

## Seagate's Attys On The New Era Of Harsher Export Controls

By Jennifer Doherty

*Law360 (September 22, 2023, 5:05 PM EDT)* -- Seagate Technology LLC's record-breaking \$300 million settlement with the U.S. Department of Commerce should serve as a warning to companies operating in China: minimize exposure now or face a darkening enforcement landscape, the company's attorneys told Law360.

Covington & Burling LLP partners Peter Lichtenbaum and Eric Sandberg-Zakian shepherded Seagate to a deal with the agency in April after Commerce's Bureau of Industry and Security determined that the company and its Singapore-based affiliate violated the foreign direct product rule when it sold millions of hard disk drives to Chinese technology giant Huawei.

As Seagate prepares to make its first \$15 million payment to the government next month under the settlement, Lichtenbaum and Sandberg-Zakian spoke with Law360 about the federal government's increasingly aggressive approach to export controls, how companies are adapting and how Seagate's case marked a sea change in enforcement activity. This interview has been edited for length and clarity.

### What lessons should the export community take from your experience on the Seagate deal?

**Lichtenbaum:** This was the largest civil-only settlement amount by many times over, despite the fact that there were a number of mitigating factors present, including [that] Commerce did not allege any knowingly violative conduct, Seagate had not previously violated the [Export Administration Regulations], Seagate publicly explained its ongoing sales to Huawei at the time it was making those sales, and Seagate carefully analyzed the rules and Commerce guidance available at the time and applied those rules and guidance to its business in good faith.

In addition, the legal theory Commerce relied on to assert violations in the case was surprising to industry and to the lawyers who had been carefully analyzing Commerce's guidance. The case therefore shows that Commerce is serious about ramping up penalties, and will do so even if they have to apply legal theories that may be surprising to the bar and industry.

### Where do you see the biggest changes in export controls enforcement taking place right now, and where are the biggest risks for companies?



Peter Lichtenbaum



Eric Sandberg-Zakian

**Sandberg-Zakian:** For a long time, the DOJ and the primary regulators have been promising an increase in enforcement. That increase was halting and gradual for much of the last 10 years, but there has been an explosion of criminal and civil cases in the last two years. This has been driven by anti-China consensus from left to right and across policy wonks and politicians; reactions to Russia's invasion of Ukraine; and individual enforcement officials taking aggressive stances. Our clients are increasingly receiving criminal and civil subpoenas, and are also facing more risk as penalty amounts increase, nonmonetary settlement provisions get more burdensome and enforcement officials get less sympathetic.

In addition, we are seeing a particular focus on the question of why U.S. companies are doing business in China at all. This question is not fair or reasonable in light of how the export control laws are structured, but it is being asked more and more. We are seeing enforcers scrutinize companies for taking good-faith, reasonable positions that could be construed as unpatriotic or against the spirit of the law. This is a highly skeptical, uncharitable enforcement environment.

**How are you encouraging your clients to address that question — "Why do business in China at all?" — now that it's out there?**

**Lichtenbaum:** We see major companies' senior levels reflecting hard on how to balance competing considerations relating to China. I think companies are trying to de-risk over time. It's not something that can happen overnight because of the role China has come to play in the global economy, particularly in the high-technology manufacturing space. But I see clients taking very seriously the national security concerns, which changed the business risk calculation. We see clients seeking to move operations out of China that could be sensitive, whether now or in the foreseeable future. But it's not an easy task. So there's a transition period in which companies are trying to do the best they can to navigate both maintaining their business and honoring national security.

**Can you expand on the recent increase in criminal subpoenas related to export controls?**

**Sandberg-Zakian:** We've seen it civilly at the Commerce Department with changes in Commerce policy that they've announced to be much more aggressive — to investigate more, send more subpoenas, hire former prosecutors for their chief counsel's office and conduct more investigations.

On the criminal side, the increase has been even more dramatic, in part because they were starting from a less active posture. We've seen almost 10 times the number of investigations started by criminal grand jury subpoenas in this area as what we were seeing maybe five years ago. The deputy attorney general's office has said this should be vaulting up the corporate compliance risk chart. The deputy attorney general herself said this area is the "new [Foreign Corrupt Practices Act]."

We've also seen U.S. attorney's offices around the country get much more active, whereas this was really traditionally a Main Justice practice area. We are handling cases all over the country now. So that's very new.

**Who are the growing ranks of export compliance prosecutors focused on?**

**Sandberg-Zakian:** Some of those investigations seem to be targeted at non-U.S. parties who are attempting to procure items from U.S. companies and divert them to China and Russia. But we're also seeing a lot of investigations where major U.S. or European companies are themselves the subjects of the investigation. We're seeing that being motivated by a very strong foreign policy and national

security interest in restricting flows of technology to China and in trying to impact activity on the battlefield in Ukraine and by very broad political consensus with respect to anti-China action. As we all know, there's not a lot of political consensus in the country right now, but it seems to be the one area where folks on the right and folks on the left all agree that trade controls cases against China are a high priority.

**Lichtenbaum:** On the China piece, the role of Congress is also significant in that Congress is doing very active oversight and pushing the administration to continuously do more. We have seen that play out in large cases that we've handled where there are sort of subtle references by the executive branch enforcement folks to the fact that whatever they do here is going to need to withstand congressional oversight.

### **How does working with U.S. attorneys who haven't traditionally handled export compliance cases affect the company's side of an investigation?**

**Sandberg-Zakian:** The National Security Division at Main Justice is where much of the expertise in this area lies. But that's a very busy division with a lot of different priorities, so the U.S. attorney's offices represent a very large force multiplier.

There is one U.S. attorney's office in particular that I can think of that does not have a history of bringing corporate export controls cases. It is now open to major export controls investigations that we are handling, and they may well have others too. So it means the geographic reach of these cases can expand. The U.S. attorney's offices have their own prosecutorial cultures and their own investigatory cultures, and so it expands the variety in the way the cases are approached.

You have prosecutors who perhaps have not brought these kinds of cases before who are very much in the mix. It's not surprising that we're seeing that expansion, because the Biden administration has said this is a very high priority. So disperse prosecutors around the country who are looking for cases that will meet the executive branch agenda and goals are naturally being drawn to these cases and looking for opportunities to pursue them.

--Editing by Alanna Weissman.