

Morgan Lewis

# U.S. Export Control Laws and Regulations: Overview and Best Practices

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# Outline

- **Overview of U.S. Export Control Laws and Regulations**

**FCPA/UKBA**

**OFAC**

**ITAR**

**EAR**

- **Best Practices for U.S. and Non-U.S. Companies**

# Export Behavior

## Anti-Corruption Laws

- ✓ **Foreign Corrupt Practices Act (FCPA)**
- ✓ **United Kingdom Bribery Act (UKBA)**

# Why is compliance with anti-corruption laws important?

2. Enforcement of anti-corruption laws has increased dramatically over the last five years.
3. Penalties for violations of anti-corruption laws are significant and apply to **individuals** as well as companies.



# **U.S. Foreign Corrupt Practices Act (FCPA)**

# Who is Subject to FCPA

- **U.S. Individuals (World Wide)**
- **U.S. Companies**
- **Foreign Branches of U.S. Companies**
- **Foreign Subsidiaries of U.S. Companies**
- **Foreign Companies Registered with SEC**
- **Foreign Companies Providing Services to Companies Registered with SEC**

# Summary of FCPA Anti-Bribery Provisions

- **Three Prongs:**
  - 1. No payments to**
  - 2. Foreign Government Officials**
  - 3. to Obtain or Retain Business**

**Only if it were that easy...**

# Foreign Corrupt Practices Act

- **Element #1: No Payments...**
  - Cash or Cash Equivalent
  - Travel or Accommodations
  - Meals or Entertainment
  - Gifts
  - Charitable Contributions
  - Anything of any value...
  
- Amount of payment or success of bid is irrelevant



# Foreign Corrupt Practices Act

- **Element #2: Foreign Government Official**
  - ✓ Officer or Employee of a Foreign Government
  - ✓ Officer or Employee of a Government-Owned Business
  - ✓ Candidate for Foreign Political Office
  - ✓ Officer / Employee of Public International Organization
  - ✓ Generally, someone who is acting in an official capacity who has influence over purchasing decisions
  - ✓ **Title is irrelevant but influence is “key”.**

# Foreign Corrupt Practices Act

- **Element #3: Obtain or Retain Business or Gain Improper Advantage**
  - Influence business / buying decisions
  - Induce foreign official in contract award determinations
  - Success in obtaining award is not required!
  - Broadly Interpreted...

# Foreign Corrupt Practices Act

## Third Party Payments also Prohibited

- Payments made to “foreign government officials” via intermediaries and / or third parties are prohibited under FCPA if:
  - **Principal knew or should have known that all or a portion of a payment will go directly or indirectly to “foreign government official”**

# Vetting/Reviewing Third Parties

## (Reps/Agents/Consultants/Distributors)

- **Requires consistent due diligence background checks, e.g.,**
  - **Government relationships/ties/direct or indirect ownership**
  - **Legal/media searches**
  - **References**
  - **Financial stability**
- **Best Practice: Establish a **documented** process for reviewing/vetting and certifying third party intermediaries on a periodic (e.g., yearly) basis**

# FCPA and ITAR

- Assuming payments are permitted under FCPA....keep in mind the 22 CFR 130.9 (ITAR) reporting requirements when paying fees/commissions to third party representatives and agents
  - An applicant for a license or approval must advise U.S. DoS Directorate of Defense Trade Controls whether license the applicant or its vendors have paid or offered or agreed to pay political contributions of \$5,000 or more or fees/commissions of \$100,000 or more
  - Empowered Officials that are signing and submitting licenses to DDTC must confirm whether or not fees/commissions are to be paid
    - *Communicate with relevant personnel (contracts, persons responsible for FCPA compliance/vetting of reps and agents)*

# Foreign Corrupt Practices Act

## Compliance Best Practice Measures:

- **Maintain books, records and accounts that explain nature of and reason for payments made to foreign persons**
- **Educate / train US operations and foreign subsidiaries regarding FCPA**

# Gifts and Hospitality

- **Gifts**

- Must be reasonable and within limits established by the local laws or applicable to recipient – including any employing agency guidance
- Gifts with company's logo are the best choice
- In all cases, gifts must be modest in value and designed to create goodwill – **NOT** reasonably expected to affect recipient's judgment in the performance of his/her job duties

# Gifts and Hospitality

- **Hospitality**
  - Any hospitality must be reasonable and customary under the circumstances
  - In line with generally accepted standards
  - Comply with local laws and regulations
  - Not be motivated to influence decision by recipient
- **Charitable Giving**
  - Contributions can not be motivated by desire to influence business
  - If a request is received, it should be vetted by Company's Legal Department



# Gifts and Hospitality

- **Recordkeeping**
  - Regardless of gift, hospitality, charitable contribution, *etc.*, complete and accurate records must be maintained with limited exception (*e.g.*, items with *de minimis* value given away at trade shows)
- When in doubt about prospective gifts or hospitality, seek **pre-approval** from Company's Legal Department
- **Best Practice**: Avoid common pitfall when entertaining foreign officials by choosing the restaurant and taking control of ordering wine/champagne to ensure excessively expensive choices are avoided, *etc.*

