

# Export Administration Regulations (EAR) and Legal Compliance

Exporting 101: Basic Exporting Seminar  
Amherst Chamber of Commerce  
U.S. Dept. of Commerce,  
Buffalo Export Assistance Center

Bryant & Stratton College  
Amherst, New York

September 11, 2007



# Disclaimer

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The information provided is believed to be accurate as of the date of the presentation, but is subject to change without notice.

This presentation is designed for informational purposes only and is not intended to be, nor should it be deemed, specific legal advice. If such advice is required, please consult with a *knowledgeable* attorney.

# Objectives

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- Familiarize or refresh exporting companies with international legal issues
- Encourage planning, compliance, and preventative strategies, including adopting or reviewing processes and procedures

**THINK PROACTIVELY**

- **STOP!** Deliberate before moving forward – seek help when needed

# Exporting: Privilege, Not Right



License may be needed

What?

Who?

Where?

What – will the end-use be?

**Exporting privileges can be taken away**

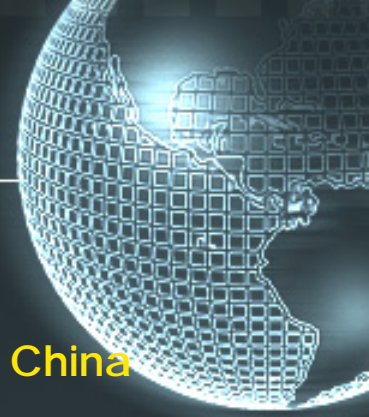
# Government Agencies

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- U.S. Bureau of Industry and Security (BIS)
- U.S. Census Bureau
- U.S. Customs and Border Protection (CBP)
- Office of Foreign Assets Control (OFAC)
- U.S. Immigration and Customs Enforcement (ICE)

# BIS Press Release



## Parker Hannifin Settles Charges Pertaining To Illegal Exports To Taiwan And China

“... Parker Hannifin Corporation of Cleveland, Ohio, has agreed to pay **\$185,000 in civil penalties** to settle charges pertaining to unlicensed exports of fluid control valves to Taiwan and China in violation of the [EAR].” BIS “charged that, between September 2000 and June 2002, Parker Hannifin committed 53 violations of the EAR,” including **17 violations by exporting check valves to Taiwan without the required licenses, 17 violations by transferring the check valves to Taiwan with knowledge that violations of the EAR were occurring, one violation by exporting manual stop cock valves to China without the required licenses, and 18 violations by making false statements on Shipper’s Export Declarations.**” The company voluntarily self-disclosed the violations. “VSDs are an important indicator of parties’ intent to bring themselves into compliance with the EAR, and may provide important BIS important information on illicit proliferation networks. A VSD is considered a ‘great weight’ mitigating factor in the settlement of BIS administrative cases.



# EXPORT COMPLIANCE: SOME BASICS

# Export Compliance

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- Part of Overall Compliance Program
- Upper Management “Buy-in”
- Risk Management Tool
- Cost Savings

# U.S. Export Controls



BIS implements and enforces

**Export Administration Regulations (EAR)** –  
15 CFR Parts 730- 774

Govern export and re-export of commercial goods, services, and technologies

“Dual-use” items – commercial and military purpose

Purely commercial items

# Export Administration Regulations



## Some General Prohibitions (Part 736):

Export an reexport of controlled U.S.-origin items to prohibited country without export license or license exception

Denial Order – August 23, 2007 BIS Press Release

Prohibited End Users or End Uses

Embargoed countries – who does U.S. have trouble with?  
Humanitarian aid requires license

Proceeding with transaction knowing it violates EAR, order, license or license exception



### What is an export?

actual shipment or transmission of items subject the EAR out the U.S.;

release or disclosure, including verbal and visual inspection of technology, software or technical information

# Export Administration Regulations - continued

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Export Control Classification Number (ECCN) – NOT same as Schedule B number

Need to determine if item has specific ECCN to determine if license is required or license exception applies

If not listed in Commerce Control List → EAR99

Usually low-tech, consumer items → generally license not required

**CAVEAT:** EAR99 item shipped to *Syria* may require license

# Commerce Control List (Part 774, Supp. No. 1)

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## 10 Categories

- 0 – Nuclear Materials, Facilities and Equipment and Miscellaneous
- 1 – Materials, Chemical, “Microorganisms,” and Toxins
- 2 – Materials Processing
- 3 – Electronics
- 4 – Computers
- 5 – Telecommunications and Information Security
- 6 – Lasers and Sensors
- 7 – Navigation and Avionics
- 8 – Marine
- 9 – Propulsion Systems, Space Vehicles and Related Equipment



## 5 Product Groups

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

# Commerce Control List (Part 774, Supp. No. 1) – Cont'd

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Scuba Gear to Canada

ECCN - 8A992.h

8 Marine  
A System, Equipment & Components

Reason for Control – AT (anti-terrorism)

