Export Transactions: What You Need to Know

Presented by

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for New Jersey Economic Development Authority
Penalties for Violating U.S. Trade Laws Are Significant!
Which U.S. Laws & Government Departments Regulate Trade?
Three Main Export Control Regulators

- **U.S. Department of the Treasury**
  - Office of Foreign Assets Control (“OFAC”)

- **U.S. Department of State**
  - Directorate of Defense Trade Controls (“DDTC”)

- **U.S. Department of Commerce**
  - Bureau of Industry and Security (“BIS”)
  - Bureau of the Census (“Census”)


U.S. Trade Laws Affect:

- Imports and exports
- Military production & sales
- Commercial production & sales
- Technology exchanges & transfers
  - Product demonstrations, test results, specs, manuals, etc.
- Financial transactions
- Domestic & international operations
  - Including foreign travel
- Joint venture operations
- Relationships with customers, distributors, & agents
EXPORT CONTROLS

- Two separate regimes administered by two separate agencies:
  - BIS
  - DDTC
- But first ……
  - What *is* an export anyway?
An “Export” Is:

- Sending or taking an item or defense article out of the United States
- Delivery of a defense article to a foreign government in the United States
- Releasing or disclosing technology or technical data to foreign persons whether in the United States or abroad
  - Sometimes referred to as a “deemed export”
  - Includes providing technical assistance
- Performing a defense service on behalf of, or for the benefit of a foreign person, whether in the United States or abroad
“Deemed Exports”

Any release of technology or technical data to a foreign national anywhere in the world (including in the United States) is an export!

- For BIS purposes, country of latest citizenship or permanent residence governs
- For DDTC purposes, all countries of citizenship or permanent residence must be considered

Foreign nationals do not include:

- Permanent residents of the United States (i.e., “green card” holders)
- U.S. citizens who are “dual citizens” of another country (e.g., U.S./U.K.)
- Certain categories of asylum seekers
“Deemed Exports” (cont’d)

- Release occurs when technology or technical data is:
  - Made available for visual inspection – blueprints, specs, manuals, etc.
  - Exchanged orally or in writing (including by fax or e-mail); or
  - Made available by practice or application (e.g., while performing services)

- Export reform initiative will address the deemed export issue
Defense Security & Export Controls

- Technology or technical data may be export-controlled even if it isn’t classified!
  - Additional rules apply to release of classified information
- Other contract specific “no foreign” restrictions may be imposed by the Department of Defense or other U.S. Government customers
Defense Trade Controls

- DDTC administers:
  - Export Control Act ("AECA")
  - International Traffic in Arms Regulations ("ITAR")

- Regulate the manufacture and export of defense articles, services and technical data
Exclusive Jurisdiction of DDTC

- “Commodity Jurisdiction Determinations” – DDTC decides which agency has jurisdiction over exports of particular products
- “Defense Articles” – i.e., articles listed on the U.S. Munitions List (“USML”) (including models, mockups or other items that reveal Technical Data)
- “Technical Data” – directly related to Defense Articles
- “Defense Services” – furnishing of Technical Data and assistance related to defense articles to foreign persons
Defense Articles

- All articles listed on the USML
  - 21 categories
- Defense articles include any specifically designed or modified components for defense articles on the USML, as well as related technical data
USML

- ITAR §121.1
- Covers 21 categories
  - Category I-Firearms
  - Category II-Artillery Projectors
  - Category III-Ammunition
  - Category IV-Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs and Mines
  - Category V-Explosives, Propellants, Incendiary Agents, and Their Constituents
  - Category VI-Vessels of War and Special Naval Equipment
  - Category VII-Tanks and Military Vehicles
  - Category VIII-Aircraft, [Spacecraft] and Associated Equipment
  - Category IX-Military Training Equipment
  - Category X-Protective Personnel Equipment
USML (cont’d)

- Category XI-Military [and Space] Electronics
- Category XII-Fire Control, Range Finder, Optical and Guidance and Control Equipment
- Category XIII-Auxiliary Military Equipment
- Category XIV-Toxicological Agents and Equipment and Radiological Equipment
- Category XV-Spacecraft Systems and Associated Equipment
- Category XVI-Nuclear Weapons Design and Test Equipment
- Category XVII-Classified Articles, Technical Data and Defense Services Not Otherwise Enumerated
- Category XVIII-[Reserved]
- Category XIX-[Reserved]
- Category XX-Submersible Vessels, Oceanographic and Associated Equipment
- Category XXI-Miscellaneous Articles

