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## Analysis

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### Who is the Exporter?: Allocation Of Roles And Risk In Export Transactions

Export transactions can take many forms. In fulfilling international orders, U.S. companies are asked to accommodate an array of logistical scenarios, varying terms of sale and unique customer preferences about delivery of goods. These variables can quickly complicate the parties' compliance obligations under U.S. export control laws and regulations—under which penalties are severe and enforcement activity is rising. For example, U.S. companies often fail to identify and assign the correct export compliance responsibilities in transactions like these:

- A customer in Canada places an order for commodities and tells you to place them on a specific rail car leaving north from Baltimore, where you will lose sight of the goods.
- A cruise line places an order for beer and wine delivered to a domestic port; you have no further insight into where the merchandise will go after it is loaded on the ship.
- The U.S. Department of Defense places an order for replacement parts for armored vehicles; one shipment is for an armory in the U.S., the other is for a base in Germany.
- A customer in Japan orders electronic components from your Silicon Valley manufacturing plant, but asks you to deliver them to and invoice its U.S. subsidiary.

This article offers guidance for U.S. sellers on key compliance issues that can arise in export transactions like these, in which the identity and responsibilities of the “exporter” in the transaction may not be clear. Throughout, we identify steps U.S. sellers can take to understand and perhaps avoid the potential responsibilities and liabilities that arise from one's role as the exporter in an international transaction.

The focus of this article is exported goods, but exporters should also be aware of the complex U.S. rules that govern transfers of information to foreign persons and countries.

**The Regulations: An Exporter's Basic Responsibilities and Liabilities**—Being an exporter has certain responsibilities and liabilities under U.S. law. Even if merchandise sold for export is not particularly sensitive or subject to strict export controls, export regulations still impose many obligations on the exporter. To manage these responsibilities and perhaps avoid any liability, U.S. sellers must understand their role in the particular transaction, including knowing who is responsible for making the automated export system (AES) filing; who must determine commodity jurisdiction (which U.S. agency regulates the particular item) and classification (how does the agency with jurisdiction classify and control export of the item); who is responsible for obtaining export licenses, if required; and what records must be kept.

These obligations arise principally from regulations administered by four U.S. Government agencies: (1) the Bureau of the Census of the Department of Commerce, (2) the Bureau of Industry and Security (BIS), also of the Department of Commerce, (3) the Directorate of Defense Trade Controls (DDTC) of the Department of State and (4) Customs and Border Protection (CBP) of the Department of Homeland Security.

Each agency imposes specific obligations on U.S. exporters. See chart next page.

These regulatory responsibilities and potential liabilities are described later in more detail. First we will examine the question of *who is the exporter* in various export transactions.

**Determining Each Party's Role: the Terms of Sale**—The starting point in determining *who is the exporter* in an international transaction is to consider the terms of sale. Although the seller and buyer may create any terms of sale desired, most international transactions follow the Incoterms (shorthand for “international commercial terms”), which were created by the International Chamber of Commerce. The basic Incoterms (2000 ed.) are listed in the chart on page 3.

Under every Incoterm but ex works, unless modified by the parties, the seller must clear the goods for

