



U.S. Dual-Use Export Controls for the Aerospace Industry

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

Farnborough International Airshow – July 2018



Overview

- Who we are
- Four questions to ask before exporting:
 - What are you exporting?
 - Where are you exporting?
 - Who will receive your item?
 - What will be the end-use of your item?
- Reexport controls
- BIS licensing process
 - License review and escalation
 - Applying for a license: Who and When?
 - Crafting a license application and supporting documentation



Who We Are

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





What Are You Exporting?

Licensing Jurisdiction
and
Commodity Classification



Three Main Regulatory Agencies

U.S. Department of Commerce,
Bureau of Industry and Security
(BIS)



- Controls “dual-use” items and certain munitions items that were previously controlled by the U.S. Department of State
- Administers the Export Administration Regulations (EAR)
- Items described on the Commerce Control List (CCL), Part 774 of the EAR

U.S. Department of State,
Directorate of Defense Trade
Controls (DDTC)



- Controls “defense articles” and “defense services”
- Administers the International Traffic in Arms Regulations (ITAR)
- “Defense articles” and “defense services” described on the United States Munitions List (USML), Part 121 of the ITAR

U.S. Department of the Treasury,
Office of Foreign Assets Control
(OFAC)



- Administers economic and trade sanctions



STEP 1: Establishing Licensing Jurisdiction

- Is my item subject to the ITAR?
 - Review the relevant USML categories
 - If your item is not listed or otherwise identified, it is not subject to the ITAR
- What if I have a prior ITAR Commodity Jurisdiction (CJ) determination?
 - If the item has moved from the USML to the CCL, the CJ is superseded
 - No need for an additional CJ unless there is doubt



STEP 2: Commodity Classification

- A commodity's classification, together with the destination, determines:
 - Whether a license is required
 - Whether any License Exception(s) may be available

Proper classification on the CCL,
down to the subparagraph level,
is essential!



Export Control Classification Number (ECCN)

- A description of the technical parameters of a particular item or type of item
- The control(s) associated with the item
- Any list-based License Exception(s) for which the item is eligible



Construct of an ECCN: 9 A 515



CATEGORY

- 0 = Nuclear materials, facilities, and equip. (and misc. items)
- 1 = Materials, Chemicals, Microorganisms and Toxins
- 2 = Materials Processing
- 3 = Electronics
- 4 = Computers
- 5 = Telecom and Info Security
- 6 = Sensors and Lasers
- 7 = Navigation and Avionics
- 8 = Marine
- 9 = Aerospace and Propulsion

PRODUCT GROUP

- A. Systems, Equip. and Components
- B. Test, Inspection and Production Equip.
- C. Material
- D. Software
- E. Technology

TYPE OF CONTROL

- 0: National Security
- 1: Missile Technology
- 2: Nuclear Nonproliferation
- 3: Chemical & Biological Weapons
- 5: Civil Spacecraft transferred from the USML ("500-series")
- 6: Items transferred from the USML ("600-series")
- 9: Non-regime and unilateral



Case Example: ECCN 9A515.a and .e

9A515 “Spacecraft” and related commodities, as follows (see List of Items Controlled).

a. “Spacecraft,” including satellites, and space vehicles, whether designated developmental, experimental, research or scientific, not enumerated in USML Category XV or described in ECCN 9A004.u or .w, that:

a.1. Have electro-optical remote sensing capabilities and having a clear aperture greater than 0.35 meters, but less than or equal to 0.50 meters;

a.2. Have remote sensing capabilities beyond NIR (*i.e.*, SWIR, MWIR, or LWIR);

e. Microelectronic circuits (*e.g.*, integrated circuits, microcircuits, or MOSFETs) and discrete electronic components that are rated, certified, or otherwise specified or described as meeting or exceeding the characteristics in either paragraph e.1 or e.2, AND “specially designed” for defense articles controlled by USML Category XV or items controlled by ECCNs 9A004.u or 9A515:

e.1. A total dose $\geq 1 \times 10^5$ Rads (Si) (1×10^3 Gy(Si)) and $< 5 \times 10^3$ Rads (Si) (5×10^5 Gy(Si)); and a single event effect (SEE) (*i.e.*, single event latchup (SEL), single event burnout (SEB), or single event gate rupture (SEGR)) immunity to a linear energy transfer (LET) ≥ 80 MeV-cm²/mg; or

e.2. A total dose $\geq 5 \times 10^5$ Rads (Si) (5×10^3 Gy (Si)) and not described in 9A515.d.



