



ACQUISITION HOUR: EXPORT CONTROLS: EXPORT ADMINISTRATION REGULATIONS (EAR)

February 16, 2016

Presented by the Wisconsin Procurement Institute



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8 WAYS A SHUTDOWN WOULD DAMAGE HOMELAND SECURITY

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EXPORT CONTROLS: EXPORT ADMINISTRATION REGULATIONS

Marc N. Violante

Wisconsin Procurement Institute

February 16, 2016



Export Administration Regulations (EAR)

1. General Overview of EAR
2. Understand CCL, structure
3. Awareness that the regulations may apply to what seem to be common items
4. The issues are serious and require documentation
5. Compliance is key



Key Take away -The “go it alone strategy”



The Landscape



“As you all know, foreign governments and other non-state adversaries of the United States are engaged in an aggressive campaign to evade U.S. sanctions regimes and acquire sensitive U.S. technology. In so doing, they threaten our economy, our prosperity and, most importantly, our national security. Disrupting these national security threats is among the highest priorities of the Department of Justice, and the National Security Division.”

“Because our companies have our nation’s crown jewels in their possession. They house information targeted by thieves ranging from foreign powers bent on economic and military superiority, to individual criminals who know the market demand for this information, to terrorists who wish to create weapons of mass destruction.”

“Penetrating and influencing the US national decision making apparatus and Intelligence Community will remain primary objectives for numerous foreign intelligence entities. Additionally, the targeting of national security information and proprietary information from US companies and research institutions involved with defense, energy, finance, dual-use technology, and other sensitive areas will remain a persistent threat to US interests.”

“Foreign Data Science. This field is becoming increasingly mature. Foreign countries are openly purchasing access to published US research through aggregated publication indices, and they are collecting social media and patent data to develop their own indices.”

Infrastructure

- A major US network equipment manufacturer acknowledged last December that someone repeatedly gained access to its network to change source code in order to make its products' default encryption breakable. The intruders also introduced a default password to enable undetected access to some target networks worldwide.

“Deny and Disrupt. We already face a global threat from electronic warfare systems capable of jamming satellite communications systems and global navigation space systems. We assess that this technology will continue to proliferate to new actors and that our more advanced adversaries will continue to develop more sophisticated systems in the next few years. Russian defense officials acknowledge that they have deployed radar-imagery jammers and are developing laser weapons designed to blind US intelligence and ballistic missile defense satellites. .”

COUNTERINTELLIGENCE

“Insiders who disclose sensitive US Government information without authorization will remain a significant threat in 2016. The sophistication and availability of information technology that can be used for nefarious purposes exacerbate this threat both in terms of speed and scope of impact.”

