

Overview

Introduction to U.S. Export Controls: Part 2

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Introduction to U.S. Export Controls: Part 2

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Opportunities & Responsibilities of U.S. Exporters

In the last 25 years, U.S. exports have continued to increase as more U.S. companies seek out customers abroad. Exports present boundless opportunities for growth, given that [95% of the world's population](#) resides outside of the U.S.

Value of U.S. Goods & Services Exports 1960-2020

Source: Bureau of Economic Analysis

Although exporting can be fruitful for a business, exporters have a significant responsibility to practice due diligence in their activities. They must adhere to U.S. export control and sanctions laws to safeguard U.S. national security and foreign policy interests, avoid costly penalties, and lower or eliminate their criminal liability. This article presents the primary categories of export compliance and consequences of noncompliance.

Practice Tip: The U.S. Census Bureau maintains a [publicly accessible database](#) for trade data. This database can provide useful insights into the export trends for your particular products year-over-year for every country in the world.

Primary Categories of Export Controls

There are three primary categories of export controls. Each category is administered by a different federal agency or division. Below is a table of the three primary export compliance categories and administering/enforcing agencies.

| Primary Export Compliance Category | Agency |
|--|---|
| Export Administration Regulations (EAR) | U.S. Department of Commerce, Bureau of Industry & Security (BIS) |
| International Traffic in Arms Regulations (ITAR) | U.S. Department of State, Defense Directorate for Trade Controls (DDTC) |
| U.S. Sanctions Programs | U.S. Department of Treasury, Office of Foreign Assets Control (OFAC) |

Consequences of Noncompliance

Failure to comply with U.S. export control laws can result in serious penalties or even criminal liability. The table below outlines civil and criminal consequences of noncompliance. It is important to note that penalties are often computed on a per violation basis. For example, violations in a series of shipments can result in penalties compounding to astronomical figures.

| Export Compliance Category | Potential Civil Consequences | Potential Criminal Consequences |
|-----------------------------------|---|---|
| EAR | \$300,000 per violation or twice the value of the transaction, whichever is greater | \$1 million per violation or up to 20 years in prison |

| | | |
|-------------------------|--|---|
| ITAR | \$1,197,728 per violation | \$1 million per violation or up to 10 years in prison |
| U.S. Sanctions Programs | Depends on specific program (e.g., \$90,743 per violation of the Trading with the Enemy Act) | Depends/fact-specific |

Please note that the figures stated above are listed according to their statutory amount and are not inflation-adjusted. The statutes require some of the above figures to be inflation-adjusted, pursuant to annual adjustments published in the Federal Register.

In addition to the civil and criminal penalties listed above, exporters who violate U.S. export control laws may be required to surrender the items that they attempted to export to the U.S. government. Furthermore, U.S. exporters can also [lose export privileges](#). For a business reliant on exports, the loss of export privileges can be devastating.

Practice Tip: BIS publishes an [annual report](#) that publicly details violations of export control laws as an example for the trade community.

Export Administration Regulations

Administered and enforced by BIS, EAR includes a set of regulations found in [15 C.F.R. 730](#) et seq. EAR governs whether a person or entity may:

- Export an item from the U.S.
- Re-export that item from a foreign country
- Transfer an item from one person to another (in-country transfer)

The scope of [EAR authority](#) includes:

- All goods produced in the U.S.
- All goods within the U.S. regardless of where it was produced
- Intangibles like technology and services of sufficient U.S. origin

The purpose of regulating these exports includes:

- Preventing arms and advanced technology from reaching a country or person who would attempt to use them against the U.S. or its allies
- Comply with international agreements
- Executive unilateral policies, such as embargoes
- Prohibit the export of goods that are in short supply domestically
- To further certain other policies, such as those pertaining to human rights

Items (including goods, services, and technology) that are subject to EAR are generally listed on the [Commerce Control List](#). The CCL contains a detailed list of items subject to EAR, and these items are classified under distinct [Export Control Classification Numbers](#) (ECCN). Furthermore, some goods are subject to EAR but are not specifically listed on the CCL. These goods are designated a catch-all classification of [EAR99](#).

The CCL is comprised of items in [11 numbered categories and five lettered product groups](#). The ECCN is a five-digit distinct code that includes the CCL category number, the production group letter, and a three-digit numeric serial number (e.g., 5A002).

The [categories](#) are as follows:

| CCL Category No. | CCL Categories |
|-------------------------|--|
| 0 | Nuclear & Miscellaneous |
| 1 | Materials, Chemicals, Microorganisms, and Toxins |
| 2 | Materials Processing |
| 3 | Electronics |
| 4 | Computers |
| 5 Part 1 | Telecommunications |
| 5 Part 2 | Information Security |
| 6 | Sensors and Lasers |
| 7 | Navigation and Avionics |
| 8 | Marine |
| 9 | Aerospace and Propulsion |

The [5 product groups](#) are as follows:

| Product Group Letter | Product Group |
|-----------------------------|--|
| A | Systems, Equipment, and Components |
| B | Test, Inspection, and Production Equipment |
| C | Material |
| D | Software |
| E | Technology |

Practice Tip: If you are unsure how to classify your proposed export, consider consulting with the manufacturer, your engineering department, or other technical subject matter experts familiar with the product's specifications. Alternatively, you may consider consulting counsel to determine the appropriate ECCN. Ascertaining the correct ECCN is key to finding out the export licensing implications for your proposed export.

