

Professional Perspective

Building & Maintaining an Export Compliance Plan

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Building & Maintaining an Export Compliance Plan

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Over 95% of the world's population lives outside of the US, which presents significant sales opportunities for US companies seeking to export. However, exporting comes with significant responsibilities as US exporters have a duty to adhere to US export control and sanctions laws. Export compliance ensures US businesses help protect US national security and avoid costly penalties and potentially even criminal liability.

This article will provide an overview of why you should have an export compliance plan in place, elements of an effective export compliance plan, and other essentials to include in your plan, including what to do when all goes wrong.

Why You Should Have an Export Compliance Plan in Place

The US Department of Commerce's [Bureau of Industry & Security](#) (BIS) encourages the development of an effective export compliance program because it is “an invaluable way a company can contribute to US national security and nonproliferation priorities while protecting vital company interests.” An effective export compliance plan helps ensure that all employees understand the export regulations, reinforces internal policies and procedures, and demonstrates to the federal government that your business is proactive about export compliance.

Penalties & Criminal Liability

US export control and sanctions laws and regulations are administered and enforced by numerous agencies, including:

Regulations	Agency
Export Administration Regulation	US Department of Commerce-Bureau of Industry & Security
International Traffic in Arms Regulations	US Department of State-Defense Directorate of Trade Control
US Sanction Programs	US Department of Treasury-Office of Foreign Assets Control
Anti-Boycott Act of 2018	Bureau of Industry & Security-Office of Antiboycott Compliance
Foreign Corrupt Practices Act	US Department of Justice & US Securities and Exchange Commission

Failing to comply with US export control and sanctions laws can lead to heavy civil penalties, criminal liability, loss of export privileges, surrender of merchandise, and other consequences. Criminal liability can include imprisonment as well as heavy penalties.

Practice Tip: Penalties are inflation-adjusted periodically and can compound quickly depending on what constitutes a single violation—e.g., every exportation or transaction can constitute a violation and a set of exportations or transactions can result in the penalty amount growing quickly.

The following is a general breakdown of civil and criminal liability under each agency's enforcement actions.

Federal Agency	Potential Civil & Criminal Liability
US Department of Commerce-Bureau of Industry & Security	Civil: \$300k/violation or twice the value of the transaction whichever is greater Criminal: \$1M/violation or up to 20 years in prison
US Department of State-Directorate of Defense Trade Controls	Civil: \$500k/violation Criminal: \$1M/violation or up to 10 years in prison
US Treasury Department-Office of Foreign Assets Control	Depends on Program E.g., \$90,743/violation for Trading with the Enemy Act, \$13,910/violation for Clean Diamond Trade Act, etc.
US Census Bureau	\$14,194/violation other than a late filing \$1,419/day for late filing violations—not to exceed \$14,194

The penalty amounts above are routinely readjusted for inflation. For example, civil penalties under OFAC are readjusted by program type. On February 9, 2022, [OFAC adjusted penalties for inflation](#), with new maximum amounts increased depending on program type. For example, the current maximum penalty for violations of the Trading with the Enemy Act is \$97,529. Similarly, the current [Census Bureau](#) maximum civil penalty for an EEI misfiling is \$15,256.

Elements of an Effective Export Compliance Plan

The steps to achieve an effective export compliance plan include the following elements, as explained in BIS' [Export Compliance Guidelines](#):

- Building & maintaining your export compliance plan
- Management commitment
- Risk assessment
- Export Authorization
- Recordkeeping
- Auditing & Internal Monitoring
- Training
- Handling export violations and taking corrective actions

Below is a chart of common export compliance risks, and the tools available to mitigate these risks:

Common Risks	Example of Tools to Mitigate Risks
Exporting without a license	<ul style="list-style-type: none"> • Prior to exporting, create an internal process to proactively determine whether a license is necessary; consult experts and counsel as needed • If an exportation has unlawfully occurred; consider filing a Voluntary Self-Disclosure with the relevant federal agency
Unauthorized release of sensitive information or controlled technology	<ul style="list-style-type: none"> • Investigate whether the unauthorized release can be reversed • Notify the receiving party that the release was unauthorized • Engage in a root cause analysis to determine the cause of the unauthorized release to ensure similar violations do not occur again • Develop a detailed written procedure to ensure similar violations do not occur again • Consider filing a Voluntary Self-Disclosure with the relevant federal agency
Servicing items located outside of the United States	<ul style="list-style-type: none"> • Confirm whether export authorization is necessary—servicing can be an export, too
Lack of communication and/or written processes within an organization	<ul style="list-style-type: none"> • Create a written procedure addressing: <ul style="list-style-type: none"> ○ How to escalate potential red flags in proposed export transactions ○ Who to contact to escalate concerns about classification—e.g., reach out to engineers and product technicians who may be more familiar with the technical specifications of a product to assist export compliance professionals in correctly classifying a potential export ○ How to escalate communication from the federal government to appropriate senior-level managers to ensure that the federal government's inquiries are accurately, professionally, and carefully handled • Hold regular trainings on export compliance, including a review of red flags, to ensure everyone is aware of proper export compliance procedures

Unknown end-user or end-use	<ul style="list-style-type: none"> • Request further information from the end-user including an end-use certificate certifying the end-use, providing sufficient information on ownership, and confirming that there is no diversion risk • Stay alert to red flags—e.g., a buyer wanting to take possession of the goods as quickly as possible or being unfamiliar with the basic capacities of the merchandise • Have a clear process that determines when you will not proceed with an exportation
Unaware of diversion risk	<ul style="list-style-type: none"> • Research and understand the diversion risk of a proposed export • Seek export authorization as necessary • Have a clear process that determines when you will not proceed with the exportation due to a risk of diversion
Violating anti-boycott laws	<ul style="list-style-type: none"> • Do not engage in transactions which require boycotts in violation of US anti-boycott laws

Building & Maintaining an Export Compliance Plan

While no formal template or required components exist for export compliance plans, it is highly recommended that exporters adhere to BIS' [Export Compliance Guidelines](#), which include the 8 steps highlighted above. The process to build and maintain an export compliance plan can be relatively involved, as it takes time and effort to establish a robust export compliance program. Some exporters build their plan internally, as a collaborative effort between senior management, accounting, sales, legal, and logistics departments—among others—while other exporters retain counsel to draft export compliance plans.

Practice Tip: It is important that export compliance plans are tailored to address the specific operations, market, supply chains, and practices of the exporter's company and industry.

Management Commitment

As a foundation to any export compliance program, commitment from senior management is an essential factor. An export compliance plan is taken seriously when senior management supports and stands by its export compliance program. BIS identifies [three ways](#) in which senior management can give significance and legitimacy to an export compliance program. These include publicly supporting compliance policies and procedures, providing sufficient resources, and supporting export compliance training and training sessions.

Practice Tip: Prefacing your export compliance plan with a letter from senior management underscoring the importance of export compliance is a terrific way to demonstrate to your employees and the federal government that you take export compliance seriously. Known as a Management Commitment Statement, BIS recommends this cover letter contain the following:

- Affirm the company's commitment to export compliance and commitment of appropriate resources to compliance
- Explain the basic purpose of export controls and its importance in protecting national security and foreign policy interests for the United States
- State that no sale under any circumstances will be made that violates or potentially violates the US export controls regulations and laws

- Stress the importance of the organization's employees being familiar and compliant with export controls, so that the employees understand possible noncompliance scenarios, specific risks as they relate to the company's products, technology, destinations, and activities
- Communicate the risk of unauthorized transfers
- Describe the possible penalties that company and/or individual could face for non-compliance
- Include the name and contact information of the Export Compliance Manager for when questions arise

Risk Assessment

The goal of a risk assessment is to identify preventable risks your company may face to build safeguards to account for these risks. Understanding likely risks will help you tailor specific export procedures to help ensure effective compliance. The following are common tools used to mitigate risk.

Writing & Maintaining a Comprehensive Export Compliance Plan. As explained above, it is a best practice for exporters of potentially controlled merchandise to develop a comprehensive export compliance plan. The plan should be regularly updated to reflect the compliance risks facing the organization and the current operations of the organizations.