Agency*	Obligation on Exporters	Potential Liabilities (for civil violations)
Census	<ul style="list-style-type: none"> <li>• The Foreign Trade Division of Census administers the Foreign Trade Regulations (FTR), 15 CFR pt. 30. The FTR is designed to compile official U.S. export statistics and support enforcement of export control laws.</li> <li>• The FTR requires exporters to report certain information about export transactions electronically over the AES. 30 CFR § 30.2 et seq.</li> <li>• Broad recordkeeping obligations. 15 CFR § 30.10.</li> </ul>	<ul style="list-style-type: none"> <li>• Up to \$10,000 per violation.</li> <li>• Penalties enforced by CBP.</li> </ul>
DDTC	<ul style="list-style-type: none"> <li>• DDTC administers the International Traffic in Arms Regulations (ITAR), 22 CFR pts. 120–130, which regulate the export of “defense articles” and “defense services” and related “technical data.” Defense articles and services are those “specifically designed, developed, configured, adapted, or modified for a military application.” 22 CFR § 120.3.</li> <li>• Manufacturers and exporters of defense articles must register with DDTC. 22 CFR § 122.1.</li> <li>• As a general matter, the ITAR requires exporters to obtain authorization (e.g. licenses) from DDTC for exports of defense articles. 22 CFR § 123.1.</li> <li>• Broad recordkeeping obligations. 22 CFR § 122.5.</li> </ul>	<ul style="list-style-type: none"> <li>• \$500,000 per civil violation.</li> </ul>
BIS	<ul style="list-style-type: none"> <li>• BIS administers the Export Administration Regulations (EAR), 15 CFR pts. 730–774, which regulate the export of “dual-use” items. As a practical matter anything that is not a “defense article” subject to the ITAR is a “dual-use” item subject to the EAR.</li> <li>• The EAR requires a license for certain transactions, depending on the commodity, the destination, the end user and the end use.</li> <li>• The EAR also requires filing of certain export-related information using the AES. 15 CFR § 758.2.</li> <li>• Broad recordkeeping obligations. 15 CFR § 762.</li> </ul>	<ul style="list-style-type: none"> <li>• \$250,000 per civil violation (or twice the value of the transaction).</li> </ul>
CBP	<ul style="list-style-type: none"> <li>• CBP is responsible for ensuring that all exports from the U.S. meet applicable U.S. laws and regulations, and thus enforces these export regulations at the border for the other Government agencies.</li> </ul>	<ul style="list-style-type: none"> <li>• Enforces the FTR penalty scheme for AES violations, up to \$10,000 per violation (delegated by the secretary of commerce to CBP).</li> <li>• For violations of the EAR and ITAR, CBP refers cases to BIS and DDTC as appropriate.</li> </ul>

\* There are additional country- and entity-specific export regulations and prohibitions administered by the Office of Foreign Assets Control (OFAC) of the Department of the Treasury, but the OFAC regulations are not within the scope of this article.

export. This means that the seller will be the “exporter” for purposes of compliance with U.S. export control laws in most transactions. In fact, even in an ex works transaction, U.S. law will consider the seller to be “exporter,” unless the exporter’s roles and responsibilities are clarified in writing. This is discussed in more detail later.

It is important to remember, however, that many transactions do not fit neatly into one Incoterm, and each of the Incoterms can be modified by the parties, e.g., specifying FCA with a U.S. port of shipment and making the buyer’s U.S. agent the exporter. It is therefore critical to understand *who is the exporter* under U.S. law.

**Determining Each Party’s Role: U.S. Export Control Laws and Regulations**—Although the terms of sale in the transaction are the beginning point in determining *who is the exporter*, U.S. exporters should always look beyond the Incoterms and determine their legal status in the transaction under applicable U.S. export control laws. Unfortunately, U.S. export control laws complicate the issue: Instead of using the terms “exporter,” “seller” and “buyer,” U.S. laws label the parties as the U.S. principal party in interest (USPPI) and the foreign principal party in interest (FPPI).

*USPPIs and FPPIs:* The USPPI and FPPI are “persons in a transaction that receive the primary benefit, monetary or otherwise, of the transaction. Generally, the

principals in a transaction are the seller and the buyer.” in the U.S. who receives the primary benefit from the  
 15 CFR §§ 30.1(c), 772. Thus, the USPPI is the person export transaction, and the FPPI is the foreign entity

