

Answers to Frequently Asked Market Access Questions

Q: My customs broker in South America told me that to ensure clearance of my company's goods; we would need to pay a small fee for services rendered by the Customs inspector at the port. Can we make such a payment?

A: The U.S. Foreign Corrupt Practices Act prohibits U.S. companies from making questionable payments to foreign officials. Prohibited payments are those intended to influence decisions by foreign officials that will assist the U.S. firm in obtaining, retaining or directing business. Exceptions from the prohibitions exist for payment to employees of foreign governments whose duties are essentially ministerial. Thus, for example, a small "grease payment" designed to facilitate the movement of goods through Customs may not fall within the scope of the Act's prohibitions. It should be noted that many of the definitions in the law regarding who falls into the category of "foreign official" and what constitutes a "questionable payment" are complex, and require precise legal analysis. Company officials should consult with their legal counsel before making such payments. Violations of this law could subject both companies and individuals to civil and criminal penalties.

Q: My company is involved in an arrangement with a sales agent who markets my products in the Middle East. He recently provided me with a questionnaire requesting information regarding my business relationships with Israel. Can we fill out the question-

naire and do we have any obligations to disclose this request?

A: Since 1974, U.S. law has prohibited U.S. companies and individuals from taking or knowingly agreeing to take any action designed to further or support a boycott imposed by another country against a country that is friendly to the United States. The law was enacted in response to the Arab Boycott of Israel. The responsibility for enforcing this law lies with the Bureau of Industry and Security in the Department of Commerce. Among the activities explicitly prohibited by the law are refusing or requiring another person to do business with or in a boycotted country; furnishing information about whether any person has or proposes to have any business relationships with or in a boycotted country; and furnishing information about the race, religion, sex or national origin of any U.S. person. The law also requires a U.S. company that receives a request to furnish information or undertake an activity designed to further a boycott to report receipt of that request to the Department of Commerce. A U.S. company receiving a questionnaire to disclose information on its business relationships with Israel would not only be obliged to report receipt of the request, it but would also be prohibited from complying with the request. The antiboycott law and its implementing regulations contain certain exceptions, including an exception for activities that are required under the local laws of the jurisdiction in which the U.S. person resides. The Department of Commerce

has aggressively enforced the antiboycott statute, and a number of U.S. companies have been fined in excess of several million dollars for violating the prohibitions of this law.

Q: I have been told that I cannot sell products in the European Union without affixing the “CE Mark.” What is the “CE Mark” and how do I qualify to get it?

A: The “CE Mark” constitutes a representation by a manufacturer that a product meets the essential environmental, health, and safety requirements set forth in a number of European Union directives. The directives cover a broad range of products, including machinery, electronic equipment, medical devices, toys, and pressure vessels. Once a company has met all of the essential requirements applicable to its products, it may affix the “CE Mark” to its products and sell them throughout the entire European Union. Depending on the nature of the product and the applicable directive, a manufacturer may declare on its own the fact that it complies with the essential requirements of the applicable directives. In other instances, a manufacturer may be required to obtain a certification from a third party testing house (“notified body”) that its products meet those requirements. A failure to affix the “CE Mark” to a product that is covered by one of the relevant directives can result in that product being held up by local customs officials. It can also result in the product’s removal from circulation by officials in any of the member states. The Department of Commerce estimates that about half of all U.S. merchandise exported to the EU is covered by directives.

Q: My company’s products were recently denied entry into an Asian country, based on a representation by a competitor that the products did not meet some “unpub-

lished” standard. We have sold these products for years in that country. What rights do we have to challenge this action?

A: Countries that have joined the World Trade Organization (WTO) have agreed to comply with the Agreement on Technical Barriers to Trade (TBT), which is an integral part of the WTO Agreement. The principles underlying the TBT agreement include: (1) avoidance of unnecessary obstacles to trade, (2) non-discrimination and national treatment, (3) harmonization, (4) equivalence of technical regulations, (5) mutual recognition of conformity assessment procedures and (6) transparency. WTO members are committed to provide open access to their standards and standardization processes, including to companies that are not based in the country that has promulgated the particular standard. WTO members have also committed to avoid standards that constitute unwarranted distortions to trade. There are a number of U.S. government agencies that will help U.S. companies achieve access to foreign markets, where those markets have barriers in the form of technical standards. In some instances, these barriers can be overcome simply through direct access to foreign government officials. In other instances, it may be necessary to employ the dispute settlement procedures that have been established under the WTO Agreement to challenge a standard that fails to comply with the provisions of the TBT Agreement.

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and exporting activities. We are experts in protecting domestic manufacturers against unfairly traded goods and

helping companies overcome barriers to entry in foreign markets.

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