



# *Export Compliance for Freight Forwarders*

**International Freight Forwarders  
and Customs House Brokers Association of Atlanta**

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**Slide 1**

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**A&B2**

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# Seminar Overview

- Recent Developments
- Overview of EAR
- Overview of OFAC Regulations
- Overview of ITAR
- Overview of Census Regulations
- Approaches to Export Compliance for Freight Companies

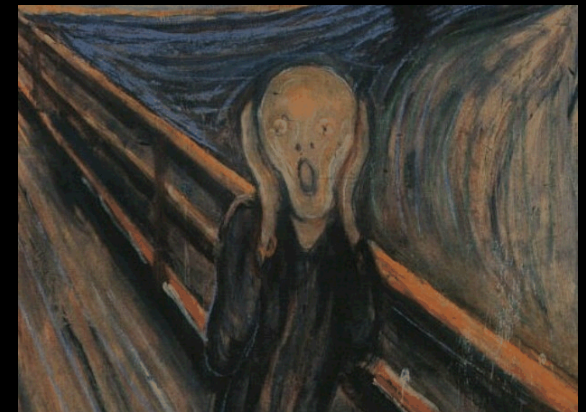
## Recent Developments: Higher Penalties

- Increased penalties for many export violations
  - Civil penalties *per violation* of up to \$250,000 or twice the amount of the transaction that is the basis of the violation, whichever is greater (raised May 22, 2006 from \$11,000 to \$50,000 and then again on October 16, 2007 to \$250,000)
  - ITAR civil penalties of \$500,000 per violation
  - Criminal fines up to \$1,000,000 per violation; imprisonment up to 20 years
  - Debarment



# Recent Developments: More Cases

- Increased enforcement of export violations
  - OEE, FBI and ICE all cooperate under Department of Justice's Export Enforcement Initiative
  - DOJ's newly established National Security Division is training more federal prosecutors across the country to handle export controls prosecutions
  - “Counter-Proliferation Task Forces” are being formed in all USAOs
  - More criminal prosecutions
  - More investigations and inquiries







## Recent Developments (Transportation Providers)

- Trend towards pursuing third parties, such as forwarders and transportation companies
- Agencies view these parties as a “last line of defense”
- Agencies see need to focus on forwarder compliance because exporters are “outsourcing” compliance to forwarders
- Forwarders and transportation companies targeted for enforcement and audits and compliance checks



## Transportation Provider Penalty Examples

- Eastways Shipping Corp.: \$70k civil penalty for making shipments of scrap metal to party on BIS Entity List
- Elite International Transportation: \$156k penalty for putting NLR on SED when materials being shipped required an export license
- DSV Samson Transport: \$649k in criminal *and* civil penalties for making shipments to party on BIS Entity List
- About 2/3rds of penalty cases against forwarders are related to exports to prohibited persons or places



## DHL Case

- August 2009-- DHL settles OFAC and BIS charges of aiding and abetting exports of goods to Syria, Sudan and Iran and failing to maintain records-- \$9.44M PENALTY AND 2+ YEAR AUDIT REQUIREMENT
- DHL failed to retain air waybills and other export documents-- wide range of shipment records must be retained for 5 years
- Records were missing for thousands of shipments
- Fewer than 100 shipments to/from Iran, Syria and Sudan were specifically charged



## Export Controls Overview

- Controls on “items” or “articles” – products, technology & software-- & defense services
- Controls on “end uses” – non-proliferation
- Controls on exports to embargoed countries
- Controls on exports to “end users”
- Prohibitions on facilitating, causing, inducing, permitting, and aiding and abetting violations of export laws
- Multiple agency regulations (and penalties)



# Overview of EAR



# Overview of EAR

- The EAR is administered by BIS
- The primary focus of export controls under the EAR is to control the export of “dual use” (*i.e.*, products capable of either military or non-military use)
- The EAR may allow, prohibit, or require licenses for, certain export transactions
- The term “dual use” is often misleading, as it encompasses products that have no appreciable military application
- Generally, any item that is not designed specifically for military use will be regulated by the EAR



