

Export Controls & Enforcement -- Legal Traps and Tips

April 17, 2007

Organized by: Maryland/Washington, DC District Export Council, Inc.
Baltimore U.S. Export Assistance Center (USEAC)

Co-sponsors: Maryland Port Administration
Maryland Department of Business & Economic Development

Lindsay B. Meyer, Esq.

Venable LLP

Tel. 202-344-4829

LBMeyer@Venable.com

2 VALUE ADDED, VALUES DRIVEN™

Road Map -- Overview of Requirements

- What are the Restrictions?
 - State Department, ITAR USML for Defense
 - Commerce - BIS CCL for "Dual Use"
 - Other Export Requirements and Restrictions
 - OFAC Trade Policy Embargoes
 - Restricted Persons and All Those Lists!
- Implications for Business: Knowledge is Key
- Traps and Practical Tips

VENABLE LLP

QUESTIONS ?

Please reach me as follows:

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829

Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com

Web: www.venable.com

THE ROAD MAP

General Focus of the Presentation

While many readers will now be aware of their general obligations under the export controls regimes governing their export shipments, many will not yet have had the pleasure of dealing "first-hand" with a full export control investigation, or indeed, the "aftermath" of such an investigation.

Persons likely to possess "first-hand" knowledge of export reporting and control requirements are persons in the logistics or traffic department, responsible for classifying and coordinating a company's shipments. However, the reach of the export control regimes of most industrialized countries goes well beyond simple controls on the shipment of goods. They usually extend to the transfer of related software and technology, technical data, and certain know-how or technical assistance and training. In the most extreme of cases, someone else's rules can even extend to meetings with foreign nationals within your own country's borders.

There is no two ways about it: today's businesses, and those within them responsible for compliance, need to be aware of export reporting and control requirements.

It is often incorrectly assumed that U.S. export reporting and control requirements are only the worry of the exporter of goods. Far from it.

The U.S. export control legislation and its interpretation have continued to evolve over the years, with the defense articles and services covered by the ITAR and the U.S. Munitions List and the "dual use" items, software and technology governed by the Bureau of Industry and Security's Commerce Control List. While similar in design, these control regimes often differ in practice along with slightly different enforcement practices. Moreover, the U.S. Government views its export controls as governing the conduct of foreign-based companies, when certain U.S. origin items and technology is involved. Thus the U.S. federal government has pursued claims against non-U.S. individuals and companies where it perceives its rules to have been contravened.

The results for multi-nationals can be traumatic, and can include civil and criminal fines and penalties, and the loss of exporting privileges.

Accordingly, today's businesses need to ensure that their export procedures are in compliance at each turn. This often requires consulting someone with this specialized knowledge, or developing that knowledge in-house. Who will be the person to guide your business through these laws and regulations ?

U.S. reporting and export controls and, more importantly, the full reach of these controls, will be the general topic of discussion in today's Presentation, and in the Materials below.

The Presentation will focus on first providing a brief overview of the basic export control requirements for U.S. exported goods, including common errors and pitfalls, using examples, and then proceed to a discussion of the strategies and overall approach to be taken to ensure compliance with export requirements, in advance of an investigation.

Navigating Through the Materials

The materials contain a fairly comprehensive review of the U.S. export control regime, and are designed to allow readers not completely familiar with these systems to more fully understand the export control systems in place in the United States.

The audience is encouraged to participate !

So feel free to ask questions at any time.

3 VALUE ADDED, VALUES DRIVEN™

Export Control Basics

- Who, What, When, Where?
- Selling Your Company's Product Overseas
 - Defense Item?
 - "Dual Use"?
 - "EAR 99" -- No License Required
 - License Required by State or BIS for the Export
 - Don't Know? Then, Request a CJ
- Tip: It Always Takes Longer Than you Think!

VENABLE LLP

QUESTIONS ?

Please reach me as follows:

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829

Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com

Web: www.venable.com

NOTES

Introduction Trade with the U.S. has actually reached new levels of scrutiny, between our trading partners. For example, in December 2002, the U.S. Bureau of Industry and Security reiterated the need to take cooperative steps among countries to address concerns about the security of international trade flows, especially among those countries where trans-shipment concerns are great. (*See* Remarks of BIS Deputy Under Secretary at Regional Forum on Transshipment Controls, Dec. 12, 2002, www.bis.gov/pressreleases). The U.S. sees a significant vulnerability that certain sensitive items could be circumvented resulting in those items going to end-users or end-uses of concern, including terrorists or countries that support them.

Enforcement of export controls is live and well in the U.S. and is seeking to expand its reach beyond its borders. Accordingly, it will pay well for all U.S. importers and exporters to understand the additional nuances of the U.S. export control regime as they may unwittingly apply to your activities.

Overview of the U.S. Export Control Rules

How the Rules Developed. The restriction of a country's trade has been a policy tool throughout history. Historically, restrictions were placed during times of conflict or when relations between particular countries became strained. However, following World War II, the United States implemented legislation to protect the country's economy for everything from post-war scarcity to protecting national security exports of military significance.

What followed was the development by the NATO allied countries and their Coordinating Committee ("CoCom") designed to prevent diversion to the East and to counter any Soviet military threat. This resulted in the 1949 Export Control Act (Act of Feb. 26, 1949, ch. 11, 63 Stat. 7). Over the years, the CoCom participating governments changed the export control cooperation to meet the changing needs from restriction of trading with China and North Korea through the use of a 1917 Trading with the Enemy Act ("TWEA") and later the 1977 International Emergency Economic Powers Act ("IEEPA"),

4 VALUE ADDED, VALUES DRIVEN™

More Export Control Basics

- So What is “Subject to the EAR”?
- U.S. Origin Items (wherever located)
- Items In the U.S. (regardless of origin)
- Items in Transit through the U.S.
- Items in FTZs (although not US Customs territory)
- Some Foreign-Owned/Made Items
 - When Made with U.S. Content or Technology
- Tip: Understand Your Business Process!

VENABLE LLP

QUESTIONS ?

