

# EXPORT CONTROLS



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*November 2014*

# Overview

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United States export controls mainly fall under the jurisdiction of three federal agencies. First, the Department of Commerce's Bureau of Industry and Security administers the Export Administration Regulations, which control exports and reexports of a wide range of commodities, software, and technology. Second, the Department of State's Directorate of Defense Trade Controls administers the International Traffic in Arms Regulations, which regulate the export of goods, technical data, and services designed for military use. Third, the Department of the Treasury's Office of Foreign Assets Control administers economic and trade sanctions against targeted countries, individuals, and entities.

## Export Administration Regulations

(Department of Commerce's Bureau of Industry and Security)

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The Department of Commerce's Bureau of Industry and Security (BIS) is responsible for implementing and enforcing the Export Administration Regulations (EAR), which regulate the export and reexport of commercial items. These items are often referred to as "dual-use" items – items that have civil applications as well as military or proliferation applications (e.g., nuclear, chemical/biological or missile proliferation activities). The EAR are not limited to "dual use" items and include some purely civilian items and items that are used for military applications but not controlled under the International Traffic in Arms Regulations.

### EXPORTS AND REEXPORTS

Exports are items sent from the United States to a foreign destination. These include items that temporarily leave the United States, are sent to a wholly owned United States subsidiary in a foreign country, or are of foreign origin and exported from the United States to the country of origin. For example, returning foreign equipment to its country of origin after repairing it in the United States and electronic transmission of non-public data that will be received abroad may be considered exports. In addition,

the release of technology or software subject to the EAR to a foreign national in the United States is "deemed" to be an export to the home country of the foreign national. Examples of such release include demonstration and oral briefing. The method used to transport an item is not relevant in determining whether an item is being exported. For example, an item may be subject to export licensing if it is sent by mail, hand delivered, uploaded or downloaded from the Internet, or transmitted by email.

# United States export controls mainly fall under jurisdiction of the Department of Commerce's Bureau of Industry and Security, the Department of State's Directorate of Defense Trade Controls, and the Department of Treasury's Office of Foreign Assets Control.

Reexports are items subject to the EAR that are shipped or transmitted from a foreign country to another foreign country. Reexports include the release of technology or software that is subject to the EAR in a foreign country to a national of another foreign country.

## LICENSES

Exports of items subject to the EAR may require a license from BIS. To determine if a license is required, four key factors must be considered: (i) the item, (ii) the item's destination, (iii) the item's end-user, and (iv) the item's end-use.

### 1 The Item

The first step is to determine whether the item intended for export has an Export Control Classification Number (ECCN). The ECCN can be found in the Commerce Control List (CCL) maintained by BIS. In addition, an ECCN can be obtained by contacting the item's manufacturer to see if it has a current ECCN or by submitting an official commodity classification request to BIS.

Items that do not appear on the CCL or have an ECCN are designated by an EAR99 classification. Items classified EAR99 generally do not require a license from BIS and ship under a "No License Required" (NLR) designation.

### 2 Destination

If an ECCN is identified for an item, an export license may be required based on the item's country of ultimate destination and reason for control. This determination is made by consulting the Country Chart maintained by BIS.

### 3 End-User and End-Use

Exports to certain individuals and organizations trigger licensing requirements, or may be prohibited, even if the item itself does not require a license according to the ECCN and Country Chart or due to an EAR99 designation. To determine if a license is required to export to an end-user, it is necessary to consult the following lists maintained by BIS: (i) entity list, (ii) unverified list, and (iii) denied persons list. The EAR also contains prohibitions against exports, reexports, and transfers to certain end-uses, unless authorized by BIS (e.g., support of certain nuclear, missile, chemical, or biological end-uses<sup>1</sup>).

