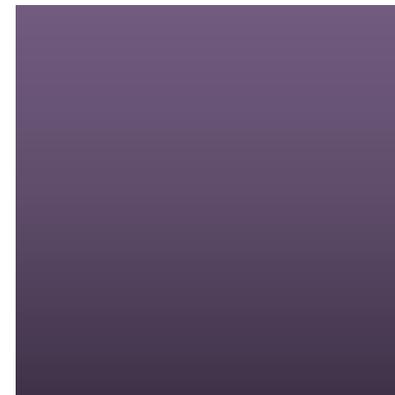
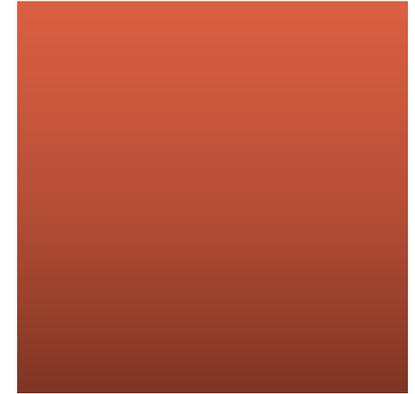
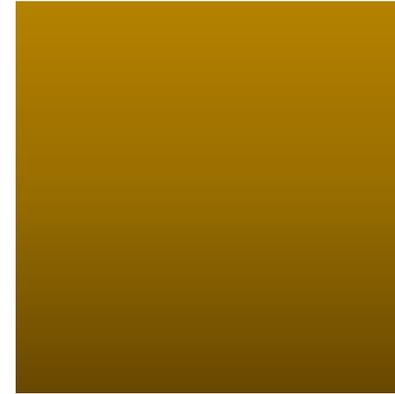




The Trump Administration's Impact on European Business



Christopher Swift, JD, PhD
European-U.S. Webinar Series
March 23, 2017



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Today's Presenter



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Relevant Experience

- Extensive experience defending international clients in U.S. Government investigations
- Served in the U.S. Treasury Department's Office of Foreign Assets Control ("OFAC")
- Named a "Recognized Practitioner" in International Trade by *Chambers USA* (2016)
- Adjunct Professor of National Security Studies at Georgetown University
- Former fellow at the University of Virginia Law School's Center for National Security Law

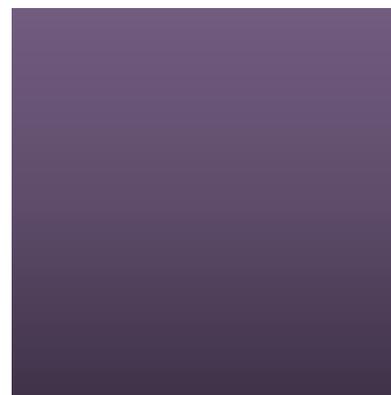
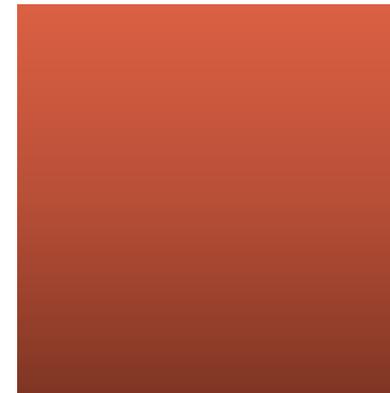
Overview



- **New Policies & Enforcement Trends**
- **Priority Enforcement Areas**
 - Export Controls (ITAR and EAR)
 - Economic Sanctions (OFAC)
 - Foreign Investment (CFIUS)
 - Searches, Seizures, and Surveillance
- **Risk Management Strategies**
- **Questions**



U.S. Government Enforcement Trends



Enforcement Trends



- **The Trump Administration's early actions indicate a paradigm shift to more protectionist policies.**
 - **Withdrawal from the Trans-Pacific Partnership (TPP)**
 - **Calls to Renegotiate NAFTA and other trade agreements.**
 - **Proposed imposition of a Border Adjustment Tax (BAT)**
 - **Aggressive Refugee & Immigration Enforcement**
 - **Concerns about Chinese imports and investments.**
 - **Deteriorating bilateral relationship with Mexico.**

Enforcement Trends



- **The Administration can leverage several national security and trade laws to support these goals.**
 - Economic Sanctions (OFAC)
 - Export Controls (ITAR and EAR)
 - Foreign Investment (CFIUS)
 - The USA PATRIOT Act.
 - The Foreign Intelligence Surveillance Act (FISA)

