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A Guide to Export Controls for the Non-Specialist

JOHN R. LIEBMAN* & KEVIN J. LOMBARDO**

I. INTRODUCTION

The export of products, technology, and services from the United States comprises an essential element of the ability of U.S. companies to conduct business globally. Yet, many nations, and in particular the U.S., place rigorous controls on the export of certain products, technology, and services to customers in other countries, reflecting their national security and foreign policy concerns.¹ In order to maintain the ability to export its products, a U.S. business enterprise must comply with the applicable U.S. export control laws (some of which apply extraterritorially).

Under U.S. law, there are serious administrative, civil, and criminal consequences for violations of the export control laws. U.S. export controls (discussed below) apply equally to U.S. companies and, in many cases, to their foreign affiliates as well. Sanctions that may be imposed against a U.S. company for export violations include the denial of export privileges and substantial civil fines.² Criminal sanctions may include heavy fines levied against a company, its subsidiaries and culpable individual

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1. See, e.g., Christopher F. Corr, *The Wall Still Stands! Complying with Export Controls on Technology Transfers in the Post-Cold War, Post-9/11 Era*, 25 HOUS. J. INT'L L. 441, 443-46 (2003); Gregory W. Bowman, *E-mails, Servers, and Software: U.S. Export Controls for the Modern Era*, 35 GEO. J. INT' L. 325-26 (2004); Daniel H. Joyner, *The Enhanced Proliferation Control Initiative: National Security Necessity or Unconstitutionally Vague?*, 32 GA. J. INT'L & COMP. L. 107, 112-15 (2004).

2. See, e.g., 15 C.F.R. § 764.3(a)(1)-(2) (2006).

employees, and the imprisonment of culpable employees.³ In addition, many of the countries in which U.S. companies and their foreign affiliates conduct business impose significant restrictions on the import and export of goods, technology, and services. In view of the consequences of export violations, employers' responses to employee misconduct in this area should include immediate suspension and separation from employment. U.S. export controls also apply to a company's consultants, sales representatives, and distributors when selling, distributing, manufacturing or servicing the company's products, or receiving technical data, software, or services.

In today's contentious and sometimes xenophobic climate, companies that engage in transactions or activities contrary to U.S. export regulations, or the regulations of any other nation, do so at considerable risk.⁴ Accordingly, U.S. companies must take aggressive measures to ensure that their activities, and those of their employees, consultants, sales representatives, and distributors comport with the standards set forth by: (1) the International Traffic in Arms Regulations ("ITAR")⁵ administered by the State Department, (2) the Export Administration Regulations ("EAR")⁶ administered by the Commerce Department, (3) the various trade embargo programs administered by the Treasury Department,⁷ and (4) any other applicable national laws and regulations, such as Special Export Controls. These four areas are discussed more fully below.

3. See, e.g., 50 U.S.C. § 1705(b) (2006); 18 U.S.C. § 3571(b), (b)(3), (c)(3), (d) (2006).

4. Donald W. Smith, *Defense of Export Control Enforcement Actions*, reprinted in COPING WITH U.S. EXPORT CONTROLS 2003; EXPORT CONTROLS & SANCTIONS: WHAT LAWYERS NEED TO KNOW 615-16 (Practising Law Institute 2003) ("In dealing with issues involving the U.S. export control laws, many companies consistently fail to recognize the severe potential consequences which can result from violations, or alleged violations, of these laws.").

5. International Traffic in Arms Regulations, 22 C.F.R. pts. 120-130 (2006).

6. Export Administration Regulations, 15 C.F.R. pts. 730-774 (2006).

7. See generally R. Richard Newcomb, Director of the Office of Foreign Assets Control, *Office of Foreign Assets Control: An Overview*, reprinted in COPING WITH U.S. EXPORT CONTROLS 2003; EXPORT CONTROLS & SANCTIONS: WHAT LAWYERS NEED TO KNOW, *supra* note 4, at 653-77 (providing an overview of Treasury Department embargos).

II. OVERVIEW OF EXPORT CONTROL LAWS

A. Introduction

Generally, the U.S. Government controls exports on a case-by-case basis, examining such factors as destination, end-user, the product, and its end-use. Accordingly, a company, along with its U.S. and foreign affiliates, divisions, and subsidiaries, must comply with all government regulations concerning: (a) exports, imports, re-exports or re-transfers⁸ of products and technical data, (b) the rendition of services to foreign persons, and (c) regulations concerning participation in financial transactions with certain designated countries and nationals of those countries. A company should not make any exports without verifying compliance with all applicable laws and regulations (which, in certain cases, will require a license from the agency administering those regulations). Because exports are controlled by different agencies depending on the inherent nature of the product (defense article or “dual use” article), proper regulatory classification is essential.⁹

The laws define an “export” broadly. In addition to the conventional shipment of products abroad from the U.S., an export includes:

The removal from the U.S. of any commodity or technical information, whether for sale, demonstration, exchange or discussion. This includes personal baggage, laptop computers, product samples and software;

The disclosure in any manner (including oral and visual) of any technical data, including software or other information, to any “foreign person,” irrespective of whether that disclosure is made in the U.S. or elsewhere. A “foreign person” is an individual who is neither a U.S. citizen, permanent U.S. resident nor immigrant alien who has the right to reside and be employed in the U.S.;¹⁰ and

8. Reexport or retransfer means the transfer of products or services “to an end-use, end-user or destination not previously authorized.” 22 C.F.R. § 120.19 (2006). Typically, this occurs when a company properly exports an item to a foreign country, then “reexports” the item to another country without proper authorization.

9. See John R. Liebman, *Product Classification and Regulatory Compliance*, reprinted in *COPING WITH U.S. EXPORT CONTROLS 2003; EXPORT CONTROLS & SANCTIONS: WHAT LAWYERS NEED TO KNOW*, *supra* note 4, at 583, 593-94.

