

Morgan Lewis

together

Nuts & Bolts of Exports

Export Compliance Workshop

November 16, 2011

www.morganlewis.com

US Export Laws & Regulations

Outline

- ✓ Export Behavior
- ✓ Export Definition & Deemed Exports
- ✓ Export Controls

Export Behavior

- 1. Foreign Corrupt Practices Act**
- 2. Anti-Boycott Act**
- 3. False Statements Act**

Export Behavior

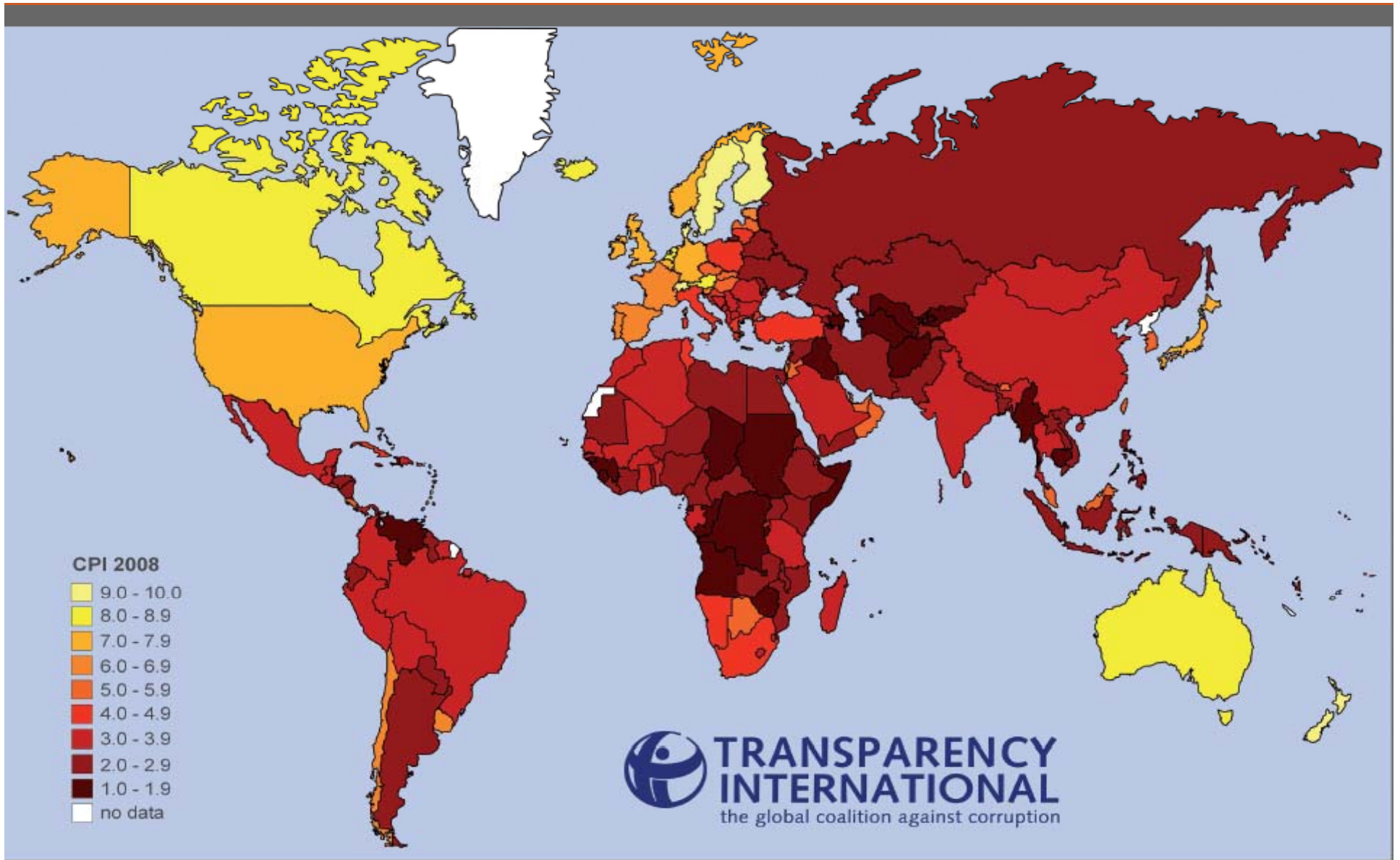
Foreign Corrupt Practices Act

(FCPA)

Why is FCPA compliance important?