Developing a License Determination Matrix. A best practice is to develop a decision tree or flowchart for making licensing decisions. Fortunately, there are already many [decision trees](#) developed by the government that you can use. For example, the EAR Export Control Decision Tree in [Supplement No. 1 to Part 732](#) of the EAR explained when goods are subject to the EAR, and when a license is required.

Developing a Training Program. A [good training program](#) is critically important as employees are often not as devoted to export compliance. These training programs should provide specific knowledge based on need, communicate the export responsibilities for each employee, hold employees accountable for export training through assessments, and include periodic reviews and revisions.

Involving Management. An export compliance plan is taken seriously when senior management supports and stands by its export compliance program.

Developing an Effective Screening Process. It is critical that every export be screened against the [Consolidated Screening List](#) or a similar commercial software to ensure that all sanctioned or blocked parties are effectively vetted.

Use a Destination Control Statement. It is a highly recommended business practice to include a [Destination Control Statement](#) in export-related transaction documents. Sample Destination Control Statement language is provided below.

Export Authorization

If authorization from a federal agency, such as BIS (for EAR), DDTC (for ITAR), or OFAC (for sanctions) is needed, it is critical that an exporter seek and receive export authorization prior to exporting. As part of a comprehensive export compliance plan, procedures and decision tables should be included to guide employees to make consistent and correct decisions regarding when export authorization is needed, and how and when to seek export authorization from which agency.

To determine whether a potential export requires export authorization, it is important to answer the following three questions:

- What jurisdiction does my proposed exportation fall under?
- How is my proposed export classified under that export control regime?
- Is an export license necessary?

Each of the above is discussed, in turn, below.

What jurisdiction does my proposed exportation fall under?

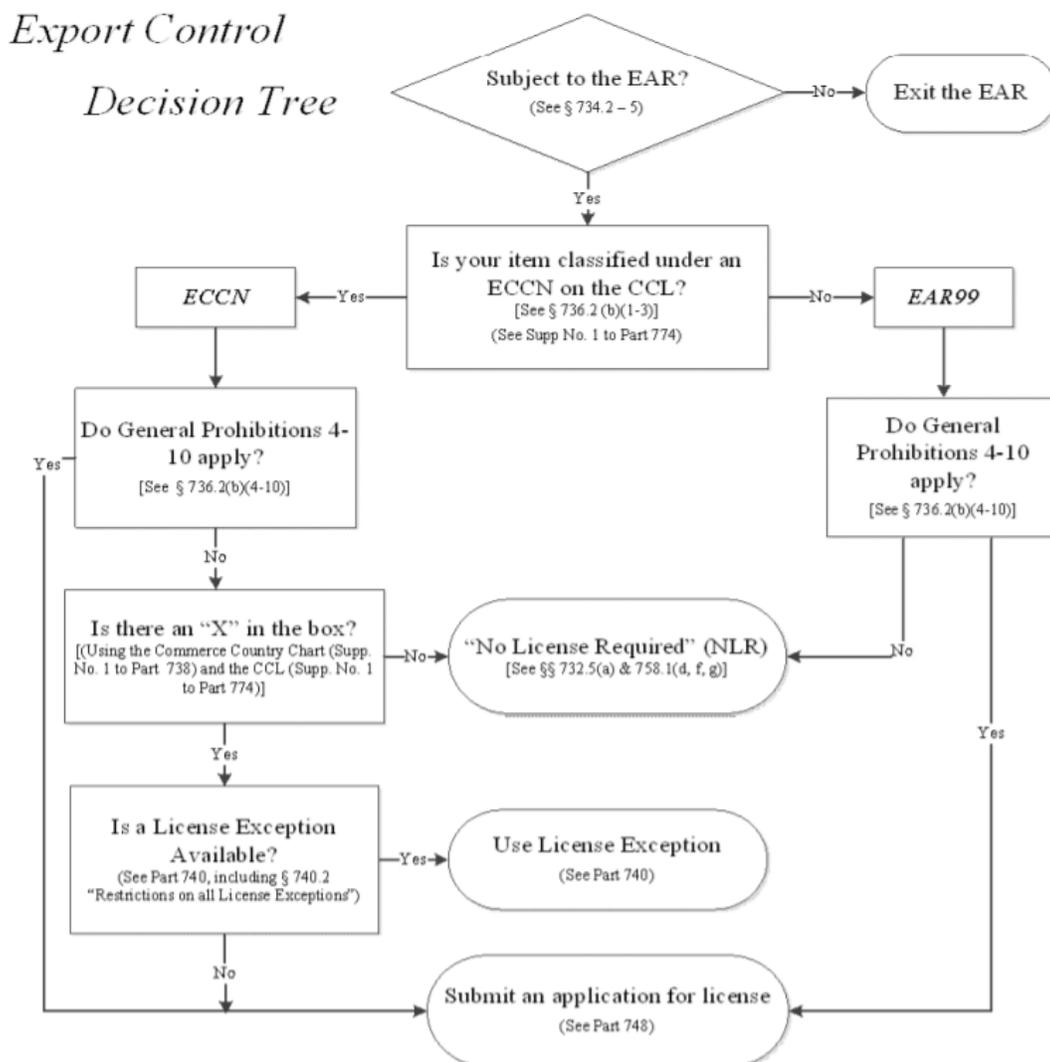
Multiple federal agencies can have jurisdiction over a single exportation. For example, a proposed exportation can be comprised of defense articles and services, and thus fall under ITAR jurisdiction, while simultaneously being subject to OFAC's broad, overarching provisions.