Technology Matters

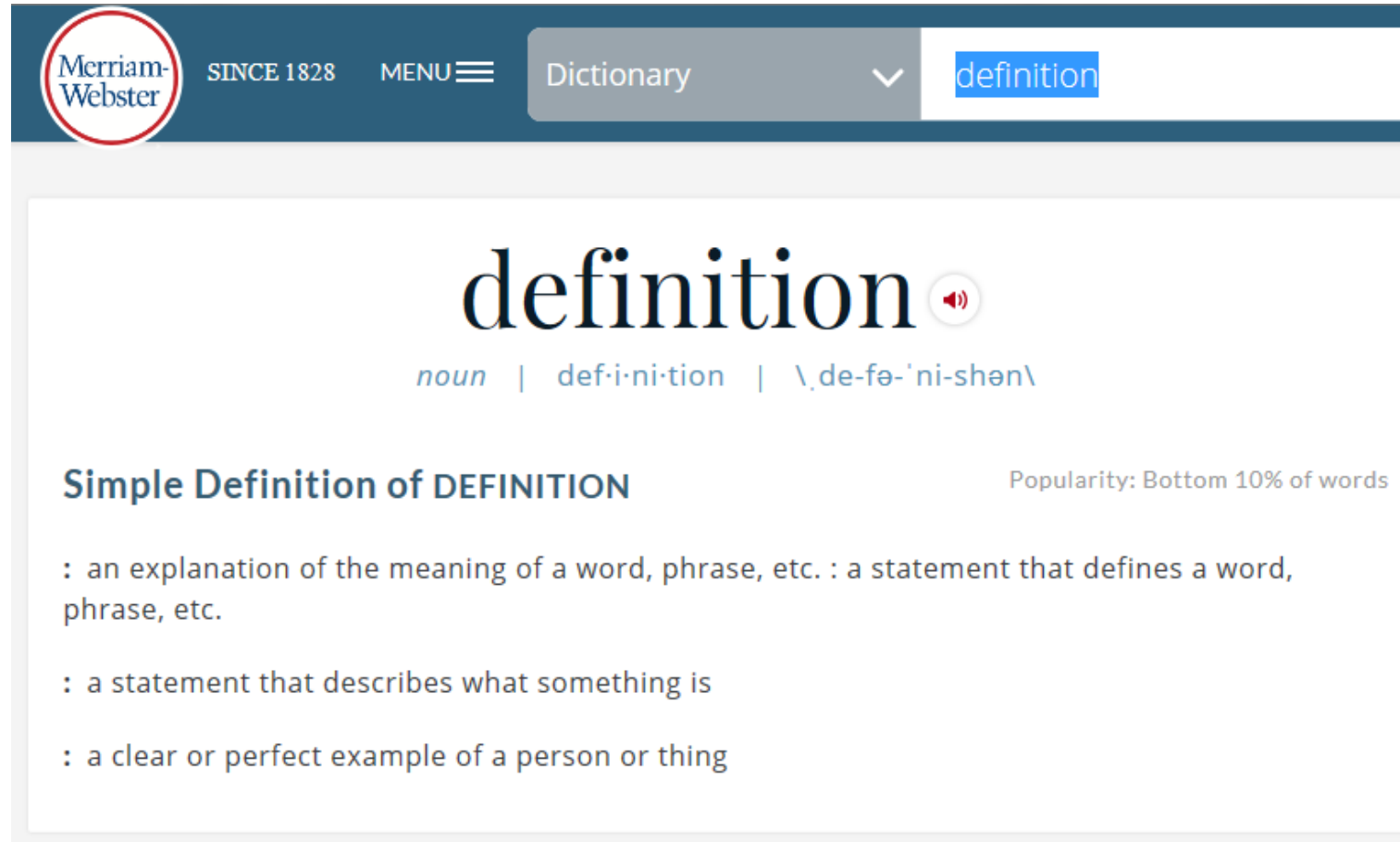


What happens when ----



Images copied from: eglin.af.mil

So do definitions



The screenshot shows the Merriam-Webster website interface. At the top left is the Merriam-Webster logo with the text 'SINCE 1828'. To its right is a 'MENU' icon. Further right is a search bar containing the word 'definition'. Below the search bar, the word 'definition' is displayed in a large, bold, serif font, followed by a speaker icon for audio playback. Underneath the word is its part of speech, 'noun', and its phonetic transcription, 'def-i-ni-tion | \.de-fə-'ni-shən\'. Below this is a section titled 'Simple Definition of DEFINITION' with a popularity note: 'Popularity: Bottom 10% of words'. Three definitions are listed, each starting with a colon:

- : an explanation of the meaning of a word, phrase, etc. : a statement that defines a word, phrase, etc.
- : a statement that describes what something is
- : a clear or perfect example of a person or thing

Source: <http://www.merriam-webster.com/dictionary/definition>

Person

- *Person.* A natural person, including a citizen or national of the United States or of any foreign country; any firm; any government, government agency, government department, or government commission; any labor union; any fraternal or social organization; and any other association or organization whether or not organized for profit.
- This definition does not apply to part 760 of the EAR (Restrictive Trade Practices or Boycotts).

U.S. Person

- **(a)** For purposes of §§740.21(e)(1), 744.6,744.10, 744.11, 744.12, 744.13, and 744.14 of the EAR,
- the term U.S. person includes:
 - (1)** Any individual who is a citizen of the United States, a permanent resident alien of the United States, or a protected individual as defined by 8 U.S.C. 1324b(a)(3);
 - (2)** Any juridical person organized under the laws of the United States or any jurisdiction within the United States, including foreign

Dual Use

- *Dual use.* Items that have both commercial and military or proliferation applications.
- This term is used informally to describe items that are subject to the EAR,
- Purely commercial items and certain munitions items listed on the Wassenaar Arrangement Munitions List (WAML) or the Missile Technology Control Regime Annex are also subject to the EAR
- (see § 734.2(a) of the EAR).

Reexport or retransfer

- *Reexport.* “Reexport” means an actual shipment or transmission of items subject to the EAR from one foreign country to another foreign country.
- For purposes of the EAR, the export or reexport of items subject to the EAR that will transit through a country or countries, or be transshipped in a country or countries to a new country, or are intended for reexport to the new country, are deemed to be exports to the new country.
- (see §734.2(b) of the EAR.) In addition, for purposes of satellites controlled by the Department of Commerce, the term “reexport” also includes the transfer of registration of a satellite or operational control over a satellite from a party resident in one country to a party resident in another country.

Deemed Export

- An export of technology or source code (except encryption source code) is "deemed" to take place when it is released to a foreign national within the United States. See §734.2(b)(2)(ii) of the Export Administration Regulations (EAR). For brevity, these questions and answers refer only to "technology" but apply equally to source code.
- Technology is "released" for export when it is available to foreign nationals for visual inspection (such as reading technical specifications, plans, blueprints, etc.); when technology is exchanged orally; or when technology is made available by practice or application under the guidance of persons with knowledge of the technology. See §734.2(b)(3) of the Export Administration Regulations (EAR).

