

# EXPORT EXPORT CONTROLS OF THE U.S. GOVERNMENT

# SCOPE AND LEGAL CHALLENGES

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Export controls of the U.S. government arise from a number of federal statutes and regulations administered and enforced by various departments of the federal government. The definition of an export, the type of products and technology controlled, and the type of end-users who are prohibited from receiving the export may vary by department. The purpose of this article is to discuss several export statutes and regulations overseen by the Departments of Commerce, State, and Treasury and to provide the practitioner and business owner with an overview of the scope and challenges of export control compliance. The article concludes with general recommendations for good company practice in this area.

## THE DEPARTMENT OF COMMERCE

The Department of Commerce's Bureau of Industry and Security (BIS) is responsible for implementing and enforcing the Export Administration Regulations (EAR),<sup>1</sup> which apply to the export of most commercial items. For purposes of EAR, an export means either an actual shipment or transmission of items subject to the EAR out of the United States, or the "deemed export" of an item via the release of technology or software subject to the EAR to a foreign national in the United States under the "deemed export rule."<sup>2</sup>

In practice, the physical act of shipping an item creates an opportunity for a company to implement an internal control to ensure that export control compliance regulations under the EAR are met before the goods are released from the company's possession. In the shipping process, company logistics personnel or their third-party service provider may prepare shipping documents such as an electronic shipper's export declaration. In today's environment, it is common for data of this kind, along with technology and software products, to be sent outside of the United States or to a foreign national electronically without concerns of export restrictions. Electronic transmissions, however, may constitute an export under the EAR. As a result, even an innocent e-mail sent in haste to meet a deadline could create exposure for a company under the EAR. Therefore, rather than relying solely on logistics personnel to ensure compliance, a company should train each company employee capable of sending technology subject to export controls on the requirements of export restrictions under the EAR.

Under the deemed export rule, a technology or source code need not even leave the United States to be subject to the EAR. A deemed export of technology or source code (except certain encryption software)<sup>3</sup> takes place when it is released to a foreign national within the United States.<sup>4</sup> 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 personal knowledge or experience ac-

quired in the United States is applied to situations abroad.<sup>5</sup> Such release is deemed to be an export to the home country or countries of the foreign national.

The deemed export rule may soon change if the proposed rules of the Office of Inspector General (OIG) are implemented. Current BIS deemed export license requirements are based on a foreign national's most recent citizenship or permanent residency. The OIG recommended that BIS amend its policy to require U.S. organizations to apply for a deemed export license for employees or visitors who are foreign nationals and have access to dual-use controlled technology if they were born in a country where the technology transfer in question would require an export license, regardless of their most recent citizenship or permanent residency.<sup>6</sup>

## Commerce Control List

Items typically subject to the EAR are found in the BIS in the Commerce Control List and include such things as commodities, software, and technology. The Commerce Control List is organized by category and classification code for each item, and includes items with both a commercial and military use, referred to as "dual-use" items. The exporter is responsible for determining if a good or technology is on the Commerce Control List and the classification of that item in the appropriate classification code.<sup>7</sup>

## Exposure to Liability

Liability under the EAR has broad parameters. Even if a company sells a product on the Commerce Control List to a customer in the U.S., it may not be completely insulated from a violation of the EAR. Caution is advised since the listed violations are broadly worded and subject to interpretation, including aiding and abetting an act prohibited by the EAR<sup>8</sup> and the catch-all phrase:

*"No person may order, buy, remove, conceal, store, use, sell, loan, dispose of, transfer, transport, finance, forward or otherwise service, in whole or in part, any item exported or to be exported from the United States, or that is otherwise subject to the EAR, with knowledge that a violation of the EAR has occurred, is about to occur, or is intended to occur in connection with the item."*<sup>9</sup>