## REEXPORTS

Some foreign-made items are subject to the EAR because (i) the item was produced or originated in the United States; (ii) the item is foreign made but contains more than a specified percentage of United States-controlled content; (iii) the item is foreign made but based on certain United States-origin technology or software and intended for shipment to specified

<sup>1</sup> For purposes of the EAR, the term US person includes: (1) any individual who is a citizen of the United States, a permanent resident alien of the United States, or a protected individual as defined by 8 U.S.C. 1324b(a)(3); (2) any juridical person organized under the laws of the United States or any jurisdiction within the United States, including foreign branches; and (3) any person in the United States.

destinations; or (iv) the item was made by a plant or a major component of a plant located outside the United States, the plant or major component of a plant is the direct product of

certain United States technology or software, and the item is intended for shipment to specified destinations.

# International Traffic in Arms Regulations

(Department of State's Directorate of Defense Trade Controls)

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The International Traffic in Arms Regulations (ITAR) control the export and temporary import of defense-related articles and defense services. Defense articles and services subject to ITAR are identified on the U.S. Munitions List (USML). The Department of State's Directorate of Defense Trade Controls (DDTC) administers ITAR and maintains the USML.

## REGISTRATION

Any person who engages in the United States in the business of manufacturing, exporting, or temporarily importing defense articles or of furnishing defense services must register with the DDTC, unless an exemption applies. Registration is a prerequisite to export licensing approval and does not confer any export privileges.

## LICENSING AND APPROVALS

A license from the DDTC is required to export or temporarily import a defense article on the USML, unless an exemption applies. A license is also needed if a defense article or defense service on the USML is reexported or retransferred (transfer to an end-use, end-user, or destination not previously authorized by license, written approval, or exemption under ITAR). An agreement approved by DDTC's Office of Defense and Trade Controls Licensing (DTCL) is required to furnish a defense service to a foreign person, to manufacture defense articles abroad, or to establish a distribution point abroad for defense articles of United States origin for distribution to foreign persons. Agreements generally include manufacturing license agreements, technical assistance agreements, distribution agreements, or off-shore procurement agreements.

# Office of Foreign Assets Control

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The Office of Foreign Assets Control (OFAC) of the Department of the Treasury administers and enforces economic and trade sanctions against targeted foreign countries, regimes, terrorists, narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the security and economy of the United States. OFAC's regulations apply to United States citizens and permanent resident aliens regardless of where they are located, all persons and entities within the United States, and all United States incorporated entities and foreign branches. Some programs require foreign persons in possession of United States-origin goods to comply with OFAC sanctions programs.

## **LIST-BASED SANCTIONS**

OFAC maintains a list of individuals and entities owned or controlled by, or acting for or on behalf of, targeted countries, or under programs that are not country specific. These individuals and companies are referred to as "Specially Designated Nationals" (SDNs). Generally, assets of SDNs are blocked, and US persons are prohibited from dealing with SDNs.

OFAC also maintains a list of foreign individuals, groups, and entities that have violated, attempted to violate, conspired to violate, or caused a violation of United States' sanctions on Syria or Iran, and of foreign persons who have facilitated deceptive transactions for or on behalf of persons subject to United States' sanctions. These individuals and entities are referred to as "Foreign Sanctions Evaders" (FSEs). US persons are prohibited from engaging in transactions with FSEs.

## **COUNTRY-BASED SANCTIONS**

OFAC's country-based sanctions impose countrywide sanctions against identified countries, which include Cuba, Iran, Burma, and Sudan. Prohibitions on transactions vary among countries, but US persons are generally prohibited from engaging in business with or in targeted countries.

## **OFAC LICENSES**

OFAC is authorized to issue licenses to permit certain transactions that would otherwise be prohibited under OFAC's sanctions programs. OFAC issues general licenses authorizing particular types of transactions without need to apply for a license. OFAC also issues specific licenses on a case-by-case basis in response to a written license application.

Violation of United States' export controls can result in severe criminal and administrative penalties and denial of export privileges. To avoid being subject to these penalties, exporters, reexporters, freight forwarders, carriers, consignees, and others involved in export transactions need to keep informed of and comply with export controls.

## CONTACT THE CORPORATE & BUSINESS PRACTICE

Hinckley Allen's Corporate & Business practice welcomes the opportunity to speak with you about our services. For more information, please visit [hinckleyallen.com/corporate-business](http://hinckleyallen.com/corporate-business) or contact:

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### ABOUT HINCKLEY ALLEN

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