

# U.S. Export Controls in a Changing World



World Trade Center  
Buffalo Niagara  
3<sup>rd</sup> Annual Summer Member Party

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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 qualified legal counsel.

# Objectives



- Introduce or review an overview of export controls basics for companies exporting U.S.-origin commodities, software or technology
- Encourage planning, compliance, and preventative strategies, including adopting or reviewing processes and procedures  
**THINK PROACTIVELY**
- STOP! Deliberate before moving forward – seek help when needed

# Government Agencies



- 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)
- Directorate of Defense Trade Controls (DDTC)

# BIS Press Release



## **Parker Hannifin Corp. Settles Charges of Illegal Exports To Taiwan And China**

The U.S. Department of Commerce today announced that Parker Hannifin 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 Export Administration Regulations (EAR). BIS charged that from 2000-02, company committed 53 violations:

- 17 violations by exporting check valves to Taiwan without the required licenses**
- 17 violations by transferring valves with knowledge violations were occurring**
- 1 violation by exporting stop cock valves to China without required license**
- 18 violations by making false statements on Shipper's Export Declarations**

Parker Hannifin voluntarily self-disclosed the violations, and cooperated fully in the investigation.

Source: BIS Press Release, November 17, 2005

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# Commercial Break

Automated Export System (AES) –  
mandatory electronic filing

Effective – July 2

Enforced – October 2

SED → Electronic Export Information



# Commercial Break

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## Automated Export System Seminar

August 20, 2008

8:30 a.m.-12:00 p.m.

WTCBN, Speed Global Services, and  
U.S. Department of Commerce, Buffalo  
Export Assistance Center

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# Export Compliance

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

# Export Administration Regulations



## 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 Compliance (cont'd)

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Basic Questions:

**What** is to be exported?

**Where** is its destination?

**Who** is the end-user?

**What** is the end-use?

# U.S. Export Controls

BIS implements and enforces

## Export Administration Regulations (EAR)

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

“Dual-use” items – commercial and military purpose

Purely commercial items



# U.S. Export Controls (cont'd)



## Some General Prohibitions

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

Denial Order

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

# Export Decision-Making




## 1. Determine Agency Jurisdiction

Defense articles – State Dept. (DDTC)

Not sure?

Commodity Jurisdiction request (CJ)

# Export Decision-Making (cont'd)



2. If software or technology –  
is it publicly available?  
If “yes” – not subject to EAR
3. **Canadian Interest:** Re-exporting  
U.S.-origin items?
4. Special steps for foreign-made items and  
those of mixed components, technology

# Export Administration Regulations - continued



## Export Control Classification Number (ECCN) –

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

## Commerce Control List – provides ECCN

Index: <http://www.access.gpo.gov/bis/ear/pdf/indexccl.pdf>

If not listed in → EAR99

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

**CAVEAT: EAR99 item may require license**

# Commerce Control List

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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

# Commerce Control List (Cont'd)

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## 5 Product Groups

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

# U.S. Export Controls - continued

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Where is the export destined?

Country Control Chart – is license required for destination because of specific control?

“X” → look for license exceptions

No “x” → no license unless shipping to end-user or for end-use requiring license

# Reasons for Control

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AT – Anti-terrorism

CB – Chemical and Biological Weapons

CC – Crime Control

MT – Missile Technology

NS – National Security

NP – Nuclear Nonproliferation

UN – United Nations Embargo

# U.S. Export Controls - continued



**Entity List** – proliferators

License required for exports and *re-exports*

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

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Specially Designated Nationals and Blocked Persons (SDN) List – assets are blocked

OFAC – terrorist and narco-traffickers

Constantly updated – July 31

License possibly be granted if coming off list

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

# U.S. Export Controls - continued



## The Unverified List

BIS could not complete end-use or end-user check

This is a “red flag” - **Duty** to inquire

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)

# U.S. Export Controls - continued

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## Denied Persons List

[www.bis.doc.gov/dpl/thedeniallist.asp](http://www.bis.doc.gov/dpl/thedeniallist.asp)

**CANNOT** deal with those on list

Export privileges have been denied

# 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)

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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/program](http://www.ustreas.gov/offices/enforcement/ofac/program)

**Destination of Diversion Concern: UAE**

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# 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



June 2008

Final rule to increase civil penalties

Maximum penalty

greater of \$250,000 or twice amount of transaction

# “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



“**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



Export license required if:

Not EAR99;

License exception is not available;

U.S. party intends to transfer controlled technology in the U.S.; and

Transfer of technology to foreign national's home country would require export license – Pakistani national with legal permanent residency status in Canada

# Deemed Export Violation



May 2008 BIS Order

CA firm settled deemed export charge -  
\$31,500

Max. penalty of \$250,000/violation

export of technology for production of  
aircraft parts to Iranian national **employee**

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# Anti-Boycott Regulations



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)



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

Must report receipt of boycott requests quarterly - 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)



## 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)**

# 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



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

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# 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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Export Enforcement Act of 2007 –  
October 2007

Increased maximum civil penalties to  
\$500,000 *per violation*

# Export Sanctions – (continued)



## Administrative Sanctions

### 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 all agencies

Mitigating factor; not “free pass”

Could result in penalty reduction

# Voluntary Self-Disclosure – (cont'd)



## 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)



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)



## Narrative –

Types of violations

Explain how and why occurred

Identify parties involved

Claimed mitigating factors

Supporting documents

Certification of company official

# Successor Liability for Export Violations

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Due diligence is needed

Successor liability imposed

asset or stock purchase

regardless of indemnity provisions

# Successor Liability for Export Violations (cont'd)

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## Some due diligence items

- compliance program
- export documents
- personnel
- deemed exports

# Successor Liability for Export Violations (cont'd)

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## Discovery of violations

voluntary-self-disclosure

negotiate price, indemnity, other terms

short honeymoon

walk-away



# It's all about compliance

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# Export Management Systems (EMS)



“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)

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# Benefits of Compliance



“Effective compliance” = “great weight” mitigation

Burden on company to show effective compliance program:

- risk analysis performed
- written compliance program
- senior management
- training
- screening of parties/transactions
- process to report violations

# Contact

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