Generally, the ITAR has jurisdiction over [defense articles and services](#) while the EAR applies to other critical and controlled technology as outlined in the [Commerce Control List](#). Finally, US exportations are always subject to the jurisdiction of US sanctions laws. It is critical that all exportations be vetted against US sanctions laws to confirm that parties and destinations with which you are doing business are not sanctioned by OFAC.

Practice Tip: If you are unsure what jurisdiction applies to your proposed exportation, you may consider filing a Commodity Jurisdiction Request. The purpose of a Commodity Jurisdiction (CJ) request is to determine whether a commodity or service is under the licensing authority of the US State Department (under ITAR) or the US Commerce Department (under EAR). The federal government usually responds to a CJ request within 60 days.

How is my proposed export classified under that export control regime? Is an export license necessary?

After determining whether your proposed exportation is subject to the EAR or ITAR, the next step is to correctly classify your proposed exportation to assist in determining whether a license is or is not required. For EAR classification, we highly recommend using the Export Control Decision Tree depicted below—and to include this flowchart in your export compliance plan.



Source: GRAPHIC: Export Control Decision Tree, Supplement No. 1 to Part 723 - Export Administration Regulations

First, an exporter must confirm that the proposed export is subject to the EAR. If it is subject to the EAR, the exporter must determine whether a specific [Export Control Classification Number](#) (ECCN) is applicable to the proposed exportation. If it is, exporters must verify whether [General Prohibitions 4-10](#) apply. If they do not, then exporters must review the [Commerce Country Chart](#) to verify whether the destination country is controlled for the [Reason of Control](#) listed under the ECCN. If there is an “X in the box”—i.e., there is control for that reason of control for the export destination), then a license is typically required unless a license exception applies.

On the other hand, if there is no applicable ECCN, the proposed exportation is provided the catch-all designation of EAR99. For EAR99 exportations, so long as they do not violate General Prohibitions 4-10, no export license is required (NLR).

Meanwhile, under the ITAR, classification occurs under the [United States Munitions List](#) (USML). Proposed exportations must be correctly classified on the USML. Furthermore, depending on how the exportation is classified, various types of export authorization are required. For example, defense articles preceded by an asterisk are classified. These articles are restricted as “secret” or “top secret,” and require greater scrutiny from DDTC.

Furthermore, a category of defense articles or services, known as [Significant Military Equipment](#) (SME), are articles for which special export controls are warranted because of their capacity for substantial military utility or capability. A subcategory of SME is [Major Defense Equipment](#) (MDE), which comprises of SME equipment with research and developments costs greater than \$50 million or total production costs greater than \$200 million.

In summary, correctly classifying your proposed exportation within the EAR and ITAR is critical as it impacts whether export authorization is necessary.

