



# **Navigating U.S. Dual-Use Export Controls**

**Gene Christiansen**

**Kelly Gardner**

**U.S. Department of Commerce  
Bureau of Industry and Security**

**Farnborough  
July 17, 2008**



# Why Export Controls?



- To meet international commitments
- To ensure national security
- To meet U.S. foreign policy objectives



# Department of Commerce Export Controls



- Authorized by:
  - The Export Administration Act of 1979, as amended
  - The International Emergency Economic Powers Act, as amended
- Gives the Department of Commerce export licensing jurisdiction over exports and reexports of dual-use “items”
- Broad licensing jurisdiction, but narrow licensing requirements



# Department of Commerce Dual-Use Export Controls Apply to:



- All items in the United States
- All U.S.-origin items, wherever located
- Certain foreign-made items incorporating controlled U.S. content
- Certain foreign-made direct products
- Activities of U.S. persons



# **Export Licensing Jurisdiction**

**Farnborough  
July 17, 2008**



# Two Sets of Regulations, Two Regulating Agencies



- **Export Administration Regulations (EAR)**
  - Administered by the U.S. Department of Commerce, Bureau of Industry and Security (BIS)
  - Control “dual-use” items (*i.e.*, items that may have both commercial and military applications)
- **International Traffic in Arms Regulations (ITAR)**
  - Administered by the U.S. Department of State, Directorate of Defense Trade Controls (DDTC)
  - Control items specifically designed, developed, configured, modified or adapted for a military application



# Why is This Important?



- Establishing licensing jurisdiction is the first step in determining the licensing requirements associated with your item
- The Department of Commerce (EAR) and the Department of State (ITAR) have differing licensing requirements
- The exporter is responsible for obtaining licenses, when required, from the appropriate agency



# Commodity Jurisdiction Request



- Used to obtain an official government determination when there is uncertainty as to whether an item is subject to the licensing jurisdiction of the Department of Commerce or the Department of State
- Commodity Jurisdiction (CJ) Requests are submitted directly to the Department of State
- CJ Requests are evaluated by the Departments of Commerce, Defense and State
- The Department of State makes the final determination



# **Bases for Commerce Controls**

**Farnborough  
July 17, 2008**



# Commerce Control List



- Based on the multilateral export control regimes
  - Wassenaar Arrangement (WA)
    - Conventional arms and dual-use goods and technologies
  - Missile Technology Control Regime (MTCR)
    - Unmanned delivery systems capable of delivering weapons of mass destruction
  - Australia Group (AG)
    - Chemical and biological weapons
  - Nuclear Suppliers Group (NSG)
    - Nuclear weapons



# Commerce Control List



- The U.S. has adopted the EU Control List
- Therefore, in most cases, multilaterally-controlled items are classified in the same way
  - Control numbers differ only in format:  
9E3 becomes 9E003
- The U.S. also maintains some unilateral controls, which are incorporated into the Commerce Control List (CCL)



# Commodity Classification



- Specific to dual-use items that are subject to the EAR
- Assumes that a determination of Commerce jurisdiction has been made, and has been made correctly
- Item fits within the technical parameters of an Export Control Classification Number (ECCN) or is classified as “EAR99”
- An item’s classification designates its licensing requirements



# Commodity Classification Request



- Used to obtain official government confirmation of a dual-use item's ECCN or EAR99 status
- Commodity Classification Requests are submitted directly to the Department of Commerce
- Commodity Classification Requests are evaluated by the Department of Commerce only
- The Department of Commerce makes the final determination



# **Commerce Licensing Requirements**

**Farnborough  
July 17, 2008**



# Commerce License Requirements Based on Reason(s) for Control



- All items on the CCL are controlled for specific reasons (e.g., NS, MT, CB, NP)
- The Export Control Classification Number (ECCN) indicates the reason(s) for control
- With the control reason(s) and the country of the consignee, the Commerce Country Chart fixes the licensing requirement



# Reasons for Control



## Regime/Convention-based

- CB = Chemical & Biological Weapons
- CW = Chemical Weapons Convention
- EI = Encryption Item
- FC = Firearms Convention
- NP = Nuclear Nonproliferation
- NS = National Security
- MT = Missile Technology
- UN = United Nations

## Unilateral

- AT = Anti-Terrorism
- CC = Crime Control
- RS = Regional Stability



# Commerce Country Chart

(EAR Supplement No. 1 to Part 738)