“Specially Designed”

- Two paragraph “catch-and-release” construct:
 - Paragraph (a):
 - Broad in scope to “catch” all items that may warrant being controlled as “specially designed”
 - Paragraph (b):
 - Lists 6 exceptions that “release” items caught in Paragraph (a)
- This construct requires answering a series of yes/no questions that lead to an objective determination whether an item is “specially designed”



Help with “Specially Designed”

- Webinars to assist in determining whether your item is “specially designed”
 - Go to WWW.BIS.DOC.GOV
 - Click on “Export Control Reform”
 - Scroll down to select various webinars on “Specially Designed”
- Web-based interactive decision tree tool to assist in determining whether your item is “specially designed”
 - Go to WWW.BIS.DOC.GOV
 - Click on “Exporter Portal”
 - Click on “Decision Tree Tools”
 - Click on “Specially Designed”



“EAR99”

- Items that do not fit within the technical parameters of any ECCN on the CCL
- Generally consist of low-technology consumer goods and do not require a license in most situations . . . Look out for catch-all controls!



Commodity Classification Process

- Commodity Classification options:
 - Classify the item on your own
 - Check with the item's manufacturer or exporter
 - Submit a classification request to BIS
- Anyone can submit a Commodity Classification Request
 - Submitted and issued electronically via the Simplified Network Application Process Redesign (SNAP-R) on the BIS website
 - Registration to use SNAP-R, at no charge, is required



Help with CCL Order of Review

- Web-based interactive decision tree tool to assist in identifying the steps to follow when classifying items on the CCL
- Go to WWW.BIS.DOC.GOV
 - Click on “Exporter Portal”
 - Click on “Decision Tree Tools”
 - Click on “CCL Order of Review”



Where Are You Exporting?

Reasons for Control,
Commerce Country Chart
and
License Exceptions



Reason(s) for Control

Each ECCN indicates the reason(s) the item is controlled

Regime/Convention-based

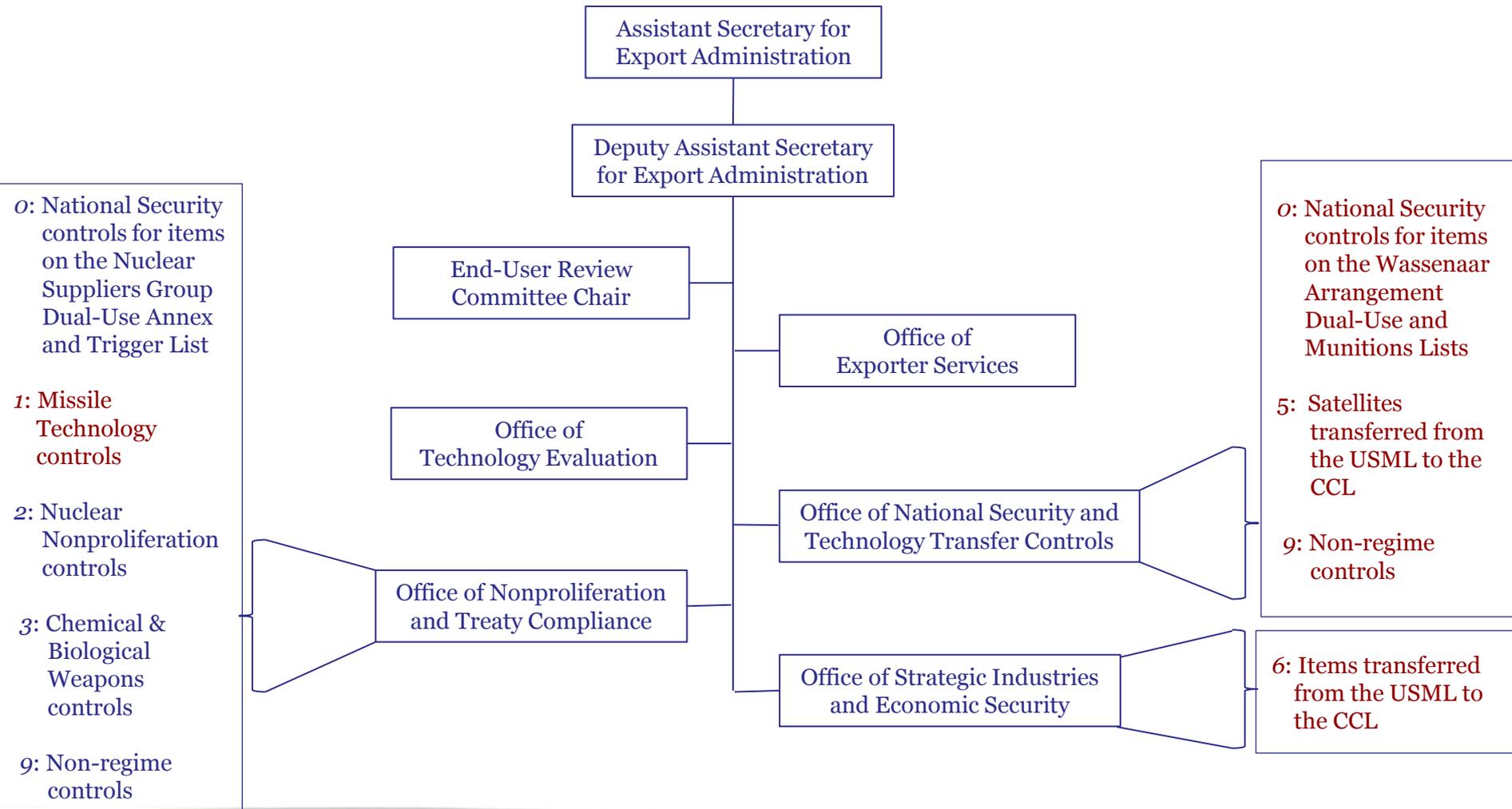
CB: Chemical &
Biological Weapons
CW: Chemical Weapons
Convention
EI: Encryption Item
FC: Firearms Convention
NP: Nuclear
Nonproliferation
NS: National Security
MT: Missile Technology
UN: United Nations