Bribery requests are routine in many, many countries.

See Red and Brown areas in next slide for countries where bribery requests are routine.



Why is FCPA compliance important?

Significant Increase in FCPA Enforcement

- Recent explosion of enforcement activity by both the DOJ and SEC
 - ✓ **2010: 31 new enforcement actions by DOJ**
 - ✓ **Many new enforcement actions by the SEC**
- In addition to newly initiated enforcement actions, there are many, many open and pending FCPA investigations.

Why is FCPA compliance important?

Penalties for FCPA Violations are significant and apply to individuals as well as companies

Penalties for FCPA Violations

Corporations:

✓ Civil Penalty:

Disgorgement of profits and

Fines of up to \$500,000

✓ Criminal Penalty:

\$2 million fine per violation or

Twice the benefit that the offender sought to obtain or

Disgorgement of profits, and

Possible debarment

Penalties for FCPA Violations

Individuals:

- ✓ Civil Penalty: Up to \$100,000
- ✓ Criminal Penalty: Up to 5 years imprisonment & \$250,000 fine
- ✓ Employers cannot indemnify employees who are fined

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

No Payments to

Foreign Government Officials

to Obtain or Retain Business

Foreign Corrupt Practices Act

Element #1: No Payments...

- ✓ Cash or Cash Equivalent
- ✓ Travel Expenses (1st Class...)
- ✓ Entertainment & Hospitality
- ✓ Gifts
- ✓ Anything of any value...

Foreign Corrupt Practices Act

Element #2: Foreign Government Official

- ✓ **Officer of Foreign Government**
- ✓ **Employee of Foreign Government**
- ✓ **Foreign Political Party Candidate**
- ✓ **Candidate for Foreign Political Office**
- ✓ **Officer / Employee of Public International Organization**

Foreign Corrupt Practices Act

Element #3:

Obtain or Retain Business

- ✓ **Gain improper advantage**
- ✓ **Influence business / buying decisions**
- ✓ **Induce foreign official in contract award determinations**
- ✓ **Successful award 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:

U.S. person knew or should have known that all or a portion of a payment will go directly or indirectly to “foreign government official”

Foreign Corrupt Practices Act

Third Parties:

- ✓ *Foreign Subsidiaries*
- ✓ *Agents*
- ✓ *Sales Representatives*
- ✓ *Distributors*
- ✓ *Consultants*
- ✓ *Lobbyists*

Foreign Corrupt Practices Act

Knowledge Standard for Third Party Payments very broad

US Person Knew because US Person:

- ✓ Issued instructions to third party
- ✓ Authorized funds transfer
- ✓ Concealed nature of payment that enabled US Person to benefit from contract under award

Foreign Corrupt Practices Act

Knowledge Standard for Third
Party Payments very broad (cont'd)

US Person should have known but US
Person exercised:

- ✓ **Conscious Disregard**
- ✓ **Willful Blindness**
- ✓ **Deliberate Ignorance**

Foreign Corrupt Practices Act

Affirmative Defenses

Facilitating payments intended to “expedite” Routine, non-discretionary foreign government actions, such as:

- ✓ *Obtaining permits or licenses (maybe)*
- ✓ *Processing governmental papers, e.g., visas*
- ✓ *Loading & unloading cargo*

Foreign Corrupt Practices Act

Affirmative Defenses (cont'd)

- ✓ Payments are “expressly” legal in Foreign country
- ✓ Payments are Bona Fide (legitimate) business expenses

Foreign Corrupt Practices Act

Red Flags

- ✓ **Unusual payment patterns**
- ✓ **Unusually high commission payments**
- ✓ **Refusals by third parties to sign certifications regarding “no payments to officials”**

Recent Trends

FCPA Cases

- ✓ **Cases Involving 13 Countries**
- ✓ **Industry-Wide Targets**
- ✓ **Export Programs (Food For Oil)**
- ✓ **Large \$\$\$ Fines (\$300,000 to \$40 Million)**
- ✓ **Mandatory Compliance Monitors**
- ✓ **Successor Liability Cases**

Export Behavior: FCPA

FCPA Guidance

**Visit Justice Department
Website at**

<http://www.usdoj.gov/criminal/fraud/fcpa/opinion/>

Export Behavior

Anti-Boycott Act

Export Behavior

Anti-Boycott Act

No "Participation" in
Other Countries' Boycotts of
Countries NOT Boycotted by U.S.

