BIOGRAPHY

Ted MacVeagh is a solo practioner located in Hanover, New Hampshire. His practice includes advising companies on technology transfer issues and representing high-tech start-ups. He also advises companies on compliance with U.S. export regulations. Mr. MacVeagh graduated from Wesleyan University with a degree in Philosophy. He received his law degree from the University of Michigan where he was magnum cum laude and a member of the Michigan Law Review. Prior to entering solo practice, Mr. MacVeagh practiced law at Bromberg & Sunstein LLP in Boston, Massachusetts and Cleary, Gottlieb, Steen & Hamilton in New York. He also received a masters degree in Philosophy from the University of Pennsylvania. He is qualified to practice in New York and Massachusetts.

Export Control Law

July 18, 2006
Presentation to
Franklin Pierce Law Center
Fifteenth
Annual
Advanced Licensing Institute
By
Theodore E. MacVeagh

Table of Contents

1. What is Export Control Law
2. Relation of Export Control Law to Licensing
3. Convincing Clients to Care
4. Current Status of Export Control Law
5. Some Historical Perspective
6. Some Policy Issues
7. Divided Authority of Current Export Control Regime
8. OFAC Responsibilities
9. DDTC Responsibilities
10. Defense Articles
11. Commodity Jurisdiction Requests
12. BIS (BXA) Responsibilities
13. Subject to the EAR
14. Using the EAR
    - Is a License Required
    - General Prohibitions
    - CCL and ECCNs
14. Using the EAR (cont'd)
    - Commerce Control List
    - ECCN 4A002
    - Commodity Classification Requests
    - Country Chart
    - License Exceptions
15. Exports of Non-Encryption Software
16. Exports of High Speed Computers
17. Exports of Encryption Software
18. Deemed Export Rule
19. Publicly Available
20. Fundamental Research
21. Exporting with Confidence
22. Exhibits
    - A: Commerce Country Chart
    - B: CCL Category 4 – Computer
    - C: Useful Web Sites

What is Export Control Law

Export control law is the body of law that regulates the transfer of U.S.- based technology and goods to non-U.S. persons and entities. The controls imposed are based on shifting national security and foreign policy interests

Export control laws also regulates:

- Activities of U.S. persons relating to proliferation of weapons of mass destruction (including chemical, biological, nuclear weapons and missile technology)
- Any trading activities of U.S. persons with specified countries or organizations subject to embargoes
- Anti-Boycott Rules

Relation of Export Control Law to Licensing

- Export controls are imposed on technology (and raw materials used with the technology)
- Export control law is (potentially) relevant to every technology transfer
- Patent and software licenses generally contain a clause such as:
  - The Licensee shall not export, re-export or use the Materials or any copy thereof in violation of the export control laws of the United States of America
- Technology subject to export control includes technology and products which are not obviously military in nature as well as objects that are used broadly in civilian contexts

Convincing Clients to Care

The cost of compliance with U.S. export laws can by high and clients may not perceive the value

It is very important for your clients to buy-in to any compliance efforts

Under U.S. Law, Exporting is a PRIVILEGE not a RIGHT

Consider these points:

- Important transactions can be held up if export status of technology is not clear
- Penalties for failure to comply can be severe, including fines, loss of export rights, blacklisting, and criminal penalties
- More aggressive enforcement is likely in the current climate
- Headlines regarding a violation of U.S. Export law are a public relations nightmare
- Patriotism: certain exports may cause material damage to U.S. interests

Current Status of Export Control Law

- Pre 9/11 Conventional Wisdom: Outdated cold war laws prohibiting efficient global commerce, and desperately in need of reform
- Post 9/11 Conventional Wisdom: Vital first line in the protection against terrorism, and desperately in need of reform

Some Historical Perspective

1775 - Continental Congress outlaws export of goods to Great Britain, establishing first American export controls

1949 - U.S. and 6 Western European nations create the Coordinating Committee for Multinational Export Controls (CoCOM) to prevent the transfer of militarily useful technology to communist countries - NOTE MULTILATERAL ORIGINS

1949 - U.S. passes the Export Control Act (ECA) giving the Dept of Commerce primary responsibility for enforcing controls on "dual-use" items

1970 - The ECA lapses and the Export Administration Act (EAA) took effect

1994 - The EAA lapses; Dept. of Commerce continues to act under Executive Orders (invoking authority under International Emergency Powers Act)