Export Control Provisions - purpose

- National Security
- Foreign Policy
- Nonproliferation of weapons of mass destruction
- Other interests of the United States

General Idea – National Intellectual Property = “Crown Jewels”

- Intellectual Property – **private sector**
 - Segregated duties
 - Limited access
 - Controls on distribution***
 - Non-disclosure agreement employees
 - Non-disclosure agreement visitors
 - Trade secrets
 - Copy rights
 - Patents
 - **Internal compliance**
 - **Training program**

Coverage of More than Exports

- Reexports
 - Products subject to EAR upon export are generally subject to EAR with respect to reexport
- Foreign Products
 - Authorization to export technology and manufacture overseas contingent upon assurances that items will not be exported to certain destinations
- Scope of “exports”
 - Release of technology to a foreign national in the U.S. via
 - Oral briefing and/or demonstration
 - Return of foreign equipment to its country of origin after repair in the U.S.
- U.S. person activities – restricts U.S. person involvement anywhere in the world

Agencies with Export Control Responsibilities

- Defense Services and Defense Articles, DOS
- Drugs, Chemicals and Precursors
 - Chemicals, DEA
 - Controlled Substances, DEA
 - Drugs and Biologics, FDA
 - Investigational drugs permitted, FDS
- Fish and Wildlife Controls, Endangered Species, DOI
- Foreign Assets and Transactions Controls, Treasury
- Medical Devices, FDA
- Natural Gas and Electric Power, DOE
- Nuclear Materials and Equipment, NRC
- Nuclear Technology, Tech Data, DOE
- Ocean Freight Forwarders, FMC
- Patent Filing Data sent Abroad, DOC
- U.S Flagged or U.S Manufactured Vessels over 1,000 Gross Tons, MARAD

Overview – U.S. Export Controls

- The U.S. Department of Commerce's Bureau of Industry and Security (BIS)
 - administers and enforces export controls on dual-use and certain munitions items for the Department of Commerce through Export Administration Regulations (EAR) under the authority of the International Emergency Economic Powers Act (IEEPA).
- The Department of State, which controls the export of defense articles and defense services subject to the International Traffic in Arms Regulations (ITAR),
- The Department of Energy, which controls exports and re-exports of technology related to the production of special nuclear materials
- The Nuclear Regulatory Commission, which controls the export of certain nuclear materials and equipment
- The Department of the Treasury -- administers economic sanctions programs.

Interagency effort

- State Department
 - Seeks technical support and national security assessments
 - Department of Defense
 - Works closely with U.S. Customs and Border Protection
 - Review of defense industry registration
 - Performance of defense export end-use check
 - Investigation
 - Civil penalties
 - Works with the Intelligence Community
 - Review alleged diversions and unauthorized transfers
 - Cooperates with the Justice Department and U.S. Attorneys
 - Pre-trial consultations, trial documentary preparation, expert testimony

EAR v. ITAR

EAR

- Items on the CCL
- Bureau of Industry and Security, Department of Commerce
- Licenses

ITAR

- Items on the U.S. Munitions List
- Directorate of Defense Trade Controls, Department of State
- Registered
- Licenses

Commerce Control List

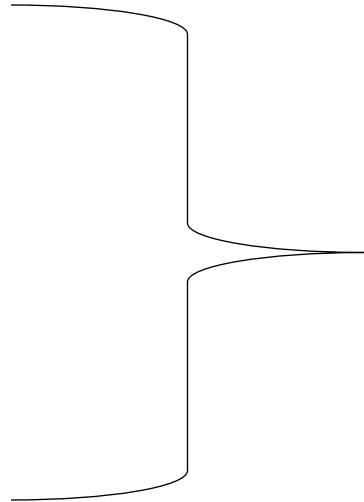
- A key in determining whether an export license is needed from the Department of Commerce is knowing whether the item you intend to export has a specific Export Control Classification Number (ECCN).
- The ECCN is an alpha-numeric code, e.g., 3A001, that describes the item and indicates licensing requirements.
- All ECCNs are listed in the [Commerce Control List \(CCL\)](#)
- The CCL is divided into ten broad categories, and each category is further subdivided into five product groups.
- Subject Index is 75 pages

CCL - categories

0	Nuclear & Miscellaneous
1	Materials, Chemicals, Microorganisms and Toxins
2	Materials Processing
3	Electronics
4	Computers
5 Part 1	Telecommunications
5 Part 2	Information Security
6	Sensors and Lasers
7	Navigation and Avionics
8	Marine
9	Aerospace and Propulsion

CCL - subdivisions for each CCL category

CCL Category (1-10)



