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U.S. Export Controls Frequently Asked Questions

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U.S. Export Controls: Frequently Asked Questions

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1. What laws govern U.S. exports?

You should be aware of the three primary export control regimes under U.S. law:

1. The Department of Commerce, Bureau of Industry and Security (“BIS”), which administers the Export Administration Regulations (“EAR”) and restricts certain U.S. products and technologies (including commercial products and technologies). The EAR is the most broad-reaching of the three enforcement regimes.
2. The Department of State, Directorate of Defense Trade Controls (“DDTC”), which administers the International Traffic in Arms Regulations (“ITAR”) and restricts products and technologies that are specifically designed or modified for a military purpose.
3. The Department of Treasury, Office of Foreign Assets Control (“OFAC”), which administers embargoes and other economic sanctions that have been imposed against certain countries in order to further U.S. foreign policy and national security objectives. In general, the OFAC sanctions prohibit U.S. persons (wherever located) from engaging in business transactions with certain entities located in a sanctioned country or controlled by the government of a sanctioned country, or business transactions involving products or services originating in a sanctioned country.

2. Do the U.S. export laws only apply to products or services originating in the U.S.?

No. The reach of U.S. export laws is incredibly broad and often includes foreign-manufactured products or foreign-designed software.

If a foreign-manufactured product incorporates U.S. technologies, components or materials (including U.S.-origin source code), then the product may be subject to U.S. export control laws.

If a foreign-manufactured product incorporates technologies or components that are subject to the ITAR, then the product will almost always require approval from DDTC to ship to a foreign person.

U.S. jurisdiction may even be triggered if U.S. persons are involved in the manufacturing or sales process, or if a business transaction is conducted by a foreign subsidiary of a U.S. company. The OFAC regulations are particularly broad in their extraterritorial reach.

3. How do I know whether my product is a “controlled product” or “controlled technology”?

Each regime classifies the scope of its controls differently.

The OFAC regulations (31 C.F.R. Chapter V) generally apply to specific individuals (including broad classes of individuals, such as all persons and companies from Cuba) or types of transactions – not to specific products or technologies.

Regions Subject to OFAC Sanctions



The ITAR restricts exports of specific products or technologies (called “defense articles,” “technical data,” or “defense services”) based on whether the products or technologies are described on the U.S. Munitions List, 22 C.F.R. § 121.1. The U.S. Munitions List includes products or technologies developed or adapted specifically for military applications. The ITAR usually requires an export license for export of any product, technology, or service listed on the U.S. Munitions List, regardless of whether the product has been incorporated as a low-level component in a larger manufactured system.

The EAR restricts exports of certain products listed on the Commerce Control List, 15 C.F.R. Part 774, Supplement 1, based on where the product is going (*i.e.*, the destination country) and what the product will be used for (*i.e.*, the end-use). While many purely commercial items do not require an export license, whether a license is required to export a product or technology subject to the EAR requires a case-by-case analysis of each product, its destination country, and its end-use.

4. What is a “defense article” under the ITAR?

A “defense article” includes any item falling within one of the several “Categories” into which the U.S. Munitions List is organized, and which meets either of two tests:

Test 1

- The item is **specifically** designed, developed, configured, adapted, or modified for a military application;
- Does not have predominant civil applications; and
- Does not have performance equivalent to an article used for civil application

Test 2

- The item is **specifically** designed, developed, configured, adapted, or modified for a military application; and
- Has such significant military or intelligence capability to warrant ITAR control.

5. What is a “defense service” under the ITAR?

A “defense service” is any service that entails:

1. Furnishing assistance to foreign persons in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing, or use of defense articles;
2. Providing foreign persons with any ITAR-controlled technical data; or
3. Providing any form of military training for foreign forces.

6. What is “technical data” under the ITAR?

“Technical data” is broadly defined to include:

1. Any information that is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification of defense articles;
2. Materials such as blueprints, drawings, photographs, plans, instructions and other documentation;
3. Classified information relating to defense articles or defense services;
4. Information or technology covered by an invention secrecy order; and
5. Software directly related to defense articles.

“Technical data” is a term unique to the ITAR. The equivalent term used in the EAR to refer to non-military technical information is simply “technology.”

7. What products or technology are controlled under the EAR?

Products, software or technologies that do not qualify as “defense articles” or “technical data” may still be controlled under the EAR.

The Commerce Control List segregates products, software and technologies into ten broad categories, including, *e.g.*, Electronics; Computers; Materials Processing; and Propulsion Systems, Space Vehicles, and Related Equipment.

Based on the description of the product, software, or technology, the Commerce Control List assigns an Export Commodity Classification Number (ECCN), which is used to determine the specific licensing restrictions.