# Penalties for FCPA Violations – *Anti-Bribery*

- **Corporations:**
  - **Civil Penalty:**
    - *Disgorgement of profits and*
    - *Fines of up to \$16,000*
  - **Criminal Penalty:**
    - *Up to \$2 million fine per violation or*
    - *Twice the benefit gained/lost (Alternative Fines Act (18 USC § 3571)) or*
    - *Disgorgement of profits*

# Penalties for FCPA Violations – *Anti-Bribery*

- **Individuals:**
  - **Civil Penalty:**
    - *Fines of up to \$16,000*
  - **Criminal Penalty:**
    - *Up to \$100,000 fine and/or*
    - *Up to 5 years imprisonment*
  - **Employers cannot indemnify employees who are fined.**
    - *Thus, fines on an individual cannot be paid directly or indirectly by the company on whose behalf the person acted.*

# Penalties for FCPA Violations – *Accounting*

- **Corporations:**

- **Civil Penalty:**

- *Disgorgement of profits and*
    - *Fines of up to \$725,000 per violation*

- **Criminal Penalty:**

- *\$25 million fine per violation or twice the gain or loss caused by the violation*

# Penalties for FCPA Violations – *Accounting*

- **Individuals:**
  - **Civil Penalty:**
    - *Fines of up to \$150,000*
  - **Criminal Penalty:**
    - *Fines of up to \$5 million and*
    - *Up to 20 years imprisonment*



# United Kingdom Bribery Act (UKBA)

# UKBA

- **UKBA Criminalizes:**
  - **Giving Bribes**
  - **Taking Bribes**
  - **Failure to Prevent Bribes that are made on your behalf**
- **UKBA repealed all pre-existing statutory and common law provisions related to bribery.**

# UKBA

## Taking Bribes

- **Requesting, accepting or agreeing to receive / accept a bribe to improperly perform a function or activity**
  - *Taking can occur directly or by means of third party*
  - *Can be by acquiescence – passive acceptance*



# UKBA

## Giving Bribes

- UKBA prohibits individuals and commercial organizations from giving bribes to private sector as well as public sector recipients
- UKBA also separately penalizes failure by commercial organizations to prevent bribes that are made on their behalf by “associated persons”, i.e., third parties

# UKBA

## Giving Bribes (cont'd)

UKBA applies extra scrutiny when bribes are made to public sector officials

- Bribery of foreign public officials in legislative, administrative, or judicial positions
- Bribery of officials or agents of public international organizations

# UKBA

## Giving Bribes (cont'd)

Bribery of foreign public officials occurs when bribes are directly or indirectly made or promised:

- To obtain or retain business or
- To obtain an advantage in the conduct of business when such advantage is not legitimately due
  - *Advantage will be legitimately due when required, authorized, or encouraged by local written law as in legally provided “preference programs”*

# UKBA

## Giving Bribes (cont'd)

### UKBA NOT limited to activities performed in UK

#### – Activities addressed in UKBA encompass:

- *Activities performed within the UK*
- *Activities performed outside of the UK*
- *Activities with no connection to the UK*

# UKBA

## Significance of UKBA:

- Non-UK companies that “carry on” business in UK are potentially captured by UKBA jurisdiction
- A UKBA violation is committed even if no elements are committed in UK
- A UKBA offense can occur anywhere in the world where an “associated person” makes a bribe on behalf of a “relevant commercial organization”

# UKBA

## Two Standards of Liability under the UKBA

- **Strict Liability:** Failure to prevent bribes does not have knowledge requirement of bribery by associated persons
- **Vicarious Liability:** “Relevant commercial organization” is liable for bribes made by an employee, agent, subsidiary or other third party!

# Guidance on Gifts & Hospitality

- The Guidance states hospitality must be “sensible and proportionate” for a bona fide purpose – the more lavish the more likely UK will infer possible bribery
- Hospitality not intended to induce recipient to act in a certain way
- Largely left to prosecutorial discretion based on facts
- Regarding hospitality, David Green, Chief of the UK’s Serious Fraud Office stated in September 2012 that the sort of bribery “we would be investigating would not be tickets to Wimbledon or bottles of champagne. We are not the ‘Serious Champagne Office’”.
  - So companies may not see a stand-alone bribery case based on hospitality any time soon

# Penalties for UKBA Violations

- **UKBA exposes businesses and individuals to**
  - **Criminal prosecution,**
  - **Unlimited fines,**
  - **Confiscation of property, and**
  - **For individuals, up to 10 years imprisonment**