Please reach me as follows:

LINDSAY B. MEYER

Venable LLP

Telephone: (202) 344 - 4829

Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com

Web: www.venable.com

which authorized broad trade and financial restrictions, and export embargoes. In the 1980s, a new threat emerged requiring export control cooperation to thwart the proliferation of nuclear, chemical and biological weapons and missile delivery systems.

In the 1990s, the export control regime further changed. First, the CoCom severely reduced the restrictions on trade with the former Soviet Warsaw pact countries. Second, in 1994, CoCom was terminated and was replaced by the establishment in 1996 of the “Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies” (“Wassenaar Arrangement”). All such regimes are informal and consensus-based controls requiring coordination and consultation. They are not treaty based and do not constitute an “organization” *per se*. With this historical backdrop were developed the U.S. export control laws and regulations restricting trade with U.S.

Be Wary of Controls on Re-exports and Items with U.S. Content. When importing products from the U.S., a foreign company or person may seek to ensure that there are no export control restrictions placed on the use or resale of the imported item or, if so, ensure that they fully understand the scope of the restrictions. Therefore, this section will provide an overview of the U.S. export control regime to allow you to assess whether it will impact your business activities.

The Governmental Entities that Control U.S. Exports

We will start with an overview of the various U.S. Departments that regulate export controls. As the bulk of items (including commodities, software and technology) exported from the United States are within the control of the U.S. Department of Commerce, the majority of the discussion which follows will be dedicated to those regulatory provisions.

U.S. Dept. of Commerce, Bureau of Industry and Security. The U.S. Department of Commerce under its Export Administration Regulations (“EAR”) regulate a broad range of controls, predominantly those that apply to items that are “dual use.” 15 C.F.R. § 730-774. The primary focus of export controls under the EAR has been to prevent the diversion of “dual use” exports; that is, exports of items capable of either military or non-military use from the United States that could adversely affect the security or foreign policy interests of the U.S.

The EAR provides differing regulatory provisions for “national security” controls and for “foreign policy” controls.

The rules controlling items for national security reasons were developed and later amended to decontrol those items that are broadly available and to concentrate on controlling access to relatively high-technology or to materials and equipment in which the particular country is deficient. Conversely, there is no list of items controlled for foreign policy reasons. In addition to such unilateral controls, the U.S. multilateral export control regimes serve as the basis for controlling the proliferation of weapons of mass destruction under, for example, the Wassenaar Arrangement. As the majority of goods offered for sale are potentially subject to the controls of the U.S. Department of Commerce, these controls will be the focus here with a brief introduction to the controls by other U.S. agencies.

U.S. Department of State, Office of Defense Trade Controls. The U.S. Department of State controls exports of defense articles and defense services under the authority of the Arms Export Control Act (22 U.S.C. §§ 2778-2994) through its Office of Defense Trade Controls (“ODTC”). Items, services and technologies are regulated if they are positively identified on the U.S. Munitions List, which is part of the International Traffic in Arms Regulations, commonly referred to as the “ITAR”.

Defense Articles, Services and Technical Data Controlled. The U.S. Munitions List (“USML”) primarily includes items designed for military purposes; namely, defense articles. Persons or entities in the U.S. who are in the business of exporting or manufacturing defense articles or services must register with ODTC as such services are also controlled. “Defense services” are defined as furnishing assistance or training of non-U.S. persons (either in the U.S. or abroad), in the design, engineering, manufacture, production, assembly or testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles.

Also, related technical data -- that is information required for the development, production, operation or maintenance of defense articles (such as blueprints, drawings, photos, or instructions) -- are also controlled by the U.S. State Department.

VALUE ADDED, VALUES DRIVEN™

Even More Export Control Basics

- Not Just Items, But Software and Technology too
- Who, What, When, Where Also Applies
- Electronic Transmission and/or Access
- Distributors, Suppliers and Others Overseas
 - Yes, Canada and Mexico are "Overseas"
- Products Made from Software & Technology
 - >25% and > 10% de minimis levels US content
 - and Controlled ECCN & Destination
- Tip: Keep Current as Business Processes Change!

VENABLE LLP

QUESTIONS ?

Please reach me as follows:

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829

Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com

Web: www.venable.com

While exports are generally controlled worldwide, exports to Canada are broadly exempted. That means, licenses are typically not required before a shipment may be sent to Canada. As will be discussed in greater detail below, that does not mean, however, that you should not concern yourself with U.S. export control matters as there may easily be instances where the controls may nevertheless apply to your actions. This can occur when, for example, the items are re-exported to a third country or when the product directly manufactured from a U.S. import contains more than *de minimis* levels of U.S.-origin content.

Single vs. Multiple Export Licenses. While case-by-case licensing is the general rule, multiple exports may be made under an approved manufacturing license agreement ("MLA") or a technical assistance agreement ("TAA"). The USML is much briefer than the corresponding CCL of Commerce. As a practical matter, State Department retains greater discretion in its jurisdiction of controls.

Which Agency Controls? File a CJ Request. The State Department will examine certain factors to determine if a factual or logical basis for its jurisdiction exists. These factors include:

- Number, variety, and predominance of civil applications
- Nature, function, and capability of civil applications
- Nature, function, and capability of military applications
- The Performance Equivalent of the item, and
- Whether the "Form, Fit and Function" are for civil applications.

If you don't know which agency controls the export, you can submit a Commodity Jurisdiction ("CJ") request with the State Department. The CJ will then identify the proper agency with which export control jurisdiction lies.

U.S. Dept of Treasury, Office of Foreign Assets Control

The U.S. Department of Treasury imposes further controls on certain export and export-related activities. Its regulations are issued by the Office of Foreign Assets Control ("OFAC") and include broad trade embargoes issued under the TWEA, currently against Cuba and North Korea, and more recent controls under IEEPA have

imposed embargoes against Libya, Iran, Sudan and formerly, Iraq. All OFAC regulations deal, either directly with an export from the U.S. or indirectly, by example, on some control transactions abroad by U.S. persons, without regard to the origin of the items. The regulations include some additional economic measures, such as restricting imports or financial transactions or freezing assets. The implementing regulations define the term "U.S. person" to include overseas branches, but with the exception of the Cuban regulations, do not include foreign incorporated firms controlled by U.S. persons. There is, however, no clear delineation between transactions controlled by OFAC rules and those subject to the licensing requirements of other U.S. agencies. There are instances where more than one U.S. agencies' regulations may apply.

