A Brief Overview of Current Export Controls Under Commerce Jurisdiction

Larry Sullivan
BIS Western Regional Office
Northern California Branch
BIS regulates exports and re-exports of items subject to the Export Administration Regulations.

This includes jurisdiction over most goods exported from the U.S. unless jurisdiction is specifically given to another agency.
What is an export?

- A shipment out of the United States
- An electronic transmission out of the United States
- Release of technology to a foreign national in the United States
  - Technology – specific information necessary for the “development”, “production”, or “use” of a product
What is a Reexport?

- A shipment of a U.S. origin item from one foreign country to another

- A shipment of a foreign produced item containing U.S. origin parts, from one foreign country to another

- Shipment from one foreign country to another of an item manufactured abroad based on U.S. origin technology
Are You Subject to the EAR?
(Part 734 - Scope)

All Items in the U.S. **except:**

1. **Publicly available technology & software** (except **encryption**, which **is almost always subject to the EAR**)
BUT what is Publicly Available?
Publicly Available

- Published Information and Software (excluding encryption) (Section 734.7)
- Fundamental Research (Section 734.8)
- Educational Information (Section 734.9)
- Patent Information (Section 734.10)
Are You Subject to the EAR?
(Part 734 - Scope)

All Items in the U.S. except:

2. **Publications that are artistic or non-technical in nature**, e.g.
   - Printed books, pamphlets, & miscellaneous publications including bound and unbound newspapers and periodicals; music books, calendars, maps, atlases, exposed and developed motion picture film and soundtrack.
Are You Subject to the EAR?
(Part 734 - Scope)

All Items in the U.S. except:

3. Items subject to the exclusive jurisdiction of another Federal Department or Agency
Other departments and agencies sometimes that administer export controls or have substantial input on export control decisions

Department of State
Department of Treasury
Drug Enforcement Administration
Food and Drug Administration
Department of Interior
Department of Energy
Department of Agriculture
Nuclear Regulatory Commission
Federal Maritime Commission
Patent and Trademark Office
Tax and Trade Bureau
Items located outside of the U.S. **MAY BE SUBJECT TO THE EAR**

Certain foreign-made items *if*:
- The item exceeds certain *de minimis* U.S. content (Supplement 2 to Part 734); **and**
  - The foreign-produced item is the direct product of **certain controlled U.S. technology and software** (discussed later).
Are You Subject to the EAR?

(Continued)

U.S. Persons & Foreign Nationals

- Certain activities of U.S. persons (Part 744)
- Release of certain technology and source code to foreign nationals in the U.S. ("Deemed Exports" (Part 734))
Deemed Exports
(Section 734.2(b)(2)(ii))

The release of technology or source code subject to the EAR to a foreign national in the United States is “deemed” to be an export to the home country of the foreign national.
Deemed Exports
(Section 734.2(b)(2)(ii))

Situations that can involve release of U.S technology or software include:

- Tours of laboratories
- Foreign national employees involved in certain research, development, and manufacturing activities
- Foreign students or scholars conducting research
- Hosting of foreign scientist
Deemed Exports
(Section 734.2(b)(2)(ii))

Export Enforcement Note

Deemed Export violations are one of the most common types of violations

Because the violation typically occurs in the U.S. and all parties are typically in the U.S., this is very often the easiest to prove in a court of law.
Part 6. Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States

(For H-1B, H-1B1 Chile/Singapore, L-1, and O-1A petitions only. This section of the form is not required for all other classifications. See Page 3 of the Instructions before completing this section.)