1995 - U.S. and 27 nations (including former communist block countries) establish the Wassenar Arrangement as a successor to CoCOM to control the spread of dangerous military technology - CURRENT MULTILATERAL FRAMEWORK

1996 - Interim rule published in the Federal register simplifies the Export Administration Regulations (EAR), the first comprehensive rewrite in 40 years

2006 - The EAA is in the process of being rewritten (and has been for some time)

Some Policy Issues

1. Export control policies were shaped in the divided world of the cold war. Query whether the current structure of controls is as effective against today's foreign policy concerns
2. Value and future of multi-lateral control regime
3. Distinctions between military and civilian technology have been blurred
   - Recent engagements (Kosovo, Afghanistan and Iraq) show value of technologies for sensors, geo-spatial location, signal processing and telecommunications over conventional military power
4. Value of export controls to national security v. drag on U.S. economic interests
   - If products are available outside U.S., U.S. loses market share with no appreciable gain in security
   - If regulations fail to keep up with technology, U.S. loses market share with no appreciable gain in security
5. Rationalization of controls is necessary. Divided regime makes compliance difficult

Divided Authority of Current Export Control Regime

1. Department of Treasury - Office of Foreign Assets Control (OFAC)
2. Department of State - Directorate of Defense Trade Controls (DDTC) (Previously OTDC)
3. Department of Commerce - Bureau of Industry and Security (BIS) (previously known as the Bureau of Export Administration (BXA))
4. Other relevant agencies: Defense Department; Intelligence Agencies; Energy Department; NRC; DEA; FDA; PTO; Department of the Interior

OFAC Responsibilities

There is no single authorizing statute for OFAC. Much of its work is authorized under the International Emergency Economic Powers Act 50 U.S.C. § 1701-1706 and the Trading with the Enemy Act 50 U.S.C. § § 1-44.

There is no single set of OFAC regulations. Rather they are contained in several parts in Title 31 of the C.F.R. (starting with Part 500)

OFAC responsibilities include:

- Imposing and Administering Trade Sanctions, and Trade and Travel Embargoes Aimed at Controlling Terrorism, Drug Trafficking and Other Illicit Activities
- Prohibiting Payments/Providing Value to Nationals of Sanctioned Countries and Some Specified Entities/Individuals
- Prohibiting Certain Travel and Other Activities with Embargoed Countries and Individuals Even When Exclusions to EAR/ITAR Apply

OFAC Responsibilities

Sanctions are administered against the following countries, persons and activities:

- **Burma, Cuba, Iran, Liberia, North Korea, Sudan, Syria, Zimbabwe**
- **Sanctions against specific persons from certain countries (Balkans, Cote D'Ivoire)**
- **Specially Designated Nationals (SDNs) and Blocked Persons which act as fronts for sanctioned governments**
- **Specially Designated Terrorists**
- **Specially Designated Narcotic Traffickers**
- **Diamond Trading**

OFAC Responsibilities

- OFAC's regulations are complex and ever-changing
- Since September 11, there have been multiple changes to the list of Blocked Persons/SDN list and a huge increase in the pressure to comply with regulations
- OFAC penalties are high. Criminal penalties for exports up to $1,000,000 fines and up to 10 year jail terms. Civil fines from $12,000 to $55,000
- Banks in particular are under pressure and have been struggling to comply with OFAC regulations designed to stop the flow of funds from or to Blocked Persons
- It is vital banks have a compliance in place to identify and stop transactions with Blocked Persons or using assets that have been frozen pursuant to OFAC regulations

DDTC Responsibilities

- The DDTC (previously OTDC) has jurisdiction over the export of “Defense Articles” and “Defense Services”
- Controls are contained in the International Traffic in Arms Regulations (ITAR) - 22 C.F.R. § 120 - 130
- ITAR is promulgated under the Arms Export Control Act (AECA) § 2778 - 2994
- “Defense Articles” are those products included on the U.S. Munitions List (USML) - 22 C.F.R. § 122
- “Defense Services” are military training services or services relating to the design, development, production, maintenance, processing of use of defense articles
- Penalties: Criminal Fines up to $1,000,000 and 10 years in Jail; Civil Fines up to $500,000 and forfeitures

DDTC Responsibilities

In addition to overseeing exports of items off the USML, the DDTC has responsibility for the following:

- Maintaining the USML (adding and subtracting items)
- The registration of persons engaged in manufacturing or exporting defense articles – If you export items on the USML, you must be registered
- Licensing temporary imports of defense articles (permanent imports of such articles are under the jurisdiction of the Treasury Department's Bureau of Alcohol, Tobacco and Firearms)
- Regulating the brokering of transactions involving defense articles or services, whatever the location or origin by a U.S. person
- Governing "deemed exports" of defense articles and services

Defense Articles

Unlike the Commerce Control List (discussed below), the USML does not include detailed technical parameters

An article may be designated on the USML if the article:

- (a) is specifically designed, developed, configured, adapted, or modified for a military application (ii) does not have predominant civil applications and (iii) does not have equivalent performance to an item or service used for civil applications; or
- (b) is specifically designed, developed, configured, adapted, or modified for a military application, and has a significant military or intelligence applicability such that control by the State Department is necessary. 22 C.F.R. 120.3

ITAR defines “defense article” to include “technical data” which includes software “directly related to” defense articles (unlike the BIS regulations, which treat technology and software differently)

Commodity Jurisdiction Requests

- Because of the broad categorizations used by the USML, it is not always possible to tell whether a particular product would qualify as on the USML or not.
- If you are selling electronics or software to the military for use in military flight schools, your products may fall on the USML
- In order to determine whether an item or service is on the USML you can file a Commodity Jurisdiction (CJ) Request with the DDTC. If you file a Classification Request with BIS for an item predominantly sold to the military, the BIS may require that you file a CJ Request before they will rule on its classification
- In reviewing CJ Requests, the DDTC pays particular attention to the origin of an item (military or not), its current use (whether it also has civilian applications) and any characteristics specially related to the use of the item by the military
- Processing Time: “Usually less than 95 calendar days”