IMPORTANT NOTE: Exports to Embargoed Countries

Note that exports to U.S. embargoed countries may lead to fines, penalties and even the denial of export privileges.

OFAC imposed a 20-year denial of export privileges against a Canadian company and its president from its purchases of certain U.S. items and resales to Iran, in violation of OFAC laws and without a BIS license. See BIS Press Release Oct. 9, 2003 regarding OTS Refining Equipment Corporation of Markham, Ontario and Abdulmir Mahdi, President.

In addition, the Treasury Department maintains a list of "Specially Designated Nationals" with whom U.S. persons are prohibited from dealing. Thus, a U.S. person (or entity) can make no exports to or financial dealings with them without being severely penalized. Examples include entities and persons associated with Libya, Cuba, No. Korea, Iran or Sudan and their governments; as well as certain identified narcotics traffickers and international terrorists. It is important to note that dealings with the embargoed countries are *per se* violations.

IMPORTANT NOTE: Freight Forwarder Paid Civil Penalties

Companies must also take care in instructing its freight forwarder not to deal with any Denied Parties.

BIS imposed civil penalties a freight forwarding company when it exported certain air conditioning units to a company whose export privileges had been denied. See BIS Press Release Sept. 3, 2003 regarding Expeditors International of Washington, Inc.

6 VALUE ADDED, VALUES DRIVEN™

Those Pesky Re-Exports

- Shipment of Item Subject to EAR after Export to a Third Country
- Also, Further Release of Software/Technology
- New Destination & End-User for Who, What, When, Where Analysis
- Be Careful not to Violate a License Restriction
- No "Exception" for Foreign Affiliates
 - Re-exports and Technology Transfers
- Tip: Watch out for U.S. Long Arm & Heavy Hand!

VENABLE LLP

QUESTIONS ?

Please reach me as follows:

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829

Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com

Web: www.venable.com

Other U.S. Agency Controls

Finally, there are also nuclear controls which are governed by the Nuclear Regulatory Commission, for exports of nuclear reactor vessels and those commodities which are specially designed or such reactors. (10 C.F.R. § 110). Other nuclear items including technical data related directly or indirectly to the production of special nuclear materials are regulated by the U.S. Department of Energy (10 C.F.R. § 810). The U.S. Department of Commerce controls exports of all other commodities and technical data related to nuclear power plants, dual use nuclear commodities, and otherwise uncontrolled commodities, if they are for use in sensitive nuclear activity. (15 C.F.R. §§ 742.3, 744.2, and 744.5.)

Also Watch out for the "FCPA" and Antiboycott Regulations.

Other controls that may come into play in any given transaction include the U.S. Foreign Corrupt Practices Act ("FCPA") and the U.S. Antiboycott regulations.

FCPA. The FCPA has two parts: one dealing with anti-bribery provisions (enforced by the U.S. Department of Justice) and the second part dealing with accounting and recordkeeping provisions (enforced by the U.S. Securities and Exchange Commission on U.S. public companies).

The anti-bribery provisions prohibit corruptly giving money or things of value to foreign officials, an official, a candidate of a foreign political party or office or to a foreign political party for the purpose of influencing an act or decision inducing them to do or omit to do an act in violation of his duty or inducing them to use influence to affect an act or decision to direct or retain business.

The FCPA allows for payments for certain "routine government action", but that term is very strictly interpreted, thereby allowing only processing of governmental papers, obtaining permits, and the like. Violations of FCPA may result in up to U.S. \$2 million for firms and up to U.S.\$100,000 in criminal and U.S.\$10,000 in civil fines for individuals. They may also result in debarment and the imposition of other penalties (such as racketeering charges).

Antiboycott. The U.S. Antiboycott regulations prohibit a U.S. person from participating in or cooperating with a foreign boycott that is not sanctioned by the U.S. government. A boycott request must be reported to the government even if you refuse to participate and, more importantly, the failure to report, itself, can result in fines. A boycott "request" is a communication, either oral or written, from a boycotting or non-boycotting country entity to take any action to further or support a restrictive trade practice or boycott against a country that is friendly to the United States. A recent BIS report noted that "U.S. companies continue to report receiving requests to engage in activities that further or support the boycott of Israel." To date, over U.S.\$26 million in civil penalties have been imposed on U.S. persons for such violations.

Against this backdrop, we will focus on the Department of Commerce controls, regulated by the former Bureau of Export Administration ("BXA"), now the Bureau of Industry and Commerce ("BIS"). BIS controls exports from the United States of a wide range of products, materials, technology and software.

The affirmative controls system is set forth in the Export Administration Regulations. 15 C.F.R. §§ 730-774, 61 Fed. Reg. 12, 714 (Mar. 25, 1996). After the 1994 expiration of the Export Administration Act of 1979 ("EAA"), no new export act has been enacted by Congress. Therefore, the export regulations have been maintained by Presidential order under the IEEPA (50 U.S.C. §§ 1701-1706; Exec. Order No. 12, 294 (Aug. 19, 1994), continued in effect by Presidential Notice of August 7, 2003 (68 Fed. Reg. 47,831 (Aug. 11, 2003)).

Exports & Re-exports of "Dual-Use" Items by BIS.

If you seek to export from the U.S. goods, software, technology with commercial and military or proliferation applications, such items are likely controlled through the EAR. Also, if you are outside the United States and seek to export or re-export an item that is of U.S. origin or that has a certain U.S. connection, your product may require a license from BIS.

7 VALUE ADDED, VALUES DRIVEN™

What is a “Deemed Export”?

- U.S. Laws Also Control Activities
- “Deemed Export” on U.S. soil:
 - Release of U.S. Technology or Software
 - To Non-U.S. Person
 - Deemed an Export to Their Home Country
- BIS Proposed Rule and Working Group
 - Expanded “Use” Definition
 - Birthplace of Foreign National?
- Tip: Talk to HR and Watch for Updates!

VENABLE LLP

QUESTIONS ?