Arab Boycott of Israel

China (PRC) Boycott of Taiwan

Pakistan Boycott of India

Export Behavior: Anti-Boycott Act

Requirement to Report Boycott Requests

- ✓ Quarterly Report
- ✓ Single Transaction Form
- ✓ Multiple Transaction Form

Export Behavior

Anti-Boycott Act

Penalties

Criminal

Civil

Penalties for participation and failure to report!

Export Behavior

False Statements Act

Export Behavior

False Statements Act

No False Statements on:

- ☑ **Export License Applications**
- ☑ **Commercial Invoices**
- ☑ **Exit Documents (SED's / AES's)**
- ☑ **Origin Certificates**

US Export Laws & Regulations

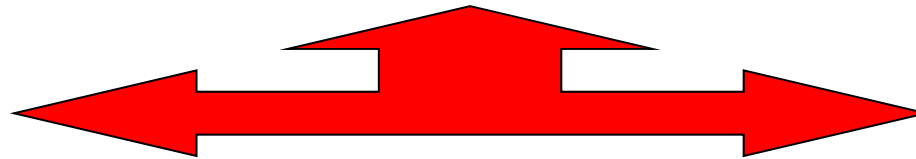
Outline

- ✓ Export Behavior
- ✓ Export Definition & Deemed Exports
- ✓ Export Controls

Export?

- Goods
- Services
- Technology / Technical Data

To



**US Person in
Foreign
Country**

**Foreign Person
in Foreign
Country**

**Foreign
Person in
United States**

Who qualifies as a “foreign person”?

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

Except when exports are “classified”

“Foreign Person” =
Anyone who is not a U.S. Citizen

Determining Foreign Person's Nationality

Export to Foreign Person =

Export to Foreign Person's:

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

Export to Foreign Person may require an export license!

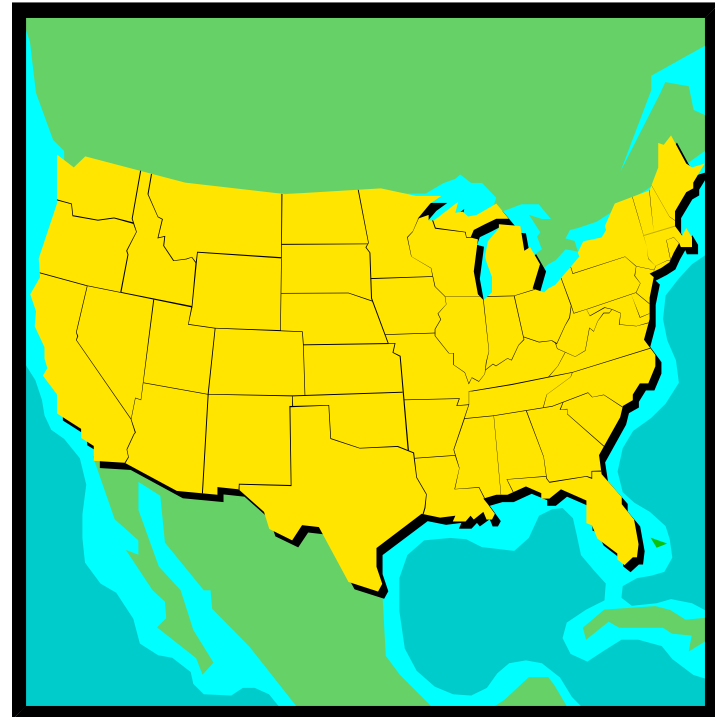
Exports Can be “Actual” or “Deemed”

(U.S. perspective)

Deemed Export:

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

- Goods
- Services
- Technical Data



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 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.