# Scope of EAR

- EAR govern export *and* reexport of:
  - US origin items and items in US
  - Foreign manufactured goods containing US origin parts or materials in excess of *de minimis*
  - Foreign made direct products of US technology or software
  - The release of technology overseas or to foreign nationals in US (deemed export rule)

# Exports and Re-exports

- An export is from the United States to the *ultimate* destination
  - Beware of transshipments
- A re-export is the shipment or transmission of items from one foreign country to another foreign country
- Thus, items in some foreign export transactions are subject to the EAR



# EAR End Use Controls

- Prohibited end uses for exports include use in the design, development, production or use of:
  - Certain nuclear activities
  - Certain missiles, rockets and UAVs
  - Certain chemical and biological weapons
  - Maritime nuclear propulsion
- Only applicable to certain countries
- New rule restricts military end use in China



## EAR: End User Controls

- May not export goods to prohibited end users, including:
  - Denied persons
  - Persons on Entity List or other non-proliferation lists
  - Debarred persons
- Common enforcement area, especially for transportation providers

# EAR Item-based controls

- EAR – “Dual use” Items
  - Listed items – on Commerce Control List (CCL) (Supp. No. 1 to Part 774 of EARs)
  - Classification of goods and technology in Categories 0 through 9 (*e.g.*, Materials, chemicals, microorganisms and toxins (1), Electronics (3), Computers (4), Telecommunications and Information Security (5))
  - Unlisted items – EAR99
  - Multilateral Wassenaar Arrangement
  - Classification, country of destination, and applicability of license exceptions determine controls



# EAR- Routed Export Transactions

- Foreign PPI takes express written responsibility for export licensing requirements and assuring export authorization from USPPI
- Foreign PPI issues POA to US agent, *i.e.*, the foreign party's freight forwarder to handle export requirements
- In such cases, the freight forwarder is the “exporter” and is responsible for determining export licensing requirements
- Similar, but slightly different concept of routed transactions under Census regulations— EXERCISE EXTRA CAUTION WHEN SERVING AS AGENT TO FPPI.



# Red Flags

- De facto “Know Your Customer” rule for exports requiring attention to Red Flags (EAR Supplement No. 3 to Part 732)
- No Self-Blinding
- Routine installation, training or maintenance services are declined by the customer
- Delivery dates are vague, or deliveries are planned for out-of-the-way destinations
- A freight forwarding firm is listed as the product's final destination
- The shipping route is abnormal for the product and destination
- Packaging is inconsistent with the stated method of shipment or destination
- When questioned, the buyer is evasive or unclear about whether the purchased product is for domestic use, export or re-export





## Red Flags (Continued)

- The customer or purchasing agent is reluctant to offer information about the end-use of a product
- The product's capabilities do not fit the buyer's line of business
- The product ordered is incompatible with the technical level of the country to which the product is being shipped
- The customer has little or no business background
- The customer is willing to pay cash for a very expensive item when the terms of the sale call for financing
- The customer is unfamiliar with the product's performance characteristics but still wants the product
- Resolve Red Flags or do NOT ship

# EAR Recordkeeping

- The EAR requires the following records to be maintained for each export shipment by any person (including forwarder) when records are made or obtained by that person
  - Export control documents (*e.g.*, B/L's, air waybills, commercial invoices, packing lists)
  - Purchase Orders
  - Memoranda
  - Notes
  - Correspondence
  - Contracts
  - Invitations to bid
  - Books of accounts
  - Financial records
  - Restrictive trade practices or boycott documents and reports



## Example Prohibitions under EAR

- Engage in conduct prohibited by EAR
- Cause or aid, abet, counsel, command, induce, procure or permit the doing of any act prohibited by the EAR
- Remove, conceal, store, dispose of, transfer, transport, forward, or otherwise service, in whole or in part, any item exported or to be exported from the United States with knowledge that a violation of the EAR has occurred or will occur.
- Fail to comply with recordkeeping requirements.



