

Suite 706**LEGAL CONSIDERATIONS*****Introduction******Export Regulations******Steps for using the EAR******Antidivision, Antiboycott and Antitrust Requirements******Enforcement Guidelines***

The following information is intended to provide insight for U.S. Exporters only.

706.01 INTRODUCTION

This covers a wide range of regulations, procedures, and practices that fall into three categories:

- regulations that exporters must follow to comply with U.S. law;
- procedures that exporters should follow to ensure a successful export transaction; and
- programs and certain tax procedures that open new markets or provide financial benefits to exporters.

706.02 EXPORT REGULATIONS

The Export Administration Regulations (EAR) regulates the export and re-export of items for national security, non-proliferation, foreign policy, and short supply reasons. The Department of Commerce's Bureau of Export Administration (BXA) has taken important steps to remove unnecessary obstacles to exporting, including completion of U.S. regulatory reform effort and export control liberalizations. Working closely with the exporting community, BXA has simplified the EAR, especially for those companies new to exporting. In addition, export controls have been liberalized on many products sold by U.S. companies around the world, consistent with national security and foreign policy concerns.

A relatively small percentage of exports and re-exports require the submission of a license application to BXA. License requirements are dependent upon an item's technical characteristics, the destination, the end use, and the end user.

Determining whether a license is required for export is easier under the newly drafted regulations which consolidate license requirements previously scattered throughout the regulations. Once a classification has been determined, exporters may use a single chart to determine if licenses are needed for a country. The revised regulations include answers to frequently asked questions, detailed step-by-step instructions for finding out if a transaction is subject to the regulations, how to request a commodity classification or advisory opinion, and how to apply for a license.

The EAR groups items (commodities, software, and technology) into ten categories each containing several entries. These entries are the Export Control Classification Numbers (ECCN). These entries are in Supplemental No. 1 to part 774 of the EAR, which is the Commerce Control List (CCL). The CCL and the Country Chart, Supplement No. 1 to part 738 taken together, define items subject to export controls based solely on the technical parameters of the item and the country of ultimate destination. Items that are listed on the CCL but do not require a license by reason of the Country Chart and items classified as EAR99 (see 734.3(c) of the EAR entitled "Scope of the EAR") are designated as "NLR," or "no license required."

All countries are not treated in the same way under the EAR because different countries present different national security, non-proliferation, or foreign policy considerations for the United States. A license requirement may be based on the end use or end user in a transaction, primarily for proliferation reasons. Part 744 of the EAR describes such requirements and relevant licensing policies and includes both restrictions on items and restrictions on the activities of U.S. persons.

The EAR covers more than exports. Items subject to the EAR are generally controlled for re-export from one foreign country to another. A relatively small percentage of exports and re-exports require an application to BXA for a license.

Many items are not on the CCL or, if on the CCL, require a license only to a limited number of countries. Other transactions may be covered by one or more License Exceptions in the EAR, part 740. However, a license is required for virtually all exports to embargoed destinations such as Cuba. Part 746 of the EAR describes embargoed destinations and refers to certain additional controls imposed by the Office of Foreign Assets Controls of the Treasury Department.

Sometimes the EAR are referred to as "dual use" regulations. The term "dual use" refers to items that can be used for both military and other strategic uses (e.g., nuclear) and commercial applications. It also refers to items with solely civil uses.

The term is also used to distinguish the scope of the EAR from items covered by the regulations of other agencies. For example, the U.S. Department of State controls exports of weapons and military related items on the U.S. Munitions List, while the Department of Energy and the Nuclear Regulatory Commission control certain items for nuclear reasons. For more information on the control of agencies other than BXA, see Supplement No. 3 to part 730 of the EAR.

706.03 STEPS FOR USING THE EAR

You may first look at part 732 of the EAR for the steps you follow to determine your obligations. Part 734 defines the scope of the EAR and excludes certain "publicly available" technology, as well as items properly subject to the jurisdiction of another agency. What is the proper classification for your item?

This information is essential to determining any licensing requirements under the EAR. You may either classify your item on your own according to the CCL or you may ask BXA for assistance. The EAR is structured in a way that you should follow the steps in order. To determine whether you need a license, consider, in

order, the scope of the EAR (part 734), the ten general prohibitions (part 736), and the license exceptions (part 740).

General Prohibitions

The general prohibitions are found in part 736 of the EAR. The ten general prohibitions describe certain exports, re-exports, and other conduct, subject to the scope of the EAR, in which you may not engage unless you have a license from BXA or qualify under part 740 of the EAR for a license exception from each applicable general prohibition paragraph.

