because typically OEE works a lot with the FBI, but the FBI is sort of like being stretched thin because of all the immigration side." What are your thoughts on that?

Don Pearce: I think you should keep an eye on the press releases coming out of BIS. I think you probably will see more of them in the coming months and you'll notice there will probably be fewer joint investigations, and they will probably be more investigations by OEE alone. This because of the fact that not just the FBI, but another perennial favorite of the joint case world, HSI are also being roped into these ICE related missions. And these missions are taking manpower and they're taking money and they're taking resources. Commerce is probably pretty safe from this. I don't know if they've been detailed. Theoretically, they could. They are federal agents. They are Series 1811 criminal investigators, just like an ICE agent, just like an FBI agent. They could be put on the streets, but I haven't heard of that happening. And one of the upsides to

being a criminal investigator in BIS was we were a one trick pony with one heck of a trick, but we were export controls, and I think that has continued. I think what you will see is, again, fewer joint cases. I'm not sure of the status of the multi-agency task forces and strike forces that were spun up during the Biden administration. Not sure what the status is on those.

Also, not sure as to whether you're going to see this in the near term because of this shutdown. Because while criminal investigators would be exempt from showing up and doing their jobs and not getting paid for it, a lot of the support staff that are critical to putting together good investigations may not have been seen as essential as well. There's going to be fewer people in the office to do things like pay the bills, take care of the administivia that goes around any organization, especially though in in law enforcement organizations.

So, stand by, again, I'm going to compete that or repeat that mantra of don't panic. Make sure you're doing what you can with the skills and the equipment and the data and the technology that you have, and if you do feel overwhelmed feel free to call us. We'll be more than happy to help.

Olga Torres: That's interesting. I heard, and actually I meant to look it up, the last time I looked it up and I think it was like a month ago, maybe a little longer than that the White House actually had requested more funding for BIS and it was very specific to BIS for Commerce. I don't know that it was granted. I should know that; we can look it up.

Don Pearce: We won't know what FY26 looks like until we get out of the CR. Pardon me for going into Beltway English here. I should explain, a continuing resolution is what they're arguing over. We don't have one right now. What a continuing resolution does is it allows the government to spend money at 10% less than they did in the past fiscal year until a bill is passed that allows them to have their FY26 budget. We don't really know what they're going to get and the other kind of wild card here is we also don't know who's going to be in charge. There hasn't been a hearing for an Assistant Secretary for Export Enforcement. There was a hearing for the Assistant Secretary for Export Administration, but his name has been withdrawn. Really, you have the Undersecretary and then a bunch of people acting. And the way the actings work is they're not allowed to do everything that the appointee would be able to do. They are only allowed to do the non-exclusive functions of the role, which is basically they can sign the checks to pay the bills but they can't do big things. They can't make new policy. They can't really shape policy. Put it that way there. They can let the administration run the way it normally would, but you're not going to see big changes. You're not going to see big decisions being made until those positions are filled. So, holding pattern is where we're we are.

Olga Torres: Yeah. And it goes back to, what I'm hearing is resources. Resources are scarce in an agency that is national security focus, which is interesting.

Don Pearce: Yes. And it's an agency that has been historically underfunded. This isn't unusual to OEE. In fact, I think one of the kind of annoying but charming parts of having been an agent was having to do more with less.

Olga Torres: That was my next question. How do you think the investigators how are they going to be prioritizing cases, right? I'm assuming based on industry and the national security concern and based on adversaries involved.

Don Pearce: That's an easy question to answer. It is going to be China semiconductors, Russian counter-proliferation cases and pretty much . .

Olga Torres: Cartels? some cartel activity.

Don Pearce: Perhaps especially around like, say, along the southern border.

Olga Torres: We'll see that more in the sanctions.

Don Pearce: Your Dallas field office will most likely see some of that. But right now the zeitgeist, the thing that is driving national security thought is the AI and the national security-level semiconductor issues. Advanced AI is an issue. The potential for quantum computing is an issue. Drones are a big issue. You add AI to drones and now they're a super big issue. And BIS has tended to look at the national security threats and prioritize those of the administration. I think that's where you're going to see the majority of the case work. You never know, though. You do have this brand new, everyone's been referring to it as the 50% rule. . .