# Overview of OFAC Regulations

# Overview of OFAC

- Two main statutory bases for US sanctions:
- Trading with the Enemy Act (1917)
- International Emergency Economic Powers Act (1977)
  - Older programs are under TWEA, all rest under IEEPA
  - Both have jurisdictional predicates of persons or property subject to US jurisdiction
  - TWEA-based programs define US person to include controlled foreign subsidiaries of US persons. IEEPA ones do not
- Multilateral sanctions
- Unilateral US sanctions



# Overview of OFAC Sanctions

- Each program is different
- Typically block assets and prohibit transactions
- Apply to all persons subject to the jurisdiction of the US, including, in some cases, foreign subsidiaries and affiliates of US companies
- US persons and covered companies prohibited from dealing directly or indirectly with targets
- Expansive concepts of prohibited “export of services” and “facilitation”
- Broad anti-evasion provisions

# Types of Restrictions

- OFAC administers and enforces economic and trade sanctions against specified:
  - Foreign governments (*e.g.*, Iran, Sudan, Cuba)
  - Individuals (*e.g.*, terrorists, narcotics traffickers)
  - Entities (*e.g.*, drug front companies, charities linked to terrorist groups)
  - Practices (*e.g.*, trade in non-certified rough diamonds)

# Scope of OFAC Restrictions

- Generally OFAC restrictions apply to activities of all US persons
- In most OFAC programs, “U.S. person” is broadly defined as:
  - Any U.S. citizen
  - Permanent resident alien
  - Entity organized under the laws of the United States (including foreign branches)
  - Any person in the United States
- Some regulations, including those that cover Cuba, extend further to include foreign entities that are owned or controlled by U.S. individuals or entities

# Current Sanctions

- 30 sanctions programs (country-based, list-based, counterterrorism, narcotics)
- Full-scope embargoes:
  - Cuba (31 CFR Part 515)
  - Iran (31 CFR Part 560)
  - Sudan (31 CFR Part 558)
- Recently lifted/modified full-scope embargoes:
  - Iraq (31 CFR Part 575)
  - Libya (31 CFR Part 550)
  - Palestinian Authority (July 17, 2006)
- Partial and/or list-based sanctions:
  - Burma (31 CFR Part 537)
  - Former Liberian Regime of Charles Taylor (31 CFR Part 593)
  - Syria (E.O. 13338 (May 11, 2004); 31 CFR Part 542)
  - Zimbabwe (31 CFR Part 541)
  - Belarus (E.O. 13405 (June 19, 2006)
  - Cote d'Ivoire (E.O. 13396) (February 8, 2006)
  - Hamas (31 CFR Part 595 designation on April 12, 2006)
  - Democratic Republic of Congo (E.O. 13413) (October 27, 2006)
  - Lebanon (E.O. 13441) (August 3, 2007)
- Residual sanctions:
  - Balkans (31 CFR Part 588)
  - North Korea (31 CFR Part 500)



## Sanctioned Entities and Individuals

- Four sets of anti-terrorism regulations:
  - Global Terrorism Sanctions Regulations (31 CFR Part 594)
  - Terrorism Sanctions Regulations (31 CFR Part 595)
  - Terrorism List Governments Sanctions Regulations (31 CFR Part 596)
  - Foreign Terrorist Organizations Sanctions Regulations (31 CFR Part 536)





## Sanctioned Entities and Individuals (cont'd)

- Narcotics Trafficking Sanctions Regulations (31 CFR Part 536)
- Foreign Narcotics Kingpin Sanctions Regulations (31 CFR Part 598)
- Weapons of Mass Destruction Trade Control Regulations (31 CFR Part 539)
- Highly Enriched Uranium Assets Control Regulations (31 CFR Part 540)
- Rough Diamond Trade Sanctions (31 CFR Part 592 Implementing the Clean Diamond Trade Act of July 29, 2003)

# Specially Designated Nationals (“SDN” List)

- The “Bad Guys” List-- Available at: [www.treas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf](http://www.treas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf)
- Example: **BIN LADEN, Osama (a.k.a. BIN LADEN, Usama; a.k.a. BIN LADIN, Osama; a.k.a. BIN LADIN, Osama bin Muhammad bin Awad; a.k.a. BIN LADIN, Usama; a.k.a. BIN LADIN, Usama bin Muhammad bin Awad); DOB 30 Jul 57; alt. DOB 1958; POB Jeddah, Saudi Arabia; alt. POB Yemen (individual) [SDT] [SDGT]**