Recordkeeping

[Recordkeeping](#) requirements can be found in [Part 762](#) of the EAR and [Part 122.5](#) of the ITAR. As a rule of thumb, exporters must maintain 5 years of exportation records. Common barriers to recordkeeping include poor development, poor support, and poor execution.

It is in your best interest to create a system to manage records, whether paper or electronic, and understand how long to retain records. In [Part 762.6](#) of the EAR, parties are required to keep export records for five years from the latest date of export or reexport activity from the United States.

Practice Tip: When recordkeeping, it is important to assign roles and responsibilities determining who, how, and where the documents will be kept, who how and when the records will be inspected for completeness, accuracy, and quality, and a detailed log including record retention requirements in contracts with freight forwarders, brokers, and distributors.

Training

A [good training program](#) is crucial to ensure that employees across divisions both take export compliance obligations seriously and have the knowledge base to proactively comply with US export control laws. Training programs should provide specific knowledge based on that employee's roles and responsibilities, communicate the export responsibilities for each employee, hold employees accountable for export training through assessments, and include periodic reviews and revisions.

Training is important because it ensures that all employees have a sufficiently strong understanding of the export regulations as it pertains to their role and reinforces internal policies and procedures. Many businesses don't realize the export compliance concerns many of their employees, not just the export department. This is because the scope of the term “export” is broad in the EAR and the ITAR.

For example, “deemed exports” refer to the release of controlled technology to a foreign person, including within the territory of the United States. Therefore, employees that have little to do with a business' export activities—e.g., accountants, information technology, customer service—can inadvertently cause your business to violate US export control laws—e.g., by sharing information to non-US persons, by failing to secure data on a cloud server, etc.

Training also demonstrates to federal government agencies that your business is proactive about export compliance. Training is a great way to demonstrate to BIS and DDTC that you are on top of your export compliance obligations. The federal agencies like to see regular export compliance training.

Finally, regular and comprehensive export compliance training is a terrific mitigating factor for your business when subject to costly penalties and even criminal liability. Many US businesses have paid hefty civil penalties for violating US export control laws. L3Harris Technologies, for example, was fined \$13 million for illicitly exporting defense technology and software. For more examples of costly civil and criminal penalties, check out BIS' latest "[Don't Let This Happen to You!](#)" report. Demonstrating to federal agencies that you have been proactive about your export compliance training efforts can help reduce penalties.

Audits

Audits assess the effectiveness of current processes and check for inconsistencies between these and the day-to-day operations. [According to BIS](#), there are different types of audits, including specific unit/functional level and program level audits. Specific unit/functional level audits are more focused audits that look at specific areas of the export process such as record keeping or shipping procedure. Program level audits are larger annual audits that should include both a review of the organization's export procedures as well as reviewing selected export transactions and how each business unit handled these regarding the current compliance procedures. For these audits it is good practice to use an outside auditor.

Practice Tip: CBP's [Automated Commercial Environment \(ACE\)](#) is the best tool for conducting export compliance audits. ACE is a free CBP system designed to facilitate legitimate trade while enhancing border security. ACE improves collection, sharing, and processing of information submitted to CBP and government agencies. We recommend that every exporter have their very own ACE account and learn how to audit exports using ACE data. ACE is also an essential tool for conducting audits in preparation for filing disclosures with [DDTC](#), [BIS](#), [OFAC](#), and the [Census Bureau](#).

Handling Export Violations & Taking Corrective Actions

When dealing with export violations, it is essential to [detect and act early](#) as early detection and fast responses to resolve the noncompliance issue is key to minimizing exposure for the organization. An early detection program for identifying suspected incidents of export related noncompliance is important in the examination of the violations. In such instances, support from senior management is crucial and needs to be truly committed to export compliance with effective and often communication. Management should encourage employees to report suspected violations and create a safe environment where there is a culture of compliance shown through a leading example.

When reporting violations, there are both external and internal procedures that could take place as suspected incidents can be reported in a variety of places in an organization including an export compliance office, legal department, or ethics hotline.

Practice Tip: When noncompliance is confirmed, written procedures should also be developed for external reporting procedures to the US Government. If a company or individual believes it has violated certain export control or sanctions laws and the federal government is unaware of these violations, proactively and voluntarily disclosing the potential wrongdoing can substantially reduce penalties.

