



Doing Business in an International World: The Importance of U.S. Export Control Compliance

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Focus of Today's Presentation

- **Part I: Export Administration Regulations (“EAR”)** administered by the Department of Commerce, Bureau of Industry and Security (“BIS”)
- **Part II: U.S. economic sanctions and embargoes** administered by the Treasury Department, Office of Foreign Assets Control (“OFAC”)
- **Part III: Penalties**
- **Part IV: Investigations**



U.S. Export Controls

U.S. Dep. Of State
**International Traffic in
Arms Regulations
("ITAR")**
Exports of USML Items

U.S. Dep. of Commerce
**Export Administration
Regulations ("EAR")**
**Exports of
Dual Use Items**

U.S. Dep. of the Treasury
Office of Foreign Asset Controls ("OFAC")
**Product Neutral
Prohibited Countries
Prohibited Entities**

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EAR

Export Administration Regulations Department of Commerce, Bureau of Industry and Security

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EAR

- Broad authority in the Export Administration Regulations (“EAR”) to regulate the exports/reexports of nearly all items other than defense or nuclear items:
 - “Dual use” products, software and technology that have both commercial and military application



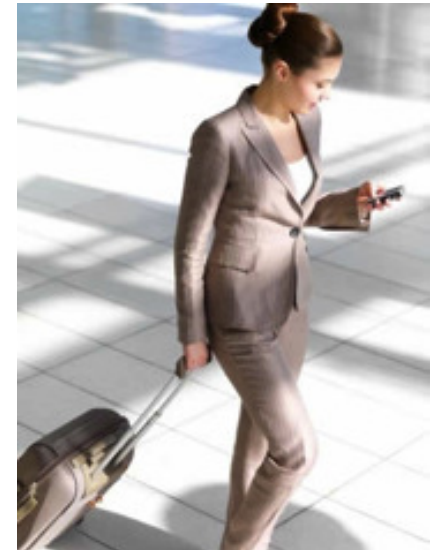
EAR

- Definition of “Export” is very broad:
 - Physical shipment or transfer of goods, software or technology out of the U.S.
 - Electronic transmission of software or technology outside of the U.S. (e.g. by email or download from a remote computer server)
 - Disclosure of controlled technology in the U.S. to a foreign national (someone other than a U.S. citizen or permanent resident) – “Deemed Export”



EAR

- An “export” is not always a sale!
- Exports include:
 - Hand-carries
 - Temporary exports
 - Samples
 - Donations
 - Transfers to foreign affiliates or subsidiaries within a corporate entity



EAR

- **Export controls under EAR have an extra-territorial application:**
 - **Regulate “reexports” from one foreign country to another of U.S.-origin products, software and technology**
 - **Control foreign-made products that include more than de minimis controlled U.S.-origin content:**
 - **10% for U.S.-sanctioned markets (Cuba, Iran, Sudan, Syria and North Korea)**
 - **25% for all other countries**



EAR

- **Is a license required from the Commerce Department under EAR?**
 - Depends on two factors:
 - The classification of the item on the EAR's Commerce Control List (“CCL”) and the reason for control; and
 - The intended destination
 - Commercial items that are not on the CCL are classified as “EAR99”



EAR

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



EAR

- Certain prohibitions apply to all items subject to the EAR → even EAR99 items may require a license (or be prohibited all together):
 - Exports to U.S.-embargoed countries or to an end-user of concern
 - Exports in support of a prohibited end-use (i.e. activities promoting proliferation of chemical, biological or nuclear weapons or missile systems)



EAR



- **Red flags** that may indicate that an export is destined for an unauthorized destination, end-use or end-user:
 - ✍ Customer is not providing complete and accurate information about the end-use of an item
 - ✍ Customer is not providing complete and accurate information about the final destination of the product – domestic use or reexport
 - ✋ If an exporter encounters a red flag he or she has a duty to inquire further
- Complete list of red flags is available on the BIS website



EAR

- **Syria** and **North Korea** are subject to restrictive export controls by BIS:
 - No exports and re-exports to Syria and North Korea of most items subject to EAR, including EAR99 items
 - Exports of food and certain medicines are allowed
 - Licenses may be issued on a limited basis



EAR

- Certain Chinese product categories are subject to restrictive export controls by BIS (e.g. avionics, lasers, aircrafts)
- Unlicensed exports and re-exports to China are prohibited if the item is intended for military end-use.



EAR

- Recent Development → New Strategic Trade Authorization (“STA”) License Exception
 - Effective June 16, 2011
 - Part of the export control reform
 - Permits unlicensed export and reexport of certain CCL items to certain “low risk” countries
 - Does not apply if export or reexport requires a license for embargo/end-use reasons



OFAC

OFAC

Office of Foreign Asset Control
Treasury Department

administers

U.S. Economic Sanction Programs

and

U.S. Trade Sanction Programs

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OFAC

Who Must Comply with OFAC Sanction Programs?

- **U.S. citizens and permanent resident aliens (no matter where located)**
- **All persons and entities within U.S. (including U.S. based branches and subsidiaries of foreign companies),**
- **U.S. incorporated entities**
- **Foreign branches of U.S. companies**
- **Foreign subs of U.S. companies (with respect to Cuba sanctions)**



OFAC

Targets of OFAC Sanction Programs

- **Designated Foreign Countries**
- **Designated Foreign Entities**
- **Designated Foreign Individuals**



Designated Foreign Countries

OFAC administers and enforces comprehensive embargoes to:

Cuba



Sudan*



Iran



Iran and Cuba sanctions apply to the entire territories of these countries as well as their governments (Cuban sanctions also reach private nationals).