License Exceptions

A license exception is an authorization for the export or re-export of some commodities, technology, or software under certain conditions. This gives you authority to ship certain items subject to the EAR that would otherwise require a license. Eligibility for license exceptions may be based on the item to be exported or re-exported, the country of ultimate destination, the end use of the item, or the end user. If a license exception is available for a particular transaction, you may proceed with the transaction without a license. A license exception does not require a specific application nor approval from the Department of Commerce. However, you are required to meet all terms, conditions, and provisions for the use of that license exception.

Applying for a License and Application Processing

If an export license is required, you must prepare a Form BXA-748P, "Multipurpose Application Form," and submit it to BXA. The form can be used for requesting an export license, re-exports, or commodity classifications. You may request forms by fax at 202-219-9179 or by phone on 202-482-3332. You must be certain to follow the instructions on the form carefully. In some instances, technical brochures and support documentation must also be included.

In reviewing specific license applications, BXA will conduct a complete analysis of the license application along with all documentation submitted in support of the application. In addition to reviewing the item and end use, BXA will consider the reliability of each party to the transaction and review any available intelligence information. To the maximum extent possible, BXA will make licensing decisions without referral of license applications to other agencies; however, BXA may consult with other U.S. departments and agencies regarding any license application.

Further information concerning the review policy for various controls is contained in parts 742 and 750. an automated voice response system that, upon request via any standard touch-tone telephone, will provide you with up-to-the-minute status on any license application pending at BXA. Requests for status may be made only by the applicant or the applicant's agent.

Avoiding Delays in Receiving a License

In filling out a license application, re-exporters commonly make four errors that account for most delays in processing applications:

- Failing to sign the application.
- Handwriting, rather than typing the application.
- Responding inadequately to section 22(j) of the application, "Description of Commodity or Technical Data," which calls for a description of the item or items to be exported. You must be specific, and you are encouraged to attach additional material to explain the product fully.
- Responding inadequately to section 21 of the application, where the specific end use of the products or technical data is to be described. Again, you must be specific. Answering vaguely or entering "unknown" is likely to delay the application process.

You may contact BXA for status of your pending certification request, advisory opinion, or license application. For advisory opinion requests, telephone 202-482-4905 or send a fax to 202-219-9179.

or by mail to the:

U.S. Department of Commerce
Bureau of Export Administration
Office of Exporter Services
Exporter Counseling Division
14th Street and Constitution Avenue, NW, Room 2706
Washington, D.C. 20230

For license applications and classification requests, telephone BXA's System for Tracking Export License Applications (STELA) at 202-482-2752. STELA is an automated voice response system that, upon request via any standard touch-tone telephone, will provide you with up-to-the-minute status on any license application pending at BXA.

Requests for status may be made only by the applicant or the applicant's agent.

Export Clearance

If you are issued a BXA license, or you rely on a license exception described in part 740 of the EAR, you are responsible for the proper use of that license or license exception and for the performance of all its terms and conditions.

If you export without either a license issued by BXA or a license exception, you are responsible for determining that the transaction is outside the scope if the EAR or the export is designated as "No License Required."

Both the Foreign Trade Statistics Regulations of the Census Bureau (15 CFR part 30) and the Export Administration Regulations require that the Shippers Export Declaration (SED) be submitted to the U.S. Government. There are exceptions to this rule, but if you are required to submit an SED, you must prepare it in accordance with the rules of the Foreign Trade Statistics Regulations (FTSR) and present the number of copies specified in the FTSR at the port of export.

For more information about the FTSR or the SED, visit the Census Bureau online at <http://www.census.gov/foreign-trade/www>.

Records on exports must be retained for five years from date of export, re-export, or any known diversion.

Where to get Assistance

The starting point for export licensing requirements and the regulations is the Exporter Counseling Division. BXA's counselors can guide you through the regulations to determine your licensing requirements. They can be reached by phone at 202-48-4811 and fax at 202-482-3617. BXA also maintains a Web site at <http://www.bxa.doc.gov>.

The regulations are published in volume 15 of the Code of Federal Regulations starting at part 730. If you wish to purchase a loose-leaf version of the EAR or any electronic version of the EAR with updates, you may contact the National Technical Information Service order desk at 703-487-4630. In addition, the Export Administration Regulations are available through the EAR Electronic Market Place on the World Wide Web at <http://w3.access.gpo.gov/bxa>.