➢ Note: defense articles on the USML denoted with an asterisk (*) are considered Significant Military Equipment (i.e., articles for which special controls are warranted because of their capacity for substantial military utility or capability)
Technical Data

- Licenses must be obtained prior to export unless an exemption is available.
- Technical data is export controlled and must not be emailed (unencrypted).
- It should be marked with an export control statement.
- Technical data should be protected from unauthorized access.
Technical Data

- (1) Information, other than software as defined in §120.10(a)(4), which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation.
- (2) Classified information relating to defense articles and defense services;
- (3) Information covered by an invention secrecy order;
- (4) Software as defined in §121.8(f) of this subchapter directly related to defense articles;
- (5) This definition does not include information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or information in the public domain as defined in §120.11. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.
Public Domain

- (a) **Public domain** means information which is published and which is generally accessible or available to the public:
  - (1) Through sales at newsstands and bookstores;
  - (2) Through subscriptions which are available without restriction to any individual who desires to obtain or purchase the published information;
  - (3) Through second class mailing privileges granted by the U.S. Government;
  - (4) At libraries open to the public or from which the public can obtain documents;
  - (5) Through patents available at any patent office;
  - (6) Through unlimited distribution at a conference, meeting, seminar, trade show or exhibition, generally accessible to the public, in the United States;
  - (7) Through public release (i.e., unlimited distribution) in any form (e.g., not necessarily in published form) after approval by the cognizant U.S. government department or agency (see also §125.4(b)(13) of this subchapter);
Public Domain
(cont’d)

- (8) Through fundamental research in science and engineering at accredited institutions of higher learning in the U.S. where the resulting information is ordinarily published and shared broadly in the scientific community. Fundamental research is defined to mean basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community, as distinguished from research the results of which are restricted for proprietary reasons or specific U.S. Government access and dissemination controls. University research will not be considered fundamental research if:
  - (i) The University or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity, or
  - (ii) The research is funded by the U.S. Government and specific access and dissemination controls protecting information resulting from the research are applicable.
Defense Services

- Must be pre-authorized by DDTC
- Defense services consist of:
  - (1) The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;
  - (2) The furnishing to foreign persons of any technical data controlled under this subchapter (see §120.10), whether in the United States or abroad; or
  - (3) Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice. (See also §124.1.)
DDTC Registration Requirements: Manufacturers and Exporters

- Registration with DDTC is required for manufacturers, exporters and brokers of defense articles (including items on the U.S. Munitions List (“USML”)) & defense service providers
- Annual fee of $2250 or more depending upon level of licensing activity
- Many prime contractors now require certification of registration by subcontractors
- Changes in information contained on Statement of Registration must be reported promptly to DDTC (e.g., changes in company name, address, officers or directors, ownership, etc.)
DDTC Registration Requirements: Brokers

- Registration with DDTC is required for persons who engage in brokering activities related to defense articles or defense services.
- Registration requirement applies to both U.S. and foreign persons.
- “Brokering activities” means acting as an agent for others in negotiating contracts, purchases, sales or transfers of defense articles or defense services in return for a fee, commission or other consideration.
- International agents representing U.S. exporters or manufacturers may be required to register.
  - Limiting role of agents to commercial business opportunities would eliminate broker registration requirement.
DDTC Export License Requirements

- Licenses are required for the export of defense articles, defense services or technical data to foreign customers, end-users, and vendors
- Defense services may occur even when items supplied are not USML
- Foreign national employees need export licenses as well as immigration visas
- Offshore procurement must be licensed even if information involved is public domain (ITAR §124.1(a))
  - Technical Assistance Agreement (TAA)
  - Manufacturing License Agreement (MLA)
    - Only when manufacturing know-how is transferred
  - DSP-5 for “build to print”
  - Only if conditions of ITAR §124.13 are strictly observed
- Plan ahead!
  - Average processing time is 15 days
Restrictions on ITAR Controlled Programs

➢ Some destinations are off-limits!
   ▪ Countries subject to U.S. trade embargoes (e.g., Burma, Cuba, Iran, Sudan, Syria, etc.)
   ▪ China
   ▪ Other countries embargoed for foreign policy or national security reasons (see ITAR §126.1)

➢ Some companies and individuals are off-limits!
   ▪ Nationals of countries that are off-limits
   ▪ Debarred companies and individuals
DDTC Penalties

Criminal

- Fines of up to $1,000,000 per violation
- 10 years in prison
- Fines & imprisonment