10. 22 C.F.R. § 120.17(4) (2006). No “foreign person” should be employed or offered employment by a company without prior approval of the Export Compliance Officer, and, in any case, is subject to the company in question obtaining an appropriate export license for that purpose.

The rendition of a service to or for the benefit of a non-U.S. person, irrespective of whether such service is rendered in the U.S. or elsewhere.¹¹

Accordingly, companies should educate employees as to the “who,” “what,” “when,” “where,” and “how” of export, reexport and import policies and procedures for products, technical data, software, and services. In order to prevent violations of export laws and subsequent enforcement proceedings, a company must require that its domestic and foreign affiliates:

Demonstrate a commitment to create active management dedicated to creating and maintaining an effective export control program;

Select an appropriate Export Compliance Officer (“ECO”);

Assure that the ECO has adequate staff, resources, training and supervision;

Establish a compliance program; and

Instill a culture of compliance in all company personnel.¹²

B. Three Main Types of Export Controls

There are three main federal agencies that control exports: (1) the U.S. Department of State (“State”), (2) the U.S. Department of Commerce (“Commerce”), and (3) the U.S. Treasury Department’s Office of Foreign Assets Control (“OFAC”).¹³ Certain commodities are subject to control by State, others by Commerce, while OFAC controls certain transactions, irrespective of the nature of the commodity.¹⁴ The majority of exports which require a license are controlled on the Commerce

11. See, e.g., *Id.* § 120.17(5); 15 C.F.R. pt. 734 (2006). Transfers of controlled technical data frequently occur in academic, commercial, and industrial environments.

12. See generally Smith, *supra* note 4, at 615-16 (“The best strategy for avoiding entanglement in an export control enforcement action is an effective internal control system ... [along with] continuing support of top management for the program and their willingness to devote sufficient personnel resources to its implementation.”); John R. Liebman, *Export Compliance Counseling: The Role of Corporate Culture*, reprinted in COPING WITH U.S. EXPORT CONTROLS 2003; EXPORT CONTROLS & SANCTIONS: WHAT LAWYERS NEED TO KNOW, *supra* note 4, at 597-607 (explaining the need for a corporate culture that supports regulatory compliance and providing models of compensation programs).

13. See Cecil Hunt, Department of Commerce Export Controls, reprinted in COPING WITH U.S. EXPORT CONTROLS 2003; EXPORT CONTROLS & SANCTIONS: WHAT LAWYERS NEED TO KNOW, *supra* note 4, at 44-46; see also U.S. Department of the Treasury, Office of Foreign Assets Control, <http://www.treasury.gov/offices/enforcement/ofac/>.

14. See Hunt, *supra* note 13, at 46.

Control List (“CCL”)¹⁵ administered by Commerce or the U.S. Munitions List (“USML”)¹⁶ administered by State. Commerce primarily uses its CCL to regulate the export of “dual-use” items, meaning items that are suitable for either military or nonmilitary related use.¹⁷ State, however, controls the export of defense articles, services, and related technologies. Conversely, OFAC is responsible for setting economic and trade sanctions against, among other things, certain foreign countries and terrorism-sponsoring organizations.

The following is a brief overview of the export control laws of State, Commerce, and Treasury. This overview is not intended to detail the complexity of the export control laws, but rather is designed to give the non-specialist a helpful introduction.

1. State Controls—ITAR

State controls the export of defense articles and services under the ITAR.¹⁸ The ITAR, promulgated pursuant to section 38 of the Arms Export Control Act,¹⁹ and administered by the Directorate of Defense Trade Controls (“DDTC”)²⁰ at State, regulates the manufacture, temporary import and export of “defense articles,” and the export of “defense services” and “technical data” appurtenant to defense articles and defense services (these terms are defined and discussed more fully below).²¹ Rigorous compliance with the ITAR is essential to the integrity and success of a company’s business operations.

The USML is part of the ITAR and sets forth what State has designated to be defense articles and defense services.²² The USML is divided into twenty-one categories and has been drafted

15. Commerce Control List, 15 C.F.R. pt. 774, supp. 1 (2006). The CCL is part of the EAR. 15 C.F.R. pts. 730-774.

16. The United States Munitions List, 22 C.F.R. § 121.1 (2006). The USML is part of the ITAR. 22 C.F.R. pts. 120-130 (2006).

17. See 15 C.F.R. § 730.3 (2006).

18. 22 C.F.R. pts. 120-30 (2006).

19. 22 U.S.C. §§ 2778, 2794(7) (2006).

20. The DDTC, Bureau of Political-Military Affairs, in accordance with 22 U.S.C. §§ 2778-2780 of the Arms Export Controls Act (“AECA”) and the ITAR, is charged with controlling the export and temporary import of defense articles and defense services covered by the United States Munitions List.

21. ERIC L. HIRSCHHORN, *THE EXPORT CONTROL AND EMBARGO HANDBOOK* 111 (2d ed. 2005).

22. See 22 C.F.R. § 121.1 (2006).

to include categories such as "Guns and Armament"²³ and "Directed Energy Weapons,"²⁴ and cover such articles as guns, explosives, ships, aircraft, lasers, and space electronics. As a matter of policy, items on the USML are limited to those specifically designed for military application.²⁵ Conversely, the "dual use" items listed on the CCL have a predominantly civil application and are controlled by Commerce.