Incoterm	Description	Export Compliance Responsibility*
Ex Works (EXW)	<ul style="list-style-type: none"> <li>The seller makes the goods available at his premises.</li> </ul>	<ul style="list-style-type: none"> <li>Buyer</li> </ul>
Free Carrier (FCA)	<ul style="list-style-type: none"> <li>The seller delivers the goods, cleared for export, to the carrier nominated by the buyer.</li> </ul>	<ul style="list-style-type: none"> <li>Seller, though this is easily modified to transfer exporter responsibility to the buyer</li> </ul>
Free Alongside Ship (FAS)	<ul style="list-style-type: none"> <li>The seller must place the goods, cleared for export, alongside the vessel at the named port of shipment.</li> <li>The buyer assumes all costs and risk thereafter.</li> <li>Maritime transport only.</li> </ul>	<ul style="list-style-type: none"> <li>Seller</li> </ul>
Free on Board (FOB)	<ul style="list-style-type: none"> <li>The seller must load the goods, cleared for export, on board the ship (past the ship's rail) at the named port of shipment.</li> <li>The buyer assumes all costs and risk thereafter.</li> <li>Maritime transport only (use FCA for land/air transport).</li> </ul>	<ul style="list-style-type: none"> <li>Seller</li> </ul>
Cost and Freight (CFR)	<ul style="list-style-type: none"> <li>The seller must load the goods, cleared for export, on board the ship (past the ship's rail) at the port of shipment.</li> <li>The seller pays the costs and freight necessary to bring the goods to the named port of destination, but the buyer assumes all risk after goods pass the rail.</li> <li>Maritime transport only (use CPT for land/air transport).</li> </ul>	<ul style="list-style-type: none"> <li>Seller</li> </ul>
Cost, Insurance and Freight (CIF)	<ul style="list-style-type: none"> <li>Same as CFR, but seller must secure marine insurance to cover buyer's risk.</li> </ul>	<ul style="list-style-type: none"> <li>Seller</li> </ul>
Carriage Paid To (CPT)	<ul style="list-style-type: none"> <li>The seller delivers the goods, cleared for export, to the first carrier and pays for carriage to the named point of destination.</li> <li>Buyer assumes risk when the goods are handed over to the first carrier.</li> </ul>	<ul style="list-style-type: none"> <li>Seller</li> </ul>
Carriage and Insurance Paid To (CIP)	<ul style="list-style-type: none"> <li>Same as CPT, but seller must secure transport insurance to cover buyer's risk.</li> </ul>	<ul style="list-style-type: none"> <li>Seller</li> </ul>
Delivered at Frontier (DAF)	<ul style="list-style-type: none"> <li>The seller delivers the goods, cleared for export, on the arriving means of transport at the buyer's disposal at the designated place at the border, but before the customs border of the destination.</li> <li>The buyer assumes all costs and risk thereafter.</li> </ul>	<ul style="list-style-type: none"> <li>Seller</li> </ul>
Delivered Ex Ship (DES)	<ul style="list-style-type: none"> <li>The seller delivers the goods, cleared for export, at the disposal of the buyer on board a ship at the named port of destination (but not cleared for import).</li> <li>The buyer assumes all costs and risk thereafter.</li> <li>The seller pays the same freight and insurance costs as he would under a CIF arrangement.</li> </ul>	<ul style="list-style-type: none"> <li>Seller</li> </ul>
Delivered Ex Quay (DEQ)	<ul style="list-style-type: none"> <li>Same as DES, but the passing of risk does not occur until the goods have been unloaded to the quay (the wharf) at the port of destination.</li> </ul>	<ul style="list-style-type: none"> <li>Seller</li> </ul>
Delivered Duty Unpaid (DDU)	<ul style="list-style-type: none"> <li>The seller delivers the goods, cleared for export, to the buyer at the named place of destination, not cleared for import and not unloaded.</li> <li>The buyer is responsible for the costs and risks for the unloading, duty and any subsequent delivery beyond the place of destination.</li> </ul>	<ul style="list-style-type: none"> <li>Seller</li> </ul>
Delivered Duty Paid (DDP)	<ul style="list-style-type: none"> <li>The seller delivers the goods, cleared for export and import, to the buyer at the named place of destination, not unloaded.</li> </ul>	<ul style="list-style-type: none"> <li>Seller</li> </ul>

\* The party identified is the one assigned export clearance responsibilities under the particular Incoterm. Incoterms of sale can be modified to transfer the export compliance responsibility to the buyer's U.S. agent.

buying the goods, or the party to whom final delivery or end-use of the goods will be made. 15 CFR § 30.1(c). The FPPI generally has few obligations under U.S. export control laws, though special cases are explored later. Other foreign parties might include foreign intermediate consignees, and such parties must be identified in export licenses and AES filings.

In most exports, “USPPI” and “exporter” are synonymous terms. This is because the EAR defines “exporter” as the “person in the United States who has the authority of a *principal party in interest* to determine and control the sending of items out of the United States.” 15 CFR § 772. Likewise, the FTR uses “exporter” and USPPI interchangeably. 15 CFR § 30.1(c) and Note to § 30.3. Thus, under both the EAR and the FTR, the “exporter” and USPPI typically are the same person: the U.S. seller. However, a U.S. agent of the FPPI may be the “exporter” under the EAR, and the applicant for an EAR license in certain “routed export” transactions, or ex works sales, as discussed below.

The ITAR does not define “exporter” or use the terms USPPI and FPPI. However, the ITAR imposes license requirements on “any person who intends to export ... a defense article.” 22 CFR § 123.1(a). Thus, in defense trade transactions, the “exporter” and USPPI is the U.S. party that takes or sends the defense articles out of the country, 22 CFR §120.17, which in most cases is the U.S. seller. However, in some transactions in which the buyer is in control of the outbound shipment, like ex works transactions, the exporter may be a different party, such as a broker of defense items or the foreign buyer’s U.S. subsidiary or procurement affiliate. At any rate, the “exporter” identified in a defense transaction—identified as the “applicant” in the export license issued by DDTC—is the same as the exporter and USPPI reported on the AES filing.