Enforcement Trends



- **These laws can restrain how and where U.S. and European companies do business.**
 - Technology transfers across international borders.
 - Relationship with suppliers and customers.
 - Investment from foreign investors.
 - Hiring and using foreign talent.
- **These laws evolve constantly in response to U.S. policies and global events.**

Enforcement Trends



- Existing U.S. laws also benefit from stronger national security enforcement tools.
 - Better coordination within the U.S. Government (especially between the DOJ and DHS)
 - Enhanced cooperation with foreign governments (though this is now weakening)
 - More focus on whistleblowers and False Claims Act (i.e., *qui tam*) actions
 - Expanded roles for the CIA and U.S. Intelligence Community.

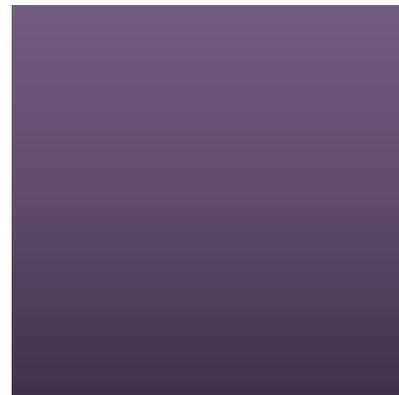
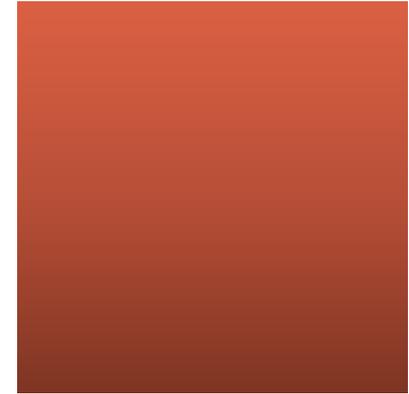
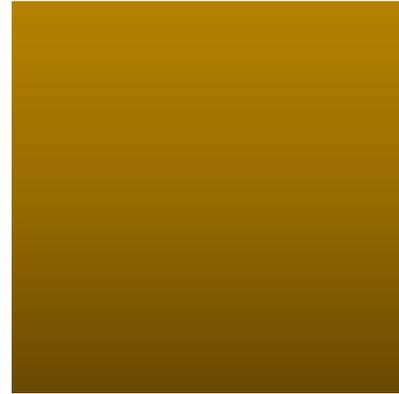
Enforcement Trends



- **Multinational companies can be uniquely vulnerable to these risks.**
 - U.S. laws cover most affiliates and joint ventures, including those incorporated and operating in foreign countries.
 - U.S. sanctions and export control violations often coincide with bribery, corruption, fraud, and other crimes.
 - Failure to address related enforcement risks can result in overlapping U.S. Government enforcement actions.
 - Companies can reduce costs and risks by adopting a comprehensive approach to these challenges.



Economic Sanctions



Economic Sanctions



- **Comprehensive Sanctions**
 - Prohibit most transactions with a particular country or territory, including persons residing there.
- **Regime-Based Sanctions**
 - Prohibit transactions with designated governments, officials, and the various entities they control.
- **List-Based Sanctions**
 - Target Terrorist Groups, Weapons Proliferators, Narcotics Syndicates, and other “Specially Designated Nationals.”
 - Similar to United Nations and European Union sanctions programs.

Economic Sanctions



- **Most sanctions programs prohibit:**
 - Engaging in commercial or financial transactions with designated countries, governments, entities, or persons
 - Making payments, entering into contracts, or holding any property in which a sanctioned person has an interest
 - Dealing with any company or entity that is at least 50 percent owned or controlled by sanctioned persons
- **The definition of “property” is very broad.**
 - Covers investments, real estate, goods, and funds
 - Includes contracts, agreements, insurance, etc.
 - Also includes Intellectual Property (IP).

Economic Sanctions



- **The U.S. Treasury Department's jurisdiction can reach entities and individuals overseas:**
 - All U.S. Citizens and Legal Permanent Residents.
 - Any entities incorporated under U.S. law.
 - Any transactions that implicate U.S. territory.
 - Exporting U.S.-origin goods, services, or technology (including to foreign subsidiaries affiliates).
 - Using the U.S. financial system, whether directly or indirectly.