# Examples of OFAC Prohibitions

- Prohibition on the “...the exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or *by a United States person, wherever located*, of any goods, technology, or services to Iran”
- Includes exportation and reexportation to a person in a third country undertaken with knowledge or “reason to know” the export is:
  - Intended specifically for supply, directly or indirectly, to Iran
  - Intended specifically for incorporation into goods to be supplied to Iran
- Prohibition on the facilitation by a US person, of the exportation or reexportation of goods, technology or services from Sudan to any destination or to Sudan from any location

# OFAC Compliance Audits

- OFAC has a freight forwarder audit program
- Companies selected based on “risk profile,” including areas of world served
- Focus on small forwarders
- Advance notice provided
- Typically half to full day exercise
- Look for Senior mgt and compliance personnel involvement in audit
- Look for written compliance program, designated compliance personnel, training, internal auditing, management support
- Examine screening measures in place





# OFAC Audits- Records



- Review documents to ensure retention
- Transportation Documents-
  - Bill of lading and documents reflecting all consignees, notify parties, forwarding agents, ports of loading and discharge and transshipment, destination, vessels and carriers
- Commercial Invoices reflecting sellers buyers, agents, manufacturers, Incoterms
- Certificates of Origin, transport details



# Overview of ITAR





# Scope of ITAR

- The ITAR is administered by DDTC
- Four categories of articles that require license or approval:
  - Defense articles on the USML
  - Activities of persons that qualify as “brokering” activities
  - Information that is considered “technical data.”
  - Services that are considered “defense services”
- Not just exports – companies must be registered with DDTC if they manufacture, broker or export defense articles or services

# What is a Defense Article?

- “Defense Article” is an article that is:
  - Specifically designed, developed, configured, adapted or modified for military application
  - Does not have predominant civil application
  - Does not have performance equivalent to items with civil application

OR

- Has “significant military or intelligence applicability” such that control under ITAR is necessary
- The intended end use of the item does not govern
- DDTC has significant discretion



## The USML

- A list of the articles, technical data and services covered by ITAR
- This list covers items that are specifically designed for military application, and lack a “predominant civil application”
- A license from DDTC is generally required to export, reexport or transfer defense articles or services covered by the USML



# What is Technical Data?

- ITAR controls “technical data”
- Technical Data is:
  - Information required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, manufacturing or modification of defense articles
    - Includes information in the form of blueprints, drawings, photographs, plans, instructions or other documentation.
  - Classified Information
  - Information covered by invention secrecy order
  - Software



# What are Defense Services?

- Furnishing assistance (including training) to foreign persons
  - Whether in the United States or abroad
  - Covers design, development, engineering, manufacture, production, assembly, testing, repair, modification, operation, demilitarization, destruction, processing, installation, integration, training, or use of defense articles
- Furnishing controlled technical data to foreign persons
- A defense service may be performed:
  - regardless of whether the underlying defense article is of U.S. or foreign origin,
  - even when no controlled “technical data” is involved

# Exports Under ITAR

- Sending or taking a defense item, including technical data, out of the United States in any manner
- Transferring registration, control or ownership to a foreign person of any aircraft, vessel, or satellite covered by the USML, whether in the United States or abroad
- Disclosing (*e.g.*, oral or visual) or transferring
  - in the US any defense item to an embassy, any agency or subdivision of a foreign government (*e.g.*, diplomatic missions)
  - technical data to a foreign person wherever located
  - A foreign person is an individual or entity who is not a U.S. citizen, permanent resident, or person granted refugee or asylum status
- Performing a defense service on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad



# ITAR and “Brokering”

- “Broker” under ITAR means any person who engages in “brokering activities”
- “Brokering activities” includes the financing, transportation, freight forwarding, or taking any other action that facilitates the manufacture, export or import of a defense article or defense service
- Brokers must register, *except* for persons exclusively in the business of financing, transporting, or freight forwarding . . . Air carriers and freight forwarders who merely transport or arrange transportation for USML items are not required to register - 22 CFR 129.3
- In fact, DDTC will not accept registration applications from forwarders