Unilateral

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



Office Responsibilities According to Controls





Case Example: ECCN 9A515

9A515 “Spacecraft” and related commodities,
as follows (see List of Items Controlled).

License Requirements

Reason for Control: NS, RS, MT, AT

<i>Control(s)</i>	<i>Country Chart (See Supp. No. 1 to part 738)</i>
NS applies to entire entry, except .e and .y.	NS Column 1
RS applies to entire entry, except .e and .y.	RS Column 1
RS applies to 9A515.e.	RS Column 2
MT applies to microcircuits in 9A515.d and 9A515.e.2 when “usable in” “missiles” for protecting “missiles” against nuclear effects (e.g. Electromagnetic Pulse (EMP), X-rays, combined blast and thermal effects).	MT Column 1
AT applies to entire entry	AT Column 1



Case Example: ECCN 9A515

Destination	ECCN	Control
Spain	9A515.a	NS1, RS1
	9A515.e.1	RS2
Sri Lanka	9A515.e.1	RS2
Sudan	9A515.e.1	AT1

Commerce Control List Overview and the Country Chart

Supplement No. 1 to Part 738 page 14

Commerce Country Chart

Reason for Control

Countries	Chemical & Biological Weapons			Nuclear Nonproliferation		National Security		Missile Tech	Regional Stability		Firearms Convention	Crime Control			Anti-Terrorism	
	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	AT 2
	Spain ³	X					X		X	X						
Sri Lanka	X	X		X		X	X	X	X	X		X		X		
Sudan ¹	X	X		X		X	X	X	X	X		X		X	X	X



License Exceptions

- A License Exception is an authorization to export or reexport, under stated conditions, items subject to the EAR that would otherwise require a license.
- License Exceptions are optional
- See EAR Part 740 for all License Exception eligibility requirements and restrictions.
- Two types of License Exceptions:
 - List driven
 - Transaction driven



ECCN 9A515 List Driven License Exceptions

9A515 “Spacecraft” and related commodities, as follows (see List of Items Controlled).