Economic Sanctions

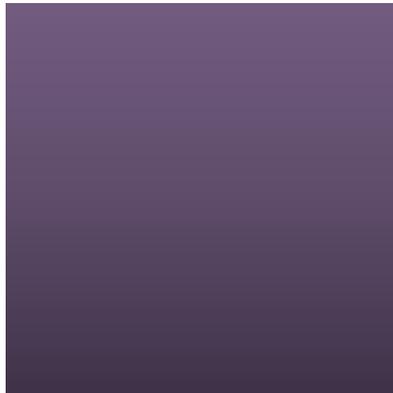
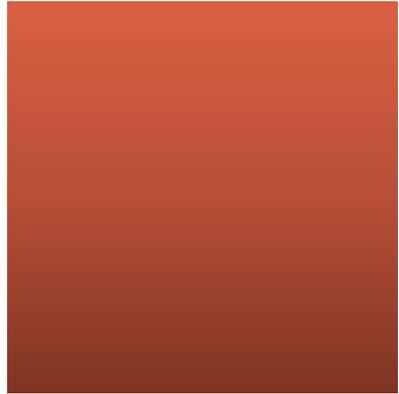
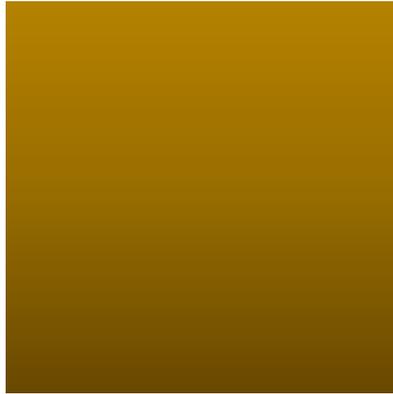


- Assume that any U.S.-related activities are covered.
 - Any meaningful jurisdictional nexus with the United States or U.S. persons is sufficient
 - Backroom support and shared services provided in the United States may constitute “facilitation”
 - Cloud-based computing in the United States and U.S. dollar transactions also pose risks
 - Foreign nationality and/or incorporation is not a protection if U.S. jurisdiction exists.
 - Structuring transactions to avoid U.S. jurisdiction can lead to conspiracy and evasion charges.

Economic Sanctions



- **Red Light (Stop)**
 - Crimea, Cuba, Iran, North Korea, Sudan, Syria
 - SDNs or other entities appearing on U.S., EU, UK, UN, and other denied party lists
 - Evidence of potential export diversion
 - Other “red flags”
- **Yellow Light (Caution)**
 - Belarus, Burkina Faso, Central African Republic, Colombia, Congo, Iraq, Ivory Coast, Lebanon, Liberia, Libya, Russia, Somalia, Ukraine, Yemen, Zimbabwe
 - Other countries known for crime, narcotics, terrorism, or weapons proliferation
- **Green Light (Go carefully)**
 - Most other countries (after screening against the U.S. EU, UK, and UN denied party lists)
 - Most domestic U.S. transactions
 - Pre-screened customers



Export Controls



- **Govern all U.S.-origin products, services, technology, and data (including IP)**
 - U.S. jurisdiction follows the U.S.-origin items wherever they go, not just the specific companies or parties.
 - Items “controlled” for country cannot be exported to that country without U.S. Government authorization.
 - Similar rules cover exports to Controlled Parties or for Controlled Uses (i.e., end-users and end-uses).
 - Even exports to “friendly” countries may require licenses depending on the technology involved.

Export Controls



- The same requirements govern “electronic” exports of software, technology, and technical data.
 - Includes items sent by e-mail, and FTP, as well as items available on company servers or via the Cloud.
 - The term “technical data” includes blueprints, computer code, designs, diagrams, instruction manuals, repair manuals, and many other items.
 - If a product is controlled, then the related software, technology, and technical data is usually subject to equal or even stronger controls.

Export Controls



- **Disclosing controlled items to European nationals located in the United States is also an “export.”**
 - The “Deemed Export Rule” prohibits disclosures to foreign employees, customers, or visitors in the United States.
 - If an item is controlled for a foreign national’s home country, it is also controlled for that individual.
 - Failure to screen foreign nationals from projects involved controlled articles can lead to fines and prosecution.
 - Dual U.S. Citizens and Legal Permanent Residents are exempt. H1B, F-1, and other visa holders are not.

Export Controls



- **International Traffic in Arms Regulations (ITAR)**
 - Controls “defense articles” on the U.S. Munitions List (USML) and items “specially designed” for military use
 - Covers “defense services,” including designing, developing, repairing, servicing, or using defense articles
 - Also governs “technical data” and items “specially designed” for military purposes.
 - Products, services, and data governed by the ITAR are controlled for all foreign countries uniformly.
 - ITAR-controlled items cannot be exported or shared without U.S. State Department authorization.