# ITAR and Freight Forwarders

- Licensees responsible for acts of agents to whom defense articles are entrusted, including for transportation
- Forwarders for licensed goods are identified and authorized in the license
- Licenses (with supporting documentation) for export of hardware must be deposited with CBP prior to export and prior to AES filing
- Must file export information via AES— 8 hours pre-departure for air and truck; 24 hours pre-departure for rail and sea





# Example Prohibitions of ITAR

- Under the ITAR it is Unlawful to:
  - Export (or import), attempt or conspire to export, or cause, or aid or abet or permit to be exported a defense article or technical data without first obtaining a license (unless exempt)
  - Use any export document containing a false statement or misrepresenting a material fact for the purpose of exporting any defense article or technical data or furnish any defense service
  - Participate in transaction in which debarred or ineligible person may have direct or indirect interest
  - Violate any of the terms and conditions of a license





# Overview of Census Foreign Trade Regulations





# Census Regulations Overview

- Mandatory AES and proof of filing annotation requirements
- Responsibility of Parties, including in routed transactions
- Correcting EEI, Penalties and Voluntary Disclosure



# Mandatory AES and Annotations

- Electronic Export Information (EEI) must be filed electronically via AES
- Filers must be certified to file by AES
- For most items the proof of filing citation or exemption legend must be noted on the first page of the B/L or AWB
- Agent (forwarder) or USPPI must provide this to carrier and carrier uses it to make same annotations to outbound manifest



## Responsibilities of Parties (Ordinary Export Transaction)

- Ordinary Export Transaction (Forwarder is AES Filer)
  - USPPI
    - Provide agent with POA,
    - Provide agent accurate and complete information on goods and export transaction
    - Retain records
  - Agent (*i.e.*, Forwarder)
    - File complete and accurate information
    - File timely
    - Respond to AES messages, *i.e.*, errors and alerts
    - Provide proof of filing citation or exemption legend to carrier
    - Promptly file corrections to EEI
    - Retain records



# Responsibilities of Parties (Routed Export Transaction)

- Routed Export Transactions
  - FPPI
    - Issue POA to US agent authorizing facilitation of export
  - USPPI
    - Provide name, address and EIN to agent
    - Provide description of goods, quantity, value and origin
    - Provide HTSUS or Schedule B numbers
    - Provide ECCN or sufficient technical detail to allow export classification
    - Licensing information (*but see* routed transactions under EAR)
  - Agent (*i.e.*, Forwarder)
    - Obtain POA from FPPI (and provide copy to USPPI upon request)
    - File timely
    - Respond to AES messages, *i.e.*, errors and alerts
    - Provide proof of filing citation or exemption legend to carrier
    - Promptly file corrections to EEI
    - Retain records





# Corrections, Penalties, Disclosures

- Civil penalties of \$10,000 per violation for violations of Census FTR, including failure to file, late filing, filing incorrect information, failure to make required annotations
- Automated nature of AES leading to increased enforcement of all export laws
- Census has adopted a voluntary self-disclosure provision in its regulations
- Disclosure strongly encouraged and is mitigating factor in penalty determinations
- Consider impact of mandatory correction of EEI requirements (15 CFR 30.9)



# Export Compliance Concepts for Transportation Providers

- General Approach
  - Senior Management Commitment
  - Formal written compliance policy and program
  - Organization and designation of responsible personnel
  - Training
  - Internal audits
  - Published method for employee reporting of violations
  - Strong Recordkeeping Program



# Export Compliance Concepts for Transportation Providers

- Screen all parties to transactions, including:
  - Sold-to
  - Ship-to
  - Distributor
  - Notify party
  - In-transit/intermediate consignee
  - End-user
  - Freight forwarder
  - Bank
  - Other?
- Screening can be manual, but automated solutions abound
- Develop “Know Your Customer” procedures, including attention to red flags



## Export Compliance Concepts for Transportation Providers

- Consider instituting special processes for shipments to certain destinations, *i.e.*, known transshipment hubs, such as Dubai, Malaysia, Singapore
- If part of a global network or global company, address compliance policies appropriately with foreign partners
- Develop strict policy about and carry out careful vetting before acting as agent in routed export transaction, especially under EAR
- Develop special security and handling procedures for specific customers, *i.e.*, ITAR customers
- Address compliance responsibilities in contracts and in writing



# Q & A

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