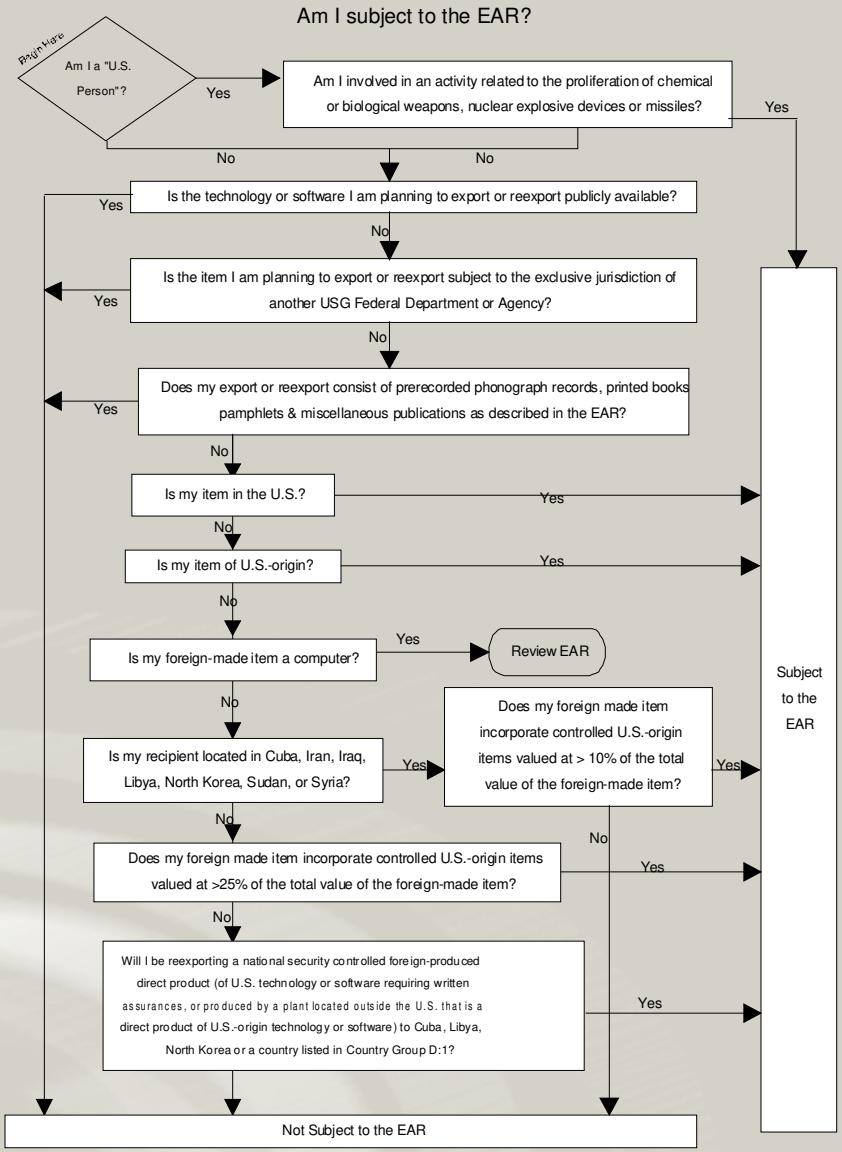
BIS (BXA) Responsibilities

- BIS has jurisdiction over the export and reexport of "dual use" items - items that may have both military and non-military uses
- Controls are contained in the Export Administration Regulations (EAR) - 15 C.F.R. § 730-774
- BIS is authorized to promulgate and administer the EAR under Executive Order; a successor to the EAA is in the process of being drafted
- Penalties: Criminal Up to $1,000,000 or 5x Value of Export for entities; Up to $250,000 and 10 years in Jail for individuals; Civil; Civil Fines from $10,000 - $100,000. PER EXPORT.
- BIS also regulates:
  - activities of U.S. persons relating to spread of weapons of mass destruction or missile technology
  - release of certain items of technology to foreign nationals within the United States (deemed exports)
  - sales of certain foreign-made items made with or incorporating U.S. technology
  - transmission of data and software electronically (e.g., via posting on web site without restrictions on access)

Using the EAR - “Subject to the EAR"

KEY CONCEPT: Is an export or activity “subject to the EAR”? See chart at 15 C.F.R. § 732 (Supplement 2)

- Is the export or activity related to the proliferation of weapons of mass destruction or missile tech?
- Is the item publicly available?
- Does another agency have jurisdiction?
- Is the item in the U.S.?
- Is the item of U.S. origin?
- Does item have certain U.S. content or is it the direct product of certain U.S. technology?



