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Export Control Considerations for Business With, and Within, the United States



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What is Different about Doing Business in the U.S. And with U.S. Companies?

U.S. Export Control Law Issues

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What are Export Controls?

- Regulations that control distribution of certain exports to foreign nationals and foreign countries
- One who “exports” from the U.S. often needs a license
- Licenses are usually, readily available, *but not always*.



Why?

- Protect National Security & US foreign obligations
- Combat Terrorism
- Prevent spread of weapons of mass destruction (nuclear, chemical, biological, missiles, etc.)



Why Do We and Our Clients Care?

- Penalties for EAR Violations
- **Criminal:**
 - Up to **\$1 million** for the company/institution
 - Up to **\$250K** for *each* violation for **individuals** and/or up to 10 years in prison
- **Civil:**
 - Up to **\$12k** for *each* violation for **individuals** and the institutions/companies.



Why Do We and Our Clients Care?

- **Penalties for ITAR Violations**
- **Criminal:**
 - Up to **\$1 million** for the institution or company
 - Up to **\$1 million** for *each* violation for **individuals** and/or up to **10 years in prison**
- **Civil:**
 - Up to **\$500k** for *each* violation for **individuals** and the institution or company



Why Do We and Our Clients Care?

- **Penalties for OFAC violations**
- **Criminal:**
 - Fine of no more than **\$1 million** for companies
 - Fine of no more than **\$100k** for **individuals** (including corporate officers) and/or **10 years imprisonment**
- **Civil penalties:**
 - Fine up to **\$55k** for *each* violation by any person





What is an “Export”?

MORE than you probably think!

- **Transfer of Controlled:**
 - Technology Software
 - Information Source Code
 - Equipment Services (ITAR)
- **To:**
 - A non-U.S. entity or individual, **wherever located**
 - Anyone outside the U.S., including U.S. citizens
- **By Any Means:**
 - Actual shipment outside the US
 - Visual inspection in or outside the US
 - FAX – PHONE – EMAIL – FACE to FACE
 - Tours of labs
 - Training sessions
 - Computer data




What is a “Deemed” Export?

- The transfer, release or disclosure of Technical Data or Technology to someone not a “**NON-US Person**” within the United States.
- A transfer is the same as exporting it to the home country of foreign national.
- **A BIG PROBLEM FOR EMPLOYERS OF FOREIGN NATIONALS!**



Who are U.S. Persons?

- U.S. citizens
- Non-U.S. Citizens who are “Lawful **Permanent Residents**” (Green Card holders)
- Other “Protected Individuals”
 - designated an asylee or refugee
 - a temporary resident under amnesty provision
 - Any entity incorporated to do business in the U.S.
- Everyone and every entity otherwise is a “non-US person”



Who are “Non-US Persons” (or “Foreign Nationals” under EAR)?

Everyone but “US Persons”, plus:

- Any foreign interest or any US Person ***effectively owned or controlled by a foreign interest***
 - Includes foreign businesses not incorporated in the U.S., persons representing other Foreign Persons, any foreign government
 - Includes: H1B Work Visa, F1 Study Visa, J1 Training Visa, E1 Investors Visa, TN Work Visa, L1 Intra-Company Transfer Visa, K and V Fiancée Visas



“EARs” (Export Administration Regulations) – Dept. of Commerce, Bureau of Industry Security

Export Administration Regulations (EAR)
(15 CFR §§734-774)

- The Commerce Control List (CCL) covers **commodities, technology & software** identified by an Export Control Classification Number (ECCN).
- Goods and Services having a “**dual use**” (commercial with military application)



EAR – Commerce Control List Categories

- Category 0 - Nuclear Materials, Facilities & Equipment (and Miscellaneous Items)
- Category 1 - Materials, Chemicals, Microorganisms, and Toxins
- Category 2 - Materials Processing
- Category 3 – Electronics
- Category 4 – Computers
- Category 5 (Part 1) – Telecommunications
- Category 5 (Part 2) - Information Security
- Category 6 - Sensors and Lasers
- Category 7 - Navigation and Avionics
- Category 8 – Marine
- Category 9 - Propulsion Systems, Space Vehicles and Related Equipment



“ITAR” (International Traffic in Arms Regulations) – State Dept.

International Traffic in Arms Regulations (ITAR) 22 CFR Parts 120-130

- US Munitions List (USML) covers **military articles, services and related technical data**
- Prior Authorization required for:
 - Sending or taking out of U.S. in any manner
 - Disclosing (including oral or visual disclosure)
 - Transferring to foreign person, whether in U.S. or abroad.
 - Performing a defense service on behalf of, or for the benefit of, a foreign person, whether in the U.S. or abroad.