According to the ITAR, defense articles, defense services, and technical data are defined as follows:

(a) Defense Articles

Defense articles consist of two types of products. The first group includes eighteen categories of products deemed to be on the U.S. Munitions List set forth in Part 121. The second group includes a "catch-all" category for articles that are not specifically enumerated in other categories of the Munitions List, but which have substantial military application and have been specifically designed or modified for military purposes.²⁶ The "catch-all" category also includes technical data and defense services that are "directly related to the defense articles enumerated in [the previous definition of defense articles]."²⁷ Some defense articles appear on the Missile Technology Control Regime Annex ("MTCR")²⁸ and may be controlled by Commerce as well as by State. ITAR also may apply a broader designation authority.²⁹ This enables State to bring within ITAR jurisdiction any article or service if it:

(a) Is specifically designed, developed, configured, adapted, or modified for a military application, and

(i) Does not have predominant civil applications, and

(ii) Does not have performance equivalent (defined by form, fit and function) to those of an article or service used for civil applications,

- or -

(b) Is specifically designed, developed, configured, adapted, or modified for a military application, and has significant military

23. *Id.* § 121.1 (Category II).

24. *Id.* § 121.1 (Category XVIII).

25. *Id.* § 121.1 at Category II (3); Category III(5).

26. *Id.* § 121.1 at Category XXI ("Miscellaneous Articles") (a).

27. *Id.* § 121.1 at Category XXI ("Miscellaneous Articles") (b).

28. *Id.* § 121.16.

29. *Id.* § 120.2.

or intelligence applicability such that control under this subchapter is necessary.³⁰

Furthermore, the intended use of the article or service after its export (i.e., for a military or civilian purpose) is not relevant in determining whether the article or service is subject to ITAR controls; the product's capability is the controlling concern.³¹

(b) Defense Services

Defense services encompass “[t]he furnishing of assistance (including training) to foreign persons, whether in the U.S. or abroad, in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles. . . .”³² Furthermore, defense services also include: (1) “[t]he furnishing to foreign persons any technical data controlled [by the ITAR], whether in the United States or abroad”;³³ or (2) “[m]ilitary training of foreign units and forces . . . including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice.”³⁴ Under 22 C.F.R. Section 124.1, licensing requirements applicable to defense services apply irrespective of whether the information or technical data to be disclosed is in the public domain or is otherwise exempt from licensing requirements under Section 125.4.³⁵

(c) Technical Data

Technical data includes information related to defense articles. This includes information required for the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles.³⁶ Further, technical data “includes information in the form of blueprints, drawings, photographs, plans, instructions [and]

30. *Id.* § 120.3.

31. *Id.* Articles or services that do not meet this test, but that have the capability for dual use are controlled by Commerce under the EAR.

32. 22 C.F.R. § 120.9(a)(1) (2006).

33. *Id.* § 120.9(a)(2).

34. *Id.* § 120.9(a)(3).

35. *Id.* § 124.1(a).

36. *See id.* § 120.10(a)(1).

documentation.”³⁷ Under the ITAR, technical data may also include certain classified information as well as information covered by an invention secrecy order and software directly related to defense articles.³⁸ However, the ITAR does not control “general scientific, mathematical, or engineering principles commonly taught in schools.”³⁹ Thus, in addition to the relatively descriptive categories in Part 121, the ITAR enables the exporter to engage in a self-classification process by inviting an overlay of its products and services against the parameters set out in the ITAR.

Broadly speaking, no defense article, defense service, or technical data (as defined by the ITAR) may be exported or reexported without the prior approval (i.e., a license) from State.⁴⁰ Moreover, not only is a license required from State before a munitions item may be exported, but a firm must register with State’s DDTTC before engaging in any munitions manufacturing or exporting activities. Anyone who engages in the manufacturing, brokering, importing, or exporting of defense articles or furnishing defense services must register with State.⁴¹ Licenses are also required to provide defense services or enter into technical assistance or manufacturing license agreements, even if no article or technical data is exported.⁴² Since obtaining a license from State requires considerable resources and substantial time and effort, the company must allow adequate lead time between the date the company accepts an order for goods and the date upon which the company is to deliver the goods.

The ITAR also provides for various exclusions and exemptions, but these limited exemptions and exclusions from licensing requirements must be well understood in order to be fully and properly utilized. The exclusions from ITAR controls apply to all destinations, whereas exemptions from these controls

37. *Id.*

38. 22 C.F.R. § 120.10(a)(2)-(4) (2006).

39. *Id.* § 120.10(a)(5) (2006).

40. See Philip S. Rhoads, *The International Traffic in Arms Regulations: Compliance and Enforcement in the Directorate of Defense Trade Controls U.S. Department of State*, reprinted in COPING WITH U.S. EXPORT CONTROLS 2003; EXPORT CONTROLS & SANCTIONS: WHAT LAWYERS NEED TO KNOW, *supra* note 4, at 495-96.

41. 22 C.F.R. § 122.1(a); 22 U.S.C. § 2778(b)(1)(A) (2006); 22 C.F.R. pt. 129 (2006) (imposing registration requirement upon brokers of defense articles). For in-depth information regarding registration procedures, see Rhoads, *supra* note 40, at 496-501, and HIRSCHHORN, *supra* note 21, at 121-27.

42. See, e.g., 22 C.F.R. §§ 123.15, 123.16 (2006).

generally apply only selectively to favored destinations. Generally, however, what is excluded or exempted from State licensing requirements is subject to Commerce jurisdiction.⁴³ Most ITAR excluded or exempted items are less rigorously controlled by Commerce. Exclusions from ITAR licensing requirements applicable to all destinations are listed in various parts of the ITAR,⁴⁴ and include, *inter alia*: (1) specified aircraft types and components;⁴⁵ (2) forgings, castings, and machined bodies in normal commercial use;⁴⁶ (3) cartridge and shell casings rendered useless;⁴⁷ (4) mere travel outside the U.S. by a person whose personal knowledge includes technical data;⁴⁸ and (5) general scientific, mathematical or engineering principles commonly taught in schools, colleges, and universities, information in the public domain, or basic marketing information on function or purpose or general system descriptions.⁴⁹

The ITAR implicitly relies on the business community to apply rigorous self-classification procedures to determine whether a given commodity or technology is subject to ITAR export controls. The ITAR, however, also sets forth a procedure that the exporter may invoke to obtain a “commodity jurisdiction” (“CJ”) determination from State in cases of doubt.⁵⁰ A CJ procedure is used to determine whether an item or service is subject to export licensing authority of either State or Commerce.⁵¹

For more information regarding the ITAR, visit www.pmdtc.org.