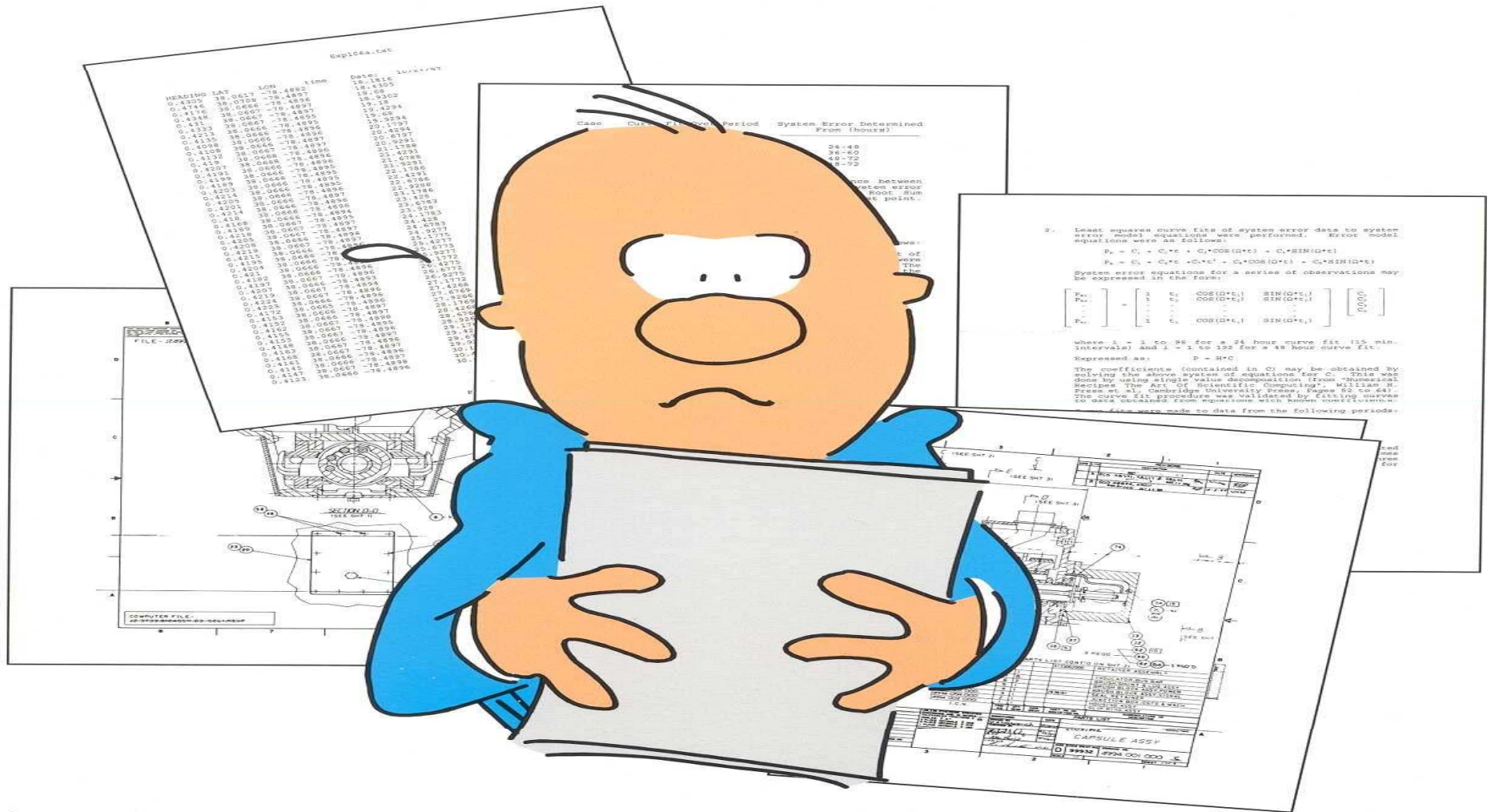
Deemed Export:

Disclosure of
technical data

In the U.S.

to a Foreign Person
In the U.S.