Olga Torres: I was just going to ask you. You read my mind.

Don Pearce: I just want to remind people they call it the 50% rule because it looks like the OFAC 50% rule. But if you read it, you'll notice that they call it the "affiliates rule" because 50% may not be the number; it may be significantly lower. It may be someone on the board that exerts control but doesn't hold more than 50%, and it still puts you in a trick bag. And the interesting

thing about this is, and I've said that this goes hand in hand with the idea that the streamlining of the government under DOGE meant that organizations had to find ways to do more with significantly less. Well, this might be one of them, because guess who's got to do that screening? It's not BIS. It's you, my friends.

Olga Torres: We do due diligence for clients, and we like it.

Don Pearce: For those of you in fintech that have been wrestling with the OFAC 50% rule, you're about 75% there. But you're still going to have a little bit of you're still going to have to look at these transactions a little more closely than you have in the past. And for those of you who are now saying, what have I gotten myself into? Again, don't panic. This is a job for automation. This is a job for getting the help that you need from experts. You don't necessarily need to completely revamp your program, but you really should be taking a look at how you do your due diligence and how you document that due diligence search.

Olga Torres: Yeah. And I also think it's going to be related to risk areas, right. Because if I'm a small company, I'm thinking, how am I going to afford this due diligence and having outsourced due diligence to lawyers and consultants. I think, well, I mean if you're in an area like semiconductors or if you're dealing with China, you may not have a ton of choice unless you want to take a lot of risk. And a lot of it probably you can set up programs internally so that your people internally can take over the function. As long as they know how to do it and then we can provide training and things like that.

I have a question on international enforcement. I've been attending some recent conferences like in the past few weeks and months and I think international, there are a lot of international people, a lot of international lawyers, a lot of international businesses. There's this sort of, I wouldn't say, I don't know what word to use, but in some cases I don't feel like a lot of international or foreign people are necessarily 100% happy with what's happening.

Don Pearce: Gee, I wonder why.

Olga Torres: What they perceive as, "hey, we're getting all these tariffs and we're getting this," and I had discussions with Canadians and people that are supposed to be like our closest allies and they're just like, "I don't know about you guys." Do you think under both sides, honestly, customs, expert controls, and this is a tough one and we don't know, right? But I think at surface

level it may be all OK government to government, but do you think there could be any issues with international cooperation where they say, “hey, the U.S. government, like we can't really figure out where they're going, or they change too much and we don't necessarily want to cooperate”? And I mention it because at the very beginning of the Trump administration, there was that issue with the FCPA pause and the Europeans were like, “hey, we're going full speed, like if the Americans don't want to do it,” and there's been changes on that and whatever. But we are taking our own sort of America first kind of road. Do we foresee any enforcement issues with that approach?

Don Pearce: The United States has been basically deprioritizing international cooperation in the multilateral export control regimes. They've said as much in public fora. These trade negotiations, some of them do have an export control component, which is unusual to say the least, but it's there. I feel like there's kind of a bifurcation here it depends on what the issue is and who the country is and what the attitude of the administration on that day might be with regards to that country or with regards to that technology. You're seeing a lot of cooperation on semiconductor smuggling cases in Southeast Asia, specifically in Singapore and Malaysia. How much of that is sustainable is a great question. But for those of you who are watching from overseas and are curious about how your government is handling this, you probably have a better idea of that than we do.

The cooperation is often done at that local level. And remember, overseas, an export control investigation isn't being done by BIS. The investigation part is being done by the local authorities because they're the ones with the authority to do it. So, those countries where we have good working relationships between the embassy and the host country probably going to be a lot more productive than those places where we don't.