2. Commerce Controls—EAR

Commerce regulates exports using the EAR, including the Anti-boycott Regulations (“ABR”).⁵² Commerce controls, which

43. See 15 C.F.R. § 734.3 (2006).

44. These include 22 C.F.R. §§ 121.1 Category VIII(a), (b), (f), and (h); 121.1 Categories XI(c) and XII(e); 121.10; 121.1 Category III(f)(2); 120.17(1); 121.1 Category X(a); 121.1 Category IV(a); 121.11; 121.1 Category V(d); 121.1 Category XIII(d); 121.1 Category XII(c); and 120.10(5).

45. 22 C.F.R. § 121.1 Category VIII(a), (b), (f), and (h).

46. *Id.* § 121.10.

47. *Id.* § 121.1 Category III(f)(2); 15 C.F.R. § 770.2(g).

48. *Id.* § 120.17(1).

49. *Id.* § 120.10(5).

50. *Id.* § 120.4.

51. *Id.*; see also HIRSCHHORN, *supra* note 21, at 113.

52. 15 C.F.R. pt. 760 (2006). Strictly speaking, the ABR are not export controls. The Commerce and Treasury Departments’ regulations and guidelines impose penalties upon

were originally authorized by the Export Administration Act (“EAA”),⁵³ and presently are authorized by the International Emergency Economic Powers Act (“IEEPA”),⁵⁴ regulate exports in several areas of governmental concern, including anti-terrorism, crime control, encryption items, foreign policy, missile proliferation, and national security.⁵⁵

The EAR is designed to identify those items that are “subject to the EAR,” meaning items and activities regulated by Commerce.⁵⁶ The EAR includes controls imposed for a variety of purposes, and covers exports, reexports and retransfers of commercial (“dual-use”) commodities, services and technical data.⁵⁷ Items (e.g., commodities, technology and software) subject to the EAR include all items “in the United States” and items of “U.S. origin” outside of the U.S., with the exception of: (a) items controlled by another agency, (b) publicly available technology and software, and (c) foreign-origin items with U.S.-origin content that is below a specified percentage.⁵⁸ Activities subject to the EAR include, *inter alia*: (i) exportation from the U.S. (and any reexportation), and (ii) certain releases of technology or software to a foreign national.⁵⁹

Once a company decides that an item or service is subject to the EAR, the company must then decide whether the export requires a license. The EAR provides that an entity may undertake transactions subject to the EAR without a license

any U.S. person who participates in, or cooperates or complies with, a boycott not sanctioned by the U.S. (including, for example, the Arab League Boycott of Israel). *Id.* pt. 760.2. These rules apply to all “U.S. persons,” including individuals and companies located in the U.S. and their foreign affiliates, subsidiaries, and divisions. *Id.* pt. 760.1(b).

53. 50 U.S.C. App. §§ 2401-2420 (2000) (expired Aug. 20, 2001).

54. 50 U.S.C. §§ 1701-1706 (2000).

55. See HIRSCHHORN, *supra* note 21, at 7.

56. 15 C.F.R. § 734.2(a) (2006).

57. See HIRSCHHORN, *supra* note 21, at 6.

58. See 15 C.F.R. § 734.4.

59. The “release” of software or source code to a foreign national who is not a permanent resident is considered to be a “deemed export” to that person’s home country. See *id.* § 734.2(b)(2)(ii). According to Commerce, technology is considered “released” for export when: (a) it is available to foreign nationals for visual inspection (such as reading technical specifications, plans, blueprints, etc.); (b) technology is exchanged orally with foreign nationals; or (c) technology is made available to foreign nationals by practice or application under the guidance of persons with knowledge of the technology. *Id.* § 734.2(b)(3). Deemed exports are subject to the license requirements that would apply to an actual transfer of technology or software to the country in question. See *id.* § 734.2(b)(2)(ii).

“unless the regulations affirmatively state such a requirement.”⁶⁰ Generally, under the EAR, most commercial commodities, technical data, software, and services on the market today (including products not subject to the ITAR) may be exported to almost any nation in the world with few, if any, conditions attached.

The EAR provides ten “General Prohibitions” that describe the scenarios under which Commerce requires an export license.⁶¹ General Prohibitions one through three are product or so-called “list based” controls, pursuant to which the CCL and the Country Chart (described more fully below) are used to determine the license requirements.⁶² General Prohibitions four through ten—the so-called “catch-all” controls—describe certain activities that are not permitted without prior authorization from Commerce.⁶³

Commerce, through the EAR, maintains the CCL (discussed in General Prohibitions one through three). The CCL details the items subject to Commerce’s licensing requirements, but does not include those items exclusively controlled for export by another agency.⁶⁴ Nevertheless, a company should be familiar with the CCL and its classification process for all items that the company exports.

The CCL is divided into ten categories, numbered zero through nine, ranging from nuclear materials to propulsion systems.⁶⁵ Within each category, the items are arranged into five

60. See *id.* § 736.1.

61. See HIRSCHHORN, *supra* note 21, at 13-15.

62. See 15 C.F.R. §§ 736.2(b)(1) (Export and reexport of controlled items to listed countries), 736.2(b)(2) (Reexport and export from abroad of foreign-made items incorporating more than a *de minimus* amount of controlled U.S. content), 736.2(b)(3) (Reexport and export from abroad of the foreign-produced direct product of U.S. technology and software).