Please reach me as follows:

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829

Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com

Web: www.venable.com

What is “Subject to the EAR?” How do you determine whether your item is subject to the EAR? The EAR regulates both items and activities “subject to the EAR.” 15 C.F.R. § 734.2. Namely, “items” subject to the EAR includes all items *in* the U.S. regardless of origin, including items in-transit and in foreign trade zones. It also includes all “U.S.-origin” items wherever located. In addition, the involvement of U.S.-origin content or technology can make some foreign-owned items subject to the EAR.

Do you have any “Deemed Exports”? In addition to the “items” subject to the EAR, certain *activities*, which are not ordinarily regarded as an export or re-export, are also subject to the EAR. For example, a “release” of technology or software to a non-U.S. national even if occurs in the United States can constitute a “deemed” export to the home country of that recipient. Also, a “deemed re-export” can occur if it occurs outside of the U.S.

Deemed exports are the latest focus of enforcement in the U.S. On March 28, 2005, BIS issued its Advance Notice of Proposed Rulemaking, 70 Fed. Reg. 15607, seeking changes to the requirements that would call for the institution of a compliance program to monitor and inspect those being licensed to ensure that they are complying with any conditions imposed by the license. This move, which has raised concern among the exporting community, was the result of a Commerce Inspector General’s report in March 2004, which criticized the agencies policies.

NOTE: Proposed Changes May affect your Business

Areas under review within the proposal include: (1) Revising the definition of “use” to include “operating, installing, maintaining or repairing controlled equipment in the U.S.” is subject to the deemed export requirements; (2) Basing deemed export requirements on the birthplace of a foreign national and not their citizenship or permanent residence status; and (3) Reevaluating the policy that permits issuance of deemed export licenses to nationals of Iran and Iraq. For example, if you employ an Iranian national, who permanently resides in Canada, under the proposed rule, that person would be treated as if they still lived in Iran, rather being treated as a “Canadian”.

What Information is Needed to Determine if you Need a License? Who, What, When, Where? In order to determine if you need a license for your U.S.-origin product you need to know the following:

A “release” can occur through oral or other communication and through visual inspection of equipment or facilities. Further, with regard to proliferation controls, uncontrolled activities of U.S. persons may be within the reach of these regulations if they are performed with knowledge that the destination or use is of proliferation concern. This may even involve foreign-origin items, to which the EAR does not typically apply. See 15 C.F.R. §§ 744.2 – 744.4, and 744.6(a)(1). For your convenience, a “Decision Tree” on this inquiry is provided in the Appendix B.

Watch out for a “Re-export”. A “re-export” is the shipment or transmission of an item subject to the EAR from one country outside the U.S. to another non-U.S. country. A re-export may also occur when there is a “release” of technology or software (*i.e.*, source code) subject to the EAR from one non-U.S. national to another non-U.S. national. While many items subject to the EAR do not require a license to re-export an item from one country to another, many items are controlled and will either require a license or qualify for a License Exception.

1. **WHO? The End-Use or End-User of the Item.** Even if you determine a license is not required based any list-based requirement, a license may nevertheless be required because of the end-use or end-user. There are particular restrictions that apply to persons or entities identified in the EAR as well as to persons whom you know or have reason to know are involved in weapons proliferation activities.
2. **WHAT? The Export Control Classification Number (“ECCN”).** The ECCN specifies the reasons for control for particular items, software and technology for reasons such as national security and antiterrorism and will specify the applicable countries to which the controls apply.
3. **WHEN? The Timing of the Export.** It is prospective and is there sufficient time before it will be shipped to obtain a license, if necessary?
4. **WHERE? The Ultimate Destination of the Item.** For each export, you need to determine if the *ultimate* destination is a country that is controlled. See 15 C.F.R. Part 738 to determine if a “X” is listed on the country chart, then the transaction is free of any list-based export license requirement.

8 VALUE ADDED, VALUES DRIVEN™

Enforcement and Self-Disclosure

- Criminal and Civil Penalties Possible
- Detention and Seizure of Goods
- The "Privilege" of Exporting
- Possibility of Debarment
- Enforcement Mechanisms:
 - Charging Letters (Proposed and Actual)
 - Aggravating & Mitigating Factors
 - Self-Disclosure – When and How?
- Tip: Serious Implications Require Expert Assistance

VENABLE LLP

QUESTIONS ?

Please reach me as follows:

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829

Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com

Web: www.venable.com

Getting to Know the Ten Categories of the CCL.

The Commerce Control List includes items (including commodities, software and technology) subject to the authority of BIS. (The CCL does not include those items that are exclusively controlled for export by another U.S. department or agency, but those are noted in the CCL.) Additionally, those items that are "subject to the EAR" but not affirmatively identified on the CCL are "EAR 99".

You should familiarize yourself with the ten categories of the CCL to determine where your products, software and/or technology may be identified. The categories are, as follows:

Category 0 – Nuclear Materials, Facilities, and Equipment

Category 1 – Materials, Chemicals, Microorganisms, and Toxins

Category 2 – Materials Processing

Category 3 – Electronics

Category 4 – Computers

Category 5 – Telecommunications and Information Security

Category 6 – Sensors and Lasers

Category 7 – Navigation and Avionics

Category 8 – Marine

Category 9 – Propulsion Systems, Space Vehicles & Related Equipment

Each category follows the same general format.

Section A covers the "Systems, Equipment and Components"

Section B covers "Test, Inspection and Production Equipment" related to the category,

Section C covers Materials associated with the category,

Section D covers "Software" for the category and

Section E covers the related "Technology" for the category.

For the category, the sections are further broken down to identify the items and their respective License Requirements, applicable License Exceptions, and List of Items Controlled. *Note:* Supplement No. 1 to part 774 provides a helpful alphabetical index which includes a listing of most of the controlled items.

What are the various Controls that may apply?

The export controls may attach to particular products, software or technology. The controls may also target certain persons, which are considered "end-user" based controls. The controls may be limited to certain countries (embargoed countries).

Additionally, the controls may be based upon particular policy reasons. The policy-based controls are largely set out under the "Reasons for Control" that you might find on the CCL. They include controls for the following:

Anti-Terrorism (AT);	Computers (XP)
Crime Control (CC);	Encryption Items (EI);
Firearms Convention (FC);	Regional Stability (RS);
Missile Technology (MT);	Short Supply (SS);
National Security (NS);	Significant Items (SI).
Nuclear Non-Proliferation (NP);	
Chemical and Biological Weapons (CB);	
Chemical Weapons Convention (CW);	

Does your Item or Activity Require a License under a General Prohibition?