Proposed exports that are subject to the EAR fall into one of three categories:

- [No license is required](#) for export
- An applicable [license exception](#) applies
- [BIS export authorization](#) is required

International Traffic in Arms Regulations

The ITAR is a U.S. regulatory regime that controls the export of defense and military-related technologies. The [purpose of the ITAR](#) is to safeguard U.S. national security and further U.S. foreign policy objectives. The scope of the ITAR includes the export, re-export, and temporary import of defense articles, defense services, and technical data. The definition of each of these are presented in turn:

- **Defense Article.** A [defense article](#) is any item or technical data that is specifically designed, developed, configured, adapted, or modified for a military, missile, satellite, or other controlled use listed on the United States Munitions List (USML).
- **Technical Data.** [Technical data](#) is any information “for the design, development, assembly, production, operation, repair, testing, maintenance, or modification of defense articles.” Technical data can include things such as models, mock-ups, blue-prints, manuals, and email exchanges where such information is discussed. Technical data does not “include general scientific, mathematical, or engineering principles commonly taught . . . information present in the public domain . . . or basic marketing information on the function or purpose of defense articles” or service.
- **Defense Service.** A [defense service](#) is providing “assistance, including training, to a foreign person, whether in the United States or abroad in the design, manufacture, installation, repair, or operation of defense articles,” as well as providing technical data.

The USML (found in [22 C.F.R. 121.1](#)) identifies 21 categories of defense articles, defense services, and technical data subject to the ITAR. These categories are:

USML Category USML Category No.

| | |
|------|--|
| I | Firearms & Related Articles |
| II | Guns & Armament |
| III | Ammunition & Ordnance |
| IV | Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs, & Mines |
| V | Explosives and Energetic Materials, Propellants, Incendiary Agents, & their Constituents |
| VI | Surface Vessels of War & Special Naval Equipment |
| VII | Ground Vehicles |
| VIII | Aircraft & Related Articles |

| | |
|-------|--|
| IX | Military Training Equipment & Training |
| X | Personal Protective Equipment |
| XI | Military Electronics |
| XII | Fire Control, Laser, Imaging & Guidance Equipment |
| XIII | Materials & Miscellaneous Articles |
| XIV | Toxicological Agents, Including Chemical Agents, Biological Agents, & Associated Equipment |
| XV | Spacecraft & Related Articles |
| XVI | Nuclear Weapons Related Articles |
| XVII | Classified Articles, Technical Data, & Defense Services Not Otherwise Enumerated |
| XVIII | Directed Energy Weapons |
| XIX | Gas Turbine Engine & Associated Equipment |
| XX | Submersible Vessels & Related Articles |
| XXI | Articles, Technical Data, & Defense Services Not Otherwise Enumerated |

Under ITAR, all U.S. persons that “manufacture or export defense articles or temporarily import such articles or furnish defense services,” must [register](#) with the U.S. State Department. The registration requirement also applies to parties that manufacture solely for the domestic market. The registration requirement informs the U.S. government regarding the scope and nature of defense manufacturing and exporting activities in the U.S and is a prerequisite for export license approval. Failure to register is an ITAR violation and could result in significant penalties.

Certain defense articles, services, or technical data listed on the ITAR warrant special treatment due to their significant military capability. Significant Military Equipment, as defined by [22 C.F.R. 120.7](#), is an “article for which special export controls are warranted because of their capacity for substantial military utility or capability.” SME comprises defense articles that are preceded by an asterisk on the USML or otherwise classified (e.g., restricted as either secret or top secret) as enumerated in [22 C.F.R. 121.1](#).

A subcategory of SME that is particularly scrutinized is Major Defense Equipment. As defined under [22 C.F.R. 120.8](#), MDE means any SME item having a “nonrecurring research and development cost of more than \$50,000,000 or a total production cost of more than \$200,000,000.” SME and MDE warrant significant scrutiny by the DDTC.

There are two basic arrangements of export authorization for defense articles, defense services, and technical data subject to the ITAR: licenses and agreements. For certain export and import activities, the DDTC may authorize licenses. [Common license categories](#) include:

- Permanent Export of Unclassified Articles & Data (DSP-5)
- Temporary Import of Articles (DSP-61)
- Temporary Export of Unclassified Articles (DSP-73)
- Permanent Export/Temporary Export/Temporary Import of Classified Articles & Data (DSP-85)

Meanwhile, certain activities require agreements between DDTC and the involved parties. [Common agreement types](#) include:

- **Manufacturing License Agreement.** authorizes manufacture of defense articles outside of the U.S.
- **Technical Assistance Agreement.** authorizes defense services to be performed and/or technical data to be transferred outside of the U.S.
- **Distribution Agreement.** authorizes certain distribution arrangements, such as establishing a center of reshipment of defense articles outside of the U.S. (e.g., warehouse with spare parts).
- **Offshore Procurement Agreement.** authorizes the export of unclassified technical data to foreign persons for procurement of defense articles.