Do You Know What Technical Data Is?



Do You Need Authorization to Export?

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

Technology / Technical Data

or

Information that is available through unlimited distribution at a conference

Also does not include:

- ☑ Published patents or
- ☑ General scientific, mathematical or engineering principles taught at universities or
- ☑ “Fundamental research” -- **CAREFUL!**

Exports of Technical Data Occur When ...

- ✓ **Hand Carrying Technical Data outside US**
- ✓ **Traveling with “Loaded” Lap Tops outside US**
- ✓ **Sending E-Mails that contain Technical Data to FP – either in the US or outside the US**
- ✓ **Disclosing Technical Data to Foreign National Employees -- either in the US or outside the US**
- ✓ **Disclosing Data to Foreign National Visitors -- either in the US or outside the US**

US Export Laws & Regulations

Outline

- ✓ **Export Behavior**
- ✓ **Export Definition & Deemed Exports**
- ✓ **Export Controls**

EXPORT CONTROLS

Jurisdiction?

DDTC



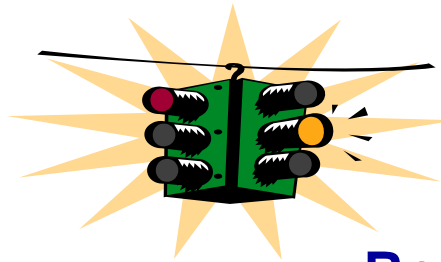
OFAC



BIS

Prohibitions

Country?
End User?



Prohibitions

Country?
End User?

Restrictions

License Required



Restrictions

Product?
End User?
End Use?
Red Flag?

License Required?
No License Required?

Export Control Jurisdiction

Which
US Laws & US Regulations
Apply to the Proposed Export?

U.S. Export Controls

OFAC Controls:

Product Neutral

Prohibited Countries

Prohibited Entities

DDTC Controls

Exports of USML
Items

BIS Controls

Exports of
Dual Use Items

Procedures

Determine Export Jurisdiction Based on Product

Military or Space

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

Not Military or Space

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

Why is Determining Export Control Jurisdiction Important?

AECA/ITAR versus EAA/EAR

1. Different Administering Agencies
2. Different Prohibitions
 - ✓ Countries
 - ✓ Buyers/End Users
3. Different Restrictions (License Requirements)
 - ✓ Product-Specific
 - ✓ Buyers/End Users
 - ✓ End Use
4. Different Licensing Analysis

Why is the Determination of Export Control Jurisdiction Important?

Administering Agencies

AECA / ITAR

State Department's

**Directorate of Defense
Trade Controls
(DDTC)**

EAA / EAR

Commerce Department's

**Bureau of Industry &
Security
(BIS)**

Why is the Determination of Export Control Jurisdiction Important?

Prohibited Countries

AECA / ITAR

- ✓ 25 prohibited countries
- ✓ See Embargoed Country Chart on DDTC website

EAA / EAR

- ✓ 5 prohibited countries
- ✓ See EAR Embargoed Countries

Why is the Determination of Export Control Jurisdiction Important?

Prohibited Buyers / End Users

AECA / ITAR

- ✓ Debarred Parties
- ✓ Denied Parties
- ✓ SDN's
- ✓ Proliferators

EAA / EAR

- ✓ Denied Parties
- ✓ SDN's
- ✓ Proliferators

Why is the Determination of Export Control Jurisdiction Important?

Product Restrictions

AECA / ITAR

Product-Specific Licenses
Always Required
unless
ITAR License Exemption Available.

EAA / EAR

Product-Specific Licenses
Required Sometimes

- ✓ **ECCN**
- ✓ **Reason for Control**
- ✓ **Country Chart**
- ✓ **Exception?**

Why is the Determination of Export Control Jurisdiction Important?

End User Restrictions

AECA / ITAR

Already licensable based on Product-Specific Reasons .

EAA / EAR

End Users can Sometimes result in license requirement

- ✓ **Unverified End User**
- ✓ **Entity List**
- ✓ **Proliferator List**

Why is the Determination of Export Control Jurisdiction Important?

End Use Restrictions

AECA / ITAR

Already licensable based on Product-Specific Reasons .