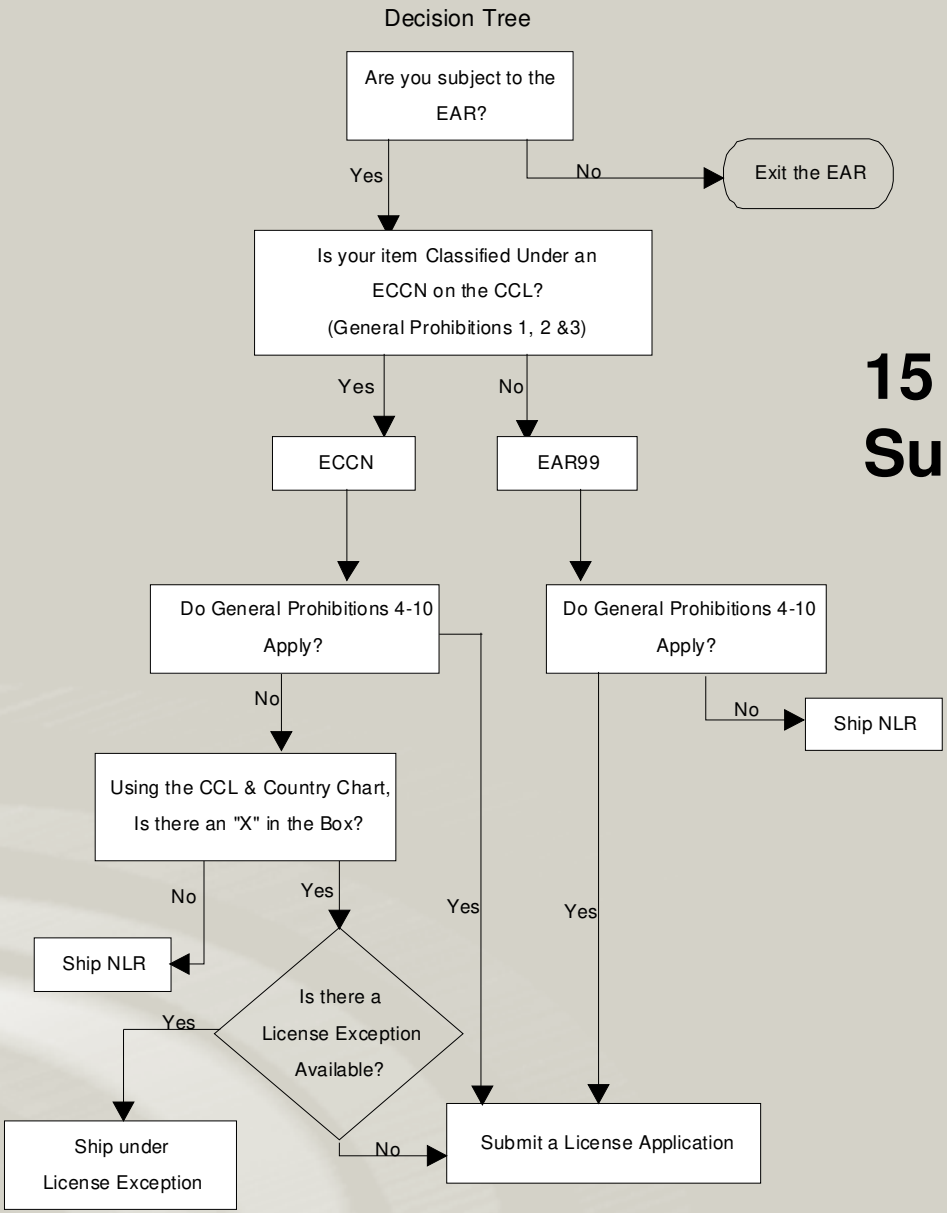
15 C.F.R. § 732, Supplement 2

Using the EAR - Is a License Required?

If an export is subject to the EAR, is a license required?

- Is the item classified under an ECCN on the Commerce Control List (CCL)?
- Does a General Prohibition apply?
- Is there an "X" across from the proposed destination of the export in the Country Chart?
- Does a license exception apply?
- Use the EAR Decision Tree at 15 C.F.R. § 732 (Supplement 1)

15 C.F.R. § 732, Supplement 1



Using the EAR - General Prohibitions

15 C.F.R. § 736 lists 10 General Prohibitions relating to the export of goods

General Prohibitions 1-3 relate to the Commerce Control List and depend upon the nature of the product being transferred

General Prohibitions 4-10 focus on preventing proliferation of missile technology and nuclear, chemical and biological weapons and apply to the transfer to end-users or end-uses related to proliferation without regard to the nature of the products

- Prohibition 5 prohibits transfers to persons on BIS's Denied Person List or Entity List
- Prohibition 7 prohibits transfers where the exporter "knows" of a specific link to proliferation activity. "Knowledge" includes a conscious disregard of the likelihood of a violation as well as positive knowledge
- Obligations require companies to use and follow BIS's "Know Your Customer" guidance and be alert for "Red Flags" (Appendix A)
- Note "objective standard" of what constitutes "knowledge" of a violation

Using the EAR - CCL and ECCNs

If an export is subject to EAR, you must determine whether the item to be exported classified on the Commerce Control List (CCL) - 15 C.F.R. § 774

- If not, a license is required only if one of the General Prohibitions apply
- CCL is "parametric" - a millimeter can make a difference

The Export Control Classification Number (ECCN) of the item will depend on its classification. The CCL will indicate the reasons for controls on a particular ECCN. These reasons include:

- Chemical/Biological Weapons
- Nuclear Nonproliferation 1/2
- National Security 1/2
- Missile Technology 1

Regional Stability 1/2
Firearms Convention 1
Crime Control 1/2/3
Anti-terrorism 1/2

Using the EAR - Commerce Control List

The CCL has ten broad categories:

- 0. Nuclear Materials, Facilities & Equipment
- 1. Materials, Chemicals, Microorganisms & Toxins
- 2 Materials Processing
- 3. Electronics Design, Development and Production
- 4. Computers
- 5. Telecommunications/Information Security
- 6. Sensors and Lasers
- 7. Navigation and Avionics
- 8. Marine
- 9. Propulsion Systems, Space Vehicles and Related Equipment

Each category is divided into 5 subcategories:

- A. Systems, Equipment and Components
- B. Test, Inspection and Production Equipment
- C. Materials
- D. Software
- E. Technology

Using the EAR - ECCN 4A002

4A002 "Hybrid computers" and "electronic assemblies" and specially designed components therefor.