A	Systems, Equipment and Components
B	Test, Inspection and Production Equipment
C	Material
D	Software
E	Technology

0	Nuclear & Miscellaneous
1	Materials, Chemicals, Microorganisms and Toxins
2	Materials Processing
3	Electronics
4	Computers
5 Part 1	Telecommunications
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CCL - subdivisions for each CCL category

A	Systems, Equipment and Components
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Determining applicability

- Is the item on the USML – if yes, -- ITAR (22 CFR 120-130)
- Step 1 – review general characteristics
- Step 2 – ID Category (1-10) then product group (A, B, C, D, E)
- Step 3 – Determine if 9x515 ECCN or 600 Series
- Step 4 – If no to step 3, determine if “catch-all” applies
- Step 4a – determine if specialty designed applies
- Step 4b – if yes to 4a – does para (b) of the def apply?
- Step 5 – If no to 600 series or 9x515 ECCN – determine if other ECCN
- Step 6 – If no to any ECCN of any category of CCL then – EAR99

Export Control Classification Interactive Tool

Reset

[Key Terms List](#)



Commerce Control List (CCL) Order of Review Decision Tool

(The tool is effective for exports on or after October 15, 2013)

Begin >>

Source: <http://www.bis.doc.gov/index.php/export-control-classification-interactive-tool>

Example of CCL entries - Cameras

- Camera equipment, underwater , n.e.s. 8A992.d
- Camera, designed or modified for remote operation with submersible vehicle 8A992.a.1
- Cameras, instrumentation 6A003.a
- Cameras, electronic framing type 6A003.a.4
- Cameras, electronic framing type 6A203.b.2
- Cameras, electronic streak type 6A003.a.3
- Cameras, electronic streak type 6A203.b.1
- Cameras, framing 6A003.a.4
- Cameras, framing 6A203
- Cameras, imaging 6A003.b
- Cameras, high speed cinema recording 6A003.a.1
- Cameras, mechanical high speed 6A203.a.2
- Cameras, mechanical or electronic steak 6A003.a.3
- Cameras, photo-optical step and repeat 3B991.b.2.d.1
- Cameras, radiation hardened TV 6A203.d
- Cameras, scanning & scanning camera systems 6A003.b.2

6A003 Cameras, systems or equipment, and “components” therefor, as follows (see List of Items Controlled).

LICENSE REQUIREMENTS

Reason for Control: NS, NP, RS, AT, UN

Control(s)	Country Chart (See Supp. No. 1 to part 738)
NS applies to entire entry	NS Column 2.
NP applies to cameras controlled by 6A003.a.2, a.3 or a.4 and to plug-ins in 6A003.a.6 for cameras controlled by 6A003.a.3 or a.4	NP Column 1.
RS applies to 6A003.b.3, 6A003.b.4.a, 6A003.b.4.c and to items controlled in 6A003.b.4.b that have a frame rate greater than 60 Hz or that incorporate a focal plane array with more than 111,000 elements, or to items in 6A003.b.4.b when being exported or reexported to be embedded in a civil product. (But see §742.6(a)(2)(iii) and (v) for certain exemptions)	RS Column 1.
RS applies to items controlled in 6A003.b.4.b that have a frame rate of 60 Hz or less and that incorporate a focal plane array with not more than 111,000 elements if not being exported or reexported to be embedded in a civil product	RS Column 2.
AT applies to entire entry	AT Column 1.
UN applies to items controlled in 6A003.b.3 and b.4.	See §746.1(b) for UN controls.

REPORTING REQUIREMENTS Reporting Requirements See §743.3 of the EAR for thermal camera reporting for exports that are not authorized by an individually validated license of thermal imaging cameras controlled by ECCN 6A003.b.4.b to destinations in Country Group A:1 (see supplement no. 1 to part 740 of the EAR), must be reported to BIS.

LIST BASED LICENSE EXCEPTIONS (SEE PART 740 FOR A DESCRIPTION OF ALL LICENSE EXCEPTIONS)

LVS: \$1500, except N/A for 6A003.a.2 through a.6, b.1, b.3 and b.4.

GBS: Yes for 6A003.a.1.

CIV: Yes for 6A003.a.1.

SPECIAL CONDITIONS FOR STA

LIST OF ITEMS CONTROLLED

Related Controls: (1) See ECCNs 6E001 ("development"), 6E002 ("production"), and 6E201 ("use") for technology for items controlled under this entry. (2) Also see ECCN 6A203. (3) See ECCN 8A002.d.1 and .e for television and film-based photographic still cameras "specially designed" or modified for underwater use. (4) See ECCN 0A919 for foreign made military commodities that incorporate cameras described in 6A003.b.3, 6A003.b.4.b, or 6A003.b.4.c. (5) Section 744.9 imposes license requirements on cameras described in 6A003.b.3, 6A003.b.4.b, or 6A003.b.4.c if being exported for incorporation into an item controlled by ECCN 0A919 or for a military end-user.