License Requirements

Reason for Control: NS, RS, MT, AT

List Based License Exceptions (See Part 740 for a description of all license exceptions)

LVS: \$1500

GBS: N/A

CIV: N/A

Special Conditions for STA

STA: (1) Paragraph (c)(1) of License Exception STA (§ 740.20(c)(1) of the EAR) may not be used for “spacecraft” in ECCN 9A515.a.1, .a.2, .a.3, or .a.4, or items in 9A515.g, unless determined by BIS to be eligible for License Exception STA in accordance with § 740.20(g) (License Exception STA eligibility requests for certain 9x515 and “600 series” items). (2) License Exception STA may not be used if the “spacecraft” controlled in ECCN 9A515.a.1, .a.2, .a.3, or .a.4 contains

<i>Control(s)</i>	<i>Country Chart (See Supp. No. 1 to part 738)</i>
NS applies to entire entry, except .e and .y.	NS Column 1
RS applies to entire entry, except .e and .y.	RS Column 1
RS applies to 9A515.e.	RS Column 2
MT applies to microcircuits in 9A515.d and 9A515.e.2 when “usable in” “missiles” for protecting “missiles” against nuclear effects (e.g. Electromagnetic Pulse (EMP), X-rays, combined blast and thermal effects).	MT Column 1
AT applies to entire entry	AT Column 1



Determining STA Eligibility

- Web-based interactive decision tree tool to assist in determining License Exception STA eligibility
- Go to WWW.BIS.DOC.GOV
 - Click on “Exporter Portal”
 - Click on “Decision Tree Tools”
 - Click on “STA”



ECCN 9A515 Transaction Driven License Exceptions

- GOV – Governments, International Organizations, International Inspections under the Chemical Weapons Convention, and the International Space Station
- RPL – Servicing and Replacement of Parts and Equipment
- TMP – Temporary Imports, Exports, Reexports, and Transfers



Case Example: ECCN 9A515

Destination	ECCN	Control
Spain	9A515.a	NS1, RS1
	9A515.e.1	RS2
Sri Lanka	9A515.e.1	RS2
Sudan	9A515.e.1	AT1

Commerce Control List Overview and the Country Chart

Supplement No. 1 to Part 738 page 14

License Exception TMP
May Authorize
These Transactions

Commerce Country Chart

Reason for Control

Countries	Chemical & Biological Weapons			Nuclear Nonproliferation		National Security		Missile Tech	Regional Stability		Firearms Convention	Crime Control			Anti-Terrorism	
	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	AT 2
	Spain ³	X					X		X	X						
Sri Lanka	X	X		X		X	X	X	X	X		X		X		
Sudan ¹	X	X		X		X	X	X	X	X		X		X	X	X



Catch-all Controls:

Who Will Receive Your Item?

For What Will Your Item be Used?

**End-User and End-Use Based
License Requirements**



End-User Lists

- BIS maintains restrictions on certain exports, reexports or transfers of items to the following lists of parties:
 - Denied Persons List
 - Entity List
 - Unverified List
 - Specially Designated Nationals List
- The Departments on Commerce, State and the Treasury consolidated end-user list screening:
 - Go to WWW.BIS.DOC.GOV
 - Click on “Consolidated Screening List”



Aerospace-related End-Use Controls

- Restrictions on certain rocket systems and UAV end-uses (*see* EAR §744.3)
- Restrictions on certain exports to and for the use of certain foreign vessels or aircraft (*see* EAR §744.7)
- Restrictions on certain military end-uses in the PRC and military end-uses and end-users in Russia and Venezuela (*see* EAR §744.21)
 - All 600 series and 9x515 items require a license



Reexport Controls



Exports vs. Reexports

- For exports, transfers, and reexports of U.S.-origin items:
 - Same licensing requirements
 - Same License Exceptions, plus Additional Permissive Reexports (APR)
 - Same license application
- For foreign-produced items, these rules extend to:
 - Items having more than the *de minimis* amount of controlled U.S. content
 - Certain items that are the direct products of U.S.-origin technology
- BIS published guidance on reexports:
 - Go to WWW.BIS.DOC.GOV
 - Click on “Reform”
 - Click on “Publications”
 - Click on “Guidance on the Commerce Department's Reexport Controls”



Special Requirements for 500- and 600-Series Items Located Outside the U.S.