# U.S. EXPORT REQUIREMENTS

# U.S. Export Control Regimes

## OFAC & OFACR Controls:

**Product Neutral**

**Prohibited Countries**

**Prohibited Entities**

## DDTC & ITAR Controls

Exports of

USML Items

## BIS & EAR Controls

Exports of

Dual Use Items

# OFAC Sanction Regimes

**17 countries sanctioned – across the board or selectively**

<b>Cuba</b>	<b>Syria</b>	<b>Iraq</b>	<b>Libya</b>
<b>Iran</b>	<b>Burma</b>	<b>Ivory Coast</b>	<b>Somalia</b>
<b>North Korea</b>	<b>Belarus</b>	<b>Lebanon</b>	<b>Western Balkans</b>
<b>Sudan</b>	<b>D.R. Congo</b>	<b>Liberia</b>	<b>Zimbabwe</b>
<b>Yemen</b>	<b>Future Use!</b>	<b>Future Use!</b>	<b>Future Use!</b>

# OFAC Sanction Regimes

**Comprehensive sanctions on 5 countries**

<b>Cuba</b>	<b>Iran</b>	<b>North Korea</b>
<b>Sudan</b>	<b>Syria</b>	

# OFAC Sanction Regimes

**Selective sanctions on 2 countries:**

<b>Burma</b>	<b>Libya</b>
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# OFAC Sanction Regimes

## SDN List Based Sanctions on 10 countries:

<b>Western Balkans</b>	<b>Belarus</b>	<b>DR Congo</b>
Iraq	Ivory Coast	Lebanon
Liberia	Somalia	Zimbabwe
Yemen (as of Nov 2012)		

# SUMMARY

## OFAC Sanction Regimes

### US Person Exports Prohibited under OFAC (Direct, Indirect & Facilitation)

#### 5 countries:

Cuba: <b>Yes</b>	Syria: <b>Yes</b>	Iraq: <b>No</b>	Libya: <b>No</b>
Iran: <b>Yes</b>	Burma: <b>No</b>	Ivory Coast: <b>No</b>	Somalia: <b>No</b>
North Korea: <b>Yes</b>	Belarus: <b>No</b>	Lebanon: <b>No</b>	Western Balkans: <b>No</b>
Sudan: <b>Yes</b>	D.R. Congo: <b>No</b>	Liberia: <b>No</b>	Zimbabwe: <b>No</b>
Yemen: <b>No</b>			

**Where “No”, apply standard export license analysis.**

# US Export Laws & Regulations: Outline

✓ Controls based on status as US company

**“Who” is subject to US jurisdiction?**

✓ Controls based on what is being exported by  
US company

**“What” is subject to US jurisdiction?**



# US Export Laws & Regulations

## Who Based Jurisdiction?

- US Individuals (WW)
- US Companies
- Foreign Branches of US Companies
- Foreign Subsidiaries of US Companies
- US-based Branches of Foreign Companies
- US-based Subsidiaries of Foreign Companies
- Foreign Individuals in US

# Who qualifies as a foreign person?

- ✓ **Non-U.S. Citizen**
- ✓ **Non-U.S. Green Card Holder**
- ✓ **Recipient of Worker Visa (H1B, etc.)**

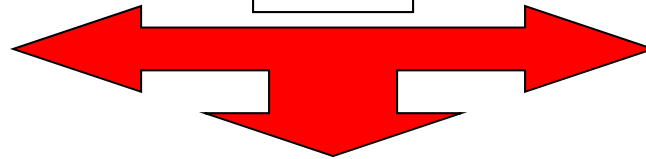
**Export to Foreign Person =**  
**Export to Foreign Person's:**

- **Country of Residence**
- **Country of Nationality / Citizenship**
- **Country of Birth**

# Export Definition

- Goods
- Services
- Technology / Technical Data

To



**US Person in  
Foreign  
Country**

**Foreign Person  
in Foreign  
Country**

**Foreign  
Person in  
United States**

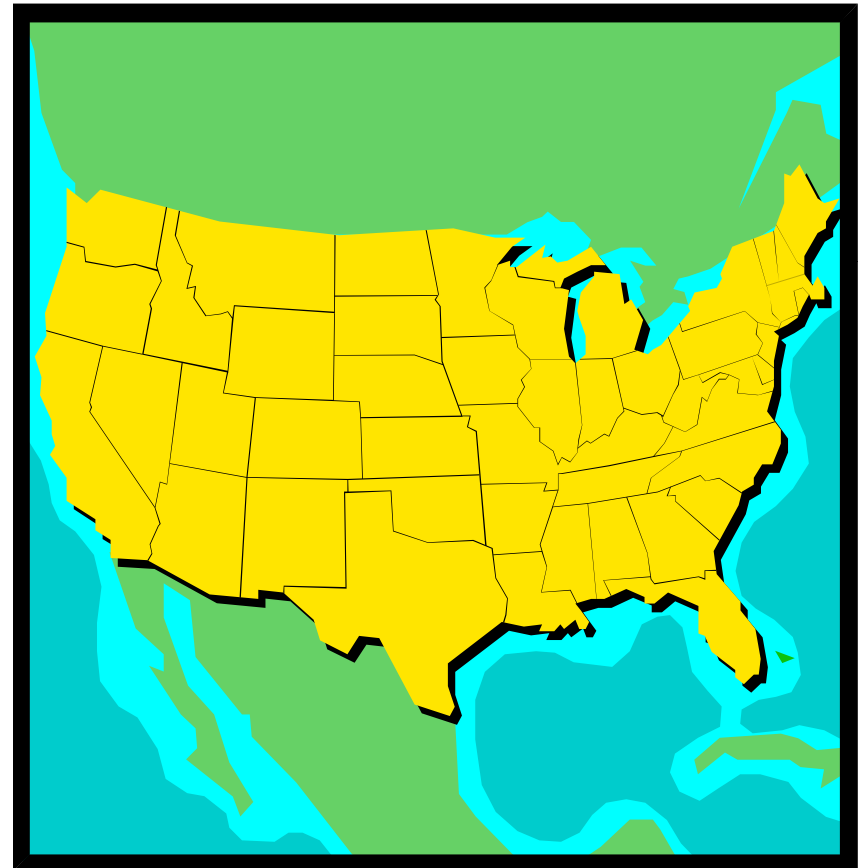
# Exports Can be “Actual” or “Deemed” (U.S. perspective)