Related Definitions: N/A

Items: a. Instrumentation cameras and "specially designed" "components" therefor, as follows:

NOTE: Instrumentation cameras, controlled by 6A003.a.3 to 6A003.a.5, with modular structures should be evaluated by their maximum capability, using plug-ins available according to the camera manufacturer's specifications.

a.1. High-speed cinema recording cameras using any film format from 8 mm to 16 mm inclusive, in which the film is continuously advanced throughout the recording period, and that are capable of recording at framing rates exceeding 13,150 frames/s;

NOTE: 6A003.a.1 does not control cinema recording cameras designed for civil purposes.

a.2. Mechanical high speed cameras, in which the film does not move, capable of recording at rates exceeding 1,000,000 frames/s for the full framing height of 35 mm film, or at proportionately higher rates for lesser frame heights, or at proportionately lower rates for greater frame heights;

a.3. Mechanical or electronic streak cameras as follows:

a.3.a. Mechanical streak cameras having writing speeds exceeding 10 mm/ μ s;

a.3.b. Electronic streak cameras having temporal resolution better than 50 ns;

a.4. Electronic framing cameras having a speed exceeding 1,000,000 frames/s;

a.5. Electronic cameras having all of the following:

Commerce – Country Chart (eg)

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
	Afghanistan	X	X	X	X		X	X	X	X	X		X		X	
Albania ^{2,3}	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	X	X		X		X	X	X	X	X		X		X		

Business Considerations

Contract management issues

- Visitor control*** (who is your customer?)
- Managing access to information
 - Internally – staff and/or employees
 - On site – in the office
 - Offsite – home, conference, during travel
- Selection of subcontractors
- Sales presentations
- Print & document control, emails, copy services
- Copier hard drive
- IT systems and IT technical staff – in house / contract

Employee considerations

- Access to information
 - Country of birth
 - If not U.S.
 - No access
 - Access requires TAA – country of birth, may require more than 1 TAA
 - Segregation of duties
 - Badge identification
 - Document control
 - Hiring policy – administration, briefing
 - Departure process

Gateway to new opportunities or barrier

- Many primes will only work with ITAR registered subcontractors
- Primes seek
 - Partners & problems solvers
 - Companies that help to manage and reduce risk
<https://www.microsoft.com/en-us/exporting/faq.aspx>
 - Strengthen and support the overall effort
- ITAR registration
 - Indicates
 - Awareness of program
 - Establishment of procedures
 - Ability to maintain control over information

Compliance Guidelines

Know your product and the requirements

https://www.microsoft.com/en-us/exporting/overview.aspx

Microsoft Store Products Support

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Exporting Microsoft Products Exporting Contact

Exporting

Overview

Microsoft technologies, products, and services are subject to US Export rules known as [Export Administration Regulations](#) (EAR) and enforced by U.S. Department of Commerce [Bureau of Industry and Security](#) (BIS).

Additionally, both the Department of Treasury and the Department of State regulate and control other types of export-related technology and product transfers and transactions. The [Office of Foreign Assets Control](#) (OFAC) of the U.S. Department of the Treasury administers and enforces economic sanctions against certain countries and regimes, terrorists, and other threats to U.S. national security, foreign policy or economic interests.

It is Microsoft policy to comply with EAR, OFAC rules, and the international [Wassenaar Arrangement](#) and to proceed with the proper classification of its products and services (which results in the determination of an ECCN – Export Control Classification Number) so that Microsoft products can be easily and readily exported to non-embargoed destinations while maintaining a high level of compliance.

Microsoft software products either are not subject to the EAR thus not on the Commerce Control List and have no ECCN, or they are EAR99, or are 5D992 Mass Market eligible for self-classification by Microsoft and may be exported to non-embargoed countries without a license as No License Required (NLR).

A few of the products have an ECCN assigned that may or may not require a license, and one should consult the EAR or legal counsel to determine license type and eligible countries for export purposes.

Possible indicators that an unlawful diversion might be planned by your customer include the following:

These are known as Red Flag indicators

Red Flag questions - 1

- 1. The customer or purchasing agent is reluctant to offer information about the end-use of a product.
- 2. The product's capabilities do not fit the buyer's line of business; for example, a small bakery places an order for several sophisticated lasers.
- 3. The product ordered is incompatible with the technical level of the country to which the product is being shipped. For example, semiconductor manufacturing equipment would be of little use in a country without an electronics industry.
- 4. The customer has little or no business background.
- 5. The customer is willing to pay cash for a very expensive item when the terms of the sale call for financing.
- 6. The customer is unfamiliar with the product's performance characteristics but still wants the product.
- 7. Routine installation, training or maintenance services are declined by the customer.

Red Flag questions - cont.