Other Essentials to Include in Your Plan

Destination Control Statement

It is a highly recommended business practice to include a [Destination Control Statement](#) in export-related transaction documents. A Destination Control Statement is a statement to include on transaction documents which notifies all individuals and entities involved in the underlying transaction and ultimate end-use regarding the sensitive nature of the exportation, and the importance that its use and transfer be controlled in accordance with U.S. export control laws.

The US Commerce Department provides a sample Destination Control Statement in [Part 758.6](#) of the Export Administration Regulations (which exporters often use verbatim in their export transactions):

These items are controlled by the U.S. Government and authorized for export only to the country of ultimate destination for use by the ultimate consignee or end-user(s) herein identified. They may not be resold, transferred, or otherwise disposed of, to any other country or to any person other than the authorized ultimate consignee or end-user(s), either in their original form or after being incorporated into other items, without first obtaining approval from the U.S. government or as otherwise authorized by U.S. law and regulations.

Practice Tip: Consider including the Destination Control Statement in multiple documents associated with the transaction, including commercial invoices, purchase orders, packing lists, website catalogues, and email correspondence. It is important to make abundantly clear to your buyers and supply chain partners the gravity of export compliance. This also helps to demonstrate to the federal government that you took your duty to notify all parties involved regarding their export compliance obligations seriously.

What To Do When All Goes Wrong. If you suspect a violation, do not panic. Instead, stop the transaction immediately and retain all records. Encourage your employees to report and make sure to emphasize when to contact an empowered official, management, or counsel. Be sure to maintain confidentiality and develop and implement corrective actions after a suspected violation.

Steps to Take When the Government Visits—Both Planned and Unplanned

When an organization is notified of an impending government visit, the following measures to adequately prepare for the visit should be taken:

How to Prepare for a Planned Visit. When notified of an impending export control visit, the organization should take several measures to ensure it is adequately prepared for the visit. First, if the pre-visit communication was not made clear, the organization should determine the scope and agenda of the meeting; it can be difficult to prepare for a visit if there is uncertainty regarding the reason for the visit. The current Export Compliance Plan should be reviewed and updated, senior management should communicate to all employees, participating in the meeting, the importance of the visit and all relevant export control regulations.

For outreach visits that are conducted pursuant to the submission of a VSD, the organization should be prepared to answer specific questions about the circumstances of the violation(s) disclosed in the VSD and any corrective measures implemented to prevent further violations. After the visit, the export control manager should review any notes taken, document important discussion and circulate it internally to relevant organization contacts. The organization should implement any corrective actions necessary to improve the organization's Export Compliance Plan.

How to Prepare for an Unplanned Visit. It is not unusual for a US Government Agency to visit a site without notice, so it is important to adequately train and prepare for such situations before they occur. On an annual basis, the organization should prepare for a potential walkthrough of the facilities, and conduct a review of recent exporting activity, which should include pulling ACE export reports. The export compliance manager and other employees should frequently train on procedures to take when there is a sudden or a surprise visit from any US agency.

Remember to review the current Export Compliance Plan to ensure it is accurate and up to date. Always remember to ask for ID. Ensure only necessary officers or employees are in the building and able to answer questions about the organization's export operations. After the visit, ensure that you have your own list and a copy of all documentation and information provided to the government.

It is a best practice to circulate this information among senior management - this ensures that your company's leadership is aware of what information has been or will be provided to the government during both planned and unplanned visits.

What to do When All Goes Wrong. Exporters have a legal obligation to report export violations. If you suspect a violation, don't panic. When you suspect a violation, self-reporting is a mitigating factor, and can eliminate or significantly reduce fines and penalties. Federal agencies encourage self-reporting through the submission of a [Voluntary Self-Disclosures](#) (VSDs).

Conclusion

It is important to build a robust export compliance plan that comprehensively addresses all the issues mentioned above. Furthermore, it is essential to effectively implement the plan in your organization's export compliance program. A key component of this is effective training, including periodic refresher courses at least once per year. Establishing and maintaining a comprehensive export compliance program will help mitigate the likelihood of costly penalty and even criminal consequences.