- If a U.S.-origin item:
 - Remains subject to the EAR, regardless of how many times it is reexported, transferred or sold
 - Any subsequent reexports or transfers (in-country) must be done in accordance with the EAR
 - No “see-through” rule in the EAR; controls extend to foreign-made items located outside the U.S. as a result of the *de minimis* and direct product rules



Items Incorporating U.S. Content: *De Minimis*

- A foreign-made item located outside the U.S. incorporating controlled U.S.-origin content that exceeds the applicable *de minimis* percentage for a particular country is subject to the EAR:
 - 10% for Cuba, Iran, North Korea, Sudan, and Syria
 - 25% for all other destinations
- For 500-series .a-x and 600-series items:
 - 25% for items with U.S. content reexported to all countries, except Country Group D:5 countries (see also ITAR §126.1)
 - 0% for Country Group D:5 countries (U.S. arms embargo)
- For ECCN 9A515.y content only:
 - Not subject to the EAR when reexported to all countries except Country Group E:1 countries and China
 - 0% for Country Group E:1 countries and China



Aerospace *De Minimis* Exclusions

- No *de minimis* for foreign-made:
 - Commercial primary or standby instrument systems of the type described in ECCN 7A994 when the systems integrate QRS11-00100-100/101 Micromachined Angular Rate Sensors
 - Commercial automatic flight control systems when the systems integrate QRS11-00050-443/569 Micromachined Angular Rate Sensors
 - Aircraft of the type described in ECCN 9A991 when such aircraft incorporate a primary or standby instrument system integrating a QRS11-00100-100/101 sensor or an automatic flight control system integrating a QRS11-00050-443/569 sensor
- No *de minimis* for U.S.-origin technology controlled by ECCN 9E003.a.1-a.8, .h, .i, and .j (certain gas turbine engine components or systems) when redrawn, used, consulted, or otherwise commingled abroad



Direct Products of U.S.-Origin Technology or Software

- Direct products of U.S. controlled technology are subject to U.S. reexport laws if:
 - Foreign-made item is controlled for National Security (NS) reasons, and
 - 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 Technology and Software Under Restriction (TSR) (*see* EAR §740.14)
- Foreign produced direct products require a license for reexport to destinations in Country Groups D:1 and E:2 (*see* Supplement No. 1 to EAR Part 740)



Direct Product Rule: 600-Series

The 600 series direct product rule

Is the foreign-produced direct product of: (i) U.S.-origin “600 series” technology or software <u>or</u> (ii) a plant or major component of a plant that is a direct product of U.S.-origin “600 series” technology or software?	Yes?
Is the foreign-produced direct product a “600 series” item?	Yes?
Is the foreign-produced direct product being reexported or exported from abroad to countries listed in Country Groups D:1, D:3, D:4, D:5, E:1, or E:2?	Yes?

Note: If “yes” to all three questions, then the foreign made item is subject to the EAR.



Direct Product Rule: 9x515 Series

The 9x515 series direct product rule

Is the foreign-produced direct product of: (i) U.S.-origin 9x515 technology or software <u>or</u> (ii) a plant or major component of a plant that is a direct product of U.S.-origin 9x515 technology or software?	Yes?
Is the foreign-produced direct product a 9x515 item?	Yes?
Is the foreign-produced direct product being reexported or exported from abroad to countries listed in Country Groups D:5 or E:1?	Yes?

Note: If “yes” to all three questions, then the foreign made item is subject to the EAR.



Help with *De Minimis* and Direct Product Rules

- Web-based interactive decision tree tool to help you determine if your non-U.S.-made item, which is located outside the U.S., is subject to the EAR
- Go to WWW.BIS.DOC.GOV
 - Click on “Exporter Portal”
 - Click on “Decision Tree Tools”
 - Click on “De minimis & Direct Product Rules”



The BIS Licensing Process



License Review Process

Days 1-9

- BIS reviews the license application
- BIS registers its recommendation
- BIS refers it to the other reviewing agencies:
 - Defense
 - Energy
 - State

30 Days

- Reviewing agencies must respond with recommendations



- If the reviewing agencies concur, the license application will be:
 - Approved
 - Approved with conditions
 - Denied
- If interagency concurrence is not possible, the license application will be escalated for resolution



Dispute Resolution Process

- Operating Committee (OC)
 - Career government employees from the reviewing agencies
 - Chaired by BIS
- Advisory Committee on Export Policy (ACEP)
 - Presidentially-appointed officials (Assistant Secretary level)
- Export Administration Review Board (EARB)
 - Cabinet level
- President



License Denials and Reconsiderations

Notification of an intent to deny (ITD)
provided in writing to the applicant

**Within
20 Days
of ITD:**

Applicant may
request
reconsideration
of denial

**Within
45 Days
of ITD:**

BIS will advise
whether the
decision to deny
has been changed

**Within
45 Days of
Final Denial:**

Applicant may
appeal to the
Under Secretary
for Industry and
Security



A License Application: Who and When?