- 8. Delivery dates are vague, or deliveries are planned for out-of-the-way destinations.
- 9. A freight forwarding firm is listed as the product's final destination.
- 10. The shipping route is abnormal for the product and destination.
- 11. Packaging is inconsistent with the stated method of shipment or destination.
- 12. When questioned, the buyer is evasive or unclear about whether the purchased product is for domestic use, export or reexport.
- 13. You receive an order for “parts” or “components” for an end item in 9x515 or the “600 series.” The requested “parts” or “components” may be eligible for License Exception STA, another authorization, or may not require a destination-based license requirement for the country in question. However, the requested “parts” or “components” would be sufficient to service one hundred of the 9x515 or “600 series” end items, but you “know” the country does not have those types of end items or only has two of those end items.
- 14. The customer indicates or the facts pertaining to the proposed export suggest that a 9x515 or “600 series” item may be reexported to a destination listed in Country Group D:5 (see supplement no. 1 to part 740 of the EAR).

Facts about your transaction

- (1) *What is it?* What an item is, for export control purposes, depends on its *classification*, which is its place on the Commerce Control List (see part 774 of the EAR).
- (2) *Where is it going?* The *country of ultimate destination* for an export or reexport also determines licensing requirements (see parts 738 and 774 of the EAR concerning the Country Chart and the Commerce Control List).
- (3) *Who will receive it?* The *ultimate end-user* of your item cannot be a bad end-user. See General Prohibition Four (Denial Orders) in §736.2(b)(4) and parts 744 and 764 of the EAR for a reference to the list of persons you may not deal with.
- (4) *What will they do with it?* The *ultimate end-use* of your item cannot be a bad end-use. See General Prohibition Five (End-Use End-User) in §736.2(b)(5) and part 744 of the EAR for general end-use and end-user restrictions.
- (5) *What else do they do?* *Conduct* such as contracting, financing, and freight forwarding in support of a proliferation project (as described in §744.6 of the EAR) may prevent you from dealing with someone.

License Exception

- A “License Exception” is an authorization contained in this part that allows you
 - to export or reexport under stated conditions
 - items subject to the Export Administration Regulations (EAR) that would otherwise require a license under General Prohibition One, Two, Three, or Eight
- Examples of exceptions
 - Limited value
 - Specified county
 - Personal item

Limited Value

- (a) *Scope*. License Exception LVS authorizes the export and reexport in a single shipment of eligible commodities as identified by “LVS - \$(value limit)” on the CCL.
- (b) *Eligible Destinations*. This License Exception is available for all destinations in Country Group B (see supplement no. 1 to part 740), provided that the net value of the commodities included in the same order and controlled under the same ECCN entry on the CCL does not exceed the amount specified in the LVS paragraph for that entry.
- (c) *Definitions*—(1) **Order**. The term *order* as used in this §740.3 means a communication from a person in a foreign country, or that person's representative, expressing an intent to import commodities from the exporter. Although all of the details of the order need not be finally determined at the time of export, terms relating to the kinds and quantities of the commodities to be exported, as well as the selling prices of these commodities, must be finalized before the goods can be exported under License Exception LVS.
- (2) **Net value: for LVS shipments**. The actual selling price of the commodities that are included in the same order and are controlled under the same entry on the CCL, less shipping charges, or the current market price of the commodities to the same type of purchaser in the United States, whichever is the larger. In determining the actual selling price or the current market price of the commodity, the value of containers in which the commodity is being exported may be excluded. The value for LVS purposes is that of the controlled commodity that is being exported, and may not be reduced by subtracting the value of any content that would not, if shipped separately, be subject to licensing. Where the total value of the containers and their contents must be shown on Shipper's Export Declarations under one Schedule B Number, the exporter, in effecting a shipment under this License Exception, must indicate the “net value” of the contained commodity immediately below the description of the commodity.
- (3) **Single shipment**. All commodities moving at the same time from one exporter to one consignee or intermediate consignee on the same exporting carrier even though these commodities will be forwarded to one or more ultimate consignees. Commodities being transported in this manner will be treated as a single shipment even if the commodities represent more than one order or are in separate containers.
- (d) *Additional eligibility requirements and restrictions*—(1) *Eligible orders*. To be eligible for this License Exception, orders must meet the following criteria:
 - (i) *Orders must not exceed the applicable “LVS” dollar value limits*. An order is eligible for shipment under LVS when the “net value” of the commodities controlled under the same entry on the CCL does not exceed the amount specified in the “LVS” paragraph for that entry. An LVS shipment may include more than one eligible order.
 - (ii) *Orders may not be split to meet the applicable LVS dollar limits*.
 - (iii) *Orders must be legitimate*. Exporters and consignees may not, either collectively or individually, structure or adjust orders to meet the applicable LVS dollar value limits.