Export Controls



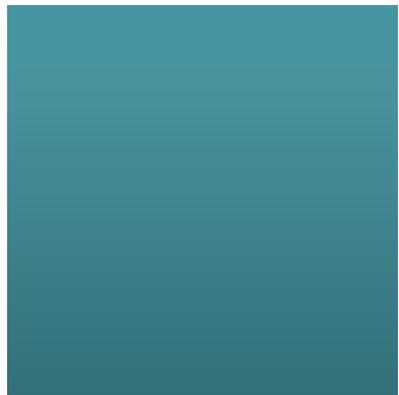
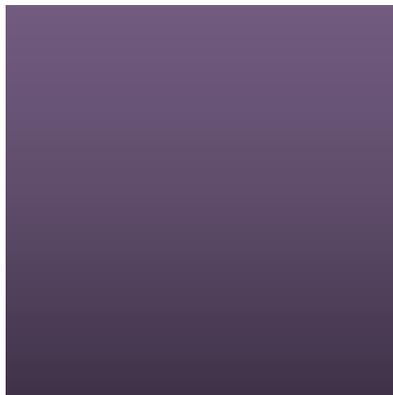
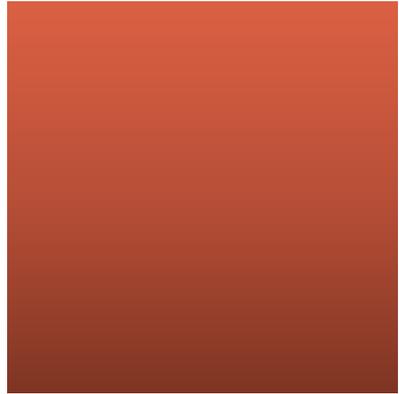
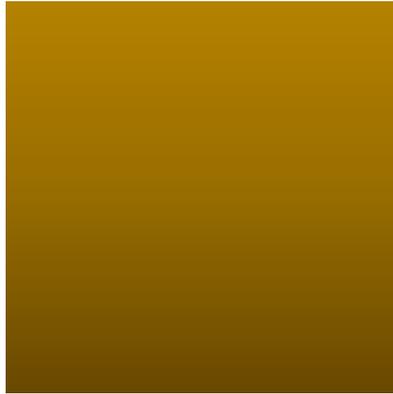
- **Export Administration Regulations (EAR)**
 - Controls “dual-use” commercial items that can be modified for military use or other harmful purposes
 - Covers most U.S.-origin commercial products, software, technology, and technical data.
- **Controls under the EAR depend on four factors:**
 - What is the item?
 - Where is it going?
 - Who will use it?
 - How will it be used?

Export Controls

Issue	Iran	Cuba	Russia	Burma
Territorial Sanctions	Yes	Yes	Some	<i>Suspended</i>
Regime-Based Sanctions	Yes	Yes	Some	<i>Suspended</i>
Sector-Based Sanctions	Yes	No	Yes	No
List-Based Sanctions	Yes	Yes	Yes	Yes
Extraterritorial Sanctions	<i>Suspended</i>	Yes	No	No
Restrictions on U.S. Dollar Transactions	Yes	No	No	<i>Suspended</i>
ITAR Restrictions & Arms Embargos	Yes	Yes	Yes	Yes
EAR Dual-Use Controls	Yes	Yes	Yes	Yes
Restrictions on U.S. Export Licensing	Yes	Yes	Yes	Some
Import Bans	Yes	Some	No	Some
Travel Bans	Yes	No	Yes	No



Foreign Direct Investment



Foreign Investment



- **European investors in U.S. companies could become subject to more National Security reviews:**
 - The Committee on Foreign Investment in the United States (“CFIUS”) coordinates **16 U.S. Government agencies.**
 - Reviews involve independent due diligence by the ODNI, CIA, FBI, DIA, and other intelligence agencies.
 - CFIUS has the power to block foreign investments and unwind transactions that undermine national security.
 - This authority has been exercised twice in the last 35 years, most recently by the Obama administration.