Commerce Country Chart (Part 738, Supp. No. 1)

AT Column 1 – no “X”

**DON'T SKIM ECCNs!**

**Look for License Exceptions**

# U.S. Export Controls - continued

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**Entity List** – proliferators (EAR Part 774, Supplement 4) – license required for exports and reexports

Last updated – August 6, 2007

China, India, Iran, Israel, Pakistan, Russia, Syria, and UAE

[www.access.gpo.gov/bis/ear/pdf/744spir.pdf](http://www.access.gpo.gov/bis/ear/pdf/744spir.pdf)

# U.S. Export Controls - continued



**The Unverified List** – established June 2002

BIS could not complete a pre-license check or post-shipment verification – end-use and end-user concerns

This is a “red flag”

HK, Malaysia, Pakistan, Russia, Singapore, UAE, and Yemen

[www.bis.doc.gov/Enforcement/UnverifiedList/Unverified\\_parties.html](http://www.bis.doc.gov/Enforcement/UnverifiedList/Unverified_parties.html)

# Red Flags



## 13 Red Flag Indicators

[www.bis.doc.gov/Enforcement/redflags.htm](http://www.bis.doc.gov/Enforcement/redflags.htm)

Customer/address is similar to one on Denied Persons List

Reluctance to give information about end-use

Willingness to pay cash for expensive items

Shipping route is unusual for product and destination

# Office of Foreign Assets Control (OFAC)

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What does it do?

Administers and enforces sanction programs against foreign countries, terrorists, narco-traffickers, and WMD proliferators

Focuses on money – front companies, banks, drug traffickers

[www.treas.gov/offices/enforcement/ofac](http://www.treas.gov/offices/enforcement/ofac)



Maintains Specially Designated Nationals  
and Blocked Persons (SDN) List

**ABSOLUTE PROHIBITION** – CANNOT  
have any transactions with parties

[www.treas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf](http://www.treas.gov/offices/enforcement/ofac/sdn/t11sdn.pdf)

Last updated – August 30, 2007

Office of Foreign Assets Control (OFAC) - continued

## Country Sanctions Programs

Cuba, Iran, N. Korea, Sudan, Syria

Also: Balkans, Belarus, Burma (Myanmar), Cote d'Ivoire, Democratic Republic of the Congo, Iraq, Zimbabwe

[www.ustreas.gov/offices/enforcement/ofac/programs/index.shtml](http://www.ustreas.gov/offices/enforcement/ofac/programs/index.shtml)

**"Destinations of Diversion Concern:" UAE**



# Country Sanctions Programs – continued



## Iranian Transactions Regulations

Cannot export, reexport, sell, or supply, directly or indirectly, from the U.S. or by a U.S. person (wherever located) to Iran, including brokering services

“Brokering” includes sales of foreign goods or arranging third-country payment

Cannot ship with knowledge or reason to know items, technology or services are intended specifically for supply, transshipment or reexport to Iran

Exceptions: licensed by OFAC; *de minimis* content rule

More restrictive if relate to petroleum or petrochemical industries

# "Deemed Export" Rule



**Technology** or source code subject to the EAR is "deemed" to be exported when it is **released** to a **foreign national** **within** the U.S.

"**Technology**" is specific information needed to **develop, produce or use** a controlled product

[www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html#1](http://www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html#1)

## “Deemed Export” Rule - continued

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“**Release**” – technology is made available to a foreign national:

For **visual inspection** – reading technical specifications, blueprints, drawings, plans;

**Oral exchange**; or

By **practice or application** under guidance of those with knowledge

## “Deemed Export” Rule - continued

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“foreign national” – a person other than a U.S. citizen, U.S. permanent resident (“green card” holder) or “protected individual” (e.g., political refugee or asylee)

H-1B workers - largest group potentially needing deemed export license

Solution: apply for adjustment of status to legal permanent residency (LPR)

# “Deemed Export” Rule - continued

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Applies to ITAR controlled items too

ITAR – International Traffic in Arms Regulations  
(22 CFR 120)

Directorate of Defense Trade Controls, Department of State  
(DDTC) – regulates military items on U.S. Munitions List (USML)  
and **defense services**

**Defense services** include assistance with manufacture, design,  
engineering, testing, repair, and maintenance

Similar regulations, different terminology, e.g.,  
“foreign person” v. “foreign national;” “disclosure” v. “release”

# Anti-Boycott Regulations (15 CFR 760 *et seq.*)

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Cannot support boycott of Israel

Must report requests

**Caveat: Not limited to Middle East**

China, India, Indonesia, Malaysia, Taiwan

Office of Antiboycott Compliance

[www.bis.doc.gov/antiboycottcompliance/Default.htm](http://www.bis.doc.gov/antiboycottcompliance/Default.htm)

# Anti-Boycott Regulations – (continued)

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Applies to U.S. individuals and companies located in U.S. and foreign affiliates