## Deemed Export:

Domestic transaction which  
U.S. law or U.S. regulation  
construes to be an export

- Goods
- Services
- Technical Data/Technology

See examples in slides that  
follow



# What is an Export Involving Goods?

## Actual Export:

Transfer of Goods  
from the U.S. to a  
Foreign Country

## Deemed Export:

Transfer of Goods  
in the U.S. to a  
Foreign Person

# Deemed Export of Goods

## Transferring Goods (defense articles) in US to:

- ☑ **A Foreign Individual in the US**
- ☑ **A US branch office of a foreign company**
- ☑ **A Foreign Embassy in the US**
- ☑ **A Diplomatic Mission of a Foreign Government in the US**
- ☑ **Any Other Foreign Person in the U.S.**

# What is an Export Involving Services?

## Actual Export:

Performing a Service outside the U.S. on behalf of or for the benefit of a Foreign Person

## Deemed Export:

Performing a Service in the U.S. on behalf of or for the benefit of a Foreign Person in the U.S.

## Services =

training, consulting, assisting, servicing, *etc.*

# Deemed Export of Services

## Providing “Services” in the US to:

- ☑ **A foreign employee working in the US**
- ☑ **A foreign employee visiting US Home Office**
- ☑ **A foreign customer visiting US seller**
- ☑ **A foreign government rep visiting US seller**
- ☑ **Any foreign person receiving services in US**



# What is an Export Involving Technical Data?

## Actual Export:

Disclosure of  
technical data

*Outside the U.S.*

to a Foreign Person  
Outside the U.S.

## Deemed Export:

Disclosure of  
technical data

*In the U.S.*

to a Foreign Person  
In the U.S.

# Technology / Technical Data

## Information required for:

- ☑ Design or Development
- ☑ Production, Manufacture or Assembly
- ☑ Operation
- ☑ Repair, Testing or Maintenance
- ☑ Modification of Products

**In the form of Blueprints, Drawings, Plans,  
Photos, Instructions or Documentation**

# Technology / Technical Data

## Does not include:

- ☑ Information that is in the Public Domain, i.e.:
  - » Information that is generally accessible to the “interested” public in any form or
  - » Information that is available at a public library or
  - » Information that is available through unlimited distribution at a public conference or
  - » Information that has been approved for public release by USG under “DoD Distribution Statement A”.

# Exports of Technical Data Occur When ...

- ✓ **Sending E-Mails that contain Technical Data to Foreign National Persons – either in the US or outside the US**
- ✓ **Hand Carrying Technical Data or “Loaded” Lap Tops outside the US (both an export of H/W and data!)**
- ✓ **Disclosing Technical Data to Foreign Person Employees -- either in the US or outside the US**
- ✓ **Disclosing Data to Foreign Person Visitors -- either in the US or outside the US**
- ✓ **Transferring Technical Data to / from “Cloud”**

# Recommended Procedures for Handling Technical Data / Technology

- **Mark Technical Data / Technology with legend that states either:**
  - **“Controlled” under “ITAR” or “EAR”, as relevant**
  - **“Not Controlled” under “ITAR” or “EAR” as relevant**
  - **Include U.S. Munitions List Category or Export Control Classification Number (“ECCN”)**
  - **Mark all data even if only being transferred to U.S. persons to put them on notice as many U.S. companies employ foreign persons**
- **Request Signed Certifications when disclosing / transferring Technical Data**
  - **Applicable to Both Foreign and US customers**
- **Implement Technology Control Plan to safeguard against inadvertent disclosures / releases of Technical Data / Technology**