- Who can apply for an export license?
 - Only a person in the U.S. can apply for an export license
- Who can apply for a reexport license?
 - U.S. or foreign principal party in interest (FPPI)
 - Other duly authorized U.S. agent of the FPPI
- When Can I Apply for a License?
 - ANYTIME!
 - No sales documentation (*e.g.*, purchase order, letter of intent, etc.) is necessary
 - No license requirement for marketing (unless controlled technical data will be transferred)



Crafting a License Application

- License applications need not be limited to a single shipment
 - May represent a reasonable estimate of items to be shipped throughout the validity of the license (four years unless otherwise requested/justified)
- BIS licenses authorize exports/reexports to and among the end-users listed on a license
- Reexport authority may be requested by the U.S. exporter in the export license application



Crafting a License Application: Letters of Explanation (LOEs)

LOEs are Required for Technology Applications

(EAR Part 748, Supplement No. 2)

- Who are the parties to the transaction?
- Where will the technology or software be used?
- ECCN for the technology or software
- Foreign availability of comparable technology or software
- Form in which the technology will be released and uses in which the technology will be employed
- Applicant's internal technology control plan



Crafting a License Application: LOEs

LOEs are Strongly Recommended for More Complex Hardware Transactions

- Many consignees/end-users
 - Relationship between consignees/end-users
 - Relationship between parties and items
- Many items
 - Application and need of each item for each of the end-users
- Complex end-uses



Boilerplate License Condition Language

**Clarifies that licenses issued by BIS
authorize the transaction(s) described in the
license application and any LOEs:**

“Unless limited by a condition set forth below, the export, reexport or transfer (in-country) authorized by this license is for the item(s), end-use(s), and parties described in the license application and any letters of explanation. The applicant is responsible for informing the other parties identified on the license, such as ultimate consignees and end-users, of the license's scope and of the specific conditions applicable to them. BIS has granted this license in reliance on representations the applicant made in the license application, letters of explanation, and other documents submitted.”



Crafting a License Application: LOEs

- A license authorizes the transaction as represented in the LOE only
- An export, reexport, or in-country transfer that materially differs from that described in the LOE requires another authorization
- LOEs provide an opportunity to place boundaries around, or “self-condition,” licenses



LOEs Should be Precise...

- An LOE should reflect the proposed transaction
 - Watch out for templates!
 - Review, tailor and update content
- Specifically address EAR concerns
 - A SOW, a grant proposal, etc., is not an LOE
 - Describe what items will and will not be exported, who will and will not have access to them, and how they will and will not be used



...But LOEs Should Not be Brittle

- Review your LOEs carefully
 - Carve-outs and other stipulations are binding
- Currently, no “revision” process for material changes to validated licenses
- If your transaction grows to exceed what is represented in the LOE, a new authorization is needed
 - Additional items, end-users or end-uses



Common Reviewing Agency Concerns

Target known agency concerns in your LOE

- Parties to the transaction:
 - What are their roles?
 - What do you know about the parties?
 - What is your source for information?
- End-use concerns:
 - Is there a balance between the product's capability and the proposed end-use?
 - Is there excess capability? Why?
 - What is the risk of diversion?
- Controls:
 - What controls are in place to prevent diversion?
 - Are the controls realistic?
 - Do the parties understand the controls?
 - Are the controls documented?
 - Who will conduct monitoring?



License Conditions

- The applicant will have the opportunity to review and accept, or request and justify changes to, the license conditions before the license is issued.
- In accordance with EAR § 750.7(a), the applicant must inform the other parties on the license, such as the ultimate consignees and end-users, of the license's scope and of the specific conditions applicable to them



Dual-Use Export Controls: A Summary

- What are you exporting?
 - Establish licensing jurisdiction
 - Determine the proper classification, down to the subparagraph
- Where are you exporting?
 - The Commerce Country Chart and the destination fixes licensing requirements
 - Check for License Exceptions: list driven and transaction driven
- Who will receive your item?
 - Consult prohibited/restricted end-user lists
- What will be the end-use of your item?
 - Review end-use controls
- BIS Licenses
 - Submit specific and detailed information in the application
 - Address agency concerns in the application
 - Understand, communicate and comply with conditions



How to Obtain More Information

BIS Website: www.bis.doc.gov

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Michael Rithmire

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