63. See *id.* §§ 736.2(b)(4) (Engaging in actions prohibited by a denial order), 736.2(b)(5) (Export or reexport to prohibited end-uses or end-users), 736.2(b)(6) (Export or reexport to embargoed destinations); 736.2(b)(7) (Support of proliferation activities), 736.2(b)(8) (In transit shipments and items to be unladen from vessels or aircraft), 736.2(b)(9) (Violation of any order, terms, and conditions), and 736.2(b)(10) (Proceeding with transactions with knowledge that a violation has occurred or is about to occur).

64. Items that are “subject to the EAR” but are not on the CCL require a license only in certain situations. These items are called “EAR 99” items. HIRSCHHORN, *supra* note 21, at 26.

65. The categories are as follows:

- 0 – Nuclear Materials, Facilities and Equipment and Miscellaneous
- 1 – Materials, Chemicals, “Microorganisms,” and Toxins
- 2 – Materials Processing
- 3 – Electronics

subcategories, or groups, which are: (A) Equipment, Assemblies and Components; (B) Test, Inspection and Production Equipment; (C) Materials; (D) Software; and (E) Technology.⁶⁶ Within each of these subcategories, the items are organized by their Export Control Classification Number ("ECCN"). The ECCN is a five digit number that identifies the item by category, group, and reason for control.⁶⁷ For example, ECCN 7D101, refers to software that is specifically designed or modified for the development or production of certain types of navigation equipment. The "7" places the item under category 7, Navigation and Avionics. The "D" puts the item in subgroup D, Software. The "101" identifies the type of controls, or "Reasons for Controls,"⁶⁸ which, in this case, would be Missile Technology.⁶⁹

Through this intricate classification process in the EAR's CCL and Commerce Country Chart,⁷⁰ a control matrix emerges that determines whether a given commodity and its related production equipment, technical information, and software must be licensed by Commerce before it may be lawfully exported from the U.S. (or reexported by the foreign customer who previously

4 – Computers

5 – Telecommunications and Information Security

6 – Lasers and Sensors

7 – Navigation and Avionics

8 – Marine

9 – Propulsion Systems, Space Vehicles and Related Equipment.

15 C.F.R. § 738.2(a).

66. *See id.* § 738.2(b).

67. HIRSCHHORN, *supra* note 21, at 27.

68. The Reasons for Control are as follows:

0-99 – National Security

100-199 – Missile Technology

200-299 – Nuclear

300-399 – Chemical and Biological Weapons

900-999 – Anti-terrorism, Crime Control, Regional Stability, UN Sanctions, etc.

15 C.F.R. § 738.2(d).

69. The license requirements section of each ECCN identifies all the possible reasons for control, which are: Anti-Terrorism (AT), Chemical & Biological Weapons (CB), Crime Control (CC), Chemical Weapons Convention (CW), Encryption Items (EI), Firearms Convention (FC), Missile Technology (MT), National Security (NS), Nuclear Nonproliferation (NP), Regional Stability (RS), Short Supply (SS), Computers (XP), and Significant Items (SI). *Id.* § 738.2(d)(2)(i)(A).

70. 15 C.F.R. pt. 738 supp. 1. The "Country Chart" header identifies a column name and number that applies to each Reason for Control. Therefore, by identifying the country to which the item will be exported, and the Reason for Control (if any) to that particular country for the items at issue, one can determine whether a license is required to export a particular item.

acquired the commodity). The matrix reveals that the level of control applied is determined by four factors: (i) the level of technological sophistication of the commodity, (ii) the commodity's potential for becoming the foundation of more advanced technology, (iii) the commodity's end-use, and (iv) the end-user to whom the exporter desires to send the commodity. For example, applying foreign policy criteria, the level of control applied to a given product is likely to be very low if it is to be exported to Canada, whereas Cuba is virtually embargoed by the U.S. Similarly, applying national security criteria, North Atlantic Trade Organization ("NATO") members fare better than some non-NATO countries. It is essential that a company establish and maintain a Product-Country Matrix for all products, services, and related items that are or may be exported.

In addition to knowing how the EAR applies to its products and services, a company must know its customers. Knowing the customers is essential because Commerce has the power to suspend individuals and companies, both in the U.S. and abroad, from eligibility to export from the U.S. or to be recipients of U.S. exports. Such suspensions or debarments are found in Commerce's Denied Persons List ("DPL"), which is frequently updated and available for inspection at www.bis.doc.gov.⁷¹ Business transactions may not take place with the parties identified on any of these lists.⁷² Accordingly, it is mandatory that a company establish—and consistently apply—procedures that require that all customers of products or services intended for export be checked against these lists before orders are accepted or shipped.

Export controls are not confined to U.S. companies. Since export controls apply not only to products, but also to the technologies those products embody, the export controls follow the products until the product is transformed into larger orders of products, so that the relevance of the original product (and the technology it contains) is minimal. For example, an electronic product exported from the U.S. under a Commerce license may not be re-exported to a third country without securing additional

71. HIRSCHHORN, *supra* note 21, at 31, 31 n.218. Similar lists are published by State, www.pmdtc.org, and OFAC, www.ustras.gov/ofac.

72. See HIRSCHHORN, *supra* note 21, at 31 ("The EAR ... hold exporters strictly liable (i.e., without any showing that the exporter acted deliberately or even negligently) for export-related dealings with denied parties.")

government approval.⁷³ This policy has created considerable resentment among trading partners of the U.S. and is often questioned by legal scholars;⁷⁴ yet, it remains the law. For that reason, foreign affiliates are as responsible for compliance with the EAR as their U.S. counterparts. Moreover, the foreign affiliates must also be informed about, and comply with, local law.