# Export Controls

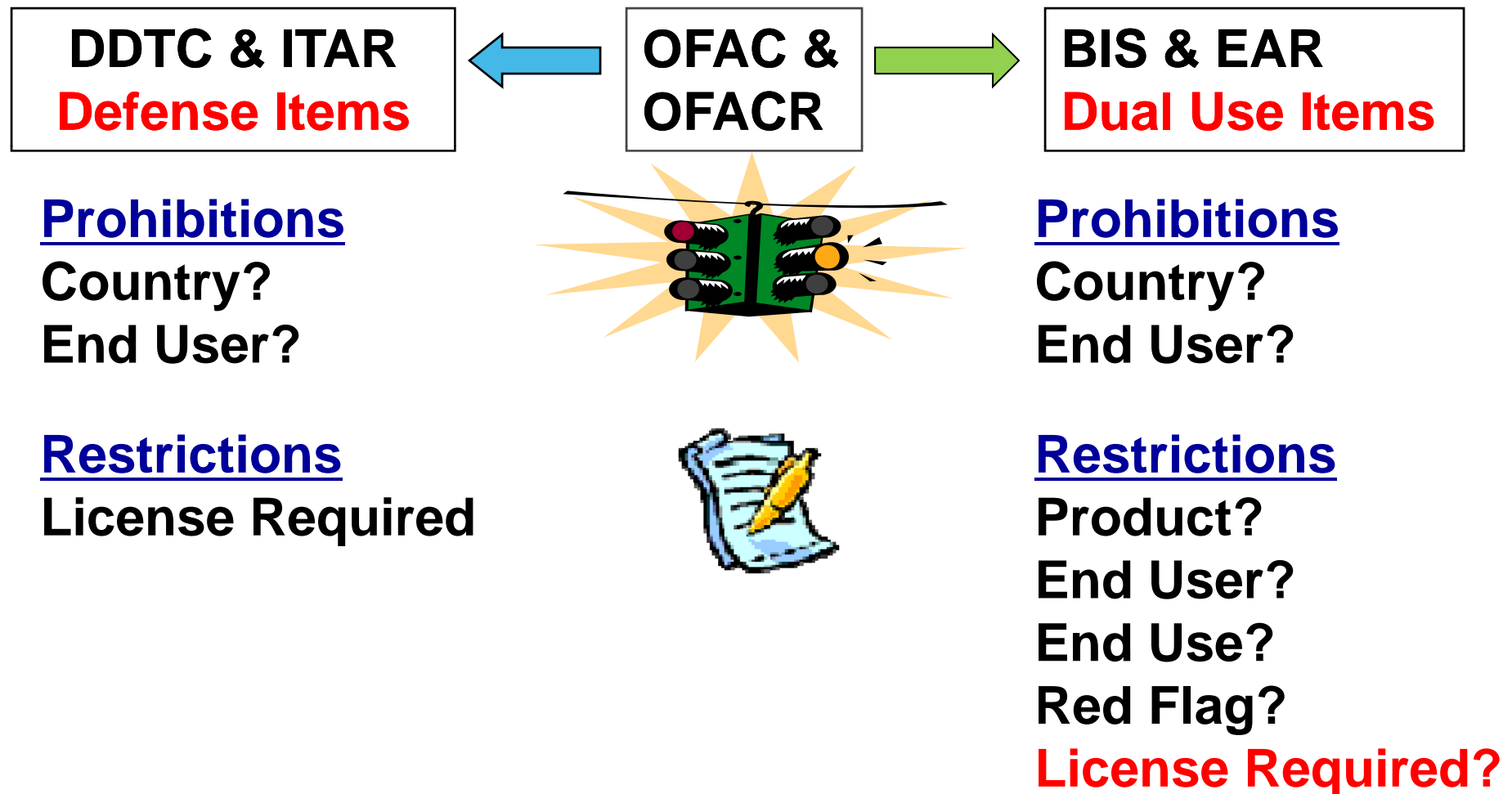
Require an initial assessment of export control jurisdiction, *i.e.*,

WHICH

US Laws & US Regulations apply to the proposed export? OFAC, ITAR, EAR, other?

# Export controls vary based on export control jurisdiction

**Jurisdiction = Fork in the Road**



# ITAR & EAR Regimes

## Export Jurisdiction Based on Product

### Military or Space

- ✓ Defense Article
- ✓ AECA / ITAR
- ✓ DOS / DDTC

### Not Military or Space

- ✓ Dual Use Article
- ✓ EAA / EAR
- ✓ DOC / BIS

**Unsure?** Apply for Commodity Jurisdiction Request (“CJ”) (22 CFR 120.4) with DDTC



# AECA / ITAR Jurisdiction

**Administering Agency**

**DDTC**

**Directorate of Defense Trade Controls**

**State Department**

**Munitions Item**

**(a.k.a. Defense Article)**

# MUNITIONS: What is a Defense Article? 22 CFR 120.6

Item Specially  
Designed for  
Military or  
Space  
Application?