Foreign Investment



- **CFIUS weighs the commercial benefits and security risks associated with foreign investment.**
 - **Export Controls & Economic Sanctions.**
 - **Classified Information and Projects.**
 - **U.S. Government Contracts.**
 - **Foreign Policy Implications.**
 - **Technology Transfer Risks.**
 - **Economic Impact.**

Foreign Investment

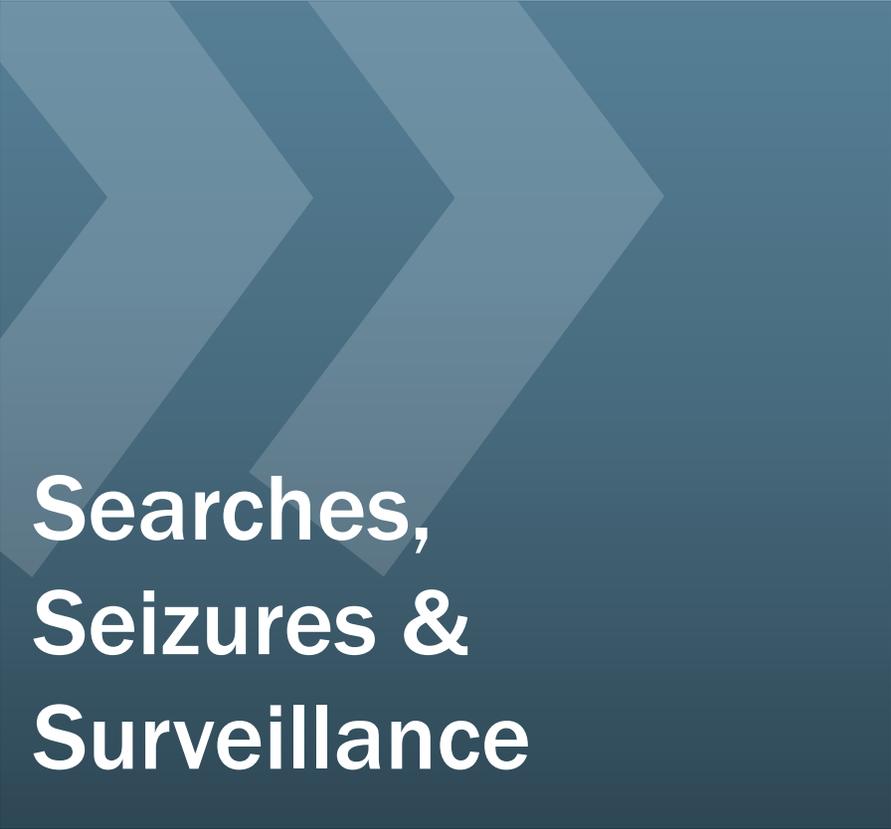


- **CFIUS review is a “voluntary” process.**
 - Most foreign investments do not involve a CFIUS review because they do not implicate national security.
 - Many parties file CFIUS notices to protect their investment from future government scrutiny.
 - CFIUS approves most foreign acquisitions, though it may impose certain conditions required by U.S. laws:
 - Limiting the control and oversight exercised by foreign owners
 - Baring foreign investors from certain products and projects.
 - Imposing proxy boards managed by U.S. citizens.

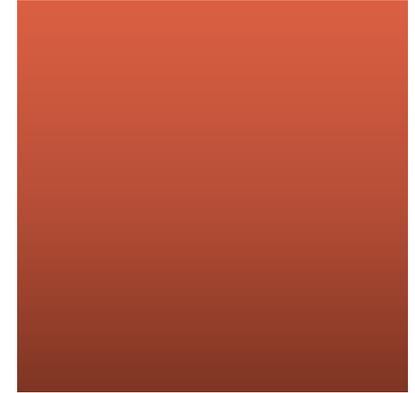
Foreign Investment



- **CFIUS review is appropriate in mergers, acquisitions, and investment with “strategic” implications.**
 - Aerospace & Defense, including defense contractors and their third-party suppliers.
 - “Sole Source” suppliers to the U.S. Department of Defense and other government agencies.
 - Certain Biotechnology and High-Technologies companies, especially those with U.S. Government grants.
 - Electricity, Water, Transportation, and other “Critical Infrastructure” companies.



Searches, Seizures & Surveillance



Searches, Seizures & Surveillance



- **Foreign Intelligence Surveillance Act (FISA)**
 - FBI and NSA must obtain warrants whenever the 4th Amendment applies to national security cases.
 - Counter-Intelligence
 - Counter-Terrorism
 - Warrants issued by the Foreign Intelligence Surveillance Court (FISC) are binding on those receiving them.
 - This is just like any other warrant or court order issued in the United States, United Kingdom Britain, the European Union.
 - The FBI will expect and demand immediate cooperation, but may not identify the nature or scope of the FISC warrant.