706.04 ANTIDIVERSION, ANTIBOYCOTT, AND ANTITRUST REQUIREMENTS

Antidiversion Clause

To help ensure that U.S. exports go only to legally authorized destinations, the U.S. government requires a destination control statement on shipping documents. Under this requirement, the commercial invoice and bill of lading (or air waybill) for nearly all commercial shipments leaving the United States must display a statement notifying the carrier and all foreign parties (the ultimate and intermediate consignees and purchaser) that the U.S. material has been licensed for export only to certain destinations and may not be diverted contrary to U.S. law.

Exceptions to the use of the destination control statement are shipments to Canada and intended for consumption in Canada and shipments being made under certain general licenses.

Advice on the appropriate statement to be used can be provided by the Department of Commerce, an attorney, or the freight forwarder.

The minimum anti-diversion statement for goods exported under Commerce Department authority is: "These commodities, technology, or software, were exported from the United States in accordance with the Export Administration Regulations. Diversion contrary to U.S. law is prohibited."

Antiboycott Regulations

The United States has an established policy of opposing restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States. This policy is implemented through the anti-boycott provisions of the Export Administration Act enforced by the Department of

Commerce and through the Tax Reform Act of 1977 enforced by the Department of the Treasury.

In general, these laws prohibit U.S. persons from participating in foreign boycotts or taking actions that further or support such boycotts. The anti-boycott regulations carry out this general purpose by:

- Prohibiting U.S. agencies or persons from refusing to do business with blacklisted firms and boycotted friendly countries pursuant to foreign boycott demands;
- Prohibiting U.S. persons from discriminating against, or agreeing to discriminate against other U.S. persons on the basis of race, religion, sex, or national origin in order to comply with a foreign boycott;
- Prohibiting U.S. persons from furnishing information about business relationships with boycotted friendly foreign countries or blacklisted companies in response to boycott requirements;
- Providing for public disclosure of requests to comply with foreign boycotts; and requests.

Requiring U.S. persons who receive requests to report receipt of the requests to the Commerce Department and disclose publicly whether they have complied with such requests.

The anti-boycott provisions of the Export Administration Act apply to all U.S. persons, including intermediaries in the export process, as well as foreign subsidiaries that are "controlled in fact" by U.S. companies and U.S. officials.

The Department of Commerce's Office of Anti-boycott Compliance (OAC) administers the program through ongoing investigations of corporate activities.

OAC operates an automated boycott-reporting system providing statistical and enforcement data to Congress and to the public, issuing interpretations of the regulations for the affected public, and offering nonbinding informal guidance to the private sector on specific compliance concerns.

U.S. firms with questions about complying with anti-boycott regulations should call OAC at 202-482-2381 or write to Office of Anti-boycott Compliance, Bureau of Export Administration, Room 6098, U.S. Department of Commerce, Washington, DC 20230.

Antitrust Laws

The U.S. antitrust laws reflect this nation's commitment to an economy based on competition. They are intended to foster the efficient allocation of resources by providing consumers with goods and services at the lowest price that efficient business operations can profitably offer.

Various foreign countries - including the European Union, Canada, Mexico, Japan, and Australia - also have their own antitrust laws that U.S. firms must comply with when exporting to such nations.

The U.S. antitrust statutes do not provide a checklist of specific requirements. Instead they set forth broad principles that are applied to the specific facts and circumstances of a business transaction. Under the U.S. antitrust laws, some types of trade restraints, known as per se violations, are regarded as conclusively illegal. Per se violations include price-fixing agreements and conspiracies, divisions of markets by competitors, and certain group boycotts and tying arrangements.

Most restraints of trade in the United States are judged under a second legal standard known as the rule of reason. The rule of reason requires a showing that certain acts occurred and such acts had an anti-competitive effect. Under the rule of reason, various factors are considered, including business justification, impact on prices and output in the market, barriers to entry, and market shares of the parties.

In the case of exports by U.S. firms, there are special limitations on the application of the per se and rule of reason tests by U.S. courts. Under Title IV of the Export Trading Company Act (also known as the Foreign Trade Antitrust Improvements Act), there must be a "direct, substantial and reasonably foreseeable" effect on the domestic or import commerce of the United States or on the export commerce of a U.S. person before an activity may be challenged under the Sherman Antitrust Act or the Federal Trade Commission Act (two of the primary federal antitrust statutes). This provision clarifies the particular circumstances under which the overseas activities of U.S. exporters may be challenged under these two antitrust statutes. Under Title III of the Export Trading Company Act the Department of Commerce, with the concurrence of the U.S. Department of Justice, can issue an export trade certificate of review that provides certain limited immunity from the federal and state antitrust laws.