*Authorized U.S. Agents:* Both the USPPI and FPPI may have “authorized U.S. agents” involved in an export transaction. These agents, often freight forwarders or affiliated companies, must be physically located in or otherwise under the jurisdiction of the U.S., and must have a power of attorney or written authorization from a USPPI or FPPI to act on its behalf. In some cases, the authorized U.S. agent serves as the “exporter” (see below regarding “routed exports”), and authorized U.S. agents generally have responsibilities under U.S. export control laws whenever they act on behalf of a USPPI or FPPI. For example, an authorized U.S. agent can be liable for entering false information into the AES, even if it does so on behalf of the USPPI or FPPI. Exporters who use

authorized agents should periodically check AES filings, not only to confirm the accuracy of their agents’ export filings, but to identify any exports that should not have been made in their name. These freight forwarders should then be contacted so that future mistakes are avoided.

**The Exporter’s Five Main Responsibilities**—Being the USPPI and “exporter” has important consequences under U.S. export controls laws. Among other things, the exporter is generally responsible for the following five key elements of U.S. export control compliance.

1. *Filing the AES Record:* The obligation common to nearly all exports, i.e., exports of defense articles and dual-use or commercial items, is the AES filing. The AES is the automated system through which exporters or their agents, such as freight forwarders, file export data with CBP. CBP then shares the data with Census and other Government agencies. The data, known as electronic export information (EEI), includes descriptions of the U.S. parties, the commodity, the purchaser, the destination, export license data and information about the export route, e.g., ports of departure and destination. 15 CFR §§ 30.2, 30.6. Today, the EEI must be filed using the AES for all exports of physical goods, i.e., excluding intangible or electronic transfers, valued over \$2,500 when shipped from the U.S. and certain U.S. territories to foreign countries. 15 CFR §§ 30.1(a)(1) (FTR provision mandating AES filing), 758.1 (EAR provision); 22 CFR §§ 120.30, 123.22 (ITAR provisions); 72 Fed. Reg. 31548 (June 2, 2008) (mandating electronic filing of EEI over the AES, effective July 2, 2008). If the information about the transaction changes, e.g., the goods are sold en route to a different end-user or the customer changes the export destination, then these changes must be reported in the AES. 15 CFR §§ 30.3(d)(5), 30.9(a). In most transactions, the USPPI or its authorized agent is responsible for the AES filing, and thus the exporter carries the liability for mistakes. 15 CFR § 30.2(a)(1). The FTR also requires the exporter to maintain all records pertaining to exports, such as shipping documents, invoices, orders, packing lists and correspondence, for five years from the date of export, and CBP and other export regulators can demand such documents. 15 CFR § 30.10. As of July 2008, the FTR imposes civil penalties up to \$10,000 per violation for failing to file EEI or filing false or incomplete EEI data. 15 CFR § 30.71(b).

As noted, the exporter can use an authorized agent—typically a freight forwarder—to make the AES filing on its behalf. 15 CFR § 30.3. In this case, both the exporter and the authorized agent have compliance

responsibility under U.S. export control law. Exporters should therefore always use reputable freight forwarders. Moreover, contracts with authorized U.S. agents should require them to maintain proper export documentation and provide the documentation to the exporter on a routine basis, e.g., monthly, or upon request.

*2. Determining the Commodity Jurisdiction of the Exported Goods:* In addition to the AES, each export transaction also is governed by either the EAR, for “dual-use” or commercial goods, or the ITAR, for defense articles. In cases in which a particular shipment includes both defense articles and dual-use items, then the export must satisfy the requirements of both regulations. To properly complete an AES record, and to properly analyze licensure and other requirements for a given export, the exporter must know whether the item is “specially designed” for a military application and subject to the ITAR, or whether the item is “dual-use” and subject to the EAR. Making this determination is the exporter’s responsibility.

A commodity jurisdiction determination can often be performed by the exporter, particularly if the exporter is also the developer and manufacturer of the item. When the commodity jurisdiction issue is unclear, the exporter can (1) seek legal advice; (2) seek a ruling from the U.S. Government known as a “commodity jurisdiction determination,” 22 CFR § 120.4, either on its own or with assistance from counsel; or (3) seek guidance from the manufacturer, if someone other than the exporter. The exporter should not rely solely on the manufacturer’s guidance because if the manufacturer is wrong, the exporter is liable for making false statements on the AES and for any other violations of the FTR, EAR or ITAR that occur because of the mistake.