EAA / EAR

End Uses can Sometimes result in license requirement

- ✓ CBP
- ✓ MT
- ✓ NP

Why is the Determination of Export Control Jurisdiction Important?

Different Analysis

AECA / ITAR

EAA / EAR

Export License Analysis

Jurisdiction?

AECA / ITAR

OFAC

EAA / EAR

Prohibitions

Country?

End User?

Prohibitions

Country?

End User?

Restrictions

License Required

Restrictions

Product?

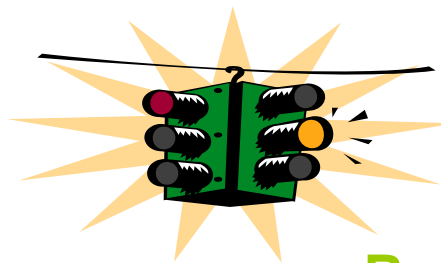
End User?

End Use?

Red Flag?

License Required?

No License Required?



Importance of Proper Export Control Jurisdiction Determination

**ITAR and EAR Apply a standard of
“Strict Liability” in assessing
ITAR and EAR Violations!**

There is No Margin For Error!

Negligent versus Criminal

Penalties For Violations

- EAR civil violations can lead to a civil monetary penalty of \$250,000 per violation
- ITAR civil violations can lead to a civil monetary penalty of \$500,000 per violation

Penalties For Violations

- Ear & ITAR Criminal:
 - **Criminal fines or prison sentences or both**
- Recent Criminal Case - Professor at Univ. of Tennessee received 4 years in prison for unlicensed export of tech data to students

US Export Control Jurisdiction

**ITAR: International Traffic in Arms
Regulations**

**EAR: Export Administration
Regulations**

U.S. Export Control Agencies

Administering Agencies

- DDTC**
- BIS**

AECA/ITAR Jurisdiction

Administering Agency

DDTC

Directorate of Defense Trade Controls

State Department

Munitions Item

(a.k.a Defense Article)

Munitions Items



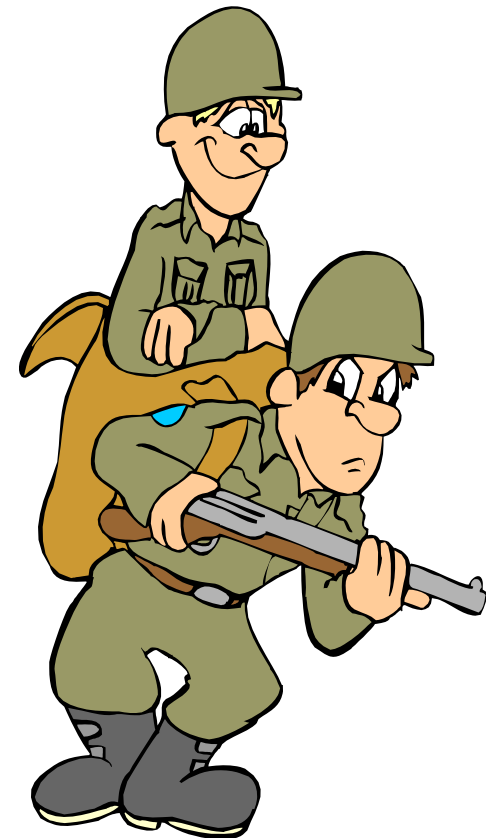
- ✓ **Defense Articles / Munitions Items**
- ✓ **Services relevant to or involving Defense Articles**
- ✓ **Technical Data for Defense Articles**

What is a Defense Article?

1. Munitions List Item

(ITAR 121.1)

- ✓ Categories
- ✓ Format



What is a Defense Article?

2. Item Specially Designed for Military or Space Application



What is a Defense Article?

3. Item Specially Modified or Specially Adapted for Military or Space Application

Significance of Modification / Adaptation is NOT

a Consideration!



What is a Defense Article?

**4. Significant Military
Equipment (SME)
or “inherently
military”**



What is a Defense Article?

5. Dual Use Item that
imbeds defense
article
(See Through Rule)



What is a Defense Article?