Civil, criminal, and administrative sanctions can result from violations. For example, willfully violating any provision of the EAR, with knowledge that the exports involved will be used for the benefit of any controlled countries, can lead to penalties of five times the value of the export involved or \$1,000,000, whichever is greater, while an individual can be fined \$250,000 or imprisoned for 10 years, or both.<sup>10</sup> A civil penalty of up to \$100,000 may be imposed for each violation involving certain national security controls. Additionally, administrative sanctions can include a denial of export privileges.<sup>11</sup>

## Anti-boycott Laws

The BIS also oversees anti-boycott compliance regulations adopted in the 1970s to deter the participation of U.S. companies in economic boycotts or embargoes instituted by foreign countries.<sup>12</sup> Anti-boycott laws cover "U.S. exports and imports, financing, forwarding and shipping, and certain other transactions that may take place wholly offshore."<sup>13</sup> Anti-boycott laws do not ban all exports to anti-boycott countries. Transactions with anti-boycott countries may occur so long as the transaction documents or communications do not include certain boycott language or behavior.

At present, the Arab League boycott of Israel is the foreign economic boycott of most concern to the U.S. government. The anti-boycott laws, however, apply to all boycotts imposed by foreign countries that are not authorized by the United States. Behavior that is illegal under these laws has been recently reported to the U.S. government from the following countries: Bahrain, Bangladesh, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Syria, United Arab Emirates, and Yemen.<sup>14</sup>

Company personnel involved in transactions with the countries identified above should carefully review all documents and correspondence received from foreign vendors, such as the purchase agreement, purchase order, pro forma invoice, sales contract, letter of credit, and any shipping instructions to identify boycott language and behavior.

Examples of boycott language and behavior found on the Office of Foreign Assets Control (OFAC) website include:

- Agreements to refuse or actual refusal to do business with or in Israel or with blacklisted companies, e.g., agreements to refuse to do business with banks on the Arab boycott list.
- Agreements to discriminate or actual discrimination against other persons based on race, religion, sex, national origin, or nationality.
- Agreements to furnish or actual furnishing of information about business relationships with or in Israel or with blacklisted companies.
- Agreements to furnish or actual furnishing of information about the race, religion, sex, or national origin of another person.<sup>15</sup>

U.S. companies have a duty to report any direct or indirect requests to use boycott language or engage in boycott behavior to the U.S. Department of Commerce on a quarterly basis.<sup>16</sup>

Criminal, civil, and administrative sanctions also apply for both knowing and willful violations of the anti-boycott laws. For example, the criminal penalties imposed for each knowing violation of the anti-boycott laws can be a fine of up to \$50,000 or five times the value of the exports involved, whichever is greater, and imprisonment of up to five years.<sup>17</sup> A civil penalty of \$11,000 for each violation may be imposed.

## FAST FACTS

Export controls arise from a number of federal statutes and regulations administered and enforced by various departments of the federal government.

Given the wide range of export controls administered by different federal departments, U.S. companies need to dedicate resources to export control compliance.

The area of export controls is complicated and ever-changing, so a company should proceed with caution with advice from legal counsel.

## THE DEPARTMENT OF STATE

Importation and exportation of defense-related trade and technology transfers are governed by International Trade in Arms Regulations (ITAR) pursuant to the Arms Export Control Act, 22 U.S. 2778. The U.S. Munitions List (USML)<sup>18</sup> is provided in ITAR and includes all defense-related services, goods, and technologies. All exports of USML items and technology must be licensed by the Office of Defense Trade Controls (DTC), within the

Department of State, unless an exemption exists.