If a product is not specifically described on the Commerce Control List, and if it is not a “defense article,” “defense service,” or “technical data,” then it is given a generic ECCN description of “EAR99.” Purely commercial products are usually classified as “EAR99.”

Note that an ECCN is a different number than the Schedule B codes assigned by the U.S. Census Bureau or the Harmonized Tariff Schedule codes assigned by the U.S. International Trade Commission. There is no correlation between how the Harmonized Tariff Schedule, Schedule B, and the Commerce Control List classify the various products.

8. What qualifies as an “export”?

You may export a product or technology in many different ways, and an export can occur both abroad or within the U.S. An export occurs when you:

1. Send or take controlled hardware, software, or other technology out of the U.S.;
2. Disclose or transfer controlled hardware, software, or other technology to a foreign governmental entity (including a foreign embassy);
3. Perform a service for a foreign person, whether in the U.S. or abroad, which involves controlled hardware, software or technology; or
4. Disclose or transfer controlled technology or a controlled product to a foreign person, either abroad or within the U.S. This is commonly referred to as a “deemed export” when the disclosure of technology occurs in the U.S.

9. Who qualifies as a “foreign person”?

Under the ITAR and the EAR, a “foreign person” includes:

1. Any individual who is not a lawful permanent resident of the U.S.;
2. Any company or organization that is not a U.S. company (*i.e.*, not a company incorporated or organized to do business in the U.S.); and
3. Any foreign government or governmental entity.

Exports to a foreign person are typically considered exports to their nation of citizenship.

10. What do I have to do before I can export controlled technology to a foreign person?

Generally, you will need to apply to the relevant agency for an export license.

When dealing with “defense articles,” “defense services,” and “technical data,” prior written approval or a license from DDTC will be required in almost all circumstances.

When dealing with other products, software, or technologies subject to the EAR, a license may be required if the ECCN description on the Commerce Control List indicates that a product is controlled for a specific reason (e.g., national security, anti-terrorism, crime control, regional stability) to a specific country. Additionally, if you have reason to know that the product will be reexported in violation of the law, you are required to seek prior approval from BIS.

If countries under OFAC jurisdiction are involved, the OFAC regulations applicable to that country must be followed. Although there are exceptions, an OFAC license will typically be required.

11. What types of information or technology can I disclose to foreign persons without prior approval from the Government?

There are some categories of information for which export licenses are not required:

1. Basic marketing information on product function or purpose;
2. General system descriptions;
3. Information that is publicly available in any public library;
4. Information that is in the public domain;
5. Information that is available in a public patent application; and
6. General scientific, mathematical or engineering principles commonly taught in schools, colleges or universities.

12. Do I need to obtain a license before I allow a foreign person access to our company's facilities?

That depends on what you manufacture and who the visitor is, but the answer may be “Yes” because of the “deemed export” rule.

If you manufacture and design defense articles, then a license from DDTC will typically be required if the plant visit will disclose to the foreign person certain technical data that could be used for the design, development, or production of a defense article. If you intend to limit the site visit so that the foreign person will not have access to any defense articles and related technical data, then a license may not be required.

If you manufacture products subject to the EAR, a license from BIS may be required if you would require a license to export the technology that will be disclosed during the plant visit to the foreign person/visitor's country of citizenship.

13. What are my obligations relating to foreign persons working in our facilities where we manufacture and/or design controlled products or technologies?

Your company has the responsibility to ensure that it is not engaging in unauthorized exports. If you have foreign person employees working with controlled products or controlled technologies, then you may not be in compliance with the law.

Many companies place responsibility on the Human Resources Director to ensure that all employees – whether hired as full-time, part-time, temporary or rotational – are properly identified when hired, and subsequently comply with the export requirements.

Additionally, you should ensure that you have written policies and procedures in place to ensure compliance with U.S. export control laws, and that you regularly conduct training for your employees to increase awareness of their obligations.

14. What are the penalties for non-compliance with the export laws?

Non-compliance can result in severe financial penalties to both the company and the individual, including possible loss of export privileges.

Intentional violations of the export laws carry criminal penalties for the company and those individuals involved in breaking the law.

Most companies view an individual's non-compliance with export laws as a basis for disciplinary action, including, but not limited to, dismissal.

15. Where can I get additional information on U.S. export laws?

Information on the various export regimes can be located at the following websites:

- OFAC: <http://www.ustreas.gov/offices/enforcement/ofac/>
- ITAR: <http://www.pmddtc.state.gov/>
- EAR: <http://www.bis.doc.gov/>

Additionally, you can contact the following individuals who specialize in helping companies comply with U.S. export controls:

- **John W. Chierichella**
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