Sometimes

But Not Always

Obvious



What is a Defense Article?

Obvious !



What is a Defense Article?

Not Obvious !



What is a Defense Article?

Obvious !



What is a Defense Article?

Not Obvious !



U.S. Export Controls DDTC Jurisdiction

Munitions Items

Obvious Military Items

Fighter Jets

Non-Obvious Items

Parts of Fighter Jets

Parts of Parts of Fighter Jets

Imbedded Items

Included in Otherwise Commercial Items
(Poisonous Tree / See Through Rule)

Munitions Item?

Determining “Munitions Item” status:

1. Review Munitions List

See ITAR Part 121

2. Designed for a military or space application?

De-Controlled under CJ?

Munitions Item?

Determining “Munitions Item” status:

3. Specially modified for a military or space application?

Significance not relevant!

Part by Part determination

Munitions Item?

Determining “Munitions Item” status:

4. **“Inherently” military, i.e. has significant military or intelligence applications?**

Quartz Rate Sensor Chip

(QSR-11 Chip)

Commercial Satellites

Munitions Item?

Determining “Munitions Item” status:

5. See Through Rule?

Commercial item imbeds Munitions Item?

QSR-11 Chip

Boeing, Goodrich & L-3

Key Considerations for USML:

Reality versus potential

“Could be” doesn't matter / count

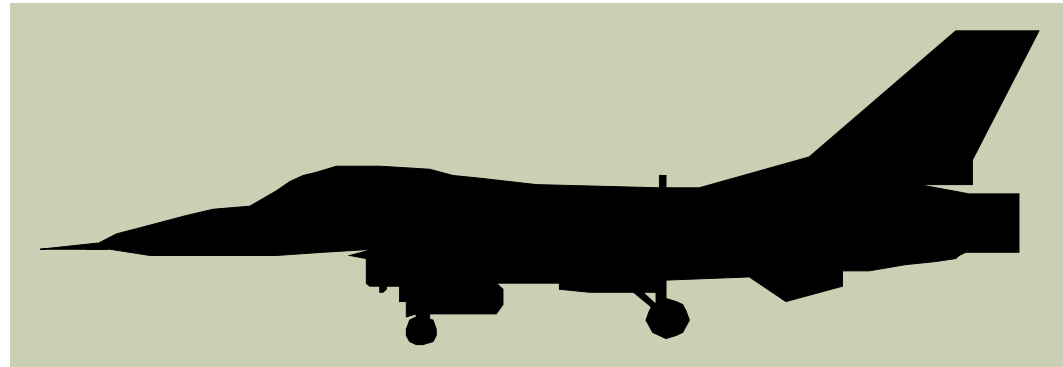
Military end user is NOT determinative!

Individual item versus product family

**USML
Category VIII?**

OR

ECCN 9A991?



U.S. Export Control Jurisdiction of DDTC

Munitions Items

Counterpoint:

Dual Use Items

Uncertain?

File Commodity Jurisdiction Request (CJR) with
DDTC

Do NOT file BIS Classification Request

Treat as USML from filing!

U.S. Export Controls Jurisdiction

Munitions Item?

Counterpoint:

Dual Use Item!

U.S. Export Control Jurisdiction

Dual Use Items

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

Fully Interchangeable!

U.S. Export Control Jurisdiction

Dual Use Items

Commerce Control List

Product Specific ECCN

EAR99

Classification Request

Top Ten Categories Requiring EAR Licenses

- Materials processing [motion simulators, chemical manufacturing equipment, detection devices
- Materials, Chemicals, Micro-organisms, Toxins
- Nuclear related
- Electronics

Top Ten Categories Requiring EAR Licenses

- **Telecommunications & Information Security**
- **Propulsion**
- **Sensors and lasers**
- **Navigation and Avionics**
- **Computers, related software and technology**
- **Marine**

EAR Restrictions

- Product-Specific**
- End Users**
- End Uses**
- Red Flags**

EAR

Product- Specific Restrictions

U.S. Export Controls Jurisdiction of BIS

Restrictions Based on Product:

CCL: ECCN Other than EAR99?

Reasons for Control?

EAR Country Chart?

BIS License?

