



Essential Facts To Understanding Export Controls and Compliance



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How To Keep Out Of Trouble



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Agenda

- Opening comments from Margrette and Su
- Hypotheticals 1, 2 and 3
- Q& A Session
- Closing comments



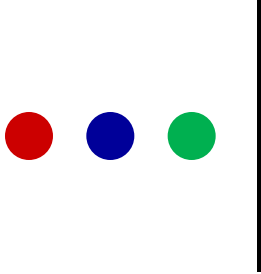
What are Export Control Laws?

- Export control laws (ECL) are U.S. federal laws and regulations that regulate the export of strategically important products, services and technologies to foreign persons.



Why are Export Controls Important?

- Restrict exports of goods and technology that could contribute to the military potential of adversaries
- Prevent proliferation of weapons of mass destruction (nuclear, biological, chemical)
- Prevent terrorism
- Comply with U.S. trade agreements and trade sanctions against other nations



Who regulates export controls?

- U.S. Department of State (DDTC)
- U.S. Department of Commerce (BIS)
- U.S. Treasury Department, Office of Foreign Assets Control (OFAC)



U.S. Department of State

- Directorate of Defense Controls (DDTC):
 - International Traffic in Arms Regulations (ITAR)
 - United States Munitions List (21 categories)
 - Covers military items, (“technical data”, “defense articles” and “defense services”).



U.S. Department of Commerce

- Bureau of Industry and Security (BIS):
 - Export Administration Regulations (EAR)
 - Commerce Control List (10 categories)
- Covers dual-use items, or items designed for a commercial purpose that might also have a military application, e.g., computers, pathogens, civilian aircraft.
- 600 Series Commodities (military products moved from the USML)
- Covers goods, test equipment, materials, technology, including technical data and assistance, and software.



U.S. Treasury Department

- Office of Foreign Asset Control (OFAC)
 - Trade sanctions and embargoes – prohibitions on trade with certain countries, e.g., Iran, Syria, Sudan, Cuba, North Korea.
 - Restrictions on financial transactions or transfers to certain end-users



General Rule

- It is illegal for a U.S. Person to:
 - Export a controlled commodity,
 - Export controlled technology, or to
 - Provide technical services
 - To a **foreign person** without valid authorization from the appropriate USG agency.





Who is a “Foreign Person?”

- For export control purposes a “foreign person” includes:
 - Persons in the U.S. in non-immigrant status (e.g., H-1B, H-3, L-1, J-1, F-1 Practical Training, L-1)
 - Persons unlawfully in the U.S.
- It does **NOT** include:
 - U.S. Citizens
 - Permanent Residents (i.e., green card holders)
 - Persons granted asylum or refugee status



What is an Export?

- Transfer of controlled technology, information, equipment, software or services to a foreign person in the U.S. or abroad by any means. For example:
 - actual shipment outside the US
 - visual inspection in or outside the US
 - written or oral disclosure

Deemed Export?

- Providing, transferring or disclosing controlled technology/information to a foreign national in the U.S. by:
 - Fax, phone, email, face-to-face, tour of facility, training, etc.
- Visa status is important
 - Permanent resident, same rights as U.S. citizen
 - Non-immigrant visa holders (license may be required)





Licenses

ITAR

- Technical Assistance Agreements (TAA)
- Manufacturing License Agreements (MLA)
- DSP-5 Permanent Export of Unclassified Technical Data and/or Hardware
- DSP-61 Temporary Import of Unclassified Hardware
- DSP-73 Temporary Export - when a defense article is coming into the U.S. and will be sent back out, a temporary import license (or exemption) is required prior to the temporary import

EAR

- BIS-748 Multipurpose Application Form
 - For Deemed Exports
 - For Re-exports
 - For Hardware, Technology and/or Software



Due Diligence Screening

- Identify/manage/eliminate risks associated with export transactions:
 - Distributors and agents
 - Suppliers/vendors
 - Joint venture partners
 - Freight forwarders
 - Customers
 - End Users





Procedures to Address Risks

- Screening Procedures
 - BIS or DDTC website lists
 - Third Party Screening Services
- Review Processes
 - Travel
 - Who is going? Where? AND what are they taking?
 - Shipping
 - In-House v. Third Party (UPS, Fed-Ex, etc.)
- Technology Control Plans
 - Equipment
 - Data



More Screening Tips

- Denied Entities List

- <http://beta-www.bis.doc.gov/index.php/policy-guidance/listsof-parties-of-concern/entity-list> parties.