Searches, Seizures & Surveillance



- **USA PATRIOT Act**

- Enhances Anti-Money Laundering (“AML”) laws to focus on criminal and territories financial networks.
- Created Geographical Targeting Orders (“GTOs”) for financial information that are similar to a subpoena.
- § 215 authorized the FISC to issue Warrants for “business records” to assist in counter-terrorism operations.
 - Includes phone, e-mail account, and other files (including metadata) that could contain customers’ personal information.
 - Like warrants issued under FISA, the FBI may not reveal the full nature or scope of a § 215 warrant.

Searches, Seizures & Surveillance



- **Other International Surveillance Tools**

- **Executive Order 12,333**

- Authorizes collection on foreign sources without the need for a FISC Warrant or other court order.
 - U.S. party participation in those communications is usually “minimized,” but not always.

- **Federal Warrants & Grand Jury Subpoenas**

- Binding orders may require European companies to the FBI and other agencies with confidential business information.
 - This was the basis for Apple Computer’s dispute with the FBI in the San Bernardino terrorism investigation.

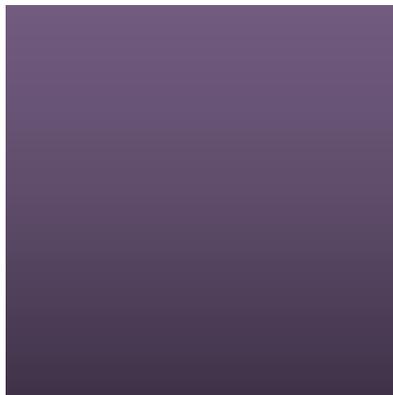
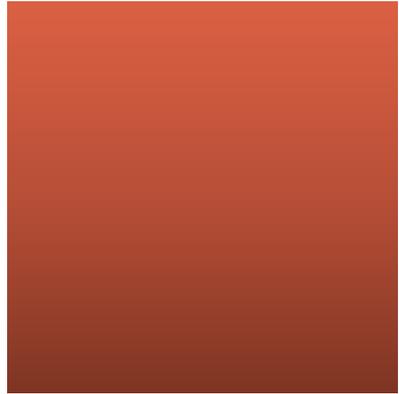
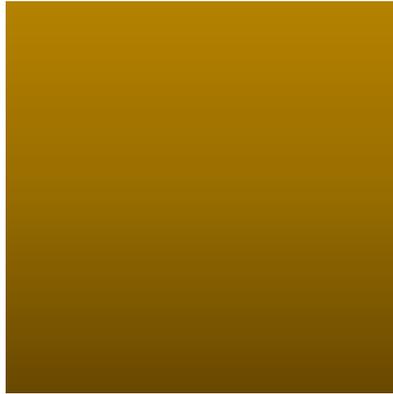
Searches, Seizures & Surveillance



- **Complying with U.S. Court Orders can create legal and reputational risks for European companies.**
 - U.S. enforcement agencies may inadvertently (and sometimes deliberately) overreach their authority.
 - European parent companies seldom understand these laws and may not respond carefully.
 - Customers may see compliance an invasion of privacy, especially after the WikiLeaks and Snowden cases.
 - When in doubt, get help.



Enterprise Risk Management



Enterprise Risk Management



- **Recent trends in U.S. Policy require European companies to take a proactive approach:**
 - U.S. Government agencies view these so-called “regulatory” issues through a National Security lens.
 - The issues impact your supply chain, your employees, your investments, and your customer base.
 - The Trump administration has broad discretion in all of these areas, plus strong Congressional support.
 - Media reports tend to sensationalize or misinterpret these issues. Follow the law, not the headlines.

Enterprise Risk Management



- **The same trends also underscore the case for effective risk management:**
 - Help protects the company from civil and criminal liability.
 - Can also help protect officers and directors from civil and criminal liability (Yates Memorandum).
 - Reduces the time, cost, and aggravation associated with government enforcement actions.
 - Assures other customers, partners, and suppliers that may face similar challenges and requirements.

Enterprise Risk Management



- The “strategic approach” to compliance with these U.S. laws has five core elements:
 - Secure senior leadership support. Risk management requires management leadership.
 - Conduct a global risk assessment. Different companies face different challenges in different areas.
 - Leverage existing company resources. This saves costs and accelerates implementation.
 - Develop policies and procedures that make sense for your business. One size does not fit all.



Questions & Answers

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