License Requirements

Reason for Control: NS, MT, AT, NP, XP

Control(s)	*Country Chart*
NS applies to entire entry	NS Column 2
MT applies to hybrid computers combined with specially designed "software", for modeling, simulation, or design integration of complete rocket systems and unmanned air vehicle systems that are usable in systems controlled for MT reasons	MT Column 1
AT applies to entire entry	AT Column 1

NP applies, unless a License Exception is available. See §742.3(b) of the EAR for information on applicable licensing review policies.

XP applies to hybrid computers with a CTP greater than 28,000 MTOPS, unless a License Exception is available. XP controls vary according to destination and end-user and end-use; however, XP does not apply to Canada. See §742.12 of the EAR for additional information.

Continued on Next Slide

Using the EAR - ECCN 4A002

License Exceptions

LVS: $5000; N/A for MT
GBS: N/A
CIV: N/A

List of Items Controlled

Unit: Equipment in number; parts and accessories in $ value
Related Controls: See also 4A102 and 4A994
Related Definitions: N/A
Items:

a. Containing "digital computers" controlled by 4A003;

b. Containing analog-to-digital converters having all of the following characteristics:

b.1. 32 channels or more; *and*

b.2. A resolution of 14 bits (plus sign bit) or more with a conversion rate of 200,000 conversions/s or more.

Using the EAR - Commodity Classification Requests

If there is any doubt about how a product should be classified, you should submit a Commodity Classification Request to the BIS.

Why is this necessary:

- **CCL may be difficult to interpret; often the standards it uses are not familiar to engineers**
- **BIS may interpret CCL differently than is apparent from the written text based upon policy decisions**
- **Classification Requests are fairly easy to prepare and submit**

Using the EAR - Country Chart

Is the item's ECCN controlled to the particular country to which you are proposing to export it?

- Review the Country Chart at 15 C.F.R. § 738
- Is there an X across from the country to which you want to export under the reason for control identified under the ECCN under which your product falls?
- If not, no license is required
- If so, a license is required

Countries	Chemical & Biological Weapons			Nuclear Nonproliferation		National Security		Missile Tech	Regional Stability	
	CB 1	CB 2	CB 3	NP 1	NP 2	NS 1	NS 2	MT 1	RS 1	RS 2
Afghanistan	X	X	X	X		X	X	X	X	X
Albania	X	X		X		X	X	X	X	X
Algeria	X	X		X		X	X	X	X	X
Andorra	X	X		X		X	X	X	X	X
Angola[1]	X	X		X		X	X	X	X	X
Antigua & Barbuda	X	X		X		X	X	X	X	X
Argentina	X					X	X	X	X	X
Armenia	X	X	X	X		X	X	X	X	X
Australia	X					X		X	X	
Austria	X					X		X	X	X
Azerbaijan	X	X	X	X		X	X	X	X	X
Bahamas, The	X	X		X		X	X	X	X	X
Bahrain	X	X	X	X		X	X	X	X	X

Continued on Next Slide

Guyana	X	X		X		X	X	X	X	X	
Haiti	X	X		X		X	X	X	X	X	
Honduras	X	X		X		X	X	X	X	X	
●Hong Kong	X	X		X		X		X	X	X	
● Hungary	X					X	X	X	X		
Iceland	X			X		X	X	X	X		
India	X	X	X	X	X	X	X	X	X	X	
Indonesia	X	X		X		X	X	X	X	X	
Iran	See part 746 of the EAR to determine whether a license is required in order to export or reexport to this destination.										
Iraq[1]	See part 746 of the EAR to determine whether a license is required in order to export or reexport to this destination.										
Ireland	X					X		X	X	X	
Israel	X	X	X	X	X	X	X	X	X	X	
Italy	X					X		X	X		

Using the EAR - License Exceptions

License exceptions are detailed at 15 C.F.R. § 740. In order to qualify for an exception, an export must meet the specific criteria required therefor. Important exceptions include:

- GBS – Shipments to Group B Countries
- CIV - Civil End-Users
- TSR - Technology and Software Under Restriction
- APP - Computers
- TMP - Temporary Imports, Exports, and Reexports
- TSU - Technology and Software - Unrestricted
- ENC - License Exceptions for Encryption Products
- USPL – United States Persons in Libya

Using the EAR - License Exception TSR

This exception permits "exports and reexports of technology and software controlled to the ultimate destination for national security reasons and identified by 'TSR - Yes' in entries on the CCL" provided:

- **that the software or technology is destined for countries in Group B;**
- **a written assurance is received from the consignee that neither the technology/software or products of the technology or software will be delivered to certain countries in Group D1 and Group E; and**
- **certain reporting requirements are met**