Q. May I take Microsoft encryption software overseas temporarily on my laptop computer?

- A. Yes. License exceptions TMP and BAG, described in the [Export Administration Regulations](#), may be applicable to your situation, subject to certain conditions.

Please be aware some destinations may either restrict, or have an import formality, for encrypted devices or certain encryption software and do not recognize a "personal use exemption". Before traveling to certain countries with a Microsoft encryption controlled item consult with an export expert or visit the [State Department International Travel site](#).

Cyber-Intrusions and Data Exfiltration

- One of the new areas of focus in our outreach efforts relates to cyber-intrusions and data exfiltration that result in your controlled technology being exported.
- “[t]he risk of cyber-attacks is likely to exceed the danger posed by al-Qaeda and other terrorist networks as the top national security threat to the United States and will become the dominant focus of law enforcement and intelligence services.” Director James Comey, Congressional testimony – Don’t Let this Happen to you, 7/15, pg 18.

Successor Liability

- Businesses can be held liable for violations of the EAR committed by companies that they acquire.
- Create awareness of the principles of successor liability
- Conduct properly structured due diligence review
- Review should include export history and compliance practices
- Include – commodity classifications, technology exchanges, export licenses and authorizations, end-users, end-uses, international contracts, status of foreign employees who have had access to controlled technologies and related manuals


It's all about -
Keeping within
the lines



Pick an approach for success!



Program elements

- Organization Structure
- Corporate Commitment and Policy
- Identification, Receipt and Tracking of relevant information
- Restricted/Prohibited Exports and Transfers
- Recordkeeping
- Internal Monitoring
- Training 
- Violations and Penalties

Guiding Principles – Export Compliance Program

- Management Commitment: Senior management must establish written export compliance standards for the organization, commit sufficient resources for the export compliance standards for the organization, commit sufficient resources for the export compliance program, and ensure appropriate senior organizational official(s) are designated with the overall responsibility for the export compliance program to ensure adherence to export control laws and regulations.
- Continuous Risk Assessment of the Export Program.
- Formal Written Export Management and Compliance Program: Effective implementation and adherence to written policies and operational procedures.
- Ongoing compliance Training and Awareness.
- Pre/Post Export Compliance Security and Screening: Screening of employees, contractors, customers, products, and transactions and implementation of compliance safeguards throughout the export life cycle including product development, jurisdiction, classification, sales, license decisions, supply chain, servicing channels, and post-shipment activity.
- Adherence to Recordkeeping Regulatory Requirements.
- Internal and External Compliance Monitoring and Periodic Audits.
- Maintaining a Program for Handling Compliance Problems, including Reporting Export Violations.
- Completing Appropriate Corrective Actions in Response to Export Violations.

Source: Don't Let This Happen to You, FY 2015, page 15

Responsible Parties

- All parties that participate in transactions subject to the EAR must comply with the EAR.
- These persons may include exporters, freight forwarders, carriers, consignees, and other participants in an export transaction.
- They EAR apply not only to parties in the United States, but also to persons in foreign countries who are involved in transactions subject to the EAR.

Oops

- In horse-shoes and hand grenades – close counts
- In golf there are Mulligans
- When you hit send – who is receiving your email?
- When dealing with information subject to EAR there are no
 - “do overs”
 - However, Voluntary Self Disclosures can be made and are encouraged

Whether you hit send, do not protect documents or service an order without performing due diligence, if the information is controlled by the program any of these events may create major issues.

Voluntary Self Disclosure(VSD)

- VSD's encouraged
- Submitted when there is a belief that EAR has been violated
- Submitted when first discovered
- Follow up within 180 days
- Most are resolved with a Warning Letter
- During fiscal year 2014, OEE opened a total of 312 VSD cases and closed a total of 213 VSD cases. Over half of these VSD cases were closed with the issuance of a warning letter, while nearly a third were closed with “no action” or “no violation.”

False Statements

- **A party to an export transaction** may be subject to criminal and/or administrative sanctions for making false statements to the U.S. Government in connection with an activity subject to the EAR.
- **Most frequently, the false statements are made on an export document or to a federal law enforcement officer.**
- Common types of false statements seen by BIS are statements on a Shipper's Export Declaration or AES Electronic Export Information filing that an export is
 - destined for one country when it is really destined for a sanctioned destination,
 - the export does not require a license (i.e., that it is "NLR") when in fact a license is required for the shipment,
 - false item valuations and statements that an export was shipped under a particular license number when in fact that license was for a different item.
 - False statements that are made to the U.S. Government indirectly through another person, such as a freight forwarder, constitute violations of the EAR.