Check Box 1 or Box 2 as appropriate:

With respect to the technology or technical data the petitioner will release or otherwise provide access to the beneficiary, the petitioner certifies that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined that:

☐ 1. A license is not required from either U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person; or

☐ 2. A license is required from the U.S. Department of Commerce and/or the U.S. Department of State to release such technology or technical data to the beneficiary and the petitioner will prevent access to the controlled technology or technical data by the beneficiary until and unless the petitioner has received the required license or other authorization to release it to the beneficiary.
Applies **only** to the following visa types:

H-1B (Highly Specialized Professional Level or DOD sponsored cooperative R&D project or acclaimed fashion model)

H-1B1 (Free Trade Nonimmigrant (Chile and Singapore **only**))

L-1 (Intra-Company Transfer of Current Employee)

O-1A (Person of Extraordinary Ability in Specified Professions)
I-129 Petition
CERTIFICATION

Outside of the purview of BIS

For details, contact
U.S. Citizenship and Immigration Services
www.uscis.gov
Reasons Why We Control Exports

- National Security
- Foreign Policy
  - Crime control
  - Anti-terrorism
  - Regional Stability
- Non Proliferation
  - Nuclear weapons
  - Chemical/biological weapons
  - Missiles
How do I determine my regulatory requirements?

Depends upon:
1. **What** is the product;
2. To **where** is the product going;
3. To **who**m is the product going;
4. For **what** is the product to be used;

Does the recipient’s intended end-use seem logical item for their business type?
Export Administration Regulations

Structured so that you can use a decision tree to determine your regulatory requirements
Commerce Control List (CCL)
(Part 738 and Part 774, Supplement No. 1)

The primary tool for determination of product sensitivity
Lists by technical parameter, sensitive items under the jurisdiction of BIS
Each entry is called Export Control Classification Number (ECCN)
Finding Your ECCN

1. Self Determine
   Work with your company’s engineers and technical support

2. Ask the Manufacturer
   (Then check that information against the CCL to confirm – YOU REMAIN RESPONSIBLE)

3. Submit a formal classification request to BIS
Commerce Control List
(Part 738 and Part 774, Supplement No. 1)

✓ Contains lists of items subject to licensing authority of BIS

✓ Each entry is called Export Control Classification Number (ECCN)
  • Five alpha-numeric characters

✓ Items listed in terms of technical parameters
3A001: Electronic components, as follows (see List of Items Controlled).

**LICENSE REQUIREMENTS:**

**LICENSE EXCEPTIONS:**

**LIST OF ITEMS CONTROLLED:**

**Unit**: Number

**Related Controls**: (1) The following commodities are under the export licensing authority of the Dept. of State, Office of Defense Trade Controls (22 CFR part 121) when “space qualified” and operating at frequencies higher than 31.8 GHz: helix tubes....

*See also 3A101, 3A201, and 3A991*

**Related Definitions**: For the purposes of integrated circuits in 3A001.a.1, 5 \( \times \) 10\(^3\) Gy(Si) = 5 \( \times \) 10\(^5\) Rads (Si); 5 \( \times \) 10\(^6\) Gy (Si)/s = 5 \( \times \) 10\(^8\) Rads (Si)/s...

**Items**: a. General purpose integrated circuits, as follows:

a.1. Integrated circuits, designed or rated as radiation hardened to withstand any of the following: ...
ECCN Structure
(Section 738.2)

Category

Product Group

Reason for Control

Sequential Numbering

3A001
Ten Categories in the CCL (0 to 4)

0. Nuclear Materials, Facilities & Equipment and **Miscellaneous**
1. Materials, Chemicals, Microorganisms & Toxins
2. Materials Processing
3. Electronics Design, Development and Production
4. Computers

e.g.: 3A001
Ten Categories in the CCL (5 to 9)

5. Telecommunications (PART 1) and Information Security (PART 2)
6. Sensors and Lasers
7. Navigation and Avionics
8. Marine

e.g.: 5A001
ECCN Structure - Product Groups

5A101
- Equipment, assemblies & components

5B101
- Test, inspection & production equipment

5C101
- Materials

5D101
- Software

5E101
- Technology
Numbering System

3A001  National Security
001-099  National Security
100-199  Missile Technology
200-299  Nuclear Nonproliferation
300-399  Chemical & Biological
900-999  Foreign Policy
980-989  Short Supply/Crime Control
990-999  Anti-Terrorism/United Nations
7A104  Foreign Policy
### Reasons for Control