Commerce Country Chart

Reason for Control

Countries	Reason for Control														
	Chemical & Biological Weapons			Nuclear Nonproliferation		National Security		Missile Tech	Regional Stability		Firearms Convention	Crime Control			Anti Terror
	CB 1	CB 2	CB 3	NP 1	NP 2	NS 1	NS 2	MT 1	RS 1	RS 2	FC 1	CC 1	CC 2	CC 3	AT 1
Guyana	X	X		X		X	X	X	X	X	X	X		X	
Haiti	X	X		X		X	X	X	X	X	X	X		X	
Honduras	X	X		X		X	X	X	X	X	X	X		X	
Hong Kong	X	X		X		X		X	X	X		X		X	
Hungary	X					X	X	X	X						
Iceland	X			X		X	X	X	X						
India	X	X	X	X	X	X	X	X	X	X		X		X	
Indonesia	X	X		X		X	X	X	X	X		X		X	



# License Exceptions

## EAR Part 740



- Authorization to export or reexport, under stated conditions, items subject to the EAR that would otherwise require a license
- Two types of License Exceptions:
  - List driven
  - Transaction driven



# General Prohibitions



- GP 1-3: License required by virtue of reasons for control
- GP 4: Denial orders
- GP 5: Prohibited end-users
- GP 6: Embargoed destinations
- GP 7: Proliferation activities
- GP 8: In transit and/or unladen
- GP 9: Violation of license terms
- GP 10: Proceeding with knowledge of potential violation



# Steps to Determining License Requirements



- Is item subject to the EAR?
- Confirm classification
- Identify reason(s) for control
- Consult Country Chart
  - Is there an “X” in the box?
- Check for possible License Exception
- Review General Prohibitions
- Submit license application



# **License Application Process**

**Farnborough  
July 17, 2008**



# Applying for a License



- BIS-748P Multipurpose Application Form
  - BIS-748P-A Item appendix
  - BIS-748P-B End-user appendix
- Electronic application via the BIS website
  - Simplified Network Application Process Redesign (SNAP-R)
  - Requires a written request to BIS



# Interagency Review



- Reviewing agencies have common national security and foreign policy interests, but unique perspectives
- Reviewing Agencies:
  - Department of Commerce
    - Technical issues
    - Economic issues
  - Department of Defense
    - National defense issues
  - Department of Energy
    - Nuclear issues
  - Department of State
    - Foreign policy issues



# Dispute Resolution



- If there is disagreement among the agencies, the Department of Commerce will attempt to resolve the issue at the working level
- If consensus is not possible, the application will enter into the dispute resolution process:
  - Operating Committee
    - Career government employees from the reviewing agencies
  - Advisory Committee on Export Policy
    - Presidentially-appointed officials (Assistant Secretary level)
  - Export Administration Review Board
    - Cabinet level
  - President



# Fiscal Year 2007 Licensing Statistics



- Processed:
  - 19,512 license applications worth approximately \$52.6 billion
- Approved:
  - 16,539 license applications
- Denied:
  - 172 license applications
- Returned
  - 2,797 license applications
- Average processing time
  - 28 days



# Licensing Tips



- When submitting a license application, provide:
  - An accurate and complete description of item
  - An accurate and complete statement of the end-use
  - A description of the consignee
    - Who are they?
    - What do they do?
- After receiving a license:
  - Share the license conditions with the consignee
  - Obtain a commitment from the consignee to abide by the license conditions
  - Ensure that the consignee understands the obligations associated with receiving items subject to EAR



# **Reexport Controls and Technology and Software Transfers**

**Farnborough  
July 17, 2008**



# What is Subject to Commerce Reexport Controls?



- Items located outside the United States:
  - U.S.-origin items, wherever located
  - Certain foreign-made items, if:
    - The value of the U.S. content exceeds the *de minimis* percentage (See EAR Supplement No. 2 to part 734 for the *de minimis* calculation)
    - The foreign product is the direct product of U.S. technology or software



# Reexports of U.S.-Origin Items



- Confirm Classification
- Identify reason(s) for control
- Consult Country Chart:
  - If no “X” in the box
  - And no GP 4-10 issues
  - Then no license is required
- If “X” in the box, then
  - Check for License Exception
  - Or submit license application



# Reexports of Foreign Made Items



- Exports of foreign-made items from one foreign country to another may be subject to the EAR if the foreign-made items:
  - Have controlled U.S.-origin content that exceeds the *de minimis* limit
  - Are direct products of National Security (NS) controlled U.S.-origin technology or software, and are going to an end-user in Country Group D:1 or E:2 (See EAR Supplement No. 1 to part 740)



# *De Minimis* for Reexports



- License requirement for foreign-made items incorporating, commingled with, or drawn from controlled U.S.-origin items
  - Exceeding 10% for Cuba, Iran, Libya, North Korea, Sudan and Syria
  - Exceeding 25% for all other destinations
- Same percentages for commodities, technology, or software (*i.e.*, no “mixing”)
- One time reporting requirement for technology and software (See EAR Supplement No. 2 to part 734)