If you determine that your export, re-export or activity is subject to the EAR, then you need to assess whether one of the ten General Prohibitions applies. These prohibitions dictate that you may not engage in the export, re-export or activity, unless you have a license from BIS or qualify for a License Exception (*see* part 740 of the EAR).

The obligations under the General Prohibitions depend largely upon five types of information (again, the who, what, when, where data):

1. **Classification of the Item.** The classification of the item on the CCL (*see* part 774 of the EAR).
2. **Destination.** The country of ultimate destination for an export or re-export (*see* parts 738 and 774 of the EAR concerning the Country Chart and the CCL);
3. **End-User.** The ultimate end-user (*see* General Prohibition Four and parts 744 and 764 for a list of persons with whom you may not deal;
4. **End-Use.** The ultimate end-use (*see* General Prohibition Five and part 744 for general end-use restrictions);
5. **Conduct.** Conduct such as contracting, financing, freight forwarding in support of a proliferation project (*see* part 744 of the EAR).



QUESTIONS ?

Please reach me as follows:

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829

Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com

Web: www.venable.com

Once you have this information available, you can assess whether one of the ten General Prohibitions apply.

If General Prohibitions 1, 2 or 3 apply, then the item is classified under an ECCN. If General Prohibitions 1, 2 or 3 do not apply, then it is deemed "EAR 99".

Next, you must determine if any of General Prohibitions 4-10 apply. They are, as follows:

General Prohibition One – Exports and Re-exports. Prohibits the export and re-export of controlled items to listed countries. A license or License Exception is required when your item is listed as controlled under the ECCN and Country Chart list.

General Prohibition Two – Parts and Components. Prohibits the re-export and export from abroad of foreign-made items incorporating more than a *de minimis* amount of controlled U.S. content. For this prohibition to apply, there must be more than minimal U.S.-origin "controlled" content in a "controlled" foreign-made item, with "controlled" as to the CCL/Country Chart for the ultimate destination. You may not, without a license or License Exception, export, re-export, or export from abroad any foreign-made commodity, software, or technology incorporating U.S.-origin commodities, software, or technology which is controlled to the country of ultimate destination. The *de minimis* threshold is up to 25% of the value of the finished foreign product in most instances. For designated terrorist supporting countries, the U.S. controlled content may not be more than 10% of the value of the finished product.

"U.S. controlled content" is content that would require a U.S. license if it were to be re-exported as separate parts or components to the country of ultimate destination.

General Prohibition Three – Foreign-Produced Direct Product Re-exports. Prohibits the export, re-export, or export abroad to Cuba, Libya, or a destination in Country Group D:1 for National Security control reasons (*see* Supp. No. 1 to part 740) for items that are the direct product of controlled U.S. software or technology.

General Prohibition Four – Denial Orders. Prohibits engaging in actions prohibited by a denial order. These orders may prohibit many actions in addition to direct exports by the person denied export privileges, including transfers within a country, either in the U.S. or abroad, by others. These Denial Orders are published in the Federal Register and a list is maintained on BIS' website. There are no License Exceptions which supercede this prohibition.

General Prohibition Five – End-Use, End-User. Prohibits knowingly exporting or re-exporting any item subject to the EAR to an end-user or end-use that is prohibited by part 744 of the EAR. These include, for example, restrictions on certain nuclear, missile, chemical or biological weapons end-uses, on certain activities of U.S. persons, for the use of certain foreign vessels and aircraft, and to all countries for Libyan aircraft, on technical assistance by U.S. persons for certain encryption items. It further places restrictions on certain entities in Russia, on exports and re-exports to "specially designated terrorists", foreign terrorist organizations, and to persons named in General Orders.

General Prohibition Six – Embargo. Prohibits exports and re-exports to embargoed destinations. Countries currently under U.S. embargo include: Cuba, Iran, Libya, Rwanda and special sanctions administered by OFAC have been placed on Angola. (*See* part 746 of the EAR.) Iraq was recently removed from the list of U.S.-embargoed countries.

IMPORTANT NOTE: The Prohibition as to Cuba may be particularly difficult for a Canadian entity. The U.S. requires a license or License Exception, however, there is a general policy of denial except for certain medicines and medical devices, telecommunications commodities, non-strategic foreign-made products that contain an insubstantial proportion of U.S.-origin materials, parts or components, or exports intended to provide support to the Cuban people. These restrictions are at odds with the policy and laws in Canada, such as the Blocking Statute.

General Prohibition Seven – U.S. Person Proliferation Activity. Prohibits the support of proliferation activities, including the financing, contracting, servicing, supporting, transporting, freight forwarding, or employment activities.

General Prohibition Eight – In-transit. Prohibits in-transit shipments and items to be unladen from vessels or aircraft. You may not export or re-export an item through or transit through certain countries without a license or the application of a License Exception. The prohibited countries include: Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Cambodia, Cuba, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Laos, Latvia, Lithuania, Mongolia, North Korea, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, and Vietnam.

General Prohibition Nine – Orders, Terms and Conditions. Prohibits the violation of any order, terms, or conditions of a license or License Exception issued or made under the EAR. There are no License Exceptions to this Prohibition. Supplement Nos. 1 and 2 to part 736 of the EAR provide for certain General Orders and Administrative Orders.

General Prohibition Ten – Knowledge Violation to Occur. Prohibits proceeding with transactions with "knowledge" that a violation has occurred or is about to occur. You may not sell, transfer, export, re-export, finance, order, buy, remove, conceal, store, use, loan, dispose of, transfer, transport, forward, or otherwise service, in whole or in part, any item subject to the EAR and exported or re-exported with knowledge that a violation has occurred or is about to occur. There are no License Exceptions that apply to this Prohibition.



QUESTIONS ?