Enforcement



Authorities and Remedies

Criminal and Civil Penalties

In cases where there has been a willful violation of the EAR, violators may be subject to both criminal fines and administrative penalties. Administrative penalties may also be imposed when there is no willful intent, which means that administrative cases can be brought in a much wider variety of circumstances than criminal cases. BIS has a range of unique administrative enforcement authorities including the imposition of civil penalties, denial of export privileges, and placement of individuals and entities on lists that restrict or prohibit their involvement in export and reexport transactions.

Under IEEPA, criminal penalties can reach 20 years imprisonment and \$1 million per violation. Administrative monetary penalties can reach \$250,000 per violation or twice the value of the transaction, whichever is greater.

Source: Don't Let This Happen to You, FY 2015, page 7

Export Enforcement Coordination Center

Housed in DHS

- U.S. Department of Commerce, Bureau of Industry and Security, Office of Export Enforcement
- U.S. Department of Defense, Air Force Office of Special Investigations
- U.S. Department of Defense, Defense Criminal Investigative Service
- U.S. Department of Defense, Defense Intelligence Agency
- U.S. Department of Defense, Defense Security Service
- U.S. Department of Defense, Naval Criminal Investigative Service
- U.S. Department of Energy, National Nuclear Security Administration
- U.S. Department of Homeland Security, Customs and Border Protection
- U.S. Department of Homeland Security, Homeland Security Investigations
- U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives
- U.S. Department of Justice, Federal Bureau of Investigation
- U.S. Department of Justice, National Security Division

Source: Don't Let This Happen to You, FY 2015, page 12

Offices

WHERE ARE WE LOCATED

In addition to our Headquarters at the Department of Commerce in Washington, D.C., Export Enforcement has nine offices that have areas of responsibilities covering the entire United States. They are located in: New York, Boston, Chicago, Dallas, Houston, Los Angeles, Miami, San Jose, and Washington, D.C.



www.bis.doc.gov

Export Enforcement also has Special Agents co-located with the FBI in Cincinnati, Ohio; Minneapolis, Minnesota; Phoenix, Arizona; Portland, Oregon; Atlanta, Georgia; and St. Louis, Missouri, as well as with DCIS in San Antonio, Texas. Export Enforcement also has Export Control Officers (ECOs) in Beijing, China; Hong Kong, China; New Delhi, India; Moscow, Russia; Dubai, UAE; and Singapore.

Source: Don't Let This Happen to You, FY 2015, page 5

Factors that are considered

Some factors are given “great weight” and are treated as considerable more significant than factors that are not so designated.

- General factors for consideration include:
 - Destination of the export
 - Degree of willfulness involved in violations
 - Number of violations
 - Criminal charges
- Mitigating factors include:
 - Voluntary Self-Disclosure of violations (“great weight”)
 - Effective export compliance program (“great weight”)
 - Cooperation with BIS investigation
 - Assistance to other BIS investigations
 - No previous record of violations
- Aggravating factors include:
 - Deliberate effort to hide or conceal violations (“great weight”)
 - Serious disregard for export compliance responsibilities (“great weight”)
 - Item is significant due to its sensitivity or reason for control (“great weight”)
 - History of violations
 - High quantity of value of exports

Interesting Resources

- Worldwide Threat Assessment of the US Intelligence Community Senate Armed Services Committee
http://www.dni.gov/files/documents/SASC_Unclassified_2016_ATA_SFR_FINAL.pdf
- Assistant Attorney General John P. Carlin Delivers Remarks at Practising Law Institute's Coping with U.S. Export Controls and Sanctions 2015 Conference, Washington, DC, United States -Friday, December 18, 2015 - : <http://www.justice.gov/opa/speech/assistant-attorney-general-john-p-carlin-delivers-remarks-practising-law-institute-s>
- Don't Let this happen to you – July 2015 edition - http://www.bis.doc.gov/index.php/forms-documents/doc_view/1005-don-t-let-this-happen-to-you-071814
- Commerce Control List - <https://www.bis.doc.gov/index.php/regulations/commerce-control-list-ccl>

QUESTIONS???

Continuing Professional Education



CPE Certificate available, please contact:

Benjamin Blanc

benjaminb@wispro.org



Federal Acquisition Regulations (FAR) Review

Sponsored by



- Weekly Webinar
- Free
- 6.00pm-7.00pm
- Begins February 17th 2016
- Contact Benjamin Blanc at benjaminb@wispro.org for details and registration

Upcoming WPI Events

- ***Acquisition Hour Live Webinar Series***
- ***FAR Review every Wednesday Starting Feb 17 - Webinars***
- ***SAME Small Business Expo – March 9 – 10, 2016 – Northbrook, IL***
- ***Government Contracting Opportunities for Small Business – March 24, 2016 – Ladysmith, WI***
- ***4th Annual US Department of Veterans Affairs Business Conference – May 12, 2016 – Brown Deer, WI***
- ***10th Annual Volk Field Small Business Conference – June 15-16, 2016 – Camp Douglas, WI***