

# EXPORT ESSENTIALS: YOUR GUIDE TO THE FUNDAMENTALS OF EXPORT LAWS AND LICENSING



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## EXPORT ADMINISTRATION REGULATIONS

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## STATUTES

- Export Administration Act 1979, as amended in 1984, 1988, and 1994, 50 U.S.C. App. § 2401 (expired)
- International Emergency Economic Powers Act (“IEEPA”), 50 U.S.C. App. § 1701, *et seq.*; Executive Order No. 12730. (Implementing authority for regulations)



## EXPORT ADMINISTRATION REGULATIONS (“EAR”)

- Administered by the Bureau of Industry and Security (“BIS”), Department of Commerce
- Control the permanent export of goods, material, equipment, software and technology
- BIS regulates only items “subject to the EAR”
- Items and activities not subject to the EAR remain outside the regulatory jurisdiction of BIS



## EXPORT ADMINISTRATION REGULATIONS (“EAR”)

- President delegated the authority to designate those items, technology, etc. subject to the EAR and controlled on the Commerce Control List (“CCL”) to the Secretary of Commerce
- Regulations establish a licensing framework to authorize exports
- Export requests are approached with a presumption of approval, presumption of denial, or neutrality



## EXPORT ADMINISTRATION REGULATIONS (“EAR”)

- Generally require prior written approvals to export items subject to the EAR
- EAR also establish license exceptions which authorize exports if certain specified factors are met



## PREMISED ON FOREIGN POLICY, NATIONAL SECURITY AND SHORT SUPPLY

- Limited to controlled goods, technology, and software
- Control exports, certain reexports and certain temporary imports
- Export approvals, limitations and/or denials are based on destination, end user and end use



# LICENSES

- License Analysis
  - ❖ Who, What, Where, Why and How?
    - To whom are you sending something?
    - What are you sending?
    - Where are you sending something?
    - Why are you sending something?
    - How are you sending something?



## LICENSES

- EAR require:
  - ❖ a controlled item;
  - ❖ a transfer that constitutes an export; and
  - ❖ a foreign destination or foreign person
- If any element of above is missing, the EAR may not apply
- Export analysis may result in two outcomes:
  - ❖ Need license; or
  - ❖ Do not need license



# LICENSES

- Ten (10) General Prohibitions require licenses for stated activities:
  - ❖ Export and reexport of controlled items to listed countries;
  - ❖ Reexport and export from abroad of foreign-made items incorporating more than a de minimis amount of controlled U.S. content (parts and components reexports);
  - ❖ Reexport and export from abroad of the foreign-produced direct product of U.S. technology and software;



# LICENSES

- General Prohibitions (cont'd)
  - ❖ Engaging in actions prohibited by a denial order;
  - ❖ Export or reexport to prohibited end-uses or end-users;
  - ❖ Export or reexport to embargoed destinations;
  - ❖ Support of proliferation activities;
  - ❖ In-transit shipments and items to be unladen from vessels or aircraft;



## LICENSES

- General Prohibitions (cont'd)
  - ❖ Violation of any order, terms, or conditions;  
and
  - ❖ Proceeding with transactions with knowledge that a violation has occurred or is about to occur.



## LICENSES

- If you need a license, the EAR establish a process for obtaining approvals and the documentation needed to support a license request
- Process:
  - ❖ Collect information on product or technology
  - ❖ Understand the functional and technical characteristics of the product or technology



## LICENSES

- ❖ Identify all parties to the transaction or activity – including U.S. parties
- ❖ Screen all parties
- ❖ Identify all foreign destinations involved
- ❖ Identify type of export – “tangible” or “intangible”
- ❖ Obtain export license application
- ❖ Complete the application



## LICENSES

- ❖ Complete the application
- ❖ Attach supporting documents to the application
- ❖ Send application to the individual parties involved to obtain confirmation of application accuracy and completeness
- ❖ Make 4 copies of the information and send 2 copies to the Commerce Department



## LICENSES

- BIS 748P:
  - ❖ For all exports
  - ❖ Multipurpose application form
- BIS 748P-A and P-B:
  - ❖ 748P-A: used for additional products or technology
  - ❖ 748P-B: used for additional end users



## LICENSES

- Approval Process:
  - ❖ Designed to adhere to strict timeline to move licenses through the system (Executive Order 12981, December 5, 1995)
  - ❖ Interagency review process established in 1994 - 1995
  - ❖ Designed to ensure appropriate review with minimal delays
  - ❖ Allows license applications to be staffed to the Departments of Defense, State, Justice/FBI, Energy, CIA, NSA, NSC and any other agency that may request the ability to review the application



## LICENSES

- Possible Government Decisions on License Applications:
  - ❖ License denial;
  - ❖ Approval without limitations;
  - ❖ Approval with limitations; or
  - ❖ Return without action.