The definition of export under ITAR includes, but is not limited to, the sending or taking of a defense article out of the U.S. in any manner and disclosing or transferring technical data to a foreign person, whether in the U.S. or abroad.<sup>19</sup> Any person who engages in the U.S. in the business of either manufacturing or exporting defense articles or furnishing defense services is required to register with the DTC.<sup>20</sup>

It is unlawful to export or attempt to export from the United States any defense article or technical data or to furnish a defense service for which a license or written approval is required without first obtaining the required license or written approval from the DTC.<sup>21</sup> Violations of the ITAR can result in criminal penalties under several different criminal statutes.<sup>22</sup>

## THE DEPARTMENT OF TREASURY

Transactions between U.S. companies and individuals and entities located outside of the United States are governed by the Department of Treasury's Office of Foreign Assets Control. The OFAC administers U.S. laws that impose economic sanctions or embargoes that currently prohibit or restrict exports to the following countries or geographical locations: Balkans, Burma (Myanmar), Congo, Cuba, Iran, Libya, North Korea, Sudan, Syria, and Zimbabwe.<sup>23</sup>

All U.S. persons must comply with OFAC regulations, including all U.S. citizens and permanent resident aliens, regardless of where they are located; all persons and entities within the United States; and all U.S. incorporated entities and their foreign branches.<sup>24</sup>

This area of export controls is complicated and ever-changing, so a company should proceed with caution with advice from legal counsel. Violations of OFAC regulations may result in criminal and/or civil sanctions. Depending on the sanction or embargo, criminal penalties can include fines ranging from \$50,000 to \$10,000,000 and imprisonment ranging from 10 to 30 years for willful violations. Civil penalties range from \$11,000 to \$1,000,000 for each violation.<sup>25</sup>

## RECOMMENDATIONS

Given the wide range of export controls administered by different federal departments, U.S. companies need to dedicate resources

to export control compliance. Compliance has become increasingly challenging with the ubiquity of the multinational corporations and the new technological capabilities of communication. A good start is to adopt and distribute a company policy that identifies red flags to consider for compliance-triggering transactions, such as shipping to new customers, sending data and specifications to suppliers, developing new product lines, hiring new employees, and sharing technology. In addition, companies should provide training, establish internal controls, create an export control compliance manual, and conduct self-audits based on risk of non-compliance.

In addition to any penalty assessed a company, violations may be posted on the relevant departmental website. As a result, what appears on the surface to be a harmless export can instead be a costly and embarrassing mistake to the company. Most companies have found it to be a wise investment to explore their options through the guidance of an attorney who specializes in export controls. ◆



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## FOOTNOTES

1. 15 CFR 734, given legal authority by Export Administration Act of 1979, Pub L 96-72, 93, Stat 503 and Amendments.
2. 15 CFR 734.2 (b)(1).
3. 15 CFR 734.2 (b)(2). Encryption software is defined as computer programs that provide capability of encryption functions, confidentiality of encryption functions, or confidentiality of information or information systems.
4. 15 CFR 734.2 (b)(2)(ii).
5. 15 CFR 734.2 (b)(3).
6. Federal Register, Vol 70, No 58, March 28, 2005.
7. 15 CFR 732.3(b)(1).
8. 15 CFR 764.2(b).
9. 15 CFR 764.2(e).
10. 15 CFR 764.3(b)(2).
11. 15 CFR 764.3(a)(1) and (2).
12. 1977 amendments to the Export Administration Act (EAA) and the Ribicoff Amendment to the 1976 Tax Reform Act (TRA).
13. <http://www.bxa.doc.gov/ComplianceAndEnforcement/oacrequirements.html>.
14. <http://www.bxa.doc.gov/ComplianceAndEnforcement/oacantiboycottrequestexamples.html>.
15. <http://www.bxa.doc.gov/ComplianceAndEnforcement/oacrequirements.html>.
16. 15 CFR 760.5.
17. <http://www.bxa.doc.gov/ComplianceAndEnforcement/oacrequirements.html>.
18. 22 CFR 121.1.
19. 22 CFR 120.17(a).
20. 22 CFR 122.1.
21. 22 CFR 127.1.
22. 22 CFR 120.27.
23. <http://www.treas.gov/offices/enforcement/ofac>.
24. <http://www.treas.gov/offices/enforcement/ofac/faq>.
25. See various Sanction and Embargo programs on OFAC website.