2B350 Chemical manufacturing facilities an equipment, except valves controlled by 2A22 or 2A292, as follows (see List of Item 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 m³ (100 liters) and less than 20 m³ (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;

a.4. Glass (including vitrified or enameled coating or glass lining);

a.5. Tantalum or tantalum alloys;

a.6. Titanium or titanium alloys;

a.7. Zirconium or zirconium alloys; *or*

a.8. Niobium (columbium) or niobium alloys.

b. Agitators for use in reaction vessels or reactors described in 2B350.a, and impellers, blades or shafts designed for such agitators, where all surfaces that come in direct contact with the chemical(s) being processed or contained are made from any of the following materials:

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

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

b.3. Fluoropolymers;

b.4. Glass (including vitrified or enameled coatings or glass lining);

b.5. Tantalum or tantalum alloys;

b.6. Titanium or titanium alloys;

b.7. Zirconium or zirconium alloys; *or*

b.8. Niobium (columbium) or niobium alloys.

c. Storage tanks, containers or receivers with a total internal (geometric) volume greater than 0.1 m³ (100 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:

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

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

c.3. Fluoropolymers;

c.4. Glass (including vitrified or enameled coatings or glass lining);

c.5. Tantalum or tantalum alloys;

c.6. Titanium or titanium alloys;

c.7. Zirconium or zirconium alloys; *or*

c.8. Niobium (columbium) or niobium alloys.

d. Heat exchangers or condensers with a heat transfer surface area of less than 20 m², but greater than 0.15 m², and tubes, plates, coils or

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
	Sudan	X	X		X		X	X	X	X	X		X		X	X
Suriname	X	X		X		X	X	X	X	X	X	X		X		
Swaziland	X	X		X		X	X	X	X	X		X		X		
Sweden ^{3,4}	X					X		X	X			X		X		
Switzerland ^{3,4}	X					X		X	X			X		X		
Syria	X	X	X	X		X	X	X	X	X		X		X	X	
Taiwan	X	X	X	X		X	X	X	X	X		X		X		
Tajikistan	X	X	X	X		X	X	X	X	X		X	X			
Tanzania	X	X		X		X	X	X	X	X		X		X		
Thailand	X	X		X		X	X	X	X	X		X		X		
Togo	X	X		X		X	X	X	X	X		X		X		
Tonga	X	X		X		X	X	X	X	X		X		X		
Trinidad & Tobago	X	X		X		X	X	X	X	X	X	X		X		
Tunisia	X	X		X		X	X	X	X	X		X		X		

EAR

**Restrictions
Based on
End Users**

U.S. Export Controls Jurisdiction of BIS

Restrictions on End Users

Unverified End User

Entity List

Proliferator List

BIS License?

EAR

Restrictions Based on End Uses

U.S. Export Controls Jurisdiction of BIS

Restrictions on End Uses

CBW

MT

NP

China Rule: 32 ECCN's

BIS License?

EAR

**Restrictions
Based on
Red Flags**

Export Procedures

EAA / EAR Red Flags

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

EAA / EAR

Restrictions Based on Red Flags:

Likely Diversion

Fails “Smell Test”

Duty to Inquire

BIS License?

EXPORT CONTROLS

Jurisdiction?

DDTC



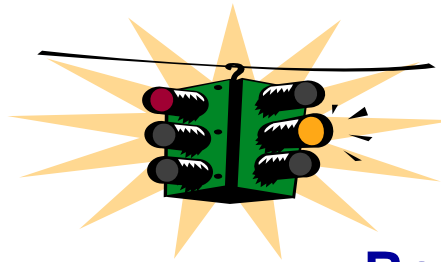
OFAC



BIS

Prohibitions

**Country?
End User?**



Prohibitions

**Country?
End User?**

Restrictions

License Required



Restrictions

**Product?
End User?
End Use?
Red Flag?**

**License Required?
No License Required?**

International Law Group

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international presence

Beijing Boston Brussels Chicago Dallas Frankfurt Harrisburg Houston Irvine
London Los Angeles Miami New York Palo Alto Paris Philadelphia Pittsburgh
Princeton San Francisco Tokyo Washington Wilmington