Although the great majority of international business transactions do not pose antitrust problems, antitrust issues may be raised in various types of transactions, among which are:

- overseas distribution arrangements;
- overseas joint ventures for research, manufacturing, construction, and distribution;
- patent, trademark, copyright, and know-how licenses;
- mergers and acquisitions involving foreign firms; and
- raw material procurement agreements and concessions.

Where potential U.S. or foreign antitrust issues are raised, it is advisable to obtain the advice and assistance of qualified antitrust counsel.

For particular transactions that pose difficult antitrust issues, and for which an export trade certificate of review is not desired, the Antitrust Division of the Department of Justice can be asked to state its enforcement views in a business review letter. The business review procedure is initiated by writing a letter to the Antitrust Division describing the particular business transaction that is

contemplated and requesting the department's views on the antitrust legality of the transaction.

Certain aspects of the federal antitrust enforcement policies regarding international transactions are explored in the Department of Justice's Antitrust

706.05 ENFORCEMENT GUIDELINES

for Foreign Corrupt Practices Act

It is unlawful for a U.S. firm (as well as any officer, directors employee, agent, or agent of a firm or any stockholder acting on behalf of the firm) to offer, pay, or promise to pay (or to authorize any such payment or promise) money or anything of value to any foreign official (or foreign political party or candidate for foreign political office) for the purpose of obtaining or retaining business. It is also unlawful to make a payment to any person while knowing that all or a portion of the payment will be offered, given, or promised, directly or indirectly, to any foreign official (or foreign political party or candidate for foreign political office) for the purposes of assisting the firm in obtaining or retaining business. "Knowing" includes the concepts of "conscious disregard" and "will-full blindness."

There is an exception to the anti-bribery provisions for "facilitating payments for routine governmental action." The statute lists a number of examples. Actions similar to those listed are also covered by this exception.

A person charged with a violation of the anti-bribery provisions of the Federal Corrupt Practices Act (FCPA) may assert as a defense that the payment was lawful under the written laws and regulations of the foreign country or that the payment was associated with demonstrating a product or performing a contractual obligation. Firms are subject to a fine of up to \$2 million; officers, directors, employees, agents, and stockholders are subject to a fine of up to \$100,000 and imprisonment for up to five years. The Attorney General can bring a civil action against a domestic concern (and the Securities and Exchange Commission [SEC] against an issuer) for a fine of up to \$10,000 as well as against any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of the firm, who willfully violates the anti-bribery provisions. Under federal criminal laws other than the FCPA, individuals may be fined up to \$250,000 or up to twice the amount of the gross gain or gross loss if the defendant derives pecuniary gain from the offense or causes a pecuniary loss to another person.

The Attorney General may also bring a civil action to enjoin any act or practice of a domestic concern (and the SEC with respect to an issuer) whenever it appears that the domestic concern or issuer (or an officer, director, employee, agent, or stockholder acting on behalf of the domestic concern or issuer) is in violation (or about to be) of the anti-bribery provisions.

A person or firm found in violation of the FCPA may be barred from doing business with the federal government. Indictment alone can lead to suspension of the right to do business with the U.S. Government.

The Department of Justice has established a Foreign Corrupt Practices Act Opinion Procedure, the details of which are found at 28 CFR Part 77. Under the Opinion Procedure, any party may request a statement of the Justice

Department's present enforcement intentions under the anti-bribery provisions of the FCPA regarding any proposed business conduct. Conduct for which the Department of Justice has issued an opinion stating that the conduct conforms with current enforcement policy will be entitled to a presumption of conformity with the FCPA.

For further information from the Department of Justice about the FCPA and the Foreign Corrupt Practices Act Opinion Procedure, contact the Deputy Chief, Fraud Section, Criminal Division, U.S. Department of Justice, Room 2424, Bond Building, 1400 New York Avenue, NW, Washington, D.C. 20530, 202-514-0651 (FTS) 202-368-0651.

The Department of Commerce supplies general information to U.S. exporters who have questions about the FCPA and about international developments concerning the FCPA and international bribery.

For further information from the Department of Commerce about the FCPA, contact the Chief Counsel for International Commerce or the Senior Counsel for International Finance and Trade, Office of the Chief Counsel for International Commerce, U.S. Department of Commerce, Room 5882, 14th Street and Constitution Avenue, NW, Washington, D.C. 20230, 202-482-0937.