*3. Determining the Export Classification of the Exported Goods:* Under both the EAR and ITAR, whichever party is the exporter bears responsibility for classifying the exported items under the appropriate export control regime. The classification is noted on the AES filing, 15 CFR § 30.6, and thus also presents an opportunity to violate the AES if done incorrectly.

The ITAR includes a list of defense articles known as the U.S. Munitions List (USML), 22 CFR § 121, which sets forth 21 categories of defense articles subject to the ITAR. If the item is subject to the ITAR, it generally is subject to a DDTC license requirement, regardless of whether the item is a Category VII tank component or a Category VIII military aircraft component. (There are numerous license “exemptions” under the ITAR, but for purposes of this discussion we presume a license is required.) However, the proper category must be

reported on the AES filing. Some USML categories are considered “significant military equipment,” 22 CFR § 121.1(b), subject to even stricter licensing requirements. Thus, proper classification of defense items on the USML is extremely important to avoid penalties under the ITAR and FTR.

In contrast, most shipments subject to the EAR are eligible for export without a license. An item’s classification under the EAR—which includes a controlled-commodities list called the Commerce Control List (CCL), 15 CFR § 774—is thus critically important to determining whether a license from BIS is required. Like the USML category for defense exports, the proper classification of a dual-use item on the CCL must be noted on the AES filing citing the appropriate export control classification numbers (ECCNs). 15 CFR § 758.1(g). Noting the wrong ECCN on an AES filing is a violation of the FTR and EAR, but can also mean that an item that requires a BIS license was exported as “no license required.”

As with commodity jurisdiction, exporters faced with difficult commodity classification decisions can seek assistance from outside counsel and the Government. Indeed, both DDTC, 22 CFR § 120.4, and BIS, 15 CFR § 748.3(b), issue decisions on commodity classification.

*4. BIS or DDTC License Requirements:* The EAR and ITAR require the exporter to determine whether a license is required to make an export and, if so, to obtain the license. Export licenses may be required based on the item’s commodity jurisdiction, commodity classification, destination, the foreign customer or planned use. Preparation for both BIS and DDTC licenses can be daunting, and exporters are well-advised to have internal personnel highly trained on U.S. export control laws before they assume responsibility for licensing determinations and license preparation. In no circumstances should exporters and USPPIs rely on authorized agents to prepare and submit licenses. Licensing is too important and too risky to delegate to a third party, although many exporters and USPPIs work closely with outside expert counsel to prepare and submit BIS and DDTC licenses.

*5. Keeping Export Records:* U.S. law requires the exporter and the exporter’s authorized agents to keep extensive records about export transactions, including the export declaration, dock receipts or bills of lading, memoranda, notes, correspondence, contracts, invitations to bid, books of account, financial records, restrictive trade practice or boycott documents and reports, licenses, invoices, and other records pertaining to the transaction that are made or obtained by the exporter.

15 CFR §§ 30.10 (FTR recordkeeping provisions), 762 (EAR recordkeeping provision); 22 CFR § 122.5 (ITAR general recordkeeping provision; several other provisions mention additional recordkeeping obligations). The ITAR even requires exporters to document use of license exemptions, 22 CFR §§ 122.5 and 123.26, meaning that even non-licensed ITAR transactions require extensive documentation and recordkeeping.

Export-related records often come from the freight forwarder who created the records, handled the export logistics and made the AES filing. With an ex works sale, or any other sale using a freight forwarder chosen by the buyer, records typically are provided to the company paying the bill of the freight forwarder. It is therefore important that the exporter in the transaction make arrangements with the forwarder to ensure that copies of all appropriate documents are provided for the exporter's files. Recall that USPPIs have a legal right to see AES filing data if the filing is made by the FPPI's agent. 15 CFR § 30.3(e)(2).

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As noted earlier, the exporter's potential liabilities are significant. If the exporter breaches these obligations, including keeping records, in an export governed by the EAR, then BIS can impose civil penalties up to \$250,000 or twice the value of the exported item, whichever is greater. Violations of the ITAR carry even stiffer penalties, up to \$500,000 per civil violation. Criminal penalties under the EAR and ITAR apply if the violations are intentional, and carry even higher fines and potential jail time. To help avoid penalties, the next sections examine some specific types of export and highlight the parties' responsibilities in each one.