Another Screening Resource

System for Award Management -
https://www.sam.gov/portal/SAM/?navigationalstate=JBPNS_rO0ABXdcACJqYXZheC5mYWNlcy5wb3J0bGV0YnJpZGdILINUQVRFX0IEAAAAAAQApdmllczo2NGM3ZDA4OS03MjZhLTQ2MzltYTlmlmZi01N2RlZjliM2UxNTIAB19fRU9GX18*&portal:componentId=5c8a0e98-8627-4de4-8635-f9f6b58e3fed&interactionstate=JBPNS_rO0ABXc0ABBfanNmQnJpZGdIVmlld0lkAAAQATL2pzZi9uYXZpZ2F0aW9uLmpzcAAHX19FT0ZfXw**&portal:type=action###11





OFAC

- https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/ssi_list.aspx

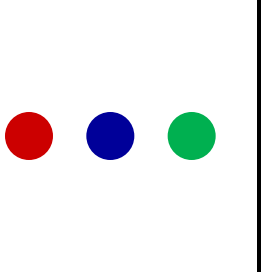


Categories of Goods

- Military, law enforcement and first responders = ITAR
- Dual use = BIS or ITAR
 - Civilian and military use
- Purely commercial = BIS
 - End use/end user restrictions
- Economic sanctions



Types of Economic Sanctions



Current U.S. List of State Sponsors of Terrorists

- Iran, Sudan and Syria
- In the past, Cuba, Iraq, Libya, North Korea were included
- Triggers export license, government assistance, import and financial transaction limitations



Other Forms of Economic Sanctions

- Other grounds for export controls, includes nuclear proliferation concerns, e.g. North Korea.
- Check the OFAC website for details about the various economic sanctions programs -<https://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>.





Shift in Focus

- In the 1990's, the U.S. started to shift from sanctions on countries to more targeted sanctions against individuals and entities, e.g. travel bans and asset freezes
- President adds names to the Specially Designated Nationals List
- Moved from unilateral to multilateral



Sources of Enforcement

- Presidential Executive Orders
- Congressional laws
- Agency regulations
- Most sanctions programs now exclude food and medicine, and also permit news and information exchanges



Extraterritorial Impact

- Limitations on trading with foreign entities necessarily has an impact outside the U.S.
- Leads to conflicting requirements
- Blocking statutes
 - Cuba
 - Arab League



Terrorist Attacks Changed the Rules



Sanctions Became Multilateral



One Key To Success

- Before making the commercial deal -
 - Make sure to screen all the parties
 - Screen them again when the shipment is ready to be exported
 - Depending on timing, you may need to screen in between.
 - Who needs to be screened?

Hypo 1

- Your shipment is being held at the export terminal because CBP want to see your ITAR license.
- The shipment contains sample dual-use widgets going to Iraq via Dubai.
- The buyer's address can only be found by GPS coordinates and Google Earth shows a wild field.
- How do you respond to CBP?





Discussion Topics

- How did you classify your product?
 - Self-classification versus Commodity Jurisdiction versus CCATS?
- Did you perform a pre-sale Denied Party Screening?
 - Consolidated Screening List?
 - Third Party Service?
- Did you obtain a signed End User Certification from the end user?



Additional Topics

- Did you use a reputable freight forwarder? Did you perform a pre-shipment due diligence check?
- What documents to you submit to CBP?





Hypo 2

- You have exported a shipment of EAR-controlled aircraft parts (9A610.x).
- The parts are coated with specialized paint which reflects radar (LO/CLO).
- The end user is the South Korean Air Force.
- What issues need to be addressed – pre and post shipment?



Discussion Topics

- Were items shipped under a valid BIS license?
- Is Low Observable/Counter Low Observable (LO/CLO) paint EAR-controlled or ITAR-controlled?
- Does coating an EAR-controlled product with LO/CLO paint change the classification of the product?



More to Consider

- Did the license application indicate the items to be shipped involved LO/CLO technology?
- Which agency should you contact?
 - BIS?
 - DDTTC?
 - DoD?
 - Census and AES
 - CBP



And More Food for Thought

- What instructions should you provide to the end user?
 - Sequester shipment?
 - Return shipment?
- Should you file a Voluntary Disclosure? If so, with which agency?