<table>
<thead>
<tr>
<th>Reason for Control</th>
<th>Reflected on Country Chart</th>
</tr>
</thead>
<tbody>
<tr>
<td>CB: Chemical &amp; Biological Weapons</td>
<td>CB: Chemical &amp; Biological Weapons</td>
</tr>
<tr>
<td>NP: Nuclear Nonproliferation</td>
<td>NP: Nuclear Nonproliferation</td>
</tr>
<tr>
<td>NS: National Security</td>
<td>NS: National Security</td>
</tr>
<tr>
<td>MT: Missile Technology</td>
<td>MT: Missile Technology</td>
</tr>
<tr>
<td>RS: Regional Stability</td>
<td>RS: Regional Stability</td>
</tr>
<tr>
<td>FC: Firearms Convention</td>
<td>FC: Firearms Convention</td>
</tr>
<tr>
<td>CC: Crime Control</td>
<td>CC: Crime Control</td>
</tr>
<tr>
<td>AT: Anti-Terrorism</td>
<td>AT: Anti-Terrorism</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Reason for Control</th>
<th>Not Reflected on Country Chart</th>
</tr>
</thead>
<tbody>
<tr>
<td>CW: Chemical Weapons Convention</td>
<td>CW: Chemical Weapons Convention</td>
</tr>
<tr>
<td>SI: Significant Items</td>
<td>SI: Significant Items</td>
</tr>
<tr>
<td>SL: Surreptitious Listening</td>
<td>SL: Surreptitious Listening</td>
</tr>
<tr>
<td>SS: Short Supply</td>
<td>SS: Short Supply</td>
</tr>
<tr>
<td>UN: United Nations Embargo</td>
<td>UN: United Nations Embargo</td>
</tr>
<tr>
<td>EI: Encryption Items</td>
<td>EI: Encryption Items</td>
</tr>
</tbody>
</table>
Working with the Country Chart
(Part 738, Supplement No. 1)

✓ Contains licensing requirements based on destination and reason for control

✓ Used with the CCL to determine if you need a license
<table>
<thead>
<tr>
<th>Countries</th>
<th>Chemical &amp; Biological Weapons</th>
<th>Nuclear Nonproliferation</th>
<th>National Security</th>
<th>Missile Tech</th>
<th>Regional Stability</th>
<th>Firearms Convention</th>
<th>Crime Control</th>
<th>Anti-Terrorism</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ireland</td>
<td>CB 1</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Israel</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Italy</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Jamaica</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Japan</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Jordan</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Kazakhstan</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Kenya</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Kiribati</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Korea, North</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Korea, South</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Kuwait</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Kyrgyzstan</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Laos</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
</tbody>
</table>

See Sections 742.19 and 746.4 of the EAR to determine whether a license is required in order to export or reexport to this destination.
If an item subject to the EAR is NOT described by any ECCN, it is designated EAR99.

In most cases, the export of an EAR99 item can be completed using the license authorization NLR (No License Required),

but ...

Check the General Prohibitions AND the “Lists to Check” for other possible licensing requirements.
The ten pages of the EAR’s Part 736 are the basic tools used in connection with the “where, who and why.”

These are the 10 General Prohibitions

“Thou shalt not ….”
GENERAL PROHIBITION 1
Applies only to items with an ECCN
YOU MAY NOT,
WITHOUT A LICENSE
OR
LICENSE EXCEPTION,
EXPORT OR REEXPORT
CONTROLLED ITEMS TO
LISTED COUNTRIES
GENERAL PROHIBITION 2
Applies only to items with an ECCN

YOU MAY NOT, WITHOUT A LICENSE OR LICENSE EXCEPTION, EXPORT OR REEXPORT FROM ABROAD, FOREIGN-MADE ITEMS CONTAINING MORE THAN A (SPECIFIED) DE MINIMIS AMOUNT OF CONTROLLED U.S. CONTENT TO LISTED COUNTRIES
GENERAL PROHIBITION 3
Applies only to items with an ECCN and are under NS Controls