**Common Export Scenarios: Standard Exports and Routed Exports**—*Standard Exports*: In a standard export transaction, the U.S. seller is both the exporter and the USPPI, and controls the movement of the cargo. This party files EEI using the AES, or authorizes a U.S. agent to facilitate export of items out of the U.S., including filing EEI in the AES. The FPPI has no export control obligations in standard export transactions. Nearly all Incoterms terms of sale follow some variation of a standard export. The main exceptions are ex works transactions and modified FCA transactions in which the buyer is the exporter of record.

The responsibilities of the exporter or USPPI in a standard export can be summarized as follows:

- Appoints authorized U.S. agent to facilitate movement of cargo (note that the exporter's specific obligations regarding costs, freight, insurance, etc.

are governed by Incoterms, not U.S. law). To use an authorized U.S. agent, the USPPI must provide power of attorney or written authorization to the authorized U.S. agent.

- Makes commodity jurisdiction, classification and license determination.
- Files EEI using the AES, or uses authorized U.S. agent to file report.
- Maintains export records.

15 CFR § 30.3(c)(1).

The responsibilities of the authorized U.S. agent in a standard export can be summarized as follows:

- Obtains the power of attorney or other written authorization from the USPPI.
- Provides transportation data to USPPI and reports required EEI over the AES, if authorized by the USPPI.
- Maintains export records and provides the USPPI with a copy of EEI that was filed, if requested.

15 CFR § 30.3(c)(2).

*Routed Exports and Routed Export Letters*: A routed export typically involves a sale, usually ex works, to a buyer without a U.S. presence. In a routed export transaction, the foreign buyer, or FPPI in U.S. export control parlance, authorizes a U.S. forwarder or some other authorized U.S. agent to facilitate export of items from the U.S. This scenario arises if a foreign buyer specifies an ex works transaction or otherwise designates a specific freight forwarder to export the goods.

Many of the transactions described in the introduction are routed exports, and the routed export scenario arises for various reasons. Many times, routed exports occur because the foreign buyer is purchasing from numerous U.S. sources, and the goods are consolidated into one container for export. When this occurs, each U.S. seller of merchandise in the container might be named an exporter by the foreign buyer's freight forwarder. Alternatively, the foreign buyer's freight forwarder might pick one U.S. seller as the exporter of the entire shipment. Absent an agreement with and instructions to the freight forwarder, the seller is without any control over this situation. The bottom line is that the FPPI controls the movement of the cargo and its export, but the USPPI retains export compliance responsibilities. Routed exports therefore pose special risks for the USPPI.

To resolve this problem, a U.S. seller can either not sell ex works or have the foreign buyer or FPPI assume the export compliance responsibilities by authorizing in writing an agent in the U.S. to be the exporter. The

person so authorized is typically a U.S. freight forwarder. For this to occur, the FPPI must expressly assume responsibility, in a writing with the USPPPI, for determining license requirements and obtaining necessary export authorizations. 15 CFR § 758.3(b). This writing from the buyer to the seller is usually called a “routed export letter.” One critical part of a routed export letter is the identification of the FPPI’s authorized U.S. agent who is the “exporter” for export control purposes. Such a written undertaking from the FPPI is required, or the USPPPI remains the exporter, with all the associated compliance obligations. 15 CFR § 758.3(b).

There is one wrinkle to note: For purposes of completing the AES filing, the “exporter” noted in the EEI is the USPPPI even if a routed export letter exists. This declaration in the EEI is done essentially for statistical purposes, and this does not mean that the USPPPI is responsible for the AES filing or other compliance obligations. 15 CFR §§ 30.3 (Note to § 30.3), 758.3 (Note to paragraph (b)). If the USPPPI has the required writing, then it is not the “exporter” under the EAR and need not worry about commodity classification or licensing. With regard to recordkeeping, the seller’s usual records must be kept, including the routed export letter, but not the usual export control documents that the USPPPI otherwise must maintain when it is the “exporter” under the EAR.

Do routed exports work with defense article exports under the ITAR? Although the ITAR does not discuss routed exports, the AES provisions on routed exports apply equally to all exports of defense articles and dual-use items. That is, if a U.S. seller engages in a routed export of defense articles, the FPPI can designate a U.S. person to operate as the exporter and obtain the DDTC license. This only works if the designated U.S. agent is registered with DDTC as a manufacturer or exporter of defense articles, and many forwarders and defense brokers who routinely export defense items are registered with DDTC.