# What is a Defense Article? 22 CFR 120.3

**Item Specially  
Modified or Specially  
Adapted for Military  
or Space**

**Application?**

**Significance of  
Modification /  
Adaptation is NOT a  
Consideration!**



# U.S. Export Control Jurisdiction of DDTTC

**If not Munitions Item, item will be dual use**

- Mutually exclusive**
- Item cannot have both USML Category and ECCN (dual use)**

# U.S. Export Control Jurisdiction

## Dual Use Items

- ✓ **Exclusive Civil/Commercial Application**
- ✓ **Civil / Commercial as well as Military Application**

**Fully Interchangeable!**

# EAA / EAR Jurisdiction

**Administering Agency**

**BIS**

**Bureau of Industry & Security  
Commerce Department**

**Commercial/Dual Use Item**

# Summary of Export Control Jurisdiction

## Determine if USML

- USML entry?
- Specially designed?
- Specially modified?
- Substantial military applicability?
- See through USML?
- Unsure? File Commodity Jurisdiction request

# Summary of Export Control Jurisdiction

If not USML, dual use...

– Determine ECCN

– On CCL?

- *Not sure, file Commodity Classification Request on BIS 748 P*

– If certain not on CCL, classify as  
**EAR99**



# Why is Determining Export Control Jurisdiction So Important?

## AECA/ITAR versus EAA/EAR

1. Different Administering Agencies
2. Different Prohibitions
  - ✓ **Countries: 25 versus 5**
  - ✓ **Buyers/End Users: 4 lists versus 4 lists**
3. Different Restrictions (License Requirements)
  - ✓ **Product-Specific: USML versus ECCN**
  - ✓ **Buyers/End Users**
  - ✓ **End Use**
4. Different Licensing Analysis

# Export Procedures

**To process export need to get “end issue” information from buyer:**

**Obtain End Use, End User, Ultimate Destination Statement**

**When: Before you make a quote or any export**

**Format: Buyer’s letterhead with Buyer’s signature**

# Export Issue Information

## Information on:

- **End Use – helpful in (if not necessary for) export jurisdiction analysis**
- **Buyer and country location**
- **End User and country location**

**Information is necessary to do required screenings**

# Export Procedures: Prohibition Screening #1

**Based on Export Jurisdiction,  
Analyze Export for Prohibited Countries**

- ✓ **Export shipment destination**
- ✓ **Ultimate destination country**
- ✓ **Intermediate destinations**
- ✓ **Transshipment countries**
- ✓ **Countries between export shipment and ultimate destination**

# Export Procedures: Prohibition Screening #2

Based on Export Jurisdiction,  
Analyze Export for Prohibited Buyers / End Users

- ✓ Debarred Parties
- ✓ Denied Parties
- ✓ SDNs
- ✓ Proliferators

# Export Procedures

**Based on Export Jurisdiction, Analyze  
Export for Product-Specific  
Restrictions / License Requirements**

- ✓ **ITAR products almost always require export licenses**
- ✓ **EAR products may require export licenses**  
**ECCN on Commerce Control List**  
**Commerce Country Chart**

**2B350 Chemical manufacturing facilities and equipment, except valves controlled by 2A226 or 2A292, as follows (see List of Items Controlled).**

**License Requirements**

*Reason for Control:* CB, AT

*Control(s)*                      *Country Chart*

CB applies to entire entry    CB Column 2

AT applies to entire entry    AT Column 1

**License Requirement Note:** *This ECCN does not control equipment that is both: (1) specially designed for use in civil applications (e.g., food processing, pulp and paper processing, or water purification) and (2) inappropriate, by the nature of its design, for use in storing, processing, producing or conducting and controlling the flow of the chemical weapons precursors controlled by 1C350.*

**License Exceptions**

LVS: N/A  
 GBS: N/A  
 CIV: N/A

**List of Items Controlled**

*Unit:* Equipment in number

*Related Controls:* N/A

*Related Definitions:* For purposes of this entry the term “chemical warfare agents” are those agents subject to the export licensing authority of the U.S. Department of State, Directorate of Defense Trade Controls. (See 22 CFR part 121)

*Items:*

a. Reaction vessels or reactors, with or without agitators, with total internal (geometric) volume greater than 0.1 m<sup>3</sup> (100 liters) and less than 20 m<sup>3</sup> (20,000 liters), where all surfaces that come in direct contact with the chemical(s) being processed or contained are made from any of the following materials:

a.1. Alloys with more than 25% nickel and 20% chromium by weight;

a.2. Nickel or alloys with more than 40% nickel by weight;

a.3. Fluoropolymers (polymeric or elastomeric materials with more than 35% fluorine by weight);

# EAR License Analysis

**Product-specific ECCNs (not EAR99) on CCL are controlled for a variety of reasons:**

- ✓ **CBW, MT, NP, NS, RS, CC, AT, *etc.***
- ✓ **Controls do not universally apply to all ECCNs**
- ✓ **ECCN listings in CCL designate which controls apply to which ECCNs**