Olga Torres: Yeah, no, totally. I remember back in the day, pre-Ukraine war, we didn't have those channels with Russia and companies, so OEE couldn't visit the company, so they would just get listed automatically to the Unverified List. I'm nearing the end in my questions because I know we're running out of time, but one of the most interesting cases that I've seen recently anyway was the cadence export case. And I thought what was so interesting because it shows how all the agencies at least you know more at the domestic level, they're all cooperating and we see the BIS penalty -BIS taking the lead on the civil side - I think they got like a \$95 million penalty if I remember correctly. It's a beautiful case because it kind of like summarizes everything we've been talking about, at least on the expert side, semiconductors, China Entity Listed entity. It has like all the check, check, check, check, and also, you know, more of the criminal component like they knew they had they had schemes, they knew this party was Entity

Listed. They knew that they were sending to a second party that was very close to that Entity Listed party. And this is before the affiliates rule. But it just shows how DOJ got its portion of the penalty. BIS got its portion of the penalty. Both agencies were leading the case, working on the case, parallel civil / criminal investigations, and I'm expecting to see more of that, basically. Have you had any intel as to whether there'll be any changes to the memos that we had seen under the Biden administration for BIS? They had like the significant violations, it's a VSD. . .

Don Pearce: There hasn't been any comment on that front but assume that aggressive stance continues and assume that you will see more cooperation between DOJ and Commerce and the other agencies.

Olga Torres: OFAC.

Don Pearce: One of the things about the Cadence case is it proves Don's first rule of law enforcement: If they're doing one thing wrong, they're probably doing something else wrong, too.

Olga Torres: Yeah. A lot of it is culture, right? Corporate culture and compliance. And my last question, looking ahead, what do you see are going to be the biggest challenges or threats for companies when it comes to avoiding enforcement, but also keeping up with the bottom line, right? Then not going crazy, especially if there's uncertainty, like what would be your recommendation?

Don Pearce: I think the reliance on how you did business yesterday is not going to cut it. You have to modernize your export compliance program to meet these new challenges. Now, it doesn't mean you need to scrap it, throw it all away and start fresh, but you certainly need to think about how you're using technology, how many people you have actually doing it, how many eyes have to be on how many targets, and how well you are documenting that process because I think when it comes down to an agent knocking at the door looking for answers, the better the quality of the information that you can give, and the better that you can show that agent that you tried really hard and that these guys didn't just fool you, but they fooled the government, too, you'll be in a lot better shape.

Olga Torres: Yeah, that's a good one. And I'll let you give some closing remarks, Tony, before I say something about my next line of thought and our next podcast.

Anthony Saranchak: And then on the import side, if you have to file a disclosure, that's better than doing nothing. Because it's going to be painful to go through the process, maybe hire outside assistance to help to put it together and make sure you have everything correct, but then you're going to know your systems more, what you weren't doing before and how to do it better going forward. And the last piece of advice if it is an investigation, and this applies for an audit, too, but even more so for an investigation: just be truthful and answer the questions. The more you try to, like, hide things or tell half-truths or not the whole truth or not be upfront about things, the more they're going to find that out and then they're just going to dig further because they think you're hiding more.

Olga Torres: Yeah. My final thought is I'm predicting more whistleblowers. I think there's just going to be more Main Street information like people understand the more employees understand it more. Several agencies, last one the DOJ criminal memo had more on the whistleblower program and adding tariffs evasion, that kind of thing. We had the False Claims Act cases that we already were seeing a trend and that's a lot of whistleblowers bring those cases forward like a qui tam action and they're the relator, they get part of the penalty.

And with that in mind, stay tuned for the next episode. We're going to bring a whistleblower attorney from DC. We've worked with him in the past where he was our opposing counsel. We were representing the company, and he was representing the relator, but we have a lot of respect for each other. We'll bring him, and I'm sure he's going to have a lot of really good information to share on the cases he's represented where we have False Claims Act or other whistleblower type actions related to trade and national security. So, thanks everybody for joining and thank you guys for joining us today. It was great seeing you.

Don Pearce: Thanks so much.

Anthony Saranchak: Thank you. Take care.