Using the EAR - License Exception TSU

This exception permits "exports and reexports of certain operations and sales technology and software, mass market software and encryption source code:

- "Operation Technology" is minimum technology necessary to install, operate, maintain etc. commodities that are lawfully exported;
- "Sales Technology" is technology to support actual bids or quotations;
- Mass market and encryption software are considered below

Exports of Non-Encryption Software

- Exports of software are governed like any other product by the CCL
- However, there is an important exception for “mass market” software (other than encryption software) - through license exception TSU
- Software qualifies as “mass market” if it is generally available to the public by being:
  - sold from stock at retail selling points, without restriction, by means of: (1) over the counter transactions; (2) mail order transactions; or (3) telephone call transactions; AND
  - designed for installation by the user without further substantial support by the supplier
- Non-Encryption mass market software can be exported without a license under license exception TSU to any destination except the T-6 (Cuba, Iran, Libya, North Korea, the Sudan, Syria – note T-6 to become T-5 with removal of Libya in July)

Exports of High Performance Computers (HPCs)

For a long time the issue of the export of HPCs was a source of tension between regulators and industry

- Regulations were always outmoded; lagged behind industry
- In 1992, 1/3 of computer industry's overseas sales were subject to license review; in 1993, a computer with a performance of 12.5 million theoretical operations per second (MTOPS), equivalent of an Intel 486 chip, needed a license; manufacturers were preparing to mass produce computers with performance at 200 MTOPS (using Intel Pentium chips and DEC's Alpha AXP chip)
- Mass-produced HPC technology was uncontrollable
- U.S. industry was being harmed; losing market share and encouraging the development of a non-U.S.-based competitors
- U.S. defense requires HPCs and would be harmed if the U.S. HPC industry ceased to be a world leader
- Control of HPCs used to be justified because of use of HPCs in nuclear weapon design. If computer speed is no longer a critical choke point for nuclear weapon design, what is the justification for control?
- Issues resolved by the creation of License Exception CTP and a commitment to revisit the policy on a regular basis
- Recent changes have been made. The new license exception is "APP"

Exports of Encryption Software

- Until 1996 most encryption technology was still listed on the Munitions List, meaning that it could not be exported without a license from the DDTC
- Similar story as with HPCs
  - Rigorous controls were a source of tension between industry and regulators
  - Wide industrial use of encryption and international availability made overbroad export control impracticable (Microsoft Office 2000 could not be exported without a license under 1999 rules)
  - Compromise reached through a far-reaching license exception ENC which lifts most controls on technology
- Encryption Software is still treated differently than other software (and other technology)
- However, new rules issued in January, 2000, and amended subsequently, substantially loosened the controls

Exports of Encryption Software

START YOUR ANALYSIS WITH EAR § 742.15 Not § 740.

Most exports require review or notice by BIS

Under License Exception TSU:

- **Publicly available (as defined in § 734.3(b)(3)) source code and corresponding object code can be exported without a license (upon notification of BIS) – To qualify it must be available for free, although a fee may be charged for products created from the code**

Under License Exception ENC:

- **Any encryption products may be exported to foreign subsidiaries of U.S. corporations without review and classification by BIS, other than subsidiaries in T-6**
- **Most encryption products of any key length may be exported to any user in the EU+5 (other than the T6) after review and classification by BIS**
- **Range of encryption products (including commercial encryption products) can be exported to non-governmental end-users outside the Supp. 3 countries after review and notification (no "open cryptographic interface")**
- **Be careful of cryptanalytic products or cryptographic products with open cryptographic interfaces**

Deemed Export Rule

- Subject of more attention lately (See settlement with New Focus, April 2004; Recent Agency Report of 2003)
- EAR § 734.2(b)(2)(ii) defines export to include: "Any release of technology or source code subject to the EAR to a foreign national. Such release is deemed to be an export to the home country or home countries of the foreign national." THIS INCLUDES RELEASES IN THE UNITED STATES
- EAR § 734.2(b)(3) provides that the "release" of technology includes: "(i) Visual inspection by foreign nationals of U.S.-origin equipment and facilities; (ii) Oral exchanges of information in the U.S. or abroad; and (iii) The application to situations abroad of personal knowledge or technical experience acquired in the U.S."
- Foreign national includes anyone in the U.S. on nonimmigrant visa categories (B, E, F, H, J or L), but does not include permanent residents (green card holders) and "protected individuals" as defined in the Immigration and Naturalization Act (e.g. asylees)
- BEWARE: ITAR has a similar rule for deemed exports of defense articles and there are almost no applicable license exceptions (see ITAR § 120(17)(a)(4)