For more information, visit the Bureau of Industry and Security ("BIS") website at www.bis.doc.gov, or call the BIS Export Counseling Division at 202.482.4811.

3. Treasury Department—OFAC

The U.S. Treasury Department's Office of Foreign Assets Control regulates a company's participation in financial transactions with certain countries (and nationals thereof) designated by Treasury.⁷⁵ For example, OFAC requires the company to obtain a license prior to proceeding with a financial transaction with a "target country" designated by Treasury.⁷⁶ Unfortunately, there is no list, or set of regulations issued by OFAC comparable to the USML or the CCL. Rather, the Code of Federal Regulations contains various provisions detailing sanctions against specific target countries or entities.⁷⁷ Each part is designed specifically to regulate transactions with that country⁷⁸ and in at least one instance expressly states that "[d]iffering foreign policy and national security circumstances may result in differing interpretations of similar language among the parts of this chapter."⁷⁹

Under the Code of Federal Regulations, no transaction of any kind is permitted between a company (or any of its employees or

73. This rule, however, is subject to *de minimis* considerations. 15 C.F.R. § 734.4 (2006). The ITAR, however, contains no such exceptions, subjecting any product containing a USML item to ITAR controls, and has led to absurd results in some instances.

74. Comment, *Extraterritorial Application of United States Law: The Case of Export Controls*, 132 U. PA. L. REV. 355, 367-75 (1984); Trevor Hiestand, *Swords into Plowshares: Considerations for 21st Century Export Controls in the United States*, 9 EMORY INT'L L. REV. 679, 707 (1995).

75. OFAC also regulates dealing in financial assets of sanctioned countries located in the U.S. See generally HIRSCHHORN, *supra* note 21, at 179-82 (summarizing the statutory basis of OFAC controls).

76. *Id.* at 179.

77. See, e.g., 31 C.F.R. pts. 535 (Cuba), 560 (Iran) (2006).

78. See, e.g., *id.* §§ 535.101 (Cuba), 560.101 (Iran).

79. *Id.* § 545.101 (Taliban sanctions).

affiliates) and any entity located within a country identified as supporting international terrorism: Cuba, Iran, Libya, North Korea, Sudan, Syria, or Myanmar (Burma).⁸⁰ Transactions between a company and entities identified as engaging in proliferation activities are subject to special limitations imposed by both State and Commerce.⁸¹ Any solicitation to conduct a transaction with any of these countries (or their nationals) or any entities identified as proliferation risks must be handled with extreme caution.⁸² Moreover, U.S. policy may vary in its application to countries from time to time, necessitating regular visits to consult the regulations in force at any given time.

For more information regarding OFAC, visit www.treas.gov/ofac, or call 202.622.2490 (compliance) or 202.622.2480 (licensing).

C. Special Export Controls – ECPI and The Wassenaar Arrangement

Several criteria are applied by the U.S. Government in determining the circumstances under which the export of goods or services will be permitted. Goods and services that, under normal circumstances, could be exported from the U.S. without advance licensing may fall under one of these “special export controls” and may not be exported without express advance approval. Special export controls cover exports in two main areas: (1) exports covered by the Enhanced Proliferation Control Initiative (“EPCI”),⁸³ which includes the export of goods or the rendition of services to end-users or to countries who are known to present risks in terms of the proliferation of chemical and biological weapons, missiles, and nuclear weaponry; and (2) exports of goods that are subject to multilateral scrutiny under the terms of the Wassenaar Arrangement.⁸⁴

The EPCI was initiated by Commerce in 1991.⁸⁵ The initiative imposes special licensing requirements for exports to end-users or countries that have been implicated in the proliferation of

80. 15 C.F.R. pt. 746 (2006).

81. *Id.* pt. 744 supp. 4; 22 C.F.R. § 126.1 (2006).

82. See discussion *infra* Section II.C.

83. 15 C.F.R. §§ 744.1-744.6 (2006).

84. The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (1996), available at <http://www.wassenaar.org/docs/IE96.html>.

85. HIRSCHHORN, *supra* note 21, at 460.

chemical and biological, missile, or nuclear weapons development.⁸⁶ Although Commerce regulations identify such end-users and countries (discussed above), exporters may be charged with knowledge of the presence of such factors in respect of end-users or projects that do *not* appear on the various government lists.⁸⁷ Exports to all such end-users or countries require special licensing procedures.⁸⁸ Any employee becoming aware of circumstances that suggest the presence of EPCI concerns must report them to the ECO.

Similarly, the Wassenaar Arrangement also imposes certain special export controls. The history of the Wassenaar Arrangement dates back several decades. The post-World War II period was characterized by tension between the U.S. and the Soviet Union, leading to the organization of military blocs, which included NATO in the West. One outgrowth of NATO was the formation of a group known as the Coordinating Committee on Multilateral Export Controls ("COCOM").⁸⁹ The purpose of the COCOM was to establish export controls for its members on certain "dual use" commodities and technology that the NATO members considered strategic.⁹⁰ Items appearing on the COCOM list could not be exported to non-NATO countries without the approval of the government of the country of origin and COCOM.

As a "relic" of the Cold War, COCOM was disbanded on March 21, 1994.⁹¹ However, on July 13, 1996, the U.S. and the former COCOM countries approved the establishment of a new cooperative regime to prevent exports of conventional arms and dual-use goods and technologies to so-called "pariah" nations: the "Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies."⁹² The Wassenaar

86. See, e.g., 15 C.F.R. §§ 744.2, 744.4, 744.5, 744.6 (2006).

87. Daniel H. Joyner, *The Enhanced Proliferation Control Initiative: National Security Necessity or Unconstitutionally Vague?*, 32 GA. J. INT'L & COMP. L. 107, 109-11 (2004) ("The obvious purpose of the EPCI provisions is to supplement the inherently limited quality of an enumerated list-based system of regulation with a more inclusive or 'catch-all' normative framework.").