### Commerce Country Chart

Reason for Control

Countries	Chemical & Biological Weapons			Nuclear Nonproliferation		National Security		Missile Tech	Regional Stability		Firearms Convention	Crime Control			Anti-Terrorism	
	CB 1	CB 2	CB 3	NP 1	NP 2	NS 1	NS 2	MT 1	RS 1	RS 2	FC 1	CC 1	CC 2	CC 3	AT 1	AT 2
	New Zealand <sup>3</sup>	X					X		X	X						
Nicaragua	X	X		X		X	X	X	X	X	X		X			
Niger	X	X		X		X	X	X	X	X		X		X		
Nigeria	X	X		X		X	X	X	X	X		X		X		
Norway <sup>3</sup>	X					X		X	X							
Oman	X	X	X	X		X	X	X	X	X		X		X		
Pakistan	X	X	X	X	X	X	X	X	X	X		X		X		
Palau	X	X		X		X	X	X	X	X		X		X		
Panama	X	X		X		X	X	X	X	X	X	X		X		
Papua New Guinea	X	X		X		X	X	X	X	X		X		X		
Paraguay	X	X		X		X	X	X	X	X	X	X		X		
Peru	X	X		X		X	X	X	X	X	X	X		X		
Philippines	X	X		X		X	X	X	X	X		X		X		

# Export Procedures

**If EAR Jurisdiction applies and do not need an export license based on product-specific controls, must now analyze export for Export License Requirements Based on:**

- ✓ **End User:** Entity List? Unverified List?
- ✓ **End Use:** MT? NP? CBW?
- ✓ **Red Flags:** Smell Test?

# Export Procedures

## EAA / EAR Red Flags

- ✓ **Consistency of End Use with Buyer's Business?**
- ✓ **Consistency of Deal with Standard Practices?**
- ✓ **Reasonability Check**

**Likely Diversion?**

**Duty to Inquire**

**BIS License?**

# Export Procedures

**Apply Appropriate Destination Control Statement to Invoice and Transportation Document**

## **AECA / ITAR**

**See ITAR 123.9(b)**

**“These commodities are authorized by the USG for export only to ...”.**

## **EAA / EAR**

**See EAR 758.6**

**“These commodities ... were exported from the U.S. in accordance with the EAR. Diversion contrary to U.S. law is prohibited.”**

# Due Diligence and Best Practices

- Screen all parties to proposed trade transactions. Screen often. Maintain Records of screenings performed.
- Get the export jurisdiction and export classification right!
  - Establish formalized export jurisdiction and classification process
  - Use process to self-classify
  - If doubt exists, submit a Commodity Jurisdiction Request to DDTC
  - If procuring hardware, prior to purchase, you should require at a minimum in the contract or via separate supplier certification that the manufacturer/supplier provide the export jurisdiction and classification as well as harmonized tariff schedule numbers
    - *Ensure that your supply chain/purchasing personnel obtain and COMMUNICATE this information to trade personnel!*

# Due Diligence and Best Practices

- When manufacturing defense articles abroad pursuant to a Manufacturing License Agreement:
  - Ensure that you ask the foreign manufacturer (signatory) to identify any dual/third country national personnel that will participate on a particular defense program (*i.e.*, receive U.S. originating ITAR-controlled technical data/defense services) in advance of any license or agreement submission to DDTC
  - This process includes:
    - *Confirming that such personnel are bona fide regular employees (ITAR 120.39)*

# Due Diligence and Best Practices

- *Confirming whether such personnel are solely nationals of NATO, the European Union, Australia, Japan, New Zealand or Switzerland. If yes, ITAR 124.16 is satisfied.*
- *Confirming whether foreign manufacturer's employees have security clearances issued by foreign government where company is located. If yes, 126.18 satisfied.*
  - *If located in Canada, confirm whether personnel were vetted under Canadian Controlled Goods Act (which includes execution of NDA's). If yes, ITAR 126.18 vetting requirements are satisfied.*
  - *If located in the UK, confirm whether personnel were screened via BPSS (Baseline Personnel Security Standard) process. If yes, ITAR 126.18 vetting requirements are satisfied.*

# Due Diligence and Best Practices

- If the answer is “no” to the above, foreign manufacturer must determine whether dual/third country personnel have *substantive contacts* with restricted or prohibited countries per ITAR 126.1 (*Belarus, Burma (Myanmar), China, Cote D’Ivoire (Ivory Coast), Congo (Democratic Republic of), Cuba, Eritrea, Iran, Liberia, North Korea, North Sudan, Syria, Venezuela*) by asking the following:
  - Regular travel to restricted or prohibited countries identified in ITAR 126.1
  - Recent or continuing contact with agents, brokers and nationals of such countries
  - Continued demonstrated allegiance to such countries
  - Maintenance of business relationships with persons from such countries
  - Maintenance of a residence in such countries
  - Receiving salary or other continuing monetary compensation from such countries
  - Acts otherwise indicating a risk of diversion
- If employee answers “yes” to any of the above, then assumption is risk of diversion and only DDTTC can determine otherwise



# Due Diligence and Best Practices

- Foreign Companies (either wholly-owned by U.S. parent or completely foreign owned):
- If you are unsure of the export jurisdiction/classification for hardware procured from the U.S., examine the paperwork you originally received with the item:
  - If U.S. owned, engage your U.S. operations for assistance!
  - Compare Destination Control Statements (ITAR vs. EAR)
  - Look for reference to State Department License Numbers (e.g., 0500001234, TA1234-11 or MA1234-11) or export exemption citations beginning with 22 CFR (e.g., 22 CFR 126.4)
  - Look for reference to Commerce Department License Numbers (e.g., D012345) or Exceptions such as NLR, TMP, GBS, CIV or reference to ECCN numbers such as 5A002