Please reach me as follows:

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829

Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com

Web: www.venable.com

IMPORTANT NOTE: Commerce recently issued a Proposed Rule which seeks to revise the definition of "knowledge". See 69 Fed. Reg. 60829 (Oct. 13, 2004). The changes sought would incorporate a "reasonable person" standard and replace the phrase "high probability" with a "more likely than not" standard. It would also add "inter alia" (i.e. among other things) to the description of inferred facts and circumstances in keeping with the notion of "conscious disregard of facts known." These proposed modifications make it more likely that "knowledge" of a violation can be inferred, thereby increasing potential exposure to exporters and re-exporters of U.S. items.

Once you have determined that your item is EAR 99 or your item is classified under an ECCN on the CCL (as covered by General Prohibitions 1-3), then you need to determine if any of General Prohibitions 4-10 apply. If yes, then a License Application must be submitted. If not, and if the item is "EAR 99", then the item can ship "No License Required" or "NLR". If, however, the item is classified under an ECCN and there is an "X" in the CCL and Country Chart, then you next review if a License Exception applies.

Is there a License Exception that Applies? If the CCL and country chart indicate that a license is required, it is next important to determine if there is a License Exception that may apply to make the transaction "license free." That is, a License Exception will allow for an export without the need to make application to BIS. (This term replaced the term "General License" which led to confusion to many who inquired as to where they were to apply for the general license.)

IMPORTANT NOTE: Before determining whether a License Exception applies, the exporter must first confirm that the transaction is, in fact, subject to the EAR and that the country chart for the particular entry and destination has an "X" under one or more of the "Reason for Control".

The circumstances covered by different License Exceptions vary widely. For example, is the shipment low value? Is it going to an agency of the U.S. or a cooperating government? Is the item in -transit through the United States? Then, a particular exception may apply. There are over twelve License Exceptions, so an exporter is advised to familiarize itself with the complete range by reviewing Part 740 of the EAR.

The availability of a License Exception may depend upon the destination of the export or re-export. The scope of the availability is determined by referencing the "Country Groups" in Supplement No. 1 to Part 740 of the EAR. The countries range from Group A (more than 30 countries that cooperate with the U.S. by means of a multilateral regime) to Group E (embargoed countries, such as Cuba). A country may be in more than one group, due to the differing criteria for a particular License Exception.

The ability to apply one of these License Exceptions depends largely upon *what* is to be exported. A "License Exception" is an authorization that allows an export or re-export of an item that would otherwise require a license based upon certain General Prohibitions. By using a License Exception, you are certifying that the terms, provisions and conditions for the Exception have been met. (See part 758 of the EAR for clearance of shipments and documenting the use of License Exceptions.) Exporters are required to maintain records of its transactions involving exports under any of the License Exceptions for a period of five years (see EAR, part 762).

License Exceptions. There are three letter symbols for each License Exception, which are used for export clearance and are recorded on the Shipper's Export Declaration ("SED") along with the appropriate ECCN for the shipment. The License Exceptions are, briefly, as follows:

LVS - Limited Value Shipments (part 740.3) Legitimate orders must not exceed the applicable dollar value limits and may not be split.

GBS - Shipments to Group B Countries (part 740.4) If controlled for National Security reasons only of Country Group B.

CIV - Civil End-Users (part 740.5) If controlled for National Security reasons only of Country Group D:1, except North Korea)

TSR - Technology and Software Under Restriction (part 740.6) Allows exports of technology and software controlled for National Security reasons provided it is destined to Country Group B.

CTP - Computers (part 740.7) Allows exports and re-exports of certain computers, electronic assemblies and components that meet particular thresholds and are destined to particular eligible countries.

KMI - Key Management Infrastructure (part 740.8) Authorizes the export and re-export of certain encryption software and equipment.



QUESTIONS ?

Please reach me as follows:

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829

Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com

Web: www.venable.com

TMP – Temporary Imports, Exports, and Re-exports (part 740.9) Permits various temporary exports and re-exports as well as the return of items temporarily in the U.S. and beta test software.

RPL – Servicing and Replacement of Parts and Equipment (part 740.10) Allows for exports or re-exports associated with one-for-one replacement parts or servicing and the replacement of equipment.

GOV- Governments, International Organizations, and International Inspections under the Chemical Weapons Convention (part 740.11) Allows for exports and re-exports for international safeguards, U.S. government agencies or personnel, and agencies of certain cooperating governments and inspection programs.

GFT – Gift Parcels and Humanitarian Donations (part 740.12). Permits donation by and to certain limited persons and entities for immediate use and not for resale.

TSU – Technology and Software Unrestricted (part 740.13) Authorizes operation and sales technology and software, software "updates" and "mass market" software and encryption source code that is considered publicly available.

BAG – Baggage (part 740.14) Authorizes persons leaving the U.S. either temporarily or permanently, to take to any destination certain authorized classes of commodities and software.

AVS – Aircraft and Vessels (part 740.15) Allows for the departure from the U.S. of foreign registry aircraft and U.S. civil aircraft and their parts and components.

APR – Additional Permissive Re-exports (part 740.16) Permits re-exports from particular Country Groups and to and among others as identified.

ENC – Encryption Commodities and Software (part 740.17) Covers certain encryption items controlled under particular ECCN provisions.

AGR – Agricultural Commodities (part 740.18) Permits the export and re-export of agricultural commodities to Cuba.

So, Now What do we do? The regulations provide for a means by which exporters can receive direction from BIS. It may take the form of a classification request, an advisory opinion, or other advice.

Classification Requests and Advisory Opinions. You make seek guidance from BIS to classify your item within the ECCN. As part of that process, BIS will advise you as to whether your item is subject to the EAR and, if applicable, provide the appropriate ECCN for the item.