Hypo 3

- You work at a company that exports goods which are ITAR regulated. The receptionist calls the Compliance Officer saying some guys with badges are here to see you. What do you want me to tell them?
- What should be your response?



Hypo 3 - Continued

- Is your answer any different if your company exports goods subject to BIS regulations?
- Is your answer any different if your company exports goods which are sold to end users subject to U.S. economic sanctions?



Discussion Topics

- Are you being served with a search warrant, grand jury summons, civil summons, inquiry by telephone or request for appointment?
- What is best practice regarding the timing of getting counsel involved?
- What are the potential penalties – criminal v. civil v. damage to the company's reputation.



Recent Dept. of Justice Activities

- Sept. 2015 - Yates memo – individual liability for corporate misdeeds
- April 2016 – Weissman letter – defined robust compliance programs



More from the DOJ

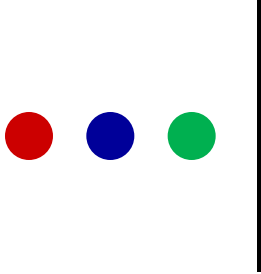
- October 2016 - *Guidance Regarding Voluntary Self-Disclosures, Cooperation, and Remediation in Export Control and Sanctions Investigations Involving Business Organizations.*
- February 2017 - *Evaluation of Corporate Compliance Programs*



Penalties/Damages

- Civil forfeiture
- Fines
- Reputational damage
- Shareholder lawsuits
- Debarment
- Denial of government contracts
- Cancellation/denial of export licenses
- Criminal convictions





What About the Commercial Consequences?

- Failure to/delay in delivery
- Additional costs
- Dissatisfied/lost customer
- Consequential damages, e.g. production line down, replacement goods, etc.



Impact Beyond the U.S.

- Many of the recent cases involved multi-million dollar fines where the U.S. and European regulators joined forces and the settlement was universal in nature
 - e.g. Banking institutions and Iran sanctions



ZTE China and US

○ Claims

- Conspiracy to unlawfully export
- Obstruction of justice
- False statements
- Criminal forfeiture



Outcome – Criminal Case

- Corporation on probation for three years
- Imposition of monitor whom the judge selected
- Fine of \$286,992,532
- Due within 90 days of sentencing- \$143,496,266, the rest held in abeyance IF compliant.



ZTE Key Take Aways

- Plea deal with corporation only, all rights to pursue individuals retained by DOJ
- Moral to the story – don't flunk the attitude test!



When Things Go Wrong

- Boeing improperly used information belonging to a competitor to gain government procurement contracts.
- The fine was \$615 million to settle criminal and civil charges.
- What were the other consequences?



Yikes!

- There were discussions about indicting the company for violations of the Economic Espionage Act, Procurement Integrity Act, False Claims Act and Major Frauds Act, plus conflict-of-interest, conspiracy and aiding and abetting.



Can Boeing Still Be Considered An Ethical Company?



Key Consequences

- Forced senior executives to plead guilty, serve time in a federal prison, pay a fine of \$250,000 and forfeit approximately \$5 billion in equity based compensation;
- Denial of export licenses;
- Potential loss of security clearances;
- Re-suspension or debarment;



More Consequences

- Potential prohibition of the use and possession of explosive devices (needed for actuators on airplane doors);
- Payment of millions in fines and penalties;
- Future impacts on contractor integrity scoring;
- Defending the Lockheed suit;



Even More Consequences

- Loss of \$1 billion of launches and being suspended from the launch business for 20 months;
- Employees fired or indicted;
- Loss of U.S. Government tanker market;
- Being forced to recompete certain projects;





The Most Important Consequence

- The hit to Boeing's reputation;
- Do people still want to work there?
- How can employees and others see the company in a good light?



Tips to Protect Your Bottom Line

- The commercial deal is only half the proposition
- Understand the regulatory context in which you are operating
- Screen, screen, and more screening
- Pick a good freight forwarder
- Compliance program and manual



Compliance Manual

- BIS

https://www.bis.doc.gov/index.php/forms-documents/doc_view/7-compliance-guidelines/

- DDTC – ITAR

http://www.pmddtc.state.gov/compliance/documents/compliance_programs.pdf



It Really Is All About Due Diligence



Questions?





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