Civil

- Fines of up to $500,000 per violation
- Detention, seizure or forfeiture of vessels and shipments
- Debarment (prohibition from participating in the export of defense articles, services or technical data)
## DDTC Penalties

<table>
<thead>
<tr>
<th>Year</th>
<th>Company</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>2010</td>
<td>Interturbine</td>
<td>$1,000,000</td>
</tr>
<tr>
<td>2009</td>
<td>Air Shunt Instruments</td>
<td>$100,000</td>
</tr>
<tr>
<td>2009</td>
<td>Analytical Methods</td>
<td>$500,000</td>
</tr>
<tr>
<td>2008</td>
<td>Boeing</td>
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</tr>
<tr>
<td>2008</td>
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<tr>
<td>2008</td>
<td>Qioptiq</td>
<td>$25,000,000</td>
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<tr>
<td>2007</td>
<td>ITT</td>
<td>$100,000,000</td>
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BIS Regulates *Commercial* Exports!

- Items and technology “subject to the EAR” include all items in the United States, all items of U.S. origin wherever located, and items containing more than *de minimis* levels of U.S. origin components or produced with U.S. origin plant, equipment or technology.

- A BIS export license may be required for *commercial* or “dual use” items controlled under the Export Administration Regulations (“EAR”) for national security, foreign policy (including anti-terrorism), nonproliferation, short supply or other reasons.

- The Country Chart at Supplement No. 1 to Part 738 of the EAR shows controls to which exports to various countries may be subject.

- Foreign origin products and technology are not subject to the EAR but may *become* subject to the EAR if they are brought into the United States.
The EAR include the Commerce Control List ("CCL"), which sets forth BIS-controlled items and applicable license requirements and exceptions (EAR Part 774).

The CCL is divided into 10 categories, as follows

0 = Nuclear materials (and miscellaneous items)
1 = Materials, Chemicals, Microorganisms and Toxins
2 = Materials Processing
3 = Electronics
4 = Computers
5 = Telecommunications and Information Security
6 = Sensors and Lasers
7 = Navigation and Avionics
8 = Marine
9 = Propulsion Systems, Space Vehicles, and Related Equipment

Each item listed on the CCL is assigned an Export Control Classification Number ("ECCN"); items not classified are listed as EAR99.
Export Compliance Clauses for Routed Transactions

- Foreign Principal Party in Interest ("PPI") must "expressly assume responsibility for determining licensing requirements and obtaining license authority, making the U.S. agent of the foreign principal party in interest the exporter for EAR purposes."

- One written agreement may cover multiple transactions between the same principals.

- Agreement should provide that the commodities, technology and/or software provided under the contract may not be exported or re-exported except in compliance with applicable U.S. laws and regulations.
Antiboycott Rules

- The EAR and U.S. tax laws contain provisions to encourage or require U.S. firms and their controlled subsidiaries to refuse to participate in foreign boycotts that the United States does not sanction (e.g., the Arab League boycott of Israel).

- Requests to participate in boycotts must be reported to:
  - The Department of Commerce (quarterly); and
  - The Internal Revenue Service (annually).
Antiboycott Rules (cont’d)

➢ Conduct that may be penalized under the antiboycott rules includes:
  ▪ Agreements to refuse or actual refusal to do business with or in Israel or with blacklisted companies;
  ▪ Agreements to furnish or actual furnishing of information about business relationships with or in Israel or with blacklisted companies; and
  ▪ Failure to report boycott requests.

➢ Boycott requests can appear in purchase orders, letters of credit, RFQs, etc.
Antiboycott Penalties

Criminal

- **Firms**: Fines of up to $1,000,000
- **Individuals**: Fines of up to $1,000,000, imprisonment of up to 20 years, or both

Civil

- Fines of up to $250,000 or twice the amount of the transaction
- Denial of export privileges
- Exclusion from practice

Tax

- Fines of up to $25,000 or imprisonment of up to one year or both for individuals
- Denial of tax benefits for corporations (e.g., foreign tax credit, tax deferments on earnings of foreign subsidiaries, extraterritorial income exclusion)
Census Administers AES

- Automated Export System = AES
- Electronic Export Information = EEI
- EEI entries via AES are required for all exports (both ITAR and EAR) pursuant to the Foreign Trade Regulations (FTR)
- Freight forwarders will make these entries on behalf of exporters if requested, but a power of attorney is required
- Records should be kept for 5 years
- Protocols for AES records and shipping paperwork must be followed
AES Penalties

- Penalties may be imposed for the delayed filing, failure to file, false filing of export information, and/or using the AES to further any illegal activity.

