Complying with U.S. Export Controls

DUAL USE ITEMS

Bureau of Industry & Security
U.S. Department of Commerce
NASBITE INTERNATIONAL
22nd Annual Conference
Kona Kai resort, San Diego, CA
April 21, 2009, 2:00pm-3:15pm

- Joseph M. Tosto, Jr.
  - Export Administration Specialist
  - Bureau of Industry & Security
  - U.S. Department of Commerce

- (949) 660-0144 x 122
  - www.bis.doc.gov
BIS
Bureau of Industry & Security

- Overview
- What is an Export
- How to determine if you need a Commerce Export License
- Ways to Export
- Some of the AES Elements of Concern to “BIS”, Bureau of Industry & Security
OVERVIEW

- Bureau of Industry & Security (BIS)
- Responsible for implementing and enforcing the Export Administration Regulations (EAR). Covering most commercial items – that have DUAL USE
- both commercial, military use or PROLIFERATION applications.
Keep the most sensitive goods out of the most dangerous hands.
INK PENS to NUCLEAR REACTORS
Dual Use Exports

- Term sometimes used to distinguish types of items covered by EAR from those covered by Other Government agencies with export licensing authority.

- In general, the term Dual Use serves to distinguish EAR-controlled items that can be used both in military and other strategic uses and in civil applications.
Some items are used in weapons and military related use or design and subject to controls of other government agencies.

Department of State, Department of Energy, Defense Trade Controls/ITAR, Department of the Treasury Office of Foreign Assets Control

The EAR also applies to items that have solely civil uses.
WHAT IS AN EXPORT?

- Any “Item” sent from United States to foreign destination. Items include: commodities, software or technology.

- Temporarily, Not for Sale, Going to Wholly-Owned Subsidiary, Foreign-origin item in United States, Returned items to United States and sent back to foreign origin are ALL EXPORTS!
How to Determine if a Commerce License is required

- What is being exporting?
- Where ?
- Who will receive item?
- What will your item be used for?
What are you Exporting?

- **ECCN, Export Control Classification Number and Commerce Control List**

- If item is under BIS control, it will either have an ECCN or it will be designated EAR99

- **Commerce Control List has 10 Categories and 5 Product Groups**
Publicly Available

- Published Information and Software (EAR '734.7)
- Fundamental Research (EAR '734.8)
- Educational Information (EAR '734.9)
- Patent Information (EAR '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
Deemed Exports

'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
'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
Any foreign national is subject to the deemed export rule except:

- A person granted U.S. citizenship;
- A person granted permanent residence status (i.e., “Green Card” holders);
- A person granted status as a “protected individual” under 8 U.S.C. 1324b(a)(3)
<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>Nuclear Materials, Facilities &amp; Equipment and Miscellaneous Items</td>
</tr>
<tr>
<td>1</td>
<td>Materials, Chemicals, Microorganisms &amp; Toxins</td>
</tr>
<tr>
<td>2</td>
<td>Materials Processing</td>
</tr>
<tr>
<td>3</td>
<td>Electronics Design, Development and Production</td>
</tr>
<tr>
<td>4</td>
<td>Computers</td>
</tr>
<tr>
<td>5</td>
<td>Telecom and Information Security</td>
</tr>
</tbody>
</table>
Ten Categories in the CCL
(5 to 9)

6 = Sensors and Lasers
7 = Navigation and Avionics
8 = Marine
9 = Propulsion Systems, Space Vehicles and Related Equipment
Five Product Groups

- **A** = Systems, Equipment and Components
- **B** = Test, Inspection and Production Equipment
- **C** = Materials
- **D** = Software
- **E** = Technology
If an item does not fall within a specific ECCN, it is...

**EAR99**

Reminder:

☑ Start at the beginning of each category
### EAR99 + ECCN CONCERNS

<table>
<thead>
<tr>
<th>1. EMBARGOED or SANCTIONED</th>
<th>2. LISTS TO CHECK</th>
<th>3. END USE / END USER</th>
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<tbody>
<tr>
<td>IRAN</td>
<td>DENIED PERSONS</td>
<td>NUCLEAR</td>
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<td>UNVERIFIED</td>
<td>CHEMICAL/BIOLOGICAL</td>
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<td>CUBA</td>
<td>ENTITY</td>
<td>MISSILE TECH</td>
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<td>SYRIA</td>
<td>SPECIALLY DESIGNATED NATIONALS</td>
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<td>NORTH KOREA</td>
<td>DEBARRED</td>
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</tr>
<tr>
<td></td>
<td>NONPROLIFERATION SANCTIONS</td>
<td></td>
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<tr>
<td></td>
<td>GENERAL ORDER 3</td>
<td></td>
</tr>
</tbody>
</table>
BIS Ways to Export

1. **NLR** – No License Required
2. “License Exception”
3. **VEU** “Validated End User”
4. Apply for “License”

Review Regulations Prior to Exporting and remember, NLR is “not” to be used until it is verified Item/s qualify for its use.
“Know your Customer” Guidance

- Be Aware of **Diversion Risks**!