Certain information may be controlled even if in public domain – Defense Services.



ITAR Munitions List

- I – Firearms, Close Assault Weapons and Combat Shotguns
- II – Guns and Armament
- III – Ammunition/Ordnance
- IV – Launch Vehicles, Guided & Ballistic Missiles, Rockets, Torpedoes, Bombs and Mines
- V – Explosives & Energetic Materials, Propellants, Incendiary Agents
- VI – Vehicles of War & Special Naval Equipment
- VII – Tanks and Military Vehicles
- VIII – Aircraft and Associated Equipment
- IX – Military Training Equipment and Training
- X- Protective Personnel Equipment and Shelters



ITAR Munitions List

- XI – Military Electronics
- XII – Fire Control, Range Finder, Optical and Guidance & Control Equip.
- XIII – Auxiliary Military Equipment
- XIV – Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment
- XV – SPACECRAFT SYSTEMS AND ASSOCIATED EQUIPMENT
- XVI – Nuclear Weapons, Design and Testing Related Items
- XVII – Classified Articles, Technical Data and Defense Services
- XVIII - Direct Energy Weapons



OFAC (“Office of Foreign Asset Control – Dept. of the Treasury)

The Office of Foreign Assets Control (OFAC)
31 CFR 500-599

Based on US foreign policy and national security goals. They cover economic and trade sanctions against targeted foreign countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction.



Scope of OFAC:

- OFAC license required for services to or from:
 - Countries, entities, or individuals
- Linked to Sanctions and Embargos
- **May apply when ITAR & EAR do not**
 - Multiple lists must be checked (applies to entities and individuals even if their country is not listed)
 - Covers some activities (i.e. proliferation of WMD or diamond trading)
- Restrictions vary by country



OFAC

- Prohibits:
 - Travel to embargoed countries
 - (Balkans, Burma, Cote d' Ivoire, Cuba, DRC, Iran, Iraq, Liberia, Lebanon, Libya, North Korea, Somalia, Sudan, Syria, and Zimbabwe)
 - Sanctions against Countries, Entities, Individuals
 - Research, field-work, or instruction
 - Surveys or interviews
 - Trade – Importing merchandise
 - Furnishing anything of value (i.e. materials, payments, services, honoraria, training)
 - Collaborating, presenting or training



EAR & ITAR Additional End User Controls/ Prohibitions

- **Separate** from ITAR & EAR listed products or services - prohibit exports to, or export collaborations with, certain designated entities or countries identified as export violators both in and outside the U.S.
- May apply though no license is required under EAR or ITAR in general, but you need to also check their lists to determine if more stringent restrictions apply to the entity or country
 - Don't be fooled by their "Academic" names (Beijing University, SW Institute of Env Testing, Chinese Academy of Engineering Physics).



“Black Lists”

- Denied Persons List (BIS)
- Unverified List (BIS)
- Entity List (BIS)
- Specially Designated Nationals List (OFAC)
- Debarred List (DDTC)
- Nonproliferation Sanctions (DDTC)



Types of Exclusions and Exemptions

Exclusion – Outside the regulations, not subject to the regulations

Exemption - License not required for item or activity as defined within the regulations

- Public Domain Exclusion (ITAR, EAR, OFAC)
- Fundamental Research Exclusion (ITAR, EAR)
- Education Exclusion (ITAR, EAR)
- License Exception TMP (Temporary Exports)
- Full-Time Employee Exemption (ITAR)

Must be used correctly; failure may result in an export control violation



PARTIAL List of Areas of Concern

Export of any product or service

Entertaining non-U.S. Business associates and guests and disclosing potentially controlled technology

Non-us persons as employees (anywhere) – **I 129 due diligence**

What happens after your export?



PARTIAL List of Areas of Concern (cont.)

Lack of procedures and policies for export control compliance

Failure to self-report

Ignorance of “red flags”

Controlled technology in benign context (toilet brush example)



PARTIAL List of Areas of Concern (cont.)