# *De Minimis* Exclusions



- There is no *de minimis* level for foreign made commercial primary or standby instrument systems and automatic flight control systems integrating QRS11-based Micromachined Angular Rate Sensors
- U.S.-origin technology required for the development or production of certain gas turbine engine components or systems (controlled by ECCN 9E003.a.1-12 and .f) does not lose its U.S.-origin when redrawn, used, consulted, or otherwise commingled abroad in any respect with other software or technology of any other origin



# EAR99 and *De Minimis*



- EAR99 items are calculated as controlled for U.S. content when exporting to an embargoed destination
- Most EAR99 items are also calculated as controlled for U.S. content when exporting to Syria



# Foreign Produced Direct Product



- Two types:
  - Direct product of U.S. technology or software
  - Direct product of a complete plant, or any major component of a plant, if such a plant or component is the direct product of U.S. technology
- Conditions defining a direct product of U.S. technology or software:
  - The foreign-made item is controlled for National Security (NS) reasons
  - The foreign-made item is the direct product of U.S. technology or software that requires a written assurance as a supporting document for a license or as a precondition for the use of License Exception TSR (Technology and Software Under Restriction)
- Foreign produced direct products require a license for reexport to destinations in Country Groups D:1 and E:2 (See EAR Supplement No. 1 to part 740)



# Technology and Software Transfers



- Confirm classification
- Identify reason(s) for control
- Consult Country Chart
  - Is there an “X” in the box?
- Check for possible License Exceptions
- Review General Prohibitions
- Submit license application
  - Letter of explanation
  - Validity periods



# **U.S. Embargoes and Terrorist Supporting Countries**

**Farnborough  
July 17, 2008**



# U.S. Embargoes



- The U.S. maintains comprehensive embargoes against
  - Cuba
  - Iran
- Export licenses are required, no matter the item



# Terrorist Supporting Countries



- Countries designated by the U.S. Secretary of State as having repeatedly provided support for acts of international terrorism:
  - Cuba
  - Iran
  - North Korea
  - Sudan
  - Syria
- Strict export license requirements



# U.S. Department of the Treasury Office of Foreign Assets Control



- The U.S. Department of the Treasury's Office of Foreign Asset Controls (OFAC) administers and enforces economic and trade sanctions against targeted:
  - Foreign governments
  - Individuals (e.g., terrorists, narcotics traffickers)
  - Entities (e.g., charities linked to terrorist groups, drug front companies)
  - Practices (e.g., WMD proliferation, trade in non-certified rough diamonds)



# Licensing Authorities for Reexports to Embargoed Destinations and Terrorist Supporting Countries



- Reexports of CCL items to Iran: OFAC
- Reexports of EAR99 items to Iran:
  - by a non-U.S. persons BIS
  - by a U.S. Person OFAC
- Reexports of all items to Sudan: OFAC
- Reexports of CCL items to Sudan: BIS & OFAC
- Reexports of all items to Cuba: BIS
- Reexports of all items to Syria: BIS
- Reexports of all items to North Korea: BIS



# **Additional Help**

**Farnborough  
July 17, 2008**



# Commerce Services Available to Foreign Parties



- Verify commodity classifications
- Issue reexport licenses
  - Actual reexports
  - Deemed reexports of technology
- Provide answers to questions of policy and interpretation of the EAR



# How to Obtain More Information



- BIS Website:  
[www.bis.doc.gov](http://www.bis.doc.gov)
- Commodity Classification Guidance:  
[www.bis.doc.gov/licensing/exportingbasics.htm](http://www.bis.doc.gov/licensing/exportingbasics.htm)
- Reexport Guidance:  
[www.bis.doc.gov/licensing/reexportguidance.htm](http://www.bis.doc.gov/licensing/reexportguidance.htm)
- State DDTTC Website:  
[www.pmdttc.state.gov](http://www.pmdttc.state.gov)
- Commodity Jurisdiction Guidelines:  
[www.pmdttc.state.gov/commodity\\_jurisdiction.htm](http://www.pmdttc.state.gov/commodity_jurisdiction.htm)
- Treasury OFAC Website:  
[www.treasury.gov/offices/enforcement/ofac](http://www.treasury.gov/offices/enforcement/ofac)



# How to Obtain More Information



- Gene Christiansen
  - Email: [gchristi@bis.doc.gov](mailto:gchristi@bis.doc.gov)
  - Phone: +1-202-482-2984
  - Fax: +1-202-482-3345
- Kelly Gardner
  - Email: [kgardner@bis.doc.gov](mailto:kgardner@bis.doc.gov)
  - Phone: +1-202-482-0102
  - Fax: +1-202-482-3345