The responsibilities of the USPPPI in a routed export, if a routed export letter is executed, can be summarized as follows:

- Provides the FPPI’s authorized U.S. agent with specific information to be used to file the AES record, including name and address of the USPPPI, the USPPPI’s Internal Revenue Service employer identification number (EIN), Schedule B description of the commodities, Schedule B number, quantity, value, and, on request from the FPPI or its agent, the commodity classification category

or sufficient technical information to determine the classification, and any other information that the USPPPI knows will affect the determination of license authority.

- Keeps records of all information supplied to the FPPI or its U.S. agent.

15 CFR § 30.3(e)(1). The USPPPI is entitled to a copy of the required export information that was submitted to the FPPI’s authorized U.S. agent to file.

The responsibilities of the authorized U.S. agent in a routed export can be summarized as follows:

- Operates under a power of attorney or other written authorization from the FPPI.
- Compiles and reports required EEI over the AES.
- On request, provides the USPPPI with a copy of certain EEI that was filed via the AES, e.g., name and address of the USPPPI, USPPPI’s EIN, description of the commodities, origin, Schedule B or Harmonized Tariff Schedule classification, ECCN or USML classification, quantities and value, to enable the USPPPI to confirm that accurate EEI was filed.
- Maintains records.

15 CFR § 30.3(e)(2).

As noted, typically, the FPPI’s freight forwarder is designated the exporter. However, some freight forwarders are reluctant to take on this responsibility, particularly if the foreign buyer is not a usual customer of the freight forwarder. In other words, foreign customers who look for the best price from a freight forwarder may not have a freight forwarder that will take on this responsibility. In such cases, USPPPIs should insist on using their own forwarder using a term of sale other than ex works, such that they are also the exporter.

In sum, USPPPIs can reduce their risk in a routed export, but only if there is (1) a writing between the USPPPI and the FPPI, wherein the FPPI expressly assumes responsibility for determining license requirements and obtaining necessary export authorizations; and (2) a writing between the FPPI and a U.S. agent specifying that the U.S. agent of the FPPI is the exporter for U.S. export control purposes.

**Special Export Scenarios: Domestic Sales with Subsequent Exports, the Canada Exemption, and Shipments by or to the Government**—*Domestic Sales with Subsequent Exports*—*Domestic Sale Letters*: One scenario described in the introduction involves an order placed by a foreign customer who requests the U.S. seller to deliver the items to and invoice the customer’s U.S.

subsidiary. Similar scenarios arise if a U.S. transaction includes some hint of a subsequent export. For example, a buyer asks the U.S. seller to provide documents to facilitate a subsequent export, or requests a North American Free Trade Agreement certificate of origin. These scenarios raise the question for the U.S. seller: Is this an export, and what can I do to avoid being the exporter and USPPI?

In such cases, the U.S. seller has made a domestic sale and should not be the exporter or USPPI. In fact, the FTR provides that if “a U.S. manufacturer sells merchandise, as a domestic sale to a U.S. buyer (wholesaler/distributor) and that U.S. buyer sells the merchandise for export to a foreign principal party in interest, the U.S. buyer (wholesaler/distributor) must be listed as the U.S. principal party in interest on the ... AES record.” 15 CFR § 30.3(b)(2). However, there are many instances in which the U.S. seller is named the exporter by the buyer’s freight forwarder in these transactions, presumably because of confusion or poor communication. To avoid confusion by the freight forwarder in these transactions, the U.S. seller should never create and provide documents that are used only for export unless it understands why these documents were requested. Moreover, the U.S. seller can require the other U.S. party, e.g., the foreign buyer’s U.S. subsidiary or the U.S. buyer who intends to export the goods, to sign a statement that the U.S. buyer will be the exporter and USPPI. This “domestic sale letter” makes clear that the first transaction is a domestic sale, and that the U.S. buyer is the USPPI responsible for any export compliance responsibilities.

A similar situation arises if there is a domestic sale, but the seller is directed to deliver the goods to the U.S. buyer’s freight forwarder or to a U.S. port. Many times, the freight forwarder will list the wrong party—the original U.S. seller instead of the U.S. buyer—as the exporter. A domestic sale letter is useful in this situation as well. The letter will capture the U.S. buyer’s confirmation that the buyer understands it is the USPPI and exporter. This letter is then provided, along with the other documents, to the freight forwarder with the merchandise.

In sum, in scenarios in which (1) a buyer wishes the U.S. seller to deliver goods to the buyer’s own freight forwarder to export the goods, or the buyer asks the seller to provide documents to facilitate a subsequent export, *and* (2) the buyer or party receiving the invoice is a U.S. entity, e.g., the U.S. subsidiary or buying agent for the foreign customer, then the U.S. seller should require the other U.S. party to sign a domestic sale letter.