# LICENSES

- License Exceptions
  - ❖ Pre-approved authorizations to export items controlled or subject to the EAR
  - ❖ Require no submission of export applications to Commerce
  - ❖ Establish elements to be satisfied
  - ❖ Vest exporter with the discretion and the ultimate liability for those decisions



## LICENSES

- License Exceptions (cont'd)
  - ❖ May be used in specified circumstances to overcome General Prohibitions – which require licenses for all activities subject to the EAR
  - ❖ 17 license exceptions available
  - ❖ License exceptions only apply to General Prohibitions 1-3
  - ❖ All other General Prohibitions require licenses



## LICENSES

- License Exceptions (cont'd)
  - ❖ Select license exceptions:
    - § 740.4 Shipments to Country Group B countries (GBS)
    - Applies to items subject to the EAR
    - Country Group B
    - Indicates “GBS – Yes” on the CCL



# LICENSES

- ❖ § 740.6 Technology and software under restriction (TSR)
  - Applies to items subject to the EAR
  - “TSR-Yes” on the CCL, provided the destination is to Country Group B
  - Written assurance required from consignee
- ❖ § 740.13 Technology and Software Unrestricted (TSU)
  - Applies to items subject to the EAR
  - operation technology and software, software updates, “mass market” software and encryption source code
  - Generally applies to all countries except Country Group E:1



## LICENSES

- ❖ § 740.17 Encryption Commodities and Software (ENC)
  - applies to items subject to the EAR
  - obtained through submission of technical review request for release from Encryption Items (“EI”) controls
  - 30-day waiting period applies for certain exports
  - BIS may hold the review request without action
  - Once issued, remains valid until product functionality changes



## LICENSES

- License Appeals Process - 15 C.F.R. § 756
  - ❖ Any person directly and adversely affected by an administrative action taken by BIS may request reconsideration and appeal that action to the Under Secretary for Industry and Security
  - ❖ The appeal or request may be reviewed by the Under Secretary's designee
  - ❖ Must be received by the Under Secretary for Industry and Security not later than 45 days after the date appearing on the written notice of administrative action



## LICENSES

- ❖ Appeals Requirements and Documentation:
  - Must outline reasons for appeal or reconsideration in a letter
  - Must include supporting and explanatory documentation
  - May include recommendations provided by other U.S. Government agencies
  - Under Secretary is not bound by the recommendations presented
  - Completely discretionary, though Under Secretary may not act in an “arbitrary or capricious” manner



## LICENSES

- Encryption Technical Reviews and Notifications
  - ❖ Encryption software, technology and hardware is tightly controlled
  - ❖ Generally listed in Category 5, Information Security, CCL
  - ❖ Generally subject to NS, EI, NP, MT controls
  - ❖ Generally require licenses depending upon functional characteristics and product robustness



# LICENSES

- ❖ Of interest to NSA and the intelligence community
- ❖ Of paramount concern to U.S. national security interests
- ❖ Process exists to permit exports of certain encryption software under license exception – Technical Review
- ❖ Technical Review:
  - Submission to BIS
  - Requests release from EI controls
  - Provides performance and functional characteristics of product and related encryption
  - Requires submission, in some circumstances, of encryption source code



## LICENSES

- Requires completion of BIS 748P to accompany transmittal letter
- Identifies whether an open cryptographic interface exists in the product
- Suggests ECCN that applies (e.g., 5D002)
- Submitted to BIS and NSA Encryption Coordinator
- CCATS issues and identifies whether product has been released for export and is eligible for export under license exception ENC
- Differs from a standard classification process



# LICENSES

- Notification
  - ❖ For software that is generally below the 64-bit level and is classified under ECCN 5D992
  - ❖ Submission to BIS does not require exporter to wait for a response
  - ❖ Submission generally includes a transmittal letter and supporting technical material to justify 5D992 designation
  - ❖ Does not require BIS 748P



## VIOLATIONS

- ❖ Standards: Strict liability with ability to mitigate or aggravate
- ❖ Sanctions
  - Administrative
    - Civil Penalty – not to exceed \$50,000
    - Denial of Export Privileges
    - Exclusion from practice before the agency



# VIOLATIONS

## ❖ Sanctions (cont'd)

- Criminal

- fined no more than five (5) times value of exports or reexports involved or \$250,000 or \$1 million, whichever is greater, or imprisoned not more than 5 years, or both
- willful violations
- Other criminal sanctions

- Other Sanctions

- Statutory sanctions
- Seizure and forfeiture
- Cross-debarment



# VIOLATIONS

## ❖ Sanctions (cont'd)

- Cases
- Voluntary disclosure does not limit the Government from imposing sanctions



## ANTIBOYCOTT

- 15 C.F.R. § 760
- Antiboycott laws were adopted to encourage, and in specific cases, require U.S. firms to refuse to participate in foreign boycotts that the United States does not sanction
- Implemented to avoid extraterritorial application of foreign countries' policies that do not comport with U.S. policies
- Most well-known boycott: The Arab League Boycott of Israel



## ANTIBOYCOTT

- Applies to all "U.S. persons," defined to include individuals and companies located in the United States and their foreign affiliates
- Applies to activities that relate to the sale, purchase, or transfer of goods or services (including information) within the United States or between the U.S. and a foreign country; generally includes U.S. exports and imports, financing, forwarding and shipping, and certain other transactions that may take place wholly offshore.



## ANTIBOYCOTT

### ❖ Prohibited activities:

- Agreements to refuse or actual refusal to do business with or in Israel or with blacklisted companies
- Agreements to furnish or actual furnishing of information about business relationships with or in Israel or with blacklisted companies
- Agreements to furnish or actual furnishing of information about the race, religion, sex, or national origin of another person



# ANTIBOYCOTT

- Criminal and Administrative Penalties
- Antiboycott Cases
- Requires reporting
  - ❖ Antiboycott forms or letter
  - ❖ Whether U.S. person responds to request or not
  - ❖ Key is phraseology
  - ❖ Commonly found in financial instruments which must be included with any reports submitted to the Office of Antiboycott Compliance



## SCREENING

- Conducted with each export
- Necessary due diligence to ensure that exporter is not dealing with suspended, denied, debarred or otherwise ineligible party
- Covers U.S. and foreign parties
  - ❖ Entities
  - ❖ Individuals
  - ❖ Government agencies