YOU MAY NOT, WITHOUT A LICENSE OR LICENSE EXCEPTION, EXPORT OR REEXPORT FROM ABROAD FOREIGN-PRODUCED ITEMS THAT ARE A DIRECT PRODUCT OF U.S. TECHNOLOGY AND SOFTWARE.
GENERAL PROHIBITION 3

Applies to direct products of technology, software, plant or major component of a plant:

1. Which had as a condition of the original export license required a Written Assurance as a precondition for the issuance of the license or as a supporting document for TSR use; AND

2. Which is controlled for National Security (NS) reasons.

3. D:1 and E:1 Countries Impacted.
General Prohibition 4
Applies if your item is classified under a specific ECCN or is EAR99

You may **not:**

Take any action prohibited by a denial order issued under part 766 (published in the Federal Register)

Check “Lists to Check” on the BIS Website OR the Consolidated List on export.gov

Absolute liability – you are responsible for checking
Friday - February 11, 2011

2011 EXPORT CONTROL FORUM

Featuring Keynote Address on Export Control Reform
By Eric L. Hirschhorn, Under Secretary for Industry & Security
February 28-March 1, 2011, Irvine, California
Find out more and register.

IN THE NEWS

February 9, 2011
Simplified Network Application Processing System, On-line Registration and Account

February 1, 2011
Iranian National Charged With Illegally Exporting Specialized Metals from the United States to Iran
DOJ Press Release | Indictment | Photo

Additional Information on Export Control Reform
Lists To Check

The following lists may be relevant to your export or reexport transaction. For your convenience, the agencies responsible for these lists have consolidated these lists into one downloadable file. To access the consolidated list, go to www.export.gov.

Denied Persons List
A list of individuals and entities that have been denied export privileges. Any dealings with a party on this list that would violate the terms of its denial order is prohibited.

Unverified List
A list of parties where BIS has been unable to verify the end-user in prior transactions. The presence of a party on this list in a transaction is a "Red Flag" that should be resolved before proceeding with the transaction.

Entity List
A list of parties whose presence in a transaction can trigger a license requirement under the Export Administration Regulations. The list specifies the license requirements that apply to each listed party. These license requirements are in addition to any license requirements imposed on the transaction by other provisions of the Export Administration Regulations.

Specially Designated Nationals List
A list compiled by the Treasury Department, Office of Foreign Assets Control (OFAC). OFAC's regulations may prohibit a transaction if a party on this list is involved. In addition, the Export Administration Regulations require a license for exports or reexports to a country on any entry on this list that contains any of the suffixes "SDGT", "SDT", "FTO", "IRAQ2" or "NPWMC".

Debarred List
A list compiled by the State Department of parties who are barred by §127.7 of the International Traffic in Arms Regulations (ITAR) (22 CFR §127.7) from participating directly or indirectly in the export of defense articles, including technical data or in the furnishing of defense services for which a license or approval is required by the ITAR.

Nonproliferation Sanctions
Several lists compiled by the State Department of parties that have been sanctioned under various statutes. The Federal Register notice imposing sanctions on a party states the sanctions that apply to that party. Some of these sanctioned parties are subject to BIS's license application denial policy described in §744.19 of the EAR (15 CFR §744.19).

General Order No. 3 was removed from the EAR in a final rule published on September 22, 2008 (73 FR 54433)
General Prohibition 5
Applies if your item is classified under a specific ECCN
or is EAR99

You may **not**, without a license, knowingly:

Export or reexport to an end-use or
end-user prohibited by part 744

*Nuclear Proliferation*

*Missile Technology*

*Chemical/Biological Weapons*

If you “know” or are “informed”

- Knowledge is defined in 772
- Entity list, Supplement No. 4 to Part 744
General Prohibition 6
Applies if your item is classified under a specific ECCN or is EAR99

You may **not**, without a license or license exception:

Export or reexport items subject to U.S. jurisdiction to countries embargoed by the U.S. or otherwise made subject to controls as described in part 746

- Cuba (General Embargo)
- Iran (General Embargo)
- Sudan (Very Strong (UN) Sanctions)
- North Korea (Very Strong (UN) Sanctions)
- Syria (Very Strong Sanctions)
- Other Sanction/Controls
- Iraq (Special UN Controls)
- Rwanda (Special UN Controls)
General Prohibition 7
Applies if your item is classified under a specific ECCN or is EAR99

You may **not**, without a license:

- Support weapons proliferation activities if you are a U.S. Person
- Financing, transportation, forwarding
- Performance of contract, service or employment
General Prohibition 8
Applies if your item is classified under a specific ECCN *or* is EAR99

You may **not**:

Export or reexport an item through or transit through certain countries unless authorized by a license or license exception, or export/reexport is eligible to such country without a license.

Involves 17 Specifically Listed Countries:

<table>
<thead>
<tr>
<th>Armenia</th>
<th>Mongolia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Azerbaijan</td>
<td>North Korea</td>
</tr>
<tr>
<td>Belarus</td>
<td>Russia</td>
</tr>
<tr>
<td>Cambodia</td>
<td>Tajikistan</td>
</tr>
<tr>
<td>Cuba</td>
<td>Turkmenistan</td>
</tr>
<tr>
<td>Georgia</td>
<td>Ukraine</td>
</tr>
<tr>
<td>Kazakhstan</td>
<td>Uzbekistan</td>
</tr>
<tr>
<td>Kyrgyzstan</td>
<td>Vietnam</td>
</tr>
<tr>
<td>Laos</td>
<td></td>
</tr>
</tbody>
</table>
General Prohibitions 9

Applies if your item is classified under a specific ECCN or is EAR99

You may **not**: 

Violate any term or condition of a license or license exception nor violate any order issued under or made part of the EAR.

- Supplements 1 and 2 to Part 736 provide for certain General Orders and Administrative Orders
- Syria - general order in place that restricts most exports
- Cuba – general order in place that details specific gift parcels
General Prohibition 10
Applies if your item is classified under a specific ECCN or is EAR99

You may **not**: Proceed with transactions with knowledge that a violation has occurred or is about to occur
Important Concepts

After determining “License Requirements,” determine if there is an available mechanism for OVERCOMING that requirement.

This potential mechanism is called a License Exception.
List Based License Exceptions

License Exception availability specified on Commerce Control List

LVS – Limited Value Shipments

GBS – Shipments to Country Group B

CIV – Civil end users

TSR – Technology and software under restriction

APP – Computers

STA – Strategic Trade Authorization (Hybrid Case)

ENC – Encryption (SPECIAL CASE)
License Exception ENC

**CRYPT**
From the Latin “Crypta” meaning **“To Hide”**

An underground chamber or vault, especially one used for **BURIAL**;

**ENCRYPT**
To scramble in order to prevent illicit access.
For assistance with Encryption matters please contact the BIS Encryption Hotline 1-202-482-0707
Transaction Based License Exceptions

**TMP** – Temporary imports, exports and reexports

**RPL** – Servicing and replacement parts and equipment

**GOV** – Governments, international organizations and international space station

**GFT** – Gift parcels and humanitarian donations

**TSU** – Technology and software - unrestricted

**BAG** – Baggage

**AVS** – Aircraft and Vessels

**APR** - Additional permissive reexports

**AGR** - Agricultural commodities (Cuba-specific)

**CCD** - Consumer communications devices (Cuba-specific)
Use SNAP-R to Apply

SNAP-R enables exporters to submit license applications, commodity classification requests, and related support documentation directly to BIS via the internet in a secure environment.

SNAP-R is provided at no cost
Support Documents
(Section 748.9)

Decision Tree Approach
- Destination
- Reason for Control

Import Certificates or End-User Statements (As referred to by issuing government)

BIS-711 or letter equivalent Exemptions