U.S. Sanctions Programs

Administered and enforced by OFAC, the purpose of U.S. sanctions programs is to advance U.S. foreign policy objectives and protect national security. U.S. sanctions programs target a wide variety of entities and individuals, including but not limited to:

- Foreign countries and regimes
- Terrorist organizations and individuals
- Narcotics traffickers
- Proliferators of weapons of mass destruction

Practice Tip: All flagged individuals and entities for export control purposes across the agencies are collectively listed on the [Consolidated Screening List](#). The CSL is a search engine that U.S. individuals and entities should search, prior to exportation, to ensure that they are not inadvertently exporting to a screened party. There are a broad array of commercial software programs available that perform export pre-compliance activities, which you should consider implementing into your export control activities.

If you do not have a software program when performing a search, we recommend you turn the “fuzzy name” feature on so that your search results include similarly spelled individuals and entities. Furthermore, we recommend that you print-to-PDF your search results so that there is a time-stamped record of your verification activities.

The scope of entities/individuals subject to U.S. sanctions programs is broad. The scope includes:

- Non-U.S. persons while in the U.S.
- U.S. citizens and permanent residents wherever they are located
- U.S. entities and foreign branches
- U.S. subsidiaries of foreign companies
- Secondary sanctions—a mechanism that requires third parties stop their activities with sanctioned individuals/entities

As of this writing, OFAC administers and enforces 37 different sanctions programs.

Practice Tip: U.S. sanctions programs and the scope of individuals and entities targeted by these programs change dynamically in response to various national security and geopolitical developments. In fact, the nature and scope of U.S. sanctions programs change multiple times a month. OFAC's [email notifications](#) are a useful tool to stay updated on developments.

To do business with a sanctioned individual, entity, or country, it is necessary to receive prior authorization from OFAC. OFAC grants authorization through two mechanisms: general licenses and specific licenses. General licenses authorize a particular type of transaction for a class of persons without the need to apply for a specific license. General licenses are published by OFAC and are broadly applicable.

While a general license is published for broad public use, U.S. businesses must apply for specific licenses to receive authorization specific to that business' proposed business transaction. OFAC's Licensing Division then determines whether to grant the specific license to a particular person or entity, authorizing a specific transaction in response to the written license application.

Practice Tip: OFAC often takes several months, if not year(s), to review and issue a determination for a specific license application. Applicants should be conscious about the lengthy review period before filing a specific license application. Furthermore, to hasten the review process, applicants should provide detailed explanations, technical specifications, and documentation regarding the proposed transaction at issue.

Export Sales & Compliance Resources

There are many resources available for U.S. companies seeking to increase sales to export markets and to comply with U.S. export control laws. Resources for export sales include:

- **U.S. Commercial Service.** The [U.S. Commercial Service](#), a division of the U.S. Commerce Department's International Trade Administration, offers companies a range of trade promotion services at subsidized or no cost. Companies can find assistance at more than 100 U.S. Commercial Service offices domestically and over 70 international offices.
- **National Association of District Export Councils.** The [NADEC](#) increases awareness and understanding of exports to the U.S. economy through education, legislative outreach, and engagement with over 60 District Export Councils throughout the country. DECs assist small and medium-sized businesses in their local communities to establish or increase export sales.
- **Export-Import Bank of the United States.** [EXIM](#) is the official export credit agency of the United States. When private sector lenders are unable to provide financing, EXIM fills in the gap for U.S. businesses by providing the financial tools necessary to compete for global sales.
- **State Export Promotion Offices.** Additionally, numerous states operate robust state export promotion offices, some of which even maintain foreign commercial offices of their own.

Resources for export compliance include:

- **BIS Export Compliance Guidelines.** BIS published an [export compliance guidelines](#) document that outlines the elements of an effective export compliance plan.
- **DDTC Response Team/Help Desk.** DDTC maintains a response team/help desk reachable at DDTCCustomerService@state.gov.
- **BIS Red Flag Indicators.** BIS provided a [checklist](#) of high-risk factors that may cause you to further scrutinize a proposed export transaction.
- **Don't Let This Happen to You!.** [BIS's periodic publication](#) highlighting stories of actual investigations of export control and antiboycott violations.

- **BIS Export Counselors.** [BIS export counselors](#) standby to assist U.S. companies seeking to export. Counselors are available by email and phone to answer your questions and hold periodic seminars to educate the trade community on export compliance.

Conclusion

Exporting can present tremendous opportunities for your business to grow but comes with important national security obligations. Failure to comply with U.S. export control laws can result in serious civil and criminal consequences. It is critical for your organization to stay familiar with quickly changing U.S. export control laws and establish and maintain a strong export compliance program.