- Each violation of the FTR may be subject to civil and criminal penalties in the amount of $1,100 to $10,000.

- Fines are based on (1) the type of violation; (2) the number of prior offenses; and (3) the balance of mitigating and aggravating factors.
IMPORTS

- Import procedures are enforced by Customs and Border Protection.

- Goods must be entered into U.S. by (i) the owner or purchaser or its authorized regular employee or (ii) a designated licensed customs broker.

- Import duties must be paid by importer or by a licensed broker on its behalf; liability for duty is fixed at time of entry.
  - Importer is responsible for providing accurate classification, origin and value information.

- Exercise due diligence when selecting and supervising your customs broker

- Retain records for applicable time period (usually 5 years after date of entry).
Customs Penalties

Criminal

- Knowing entry of goods falsely classified or undervalued, or underpayment of the duty legally owed.
  - **Firms:** Fines
  - **Individuals:** Fines, imprisonment of up to 2 years, or both.

- Sentences typically are based on the Federal Sentencing Guidelines.
- Referral to other U.S. agencies for prosecution of other export/import laws.

Civil

- Fines (vary depending on offense)
  - Recordkeeping penalties may reach up to $100,000 or 75% of the appraised value of the merchandise, whichever is less.
  - Entry by means of false claims varies by degree of culpability. Maximum is 80% of dutiable value.

- Seizure and/or forfeiture of merchandise.
Recordkeeping

- All records for export and imports should be kept for a minimum of 5 years.
- This includes shipping invoices, contracts, licenses, AES entries, denied party screening, *etc.*
Why Do We Need a Compliance Program?

Now I get it...
A Compliance Program ...

- *Protects employees* from inadvertently violating trade laws through training and awareness programs
- *Protects the company* against inadvertent violations of trade laws through on-going control and review systems
- Demonstrates your company’s strong *commitment to compliance* with trade sanctions and export/import laws and regulations
- *Supports national security* and anti-terrorism objectives
Your Compliance Program Should Strive For:

- **Prevention of violations** through effective training and written standards of conduct with executive management oversight
- **Detection of violations** through careful internal monitoring and control
- **Disclosure of problems** internally through self-reporting by employees to responsible officials
- **Correction of the problems** (through disciplinary action when appropriate) to deter future violations
Know Your Customer!

- **Know all the parties**, including owners, operators, *etc*.
- Watch for **countries subject to embargoes**.
- Check all **seven lists of denied parties**:
  - [http://www.bis.doc.gov/ComplianceAndEnforcement/ListsToCheck.htm](http://www.bis.doc.gov/ComplianceAndEnforcement/ListsToCheck.htm)
- Obtain necessary export licenses
Know Your Supplier!

- Watch for *countries subject to embargoes*
- Check all *seven lists of denied parties*:
  - [http://www.bis.doc.gov/ComplianceAndEnforcement/ListsToCheck.htm](http://www.bis.doc.gov/ComplianceAndEnforcement/ListsToCheck.htm)
- Do you need to provide technical data or design assistance to the supplier? Does the supplier have foreign employees or representatives?
  - Obtain necessary export licenses
  - Follow marking requirements
Ensure that Only Authorized Employees Participate in Controlled Programs

- Consistent with local employment laws, determine whether prospective employees who are not "U.S. persons" wish to be considered for jobs on controlled programs subject to U.S. export controls
- Employment offers must be conditioned upon obtaining any necessary license or approval
- Immigration visa ≠ export authorization
Implement Mandatory Training Programs

- All employees should learn
  - applicable laws; and
  - company procedures designed to ensure compliance with these laws
- Update training regularly
  - Make sure compliance personnel are available to provide guidance and answers to questions when needed
- Ensure policies and procedures and compliance manual are easily accessible by all employees (e.g., on company intranet)
Access Control
Ensure that Only Authorized Persons Have Access to Controlled Items

- Physical access controls should include:
  - Facility access procedures
  - Visitor identification procedures
  - Plant visit authorization procedures
  - Guidelines for marking and identifying technical data

- Electronic access controls should include:
  - Restricted access to computer network
  - Encrypted e-mail capability

- Technology Control Plan
  - Restricts unauthorized access to defense articles
  - Restricts unauthorized access to technical data
You *can* avoid legal pitfalls!

- Know the rules.
- Know your products.
- Know the destination of your products.
- Know your customers and suppliers.
- Know your employees and consultants.
Questions?

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