- Lists you must check prior to export:
  - Denied Parties
  - Embargoed countries
  - BIS Listed Entities
  - BIS General Orders
  - OFAC, Treasury Dept

- Exercise due diligence where Red Flags are present; refrain from/report questionable transactions.
Exporter Responsibility

- When using Export License or License Exception (Part 740), be sure you are in compliance.
- Census Bureau has requirements, verify.
- Export records MUST be maintained 5 years from date of export, reexport or many other activities.
- Antiboycott Compliance (202) 482-2381
AES Data Elements of Concern to BIS

- License Type (license, exception, NLR)
- License Number
- ECCN
- Country
- Quantity and Value
- Exporter
- Consignee
- U.S. Agent
- AES Filer
- Harmonized/Schedule B Number
License Exception Reporting Problems

- License Exceptions Reported without ECCNs—ie: LVS, TMP, RPL
- License Exceptions Reported with EAR99
- License Exceptions are Non-Applicable to CCL
- License Exceptions are Non-Applicable to Countries
No License Required Analysis

- **NLR Export Data Parameters:**
  - **ECCN, HS, Country, USPPI, Consignee, Description**
  - These Parameters Match Licensed Exports
2007 Compliance Study

- License Exception Usage
- ECCN Validation
- No License Required/EAR99 Review
License Exception Use

4th Qtr 2007 License Exception Reporting Problems

- Missing ECCN: 11,195
- EAR99: 3,733
- ECCN N/A: 376
HOW VIOLATIONS HAPPEN IN GOOD COMPANIES

- Overwhelmed by end of quarter orders and processing
- New personnel using outdated go-by documentation
- Export manager on vacation (cross train back up personnel)
- Lack of communication with sales staff and foreign distributors
ECCN Reporting Problems

- ECCNs Reported in AES Do Not Exist in the CCL
- ECCNs on License Do Not Match ECCNs in AES
License Determination and Authority

- No “Writing”
  - The USPPI is the “Exporter” and Responsible for License Determination and Obtaining Authorization

- A “Writing”
  - The FPPI Assumes Responsibility for Determination and Obtaining Authorization
  - The FPPI’s Agent is the “Exporter”
Preparing for Government Follow-Up

- **BIS Compliance Reports**
  - Identifies Exporters and Forwarding Agents
  - Identifies Unresolved Fatal Errors
  
  512 FATAL ECCN MISSING
  515 FATALECCN MUST BE FORMATED NANNN
  542 FATAL LICENSEABLE SHPMT NOT PERMITD/OPT 4 USPPI
  544 FATAL BIS LICENSE NBR MISSING
  545 FATAL BIS LICENSE NBR UNKNOWN
  546 FATAL BIS LICENSE NO LONGER ACTIVE
  547 FATAL BIS EXEMPTION CODE MISSING
  548 FATAL BIS EXEMPTION CODE UNKNOWN
  666 FATAL ECCN MUST BE FROM APPROVED LIST
  667 FATAL COUNTRY NOT ALLOWED FOR LICENSE TYPE
Follow-Up Continued

- Identifies Unresolved AES Compliance Warnings on EAR Related Data

700 COMPLIANCE SHIPMENT REPORTED LATE; OPT 2
701 COMPLIANCE SHIPMENT REPORTED LATE; OPT 4
702 COMPLIANCE LINE ACTIVITY ADD POST DEPARTURE
703 COMPLIANCE LINE ACTIVITY DELETED POST DEPARTURE
704 COMPLIANCE LICENSE TYPE CHANGE POST DEPARTURE
705 COMPLIANCE LICENSE NUMBER CHANGE POST DEPARTURE
706 COMPLIANCE LICENSABLE VALUE CHANGE POST DEPARTURE
Data Retention