NOTE: Recent Changes to Encryption Policy

In Dec. 2004, BIS implemented certain changes to its U.S. encryption policy, which include:

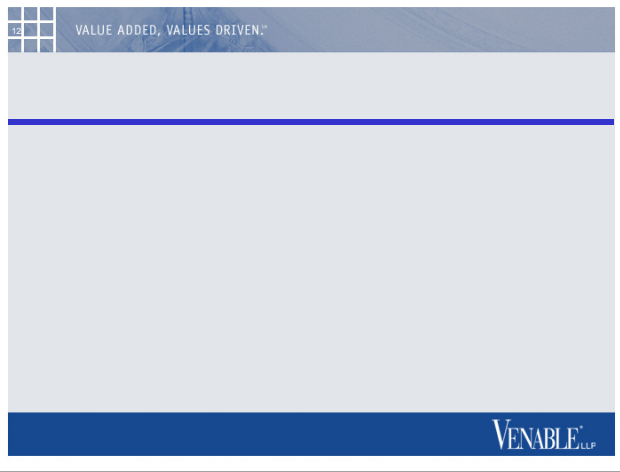
- Implementing 30-day review period;
- Removes the requirement for de minimis eligibility treatment for exception ENC for certain items;
- Relaxes the requirements for beta test encryption software under license TSU;
- Addresses "mass market" treatment of certain encryption items simplifying procedures for treatment;
- Updates Supp. No. 3 to include new EU countries in the "license free zone" ; and
- Clarifies the semi-annual reporting requirements of License Exception ENC apply to export destinations except Canada , and to re-exports from Canada to other foreign destinations.

Each Classification Request must be limited to six items and must be submitted on BIS Form 748P (*see* Supp. No. 1 to part 748 of the EAR for specific instructions). Each Request must provide sufficient descriptive literature and technical data, in BIS' opinion, to enable the classification or the Request will be rejected.

Therefore, it is advisable to consult with an expert in such matters to guide a company through the process particularly in the first instance.

Also, if requested, BIS will advise as to whether a license is required, or likely to be granted, for a particular transaction. They will not, however, provide any blanket Advisory Opinion, rather each request must be fact- and transaction-specific. While these provide guidance, they do not bind BIS to issuing a license in the future on the item.

Again, sufficient information must be provided to BIS to permit a determination of the matter. As with any request to the government, the request should be carefully drafted with the determination sought and the rationale in support provided as part of the request. As such, it is recommended that an expert be consulted. Otherwise, the exporter may find itself bound to an affirmative decision that it was not seeking.



QUESTIONS ?

Please reach me as follows:

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829

Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com

Web: www.venable.com

Another alternative is to seek the guidance and opinion of an expert without seeking a decision per se from the government. This provides a greater level of security to the exporter and a "first level of defense" should the transaction ever be questioned. Often, a export control attorney may seek anonymous oral confirmation of a provision without ever having to declare the particular company seeking to make the export or re-export and, again, in an effort to minimize risk.

We Need a License, so How do we Get One? To apply for a license, the applicant (the principal party in interest or its agent) must submit its request on a BIS form (748P) in keeping with the agencies instructions (*see* part 748.6 of the EAR). Each application will receive a Control Number which permits status tracking during the process.

Each application must provide sufficiently descriptive information including the technical description, manufacturer, quantity, units, value as well as identify all parties to the transaction such as the purchaser, intermediate consignee, ultimate consignee, end-user. The application must also describe the end-use and the recommended ECCN. If insufficient data is provided, the application may be returned "without action," additional information may be submitted, but it must follow the original application Control Number.

An application may cover a single transaction or multiple shipments that may be made under a particular license. And, any extension of a license must be sought *before* the license expires. There are also procedures to seek emergency treatment, but BIS does not favor the delay by an exporter as a basis for seeking emergency processing.

A license may be approved or denied (in whole or part), or simply returned "without action." (An applicant may request that it be considered as a whole and either approved or denied in its entirety). The regulations require that a change in the facts occurs at any time which would affect any material or substantive change in the terms of the order – whether issued or pending -- then it must be promptly reported to BIS, unless the changes are excepted (*see* EAR, part 750.7(c)).

Each license application may undergo review by several U.S. agencies, including the Departments of State, Defense, Energy, Arms Control and Disarmament Agency.

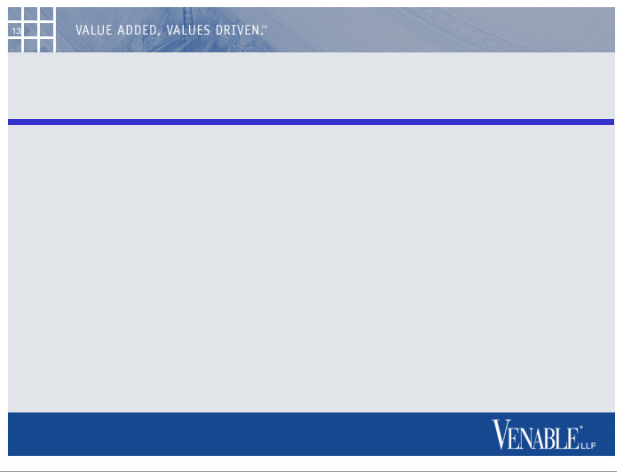
Some of the obstacles that may face a license application include a "pre-license check" to establish the identity and reliability of the intended recipient of the item. These can take the form of site visits or other inquiries by U.S. officials abroad.

In certain cases, a government-to-government assurance may be required as to the end-use of sensitive items. Additionally, special conditions may be imposed on a license, which can cause complications and delay in normal processing. Conditions imposed may include the provision of assurances and certifications as well as potential visits and monitoring of the items once exported.

TIP: Also consider if your customer can assist in putting pressure on the U.S. agency that may have some questions regarding an application and can allay the concerns. Alternatively, you may consider seeking the assistance from a local expert to facilitate the approval of the license.

What are our Export Clearance Requirements? Given the recent changes to the export system, entities seeking to export items, software, and technology or undertake activities in support, are well-advised to properly observe the regulatory requirements relating to the clearance of shipments. In recent years, there has been a great reduction in the number of exports requiring an issued license by BIS along with the shift in burden to the exporter to determine and declare the basis for license-free exports. Therefore, exporters today are required to properly classify their items, to refer to the Country Chart to determine whether a license is required to a particular destination, and to correctly reporting the availability of a License Exception. More importantly, these responsibilities may not be outsourced to a freight forwarder as liability for misstatements on the export documentation is the ultimate responsibility of the exporter of record.

Additionally, new rules requiring electronic filing of export documentation were published by the U.S. Census Bureau recently. The use of this automated system means that the U.S. Bureau of Customs and Border Protection ("U.S. Customs" or "CBP") will now have a greater ability to check the completeness and accuracy of export shipment documentation, such as the Shipper's Export Declaration ("SED") *before* the shipment leaves the U.S.