88. See 15 C.F.R. § 744.1 (2006). Some of these countries may appear in supplements to Part 744 of the EAR.

89. See Jamil Jaffer, *Strengthening the Wassenaar Export Control Regime*, 3 CHI. J. INT'L L. 519, 519 (2002).

90. See *id.*

91. *Id.*; see also Hunt, *supra* note 13, at 43.

92. Hunt, *supra* note 13, at 43; Jaffer, *supra* note 89, at 520. Currently, there are 40 member countries of the Wassenaar Arrangement: Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, Finland,

Arrangement control lists can be found on their website at www.wassenaar.org.

Finally, H.R. 3100, the East Asia Security Act, was introduced in Congress in Summer, 2005. If enacted in its original version, this bill would have applied broad and stringent controls to all exports from the U.S. to China and, potentially, other countries as well. Although the original bill was defeated,⁹³ its introduction in the Congress symbolizes the concern in Washington with the rise of China as an economic and military superpower⁹⁴ and foreshadows a much more restrictive environment for the conduct of trade in the United States.⁹⁵ In fact, Commerce recently published proposed revisions to the EAR the effect of which would be to require licenses for exports of certain CCL items to China, previously not requiring licenses, where the end-use is deemed to be military.⁹⁶

III. PENALTIES: THE CONSEQUENCES OF ILLEGAL IMPORTS

Failure to comply with the U.S. export regulations, as noted above, may result in fines, as well as suspension or revocation of a company's export privileges.⁹⁷ Individuals who participate in an export activity that is not properly authorized or licensed will be held accountable for the illegal activity. Violations are punishable by fines or imprisonment, or both,⁹⁸ and the potential loss of employment with the company in question.

France, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom and United States. The Wassenaar Arrangement: Introduction, <http://www.wassenaar.org/introduction/index.html>.

93. The original version of the East Asia Security Act was defeated on the House floor July 14, 2005. William Matthews, *U.S. House OKs Version of Dual-Use Export Bill; Trade Groups Have Reservations*, DEFENSE NEWS, July 25, 2005, at 58. However, a "toned-down version of legislation" was later passed. *Id.*

94. William Matthews, *U.S. Lawmakers Defeat Anti-China-Trade Bill*, DEFENSE NEWS, July 18, 2005, at 17 (noting the bill was a product of "rising anti-China sentiments" in the House of Representatives).

95. John M. Doyle et al., *China Syndrome; Worried about China's Military Buildup, U.S. Could Impose Tighter Control on Tech Transfers*, AVIATION WEEK & SPACE TECH., Feb. 20, 2006, at 83 (reporting that, in the wake of China's military buildup, the Commerce Department is working on changes to export rules regarding giving sensitive technology to foreign nationals within the U.S., and the Defense Department hopes to reform aspects of the ITAR).

96. See 71 C.F.R. § 38313 (2006).

97. See HIRSCHHORN, *supra* note 21, at 101.

98. See generally *id.* at 101-05.

For example, according to the ITAR Section 127.1, the following actions are deemed violations:

To export or attempt to export from the United States any defense article or technical data or to furnish any defense service for which a license or written approval is required by this subchapter without first obtaining the required license or written approval from the Office of Defense Trade Controls;

To import or attempt to import any defense article whenever a license is required by this subchapter without first obtaining the required license or written approval from the Office of Defense Trade Controls;

To conspire to export, import, reexport or cause to be exported, imported or reexported, any defense article or to furnish any defense service for which a license or written approval is required by this subchapter without first obtaining the required license or written approval from the Office of Defense Trade Controls; or

To violate any of the terms or conditions of licenses or approvals granted pursuant to this subchapter.⁹⁹

A person who violates the licensing requirements of the ITAR is liable for civil and criminal penalties, which includes suspension, debarment, and a fine of not more than \$500,000 for each violation.¹⁰⁰

Similarly, every person who in any capacity participates in an export knowing that export to be unauthorized under the EAA or the EAR may be held liable for the export, and is subject to the imposition of administrative, civil and criminal penalties.¹⁰¹ The administrative penalties include subjecting the offender (and related persons) to a "denial order," which bars exports by such persons.¹⁰² Civil penalties include a fine of up to \$10,000 for each violation ("except that a civil penalty not to exceed \$100,000 may be imposed for each violation involving national security controls imposed under section 5 of the EAA").¹⁰³ Criminal penalties

99. 22 C.F.R. § 127.1 (2006). The ITAR also makes it unlawful to use any export or temporary import control document containing a false statement or misrepresenting (or omitting) a material fact for the purpose of exporting any defense article, technical data, or the furnishing of any defense service for which a license or approval is required. *See id.* § 127.2.

100. *See id.* pt. 127.

101. *See id.* pt. 764.

102. *Id.* § 764.3(a)(2).

103. *Id.* § 764.3(a)(1).

include, among other things, a fine not more than five times the value of the export or \$50,000, whichever is greater.¹⁰⁴ Additionally, conduct that constitutes a violation of the EAR or the EAA, may also be prosecuted under other provisions of the law, including conspiracy,¹⁰⁵ false statements,¹⁰⁶ mail and wire fraud,¹⁰⁷ and money laundering.¹⁰⁸

Both State and Commerce strongly encourage exporters to use voluntary disclosures if the exporter believes that it has violated export control laws.¹⁰⁹ A voluntary self-disclosure may be considered a mitigating factor in determining the various penalties administered by the agency in question.¹¹⁰ Recent experience with BIS, however, suggests that voluntary disclosures may not be in the exporter's best interest in all situations.