- Keep Documents that Support the License Determination
- Keep Copies of any Writings, POAs, or Written Authorizations
- Keep Supporting Documents that Assist you in Preparing the AES Record
- Keep the ITN and Your Company Reference Number
- Know How to Access the AES Record in a Timely Manner
- Know Who is the Provider of the Information Above
- Keep the Information for a Minimum of 5 Years
AES Administrator Responsibilities

- **Company Administrator**
  - **USPPI**
    - Notifies Staff, Agents, Software Vendors, and Carriers of Updates
  - **Agents**
    - Notifies Staff, USPPIs, FPPIs, Software Vendors, and Carriers of Updates
ECCN Validation

4th Qtr 2007 ECCN Reporting Problems

- Invalid ECCN with License Shipment: 18
- Invalid ECCN with Excepted Shipment: 149
- License - Export ECCN mismatch: 259
Checklist for USPPIs and Agents

- Who is Determining Export Control Requirements?
- Who is Obtaining License Authorization?
- Do I need a “Writing” from the FPPI?
- Do I need to obtain or provide a power of attorney or written authorization?
- Do I understand my obligation NOT to proceed if a violation is present?
- What data do I obtain or provide and from or to whom in order to complete an AES record?
- Do I know who is completing the AES record?
- Am I prepared to respond to AES error messages?
- Do I have sufficient documentation that supports my export control determination and AES filing and have I retained that documentation?
- Do I have a process in place to give my agent or carrier the proof of AES filing or exemption or exclusion?
- Do I know how and when I can make corrections to data in AES?
- Am I ready to respond to a Government request to improve compliance?
- Upon request, can I provide information to the USPPI that they supplied and I filed in AES?
Contact Information

- **Office of Technology Evaluation:**

  Gerry Horner  
  U.S. Department of Commerce  
  Office of Technology Evaluation  
  1401 Constitution Ave., NW  
  Room 1093  
  Washington, DC 20230  
  ghorner@bis.doc.gov  
  202-482-2078  
  202-482-5361 (fax)
Office of Export Enforcement

OEE routinely works with various U.S. intelligence and defense agencies for threat assessment and the enforcement of U.S. Export Laws.
If you have reasons for concern about a potential or real RED FLAG, do not proceed with transaction. Notify BIS for further guidance.

BIS Office of Export Enforcement may be contacted 24 hours a day at:

1 (800) 424-2980
penalties

**Criminal:**
- 20 years imprisonment
- $250,000 fine
- ($1,000,000 corporation)

**Civil:**
- $250,000 max per violation
  or 2 x value of export
- Denial of export privileges
DON’T LIE TO THE FEDS!!


Criminal fine and imprisonment up to 5 years
Person ordering the item is unfamiliar with product or technical information regarding end-use.

Inappropriate end-user – banks, overseas freight forwarders, etc.

Conflicting information on sales documentation and export routing correspondence.
It all depends on the meaning of the word, “know.”

American Heritage Dictionary: To be certain of; regard or accept as true beyond doubt

EAR defines “knowledge”: …includes not only positive knowledge that the circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence. Such awareness is inferred from evidence of the conscious disregard of facts known to a person and…also…from a person’s willful avoidance of facts.
EVIDENCE OF EFFECTIVE COMPLIANCE

- **Documentation**
  - Training records
  - Disciplinary records for violations of company policy
  - Due diligence/screening checklist
  - Evidence of record retention
  - Provide results of compliance audits
  - Clearly written designation of responsible personnel
Where to Get Assistance

- **Western Regional Offices**
  - Newport Beach, CA (949) 660-0144
  - San Jose, CA (408) 998-8806

- **Washington, D.C.**
  - (202) 482-4811
  - Web: www.bis.doc.gov
SUMMARY

1. **What** “Item” is being Exported?
2. **Where** is “Item going”?
3. **Who** will receive Item?
4. **What** will Item be used for?

Freight Forwarder, Third Party Logistics, Integrated Carrier, Airline, Steamship Line, NVOCC may not know answer to “What”, however be alert to ???

Be Positive you have an Export Compliance Program in place, it is being used and current. Attend our Seminars on a regular basis.

**REFER TO CURRENT REGULATIONS WHEN MAKING DECISIONS!!!**
If your competitor, or any PERSON is breaking the law, help them find a new home.

www.bis.doc.gov
Optimistically Yours,

- Contact me for specific “challenges” you may face in complying with current Export Administration Regulations!

- Joe Tosto, Jr., (949)660-0144 x 122

- jtosto@bis.doc.gov