Deemed Export Rule

- Encryption "software" (source code and object code) is not subject to "deemed export" rule (possibly a reaction to Bernstein v. Department of State, 922 F. Supp. 1426 (1996)). See § 734.2(b)(9)
- The deemed export rule would apply to encryption "technology" except that license exception ENC permits transfers of encryption technology to foreign nationals within the U.S. for internal company use (exception nationals of the T6)
- Result of Deemed Export Rule:
  - Companies must classify all technology, not just technology included in exports
  - Companies have an obligation to determine the nationality or immigration status of all of its employees who may have access to controlled data

Publicly Available/Public Domain Exclusion

See 15 C.F.R. 734.3(b), 734.7-734.10; See 22 C.F.R. 120.10(5), 120.11, 125.1(b), 125.4

This is an exclusion available to all

Information already published, not just ordinarily published, through specified means:

- libraries open to the public, including most university libraries;
- unrestricted subscriptions, newsstands, or bookstores for a cost not exceeding reproduction and distribution costs (including a reasonable profit);
- published patents;
- conferences, meetings, seminars, trade shows, or exhibits held in the U.S. (ITAR) or anywhere (EAR), which are generally accessible by the public for a fee reasonably related to the cost and where attendees may take notes and leave with their notes; or
- websites accessible to the public for free and without the host's knowledge of or control of who visits or downloads software/information (clearly acceptable under EAR, and likely acceptable under ITAR).
- Does not apply to Encryption Software/Technology.

Fundamental Research Exclusion

See 22 C.F.R. 120.11(8); 15 C.F.R. 734.8(a) and (b)

Applies to Research Undertaken at Colleges and Universities

- **Information--Not to Items or Materials**
- **Resulting From--Or Arising During (Open Issue: "Already Existing and Used During" – Will the transfer of already existing "use technology" result in a "deemed export")**
- **Basic and Applied Research in Science and Engineering**
- **Conducted at an Accredited Institution of Higher Education (EAR)/Higher Learning (ITAR)**
- **Located in the U.S. (Doesn't Apply Abroad with Limited, Specific Exception Under ITAR)**
- **Where the Information Is Ordinarily Published and Shared Broadly In The Scientific Community; and**
- **Is Not Subject to Proprietary or U.S. Government Publication or Access Dissemination Controls (e.g., re: foreign national participation)**
- **Query whether research is federally funded research that includes specific National Security Controls – Review Agreement**

Fundamental Research Exclusion

- Purpose: Allows U.S. Universities to Include Foreign Faculty, Students in Research Without a License
- Once Created in Fundamental Research, Information May Be Transferred Abroad Without Restriction
- Under EAR (But Not ITAR) Commercial Companies Have a Similar Exclusion if Research is Not Subject to Publication/Access/Dissemination Restrictions (15 C.F.R. 734.8(d), (e))
- Side Deals with Sponsors Destroy Exception
- Short Pre-Publication Review Period (30-90 days) for Patent Protection and to Remove Sponsor Confidential Information is Okay
- Consider deemed export rules in allowing foreign students access to EAR or ITAR controlled equipment

Exporting with Confidence

1. You have submitted a Commodity Jurisdiction Request and received confirmation that your product is not a "defense article" under the jurisdiction of DDTC
2. You have submitted a Classification Request with respect to your product to the BIS and received an ECCN Number
3. You have checked the controls on the ECCN against the Country Chart and determined that there is no control for the country to which you are exporting
4. The Destination/Foreigner's Nationality is not in a country against which OFAC administers sanctions or a Member of the T-6
5. You have checked your licensee/purchaser against the most recent (i) OFAC list of SDNs and other Blocked Persons; (ii) BIS's Denied Persons, Entity and Unverified List; and (iii) DDTC's Debarred List
6. You have confirmed that you are not exporting your product in violation of any of the General Prohibitions, and the project for which the product is being used is not associated with a WMD program or Missile Technology Program
7. You have followed the BIS "Know Your Customer Guidelines" and have a process in place that will catch any Red Flags indicating potential diversion of materials

THANK YOU

© 2006 Theodore E. MacVeagh