TRAVEL

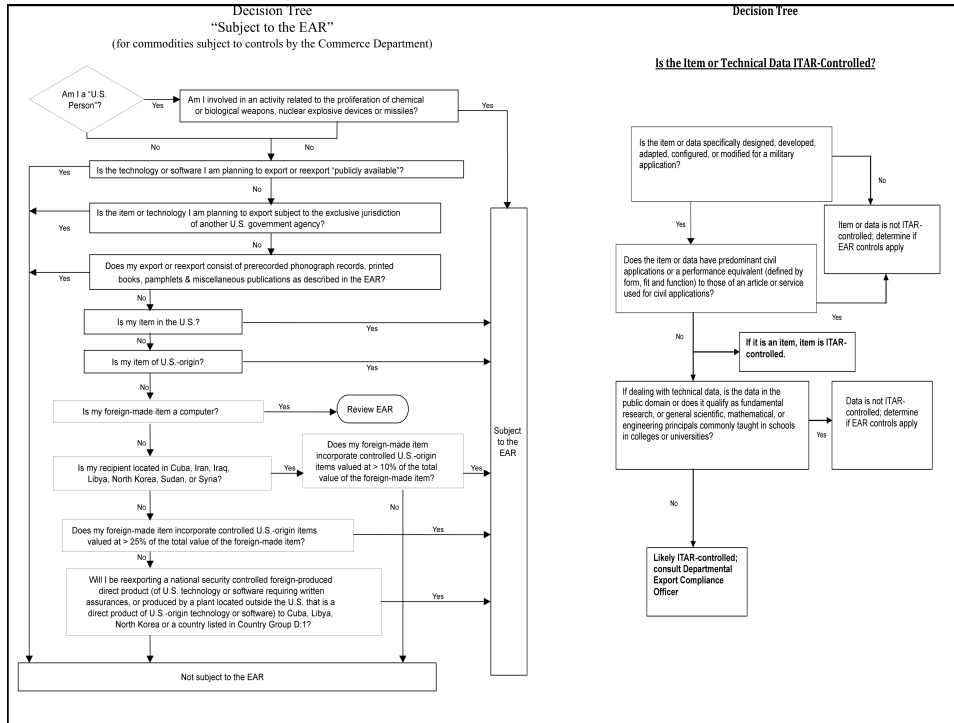
- Travel to embargoed countries
 - (Balkans, Burma, Cote d' Ivoire, Cuba, Dem. Rep of Congo, Iran, Iraq, Liberia, Lebanon, Libya, North Korea, Somalia, Sudan, Syria, and Zimbabwe)

- Taking equipment (laptops, etc.), out of the country may require a license for equipment or controlled technology loaded on equipment



How does Compliance appear?





CATEGORY 2 - MATERIALS PROCESSING

Note: For quiet running bearings, see the U.S. Munitions List.

A. "END ITEMS," "EQUIPMENT," "ACCESSORIES," "ATTACHMENTS," "PARTS," "COMPONENTS," AND "SYSTEMS"

2A001 Anti-friction bearings and bearing systems, as follows, (see List of Items Controlled) and "components" therefor.

License Requirements

Reason for Control: NS, MT, AT

Control(s) Country Chart (See Supp. No. 1 to part 738).

NS applies to entire entry NS Column 2

MT applies to radial ball bearings having all MT Column 1

Commerce Control List Overview and the Country Chart Supplement No. 1 to Part 738—page 1

Commerce Country Chart

Reason for Control

Countries	Chemical & Biological Weapons			Nuclear Nonproliferation		National Security		Missile Tech	Regional Stability		Firearms Convention	Crime Control			Anti-Terrorism	
	CB 1	CB 2	CB 3	NP 1	NP 2	NS 1	NS 2	MT 1	RS 1	RS 2	FC 1	CC 1	CC 2	CC 3	AT 1	AT 2
	Alghanistan	X	X	X	X		X	X	X	X	X		X		X	
Albania	X	X		X		X	X	X	X	X		X	X			
Algeria	X	X		X		X	X	X	X	X		X		X		
Andorra	X	X		X		X	X	X	X	X		X		X		
Angola ¹	X	X		X		X	X	X	X	X		X		X		
Antigua & Barbuda	X	X		X		X	X	X	X	X	X	X		X		
Argentina	X					X	X	X	X	X	X	X		X		
Armenia	X	X	X	X		X	X	X	X	X		X	X			
Australia	X					X		X	X							
Austria	X					X		X	X	X		X		X		
Azerbaijan	X	X	X	X		X	X	X	X	X		X	X			
Bahamas, The	X	X		X		X	X	X	X	X	X	X		X		
Bahrain	X	X	X	X		X	X	X	X	X		X		X		

So.....

Get help! (Legal and non-legal consultants / audits)

In-house export control personnel, written policies/ procedures and frequent training.

Obtain license(s) if possible and needed?

Exemptions?

General prohibitions?

Check all export control schemes!

Where to find more self-help info?

- ITAR:
<http://www.pmdtc.org/reference.htm>
- EAR: http://www.access.gpo.gov/bis/ear/ear_data.htm.
- OFAC: <http://www.treas.gov/offices/enforcement/ofac>



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