Must report receipt of boycott requests quarterly on form BIS 621-P

[www.bis.doc.gov/antiboycottcompliance/DOC/BIS-621P.pdf](http://www.bis.doc.gov/antiboycottcompliance/DOC/BIS-621P.pdf)

# Anti-Boycott Regulations – (continued)

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## Examples:

**Goods of Israeli origin not acceptable.  
(PO from Bahrain)**

**Does your company have a plant in Israel; has it sold to Israel;  
does it own shares in an Israeli firm; has it provided services to an  
Israeli firm; granted IP rights to an Israeli firm?  
(POA from Lebanese company)**

[www.bis.doc.gov/antiboycottcompliance/oacantiboycottrequestexamples.html](http://www.bis.doc.gov/antiboycottcompliance/oacantiboycottrequestexamples.html)

# Foreign Corrupt Practices Act (FCPA)



Criminal statute - Anti-bribery and Record-keeping provisions (15 U.S.C. §§78dd-1, *et seq.*)

In general applies to:

publicly-traded (domestic and foreign) and private parties; companies and individuals including foreign nationals in the U.S. and U.S. persons abroad and U.S. and foreign agents

Need written compliance policy, training, include confirmation by foreign agents, etc.

## Foreign Corrupt Practices Act - continued

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Very generally, prohibits parties from:

making or offering to make corrupt payments of value (money, gifts, etc.) to foreign officials or political parties for the purpose of obtaining or retaining business –  
*corrupt intent*

Q: What about officials of state-owned companies?

Can form basis for civil RICO case

# Foreign Corrupt Practices Act - continued

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Main Exception –

“Facilitating Payment” aka “grease” payment

Payment made to facilitate or expedite “routine government action” - utility service; load/unload cargo; inspections

DOJ FCPA Guide

[www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm](http://www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm)

# Export Sanctions

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Civil and criminal penalties can be imposed for violations

USA PATRIOT ACT Improvement and Reauthorization Act of 2005 – March 2006

Increased civil penalties from \$11,000 to \$50,000 *per violation*

# Export Sanctions – (continued)

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Proposed legislation (“Export Enforcement Act of 2007”)

Would increase maximum civil penalties to \$500,000 per violation

# Export Sanctions – (continued)



## Administrative Sanctions (15 CFR 764.6)

### Denial Order –

Company X, its successors, assigns, representatives, agents, officers or employees (“Denied Persons”) may not participate, directly or indirectly, in any way in any transaction involving the export or reexport of commodities, software or technology subject to EAR  
for 25 years

# Export Sanctions – (continued)



## Includes:

applying for, obtaining or using any license, License Exception or export control document

negotiating, ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving exports subject to the EAR

benefiting in any way from any transaction ...

# Voluntary Self-Disclosure (VSD)



Strongly encouraged by BIS

Mitigating factor; not “free pass”

Could result in 40 – 60% penalty reduction

# Voluntary Self-Disclosure – (cont'd)

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## Specific requirements

Voluntary – received before investigation or inquiry begun

Mitigating factor – one factor; discretionary

Can be outweighed by aggravating factors

# Voluntary Self-Disclosure – (cont'd)

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Timely – “as soon as possible”

Completeness – must fully investigate suspected transactions for 5 year period

Risk: not given VSD treatment for violations not disclosed

# Voluntary Self-Disclosure – (cont'd)

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## Narrative –

Types of violations

Explain how and why occurred

Identify parties involved

Claimed mitigating factors

Supporting documents

Certification of company official



# How to Comply?

# Export Management Systems (EMS)

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“The requirements described in the [EAR] may seem overwhelming without a system to capture analysis, decisions, accountability and implementing procedures. An EMS takes individual decisions and pieces of information and builds them into an organized, integrated system.”

[www.bis.doc.gov/ComplianceAndEnforcement/ExportManagementSystems.htm](http://www.bis.doc.gov/ComplianceAndEnforcement/ExportManagementSystems.htm)



## Administrative Elements

Element 1: Management Policy

Element 2: Responsible Officials

Element 3: Recordkeeping

Element 4: Training

Element 5: Internal Reviews

Order Processing System Element



## Screening Elements

Element 1: Denied Persons

Element 2: Product Classification/  
License Determination

Element 3: Diversion Risk

Element 4: Sensitive Nuclear End-  
Uses/End-Users

# Export Management Systems (EMS) – cont'd

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Element 5: Missile End-Uses/End-Users

Element 6: Chemical and Biological  
Weapons End-Uses/End-Users

Element 7: Antiboycott

Element 8: Informed Letter/Entity List

**Sample Module:**

[www.bis.doc.gov/exportmanagementsystems/pdf/EMSModuleV2.pdf](http://www.bis.doc.gov/exportmanagementsystems/pdf/EMSModuleV2.pdf)

# Conclusions

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Exporting is vital to successful business

Must know applicable regulations

Compliance = risk management

Assistance is available from many sources



# Contact

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