*The Exporter’s (Potentially Limited) Obligations for Exports to Canada:* U.S. export shipments are exempt from AES filing if Canada is the destination, unless the export contains items on the USML, requires a BIS license, is subject to the EAR and is ultimately destined for a third country, is subject to the ITAR but a license exemption applies, or is another specified nonexempt transaction. 15 CFR § 30.36.

For exports to Canada, the AES requirement is not necessary for statistical purposes because the U.S. and Canada share export and import statistics for trade flow between them. A memorandum of understanding (MOU) signed by CBP and statistical agencies in the U.S. and Canada enables the U.S. to substitute Canadian import statistics for U.S. export statistics. Similarly, in accordance with the MOU, Canada substitutes U.S. import statistics for Canadian exports to the U.S. This exchange of data eliminates the requirement for U.S. exporters to file any information with the U.S. Government for exports of non-licensed shipments to Canada.

This Canada AES exemption has positive implications for those engaged in routed exports to Canada. In fact, there is effectively no need for a routed export letter if the transaction is exempt from the AES filing requirement. For exempt transactions, any misinformation reported to Canadian customs will be an issue for the importer under Canadian customs law, but will not result in liability for the USPPI.

A good approach for export sales to Canada is as follows.

- If no export authorization is needed, then the USPPI can sell ex works or a delivered type based on the desires of the customer.
- If export authorization is needed, the USPPI has two basic options. Under the first option, the USPPI does not sell ex works. Instead, it obtains the export authorization and is the exporter and AES filer. Under the second option, the FPPI must designate a U.S. agent as the USPPI to do the AES filing—i.e., only a U.S. agent or carrier designated by the customer can serve as the FPPI’s authorized U.S. agent. In this instance, the USPPI is advised to obtain a routed export letter, and the U.S. carrier, forwarder or U.S. subsidiary of the foreign buyer makes the AES filing as the exporter. Note that a Canadian carrier cannot come to the U.S. and retrieve the goods and file the EEI using the AES because the AES filer must be a U.S. person.

*Shipments by and to the U.S. Government:* Another important subset of export transactions in which the exporter's identity and responsibilities are unclear are export shipments by or to the U.S. Government. Government shipments are generally not exempt from the FTR, EAR or ITAR, and thus it is important to remember that shipments to Government facilities or personnel in foreign countries are "exports," and there is an "exporter" who must comply with U.S. laws. However, U.S. export laws provide several exemptions for shipments involving the Government.

Under the FTR, the exporter or USPPI need not file an AES record if shipping the following to U.S. Government agencies and employees abroad for use by Government employees: office equipment; household goods and personal property; food, medicine and related items; and books, maps, charts, pamphlets and similar published materials. This exemption also includes shipments by the U.S. Government for use by *foreign* libraries, government establishments or similar institutions. 15 CFR § 30.40. For such shipments, the USPPI remains the exporter, but need not make an AES filing.

The FTR also carves out an exemption for exports, whether shipped commercially or through Government channels, consigned to the U.S. Armed Services for their exclusive use. 15 CFR § 30.39. However, exporters of defense articles should note that this exemption does not apply to USML articles. There are numerous exemptions in the ITAR that permit an exporter to ship defense articles to U.S. Government agencies abroad without a license, but these exemptions are complex, narrowly construed by DDTC and require

close analysis to ensure their applicability to a particular defense article export.

**Conclusions and General Thoughts on Best Practices**—U.S. exporters must navigate numerous, overlapping export control regimes, and each set of rules includes severe civil penalties that can make even inadvertent, unknowing violations extremely costly. Exporters must therefore understand their roles, responsibilities and liabilities inside and out. Basic knowledge of Incoterms and the relevant U.S. regulations can help U.S. sellers know when they are truly the "exporter," with all the attendant compliance burdens. If exporters can identify routed exports and domestic sales with subsequent exports, they can use routed export letters and domestic sale letters to reduce their compliance burden and risk. Exporters should also understand and use, if applicable, the various exemptions in the FTR, EAR and ITAR that help ease compliance burdens. For this reason, every company's export compliance program—and any U.S. exporter should have a well-written, well-implemented compliance program—should focus on early identification of the parties and their roles and responsibilities. This will help ensure that later compliance decisions are made with the appropriate input and allocation of risk.



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