To demonstrate how these penalties may be applied, the following tables published in *United States Export Controls* highlight recent penalties issued by OFAC, BIS, and DDTC.¹¹¹

104. *Id.* § 764.3(b). Note that if the EAA or EAR violation is willful, “[the fine shall be] not more than five times the value of the export or reexport involved or \$1,000,000, whichever is greater; and, in the case of an individual [they] shall be fined not more than \$250,000, or imprisoned not more than 10 years, or both.” *Id.* § 764.3(b)(2).

105. 18 U.S.C. § 371 (2006).

106. *Id.* § 1001.

107. *Id.* §§ 1341, 1343, 1346.

108. *Id.* §§ 1956, 1957.

109. HIRSCHHORN, *supra* note 21, at 94, 174.

110. 15 C.F.R. § 764.5 (2006); 22 C.F.R. § 127.12 (2006); *see also* Smith, *supra* note 4, at 625-29 (discussing the benefits and drawbacks of voluntary disclosure).

111. *See* WILLIAM A. ROOT & JOHN R. LIEBMAN, UNITED STATES EXPORT CONTROLS (4th ed. Supp. 2005).

Office of Foreign Assets Control Fines and Penalties						
Date Reported	Entity	Location	Charges	Voluntary Disclosure	Penalty	Sanctions Program
3-Jun-05	Fidelity Brokerage Services Inc. dba Fidelity Investments	Boston, MA	1999-2000 Operation of Iranian account	NO	Civil - Settled, \$63,853	Iran
3-Jun-05	Pioneer Valley Travel	Northampton, MA	2001 Provision of unlicensed travel-related services	NO	Civil - Settled, \$750	Cuba
3-Jun-05	WTS Agencies, Inc. (formerly Inchcape Shipping Services)	Mobile, AL	1997 Facilitation of Trade	NO	Civil - Assessed, \$3,000	Sudan
3-Jun-05	Zooma Enterprises, Inc.	San Diego, CA	1998 Attempted exportation of goods to Iraq	NO	Civil - Settled, \$2,500	Iraq
3-Jun-05	33 Individuals	n/a	Travel-related transactions	N/A	total amount for all individuals - settled, \$31,963.12	Cuba
3-Jun-05	15 Individuals	n/a	Travel-related transactions and importation	N/A	total amount for all individuals - settled \$24,942.38	Cuba

Bureau of Industry and Security Fines and Penalties						
Date Reported	Entity	Location	Specific Charges	Voluntary Disclosure	Penalty	Reasons and Size of Transaction
3-Jun-05	Wilden Pump and Engineering Co., LLC	Grand Terrace, CA	71 violations of the EAR between 2000 and 2003. 26 violations for exporting diaphragm pumps without the required licenses. 22 violations for transferring diaphragm pumps with knowledge that violations would occur. 23 violations for making false statements on export control documents.	Unknown	Settlement - 1) Civil penalty of \$700,000 to settle administrative charges and 2) 3 year denial of export privileges for items on the Department of Commerce's control list.	Sizeable penalty due to the large number of violations, many with knowledge that the shipments were destined to embargoed countries. Pumps subject to the Department of Commerce's EAR and the Transportation's Iranian Transaction Regulations. Controlled because of possible usage in chemical and biological weapons proliferation.
26-May-05	Laurel Industrial, Inc.	San Jose, CA	Violation of the EAR between March 1999 and February 2000 for the unauthorized export of underwater acoustic detection equipment to China. Laurel knowingly exported three DS7000 acoustic deck units used for underwater acoustic detection to the PRC without the required Department of Commerce export licenses. Laurel made false or misleading statements on export documents related to these shipments.	Unknown	Settlement - 1) Civil penalty of \$44,000 for administrative charges and 2) A complete internal export compliance audit with results to be submitted to BIS.	Items are controlled for national security reasons.

Bureau of Industry and Security Fines and Penalties						
Date Reported	Entity	Location	Specific Charges	Voluntary Disclosure	Penalty	Reasons and Size of Transaction
3-Jun-05	Wilden Pump and Engineering Co., LLC	Grand Terrace, CA	71 violations of the EAR between 2000 and 2003. 26 violations for exporting diaphragm pumps without the required licenses. 22 violations for transferring diaphragm pumps with knowledge that violations would occur. 23 violations for making false statements on export control documents.	Unknown	Settlement - 1) Civil penalty of \$700,000 to settle administrative charges and 2) 3 year denial of export privileges for items on the Department of Commerce's control list.	Sizeable penalty due to the large number of violations, many with knowledge that the shipments were destined to embargoed countries. Pumps subject to the Department of Commerce's EAR and the Department of Transportation's Iranian Transaction Regulations. Controlled because of possible usage in chemical and biological weapons proliferation.
26-May-05	Laurel Industrial, Inc.	San Jose, CA	Violation of the EAR between March 1999 and February 2000 for the unauthorized export of underwater acoustic detection equipment to China. Laurel knowingly exported three DS7000 acoustic deck units used for underwater acoustic detection to the PRC without the required Department of Commerce export licenses. Laurel made false or misleading statements on export documents related to these shipments.	Unknown	Settlement - 1) Civil penalty of \$4,000 for administrative charges and 2) A complete internal export compliance audit with results to be submitted to BIS.	Items are controlled for national security reasons.

IV. CONCLUSION

Compliance with export regulations is an exacting and demanding discipline, without which an exporter faces shipping delays, customer dissatisfaction, and expensive enforcement actions. Properly applied, however, a sound export compliance program is a competitive asset and once mastered, supports positive business planning all around.