Designated Foreign Countries

- Sudan → Transactions with specified areas of Southern Sudan are now permissible, unless they involve
 - Property of the government of Sudan;
 - Sudan's petroleum/petrochemical industries;
 - Transshipments through non-exempt areas of Sudan



Designated Foreign Countries

OFAC administers limited sanctions that permit certain dealings but prohibit others, involving:

Burma*



Syria



North
Korea



■ Burma

- April 17, 2012, OFAC issued a new General License No. 14-C to the Burmese Sanctions Regulations (BSR) **authorizing US persons to export financial services in support of humanitarian, religious, and other not-for-profit activities in Burma.**



Cuba



CUBAN DEMOCRACY ACT

- Enacted 1992 [22 USC 6001-6010]
- Codified embargo on foreign subs of US companies

HELMS-BURTON ACT

- Enacted 1996 [22 USC 6021-6091]
- Imposed additional sanctions with respect to Cuba
- Provided private right to sue foreigners in US courts for certain Cuba dealings
- The right to sue has been suspended by Presidential action repeatedly @ 6 mo. Intervals
- **EU & Canada & Mexico have implemented various “blocking” measures**
- **Blocking and US measures can be contradictory**
- **If you are caught between contradictory U.S. requirements and foreign blocking measures, consult legal counsel**





IRAN:

GENERAL PROHIBITION ON EXPORTS

- No products, technology or services may be exported from the US or from third countries by “US person” to Iran w/o OFAC license [31 CFR 560.204]
- **NO Financial dealings, brokering, facilitating, guaranteeing**





LIMITED EXPORT LICENSES FOR IRAN

**OFAC may license certain
exports to Iran:**

- ✓ **Agricultural commodities**
- ✓ **Medicine and Medical
Devices**



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TRANSFERS / RE-EXPORTS TO IRAN FROM OUTSIDE US

- “US person” shipments – prohibited without a license
- **NON-US person re-export shipments – prohibited with respect to property subject to US jurisdiction w/o license 31 CFR 560.205**



OFAC

Foreign Entity / Individual Sanctions

OFAC also administers comprehensive sanctions against Certain Blocked Entities and Specially Designated Nationals (**SDN's**)

- Agents acting for sanctioned countries
- Terrorists
- Narcotics Traffickers
- Weapons of Mass Destruction Proliferators



OFAC

Foreign Entity / Individual Sanctions

“U.S. Persons”:

- **Are prohibited from dealing with blocked entities and SDN's and**
- **Must block all property in which such entities / SDN's have an interest when such property is in the U.S. person's possession or under the U.S. person's control.**



OFAC

What do comprehensive (i.e., Iran, Cuba, Sudan, entity/individual) economic sanctions prohibit?

- **U.S. import and export with target country, entity, or individual**
- **With certain exceptions, third country export trade that involves**
 - **“U.S. Person” and/or**
 - **U.S.-origin products or technologies and foreign items with more than 10% U.S. content**
- **U.S. Investment in target country**
- **Dealings in property of target country, entity or individual**



OFAC

What do comprehensive (i.e., Iran, Cuba, Sudan, entity/individual) economic sanctions prohibit?

- **No U.S. person “**facilitation**,” which includes:**
 - **Approving a transaction or participating in contract negotiation/performance**
 - **Furnishing any kind of transactional support**
 - **Allowing a U.S.-based computer server to provide substantive support to the transaction**
 - **Providing global transportation or insurance arrangements**



OFAC

OFAC LICENSES & EXEMPTIONS

- General License
 - Authorization for broad categories of transactions.
 - Already published in regulation or website
- **NO** application required
- Example:
 - Certain visits to a “close relative” [31 CFR 515.561]



OFAC

OFAC LICENSES & EXEMPTIONS

- Specific License
 - Requires a written application
 - Issued on case-by-case basis
- Authorizes particular transaction(s)
- Example:
 - Exports of agricultural commodities to Sudan and Iran.



OFAC

OFAC LICENSES & EXEMPTIONS

- Exemption – no license required
- Examples:
 - Transactions related to information and informational materials



OFAC

OFAC LICENSABLE ACTIVITIES

- ✓ Exports of food, medicine and medical devices to Iran and Sudan
- ✓ Humanitarian transactions (e.g. NGOs relief efforts to Sudan)

[See OFAC website:](#)

Interpretative Guidance and Statements
of Policy



PENALTIES

- **Penalties for Violation for EAR/Economic Sanctions**
 - **Maximum civil fine - \$250,000 per violation or twice the value of the transaction**
 - **Maximum criminal fine - \$1 million per violation**
 - **Maximum jail time – 20 years**
- **EAR applies a standard of “Strict Liability” in assessing Violations!** → don't stick your head in the sand.



PENALTIES

- Treasury Department (OFAC):
 - Criminal: Up to \$1,000,000 per violation and up to ten years in prison;
 - Civil: \$12,000 - \$250,000 fines (depending on the applicable law) per violation;



INVESTIGATIONS

- When to Investigate
- Why Investigate
- How to Investigate



Investigations

- Employee Complaints
- Customer Complaints
- Competitor Complaints
- Audit Discoveries
- Government Inquiries



How Extensive Should Investigation Be?

- Isolated Issue or Systemic Problem
- Low-Level or Senior Management
- Self-Discovered or Government Inquiry



Attorney/Client Privilege

- Whose Privilege
- When Can it be Waived
- When Should it be Waived
- Consequences of Waiver
- Consequences of Refusal to Waive



KEYS TO SUCCESS

- Accuracy
- **The greatest tragedy of science is the slaying of a beautiful hypothesis by an ugly fact.**
- Timeliness
- Eighty percent of success is showing up.
Woody Allen



Using the Results

- Voluntary Disclosure
- Satisfying Regulators
- Avoiding Prosecution
- Implementing Remedial Measures





THANK
YOU

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