# Due Diligence and Best Practices

- When dealing with U.S.-originating defense articles, technical data and/or defense services, ensure the U.S. company is actively registered as a manufacturer/exporter of defence articles and/or defence services
  - Request date of expiration of the U.S. company's DDTC registration
- Technical Assistance & Manufacturing License Agreements
  - Work with U.S. applicant and ensure you review and check proposed Technical Assistance (TAA) and Manufacturing License Agreements (MLA) application prior to submission by the U.S. applicant to DDTC to ensure the TAA/MLA meets your scope of work
  - If you have a U.S. parent or affiliate, use them to help you with issues!
  - You should be ready to execute the TAA/MLA upon approval – so prior review by you is critical!!!
- To obtain an approved TAA/MLA that meets your program requirements, you must ensure that the U.S. applicant knows:
  - All parties to the proposed transaction – including sub-licensees/contractors, Intermediaries, *etc.*
  - End use/end user
  - All relevant sites
  - Dual/Third country national employed by you and your subs

# Due Diligence and Best Practices

- Will you want to Sub-contract work?
  - If you are subcontracting work and **WILL NOT** provide any of the U.S. applicant's ITAR-controlled hardware, technical data and/or defence services (that were transferred under the TAA/MLA) or any of your company's data that was derived from the U.S. company's data to your subcontractor, you don't have to include the subcontractor on the TAA/MLA
  - If you are subcontracting and **WILL** provide any of the U.S. applicant's ITAR-controlled hardware, technical data and/or defence services to your subcontractor, the DDTC views this as "Sublicensing" and you will have to include the subcontractor as a sublicensee on the TAA/MLA
  - In many cases, your subcontractors (*i.e.*, sublicensees) may not be familiar with the ITAR and therefore likely will require your help in understanding ITAR compliance requirements – invest the time!!!

# Due Diligence and Best Practices

- Obtain copy of the DDTC approval letter from the U.S. applicant prior to executing Agreement and a copy of the fully executed TAA/MLA for your records/files
  - **No** DDTC rule regarding sharing of approval letters with non-U.S. signatories!
  - If U.S. applicant pushes back, don't sign the TAA/MLA
  - Ensure you have a process in place to track sales/manufacturing value for MLA's and timely reporting each year to U.S. applicant
- Every six months, review the scope of your program/activities to ensure you are complying with the scope of the approved TAA/MLA
  - If you need to add parties, sublicensees, manufacturing value, other scope changes, identify the changes to U.S. applicant and request that the U.S. applicant submit an amendment to the TAA/MLA
- Flow down any provisos/limitations to your sub-contractors/sub-licensees
  - **Build time into the process to ensure you receive timely approvals**

# Due Diligence and Best Practices

- For DSP-5 export licences (hardware):
  - Ensure you identify all the foreign consignees (companies that will perform integration/processing)
  - Identify all foreign intermediate consignees (freight forwarders)
  - Identify end-user and country of ultimate destination
  - Identify end-use/platform
  - Failure to identify even one party potentially will result in non-compliance (submission of Voluntary Disclosure to the DDTTC) and likely a General Correspondence Request to fix the problem/issue

# Due Diligence and Best Practices

- Annual internal/external assessments and/or audits of:
  - International trade licensing and compliance policies and procedures concerning, *e.g.*:
    - *ITAR*
    - *EAR*
    - *FACR*
    - *Customs*
    - *FTR/AES*
    - *BATFE*
    - *Anti-Boycott & Anti-Corruption (FCPA/UKBA)*
  - Freight Forwarders, Customs Brokers and Reps/Agents
  - Company's website (monthly or quarterly basis is best!) to ensure no ITAR or EAR-controlled technology/technical data appears on the website

# Due Diligence and Best Practices

- Trade personnel must be involved with Mergers, Acquisitions and Divestitures to determine compliance posture of target in an effort to identify violations of U.S. export control laws and regulations prior to closing to mitigate successor liability
- Cross-function communication among trade personnel, legal, contracts/capture/BD/Marketing, engineering, finance, HR, tax (anti-boycott reporting), *etc.*
- Keep complete records for all trade transactions, trade compliance training, and screenings performed
- Records must be accurate, legible and readily available.
- Remember, it's not what you tell U.S. government enforcement agents, it's what you show them
  - *Thorough records that demonstrate reasonable analysis (e.g., export jurisdiction analysis) likely will mitigate fines/penalties.*
- Where possible, automate trade processes (e.g., via ERP System that locks down hardware and technical data based on export jurisdiction and classification)

# Export Reform

- Export Reform is coming
- On February 5, 2012, DoS notified Congress that it was refining U.S.M.L. Categories VIII (aircraft) and XIX (gas turbines); Transition Guidance
- Notification begins 180-day transition period, after which changes would take full effect – absent action to the contrary by Congress
- Stay tuned!



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