QUESTIONS ?

Please reach me as follows:

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829

Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com

Web: www.venable.com

Any problems that arise will likely lead to a delay of the shipment and it will be the exporter that will suffer consequences including potential legal and commercial difficulties. The forwarding agent may also find itself under scrutiny for its actions.

For example, while many may believe that all shipments from the U.S. destined to Canada do not need an SED, there are instances where such documents are required and those are the areas where a company can quickly find itself with problems. If the export requires a license from the U.S., then an SED must be filed for the shipment. The difficulty may arise if the item is exported to Canada, where it may undergo further manufacturing and the U.S. origin may exceed the *de minimis* thresholds. In such instances, the U.S. license requirements will follow the shipment after its export. Another complication may arise in routed transactions, as discussed below.

Routed Export Transactions & Re-exports: Why Should You Care? A "routed transaction" is a transaction where the foreign principal party in interest authorizes a U.S. forwarding agent or other agent (perhaps a U.S. affiliated entity) to facilitate the export of items from the U.S. For routed transactions, the U.S. principal party in interest (that is, typically the seller that receives the primary benefit of the export transaction) may obtain from the foreign principal party (e.g., the Canadian buyer) an express assumption of responsibility for determining the licensing requirements and obtaining license authority (typically through a power of attorney, *see* part 758.3(b) and (d) of the EAR), thus making the U.S. agent the exporter for EAR purposes. Therefore, it is advisable to determine if you, as a "foreign principal party," have retained this responsibility for U.S. export control purposes.

For instance, while most exports from the U.S. to Canada will not require the filing of an SED (provided a license is not required), if the item is to be re-exported from Canada, then the ultimate destination must be examined to see if the controlled item requires a license there. The more difficult scenario to address is under General Prohibition Two where a re-export from the original foreign country destination may be a "foreign made" item which incorporates more than a *de minimis* amount of controlled U.S. content, which may then be prohibited without a license or License Exception:

Any foreign-made commodity, software, or technology incorporating U.S. origin commodities, software, or technology respectively that is controlled to the country of ultimate destination if the foreign-made items meets all of the following conditions:

- (A) It incorporates more than the *de minimis* amount of controlled U.S. content (that is, generally for non-computer related equipment, where there is no more than 10% U.S. origin controlled content to embargoed countries and no more than 25% to other countries (*see* part 734.4 of the EAR). **Note:** certain encryption items are subject to the EAR even if they incorporate less than the *de minimis* level of U.S. content.
- (B) It is controlled for a reason indicated in the applicable ECCN; and
- (C) Its export to the country of destination requires a license for that control reason as indicated on the Country Chart.

However, a License Exception may supercede this Prohibition.

Does your Foreign-made Item Incorporate Less than the de minimis level of U.S. parts, components and materials? First, determine the value of the U.S.-origin controlled content (*see* Supp. No. 2 to part 734 of the EAR). Next, classify the U.S.-origin content on the CCL to determine which items that require a license to the ultimate destination (if exported in the form received) and divide the total value of the controlled U.S. parts and components and materials by the sale price of the foreign-made item. If the U.S.-origin content are below the *de minimis* levels (generally 25% unless to designated terrorist supporting countries, then 10%) then no U.S. license is required. If not, then a license must be obtained or a License Exception identified *before* the parts, materials and components are shipped from the U.S. Have you performed this analysis?

What about Foreign-made items produced with U.S. technology for re-export? Products manufactured outside of the U.S. directly from U.S.-origin technology are subject to the EAR only if they are intended for specific destinations, would be subject to national security controls (if they were of U.S.-origin) and the U.S.-origin technology or software on which the foreign-made product is based required a written assurance from the recipient when it was exported from the U.S. (*See* sections 734.3(a)(4) and 736.2(b)(3)).



QUESTIONS ?

Please reach me as follows:

LINDSAY B. MEYER

Venable LLP

Telephone: (202) 344 - 4829

Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com

Web: www.venable.com

Likewise, if you incorporate U.S.-origin software into your foreign-origin software or if your technology is commingled with or drawn from U.S.-origin technology, the same analysis must occur. Also, there is a one-time reporting requirement (see part 734.4 and Supp. No. 2 to part 734 of the EAR). Note: The *de minimis* exception can only be used for items that are alike. That is, hardware into hardware or software into software. You cannot use the *de minimis* exception for incorporating software into hardware.

For example, when the country scope of prohibition includes exports to Cuba, Libya and any country in Country Group D:1 and the software or technology was subject to the EAR, then the direct products manufactured outside of the U.S. remain subject to the export controls of the EAR.

The “Long Arm” of U.S. Law. The regulations include enforcement and protective measure to ensure that the recipients of items subject to the EAR comply with the re-export license requirements. More importantly, if BIS determines that an entity has not so complied, it may institute administrative enforcement proceedings which can result in civil penalties and/or the denial of an eligibility to receive U.S. exports (see part 764 of the EAR), as discussed further below. Moreover, the fact that a person complies with the U.S. laws and regulations does not excuse them from also fulfilling the requirements of their respective country's laws. Conversely, any person who complies with the license or other requirements of its own laws and regulations is not relieved of the responsibility of complying with the U.S. laws and regulations.

Are you a "U.S. Person"? In addition, if you are a foreign branch or affiliate of a U.S. entity, you may have further reason to understand the requirements. The EAR generally defines U.S. person as any individual who is a U.S. citizen or permanent resident alien (U.S. green card holder) or certain protected individuals. It also includes any juridical entity organized under U.S. laws (e.g., U.S. corporation) including its foreign branches as well as "any person in the U.S." (for purposes of sections 744.6, 744.10 and 744.11). Also, as regards encryption items, a U.S. person includes a foreign subsidiary when the U.S. entity owns (25%) or controls the subsidiary or entity.

Enforcement Proceedings -- The Export Administration Act extends its criminal and civil penalties and administrative sanctions to violations not only of the Act, but also of "any regulation, order or license." (See 50 U.S.C. app. §§ 2410(a), (b)(1), and (c)(1)).

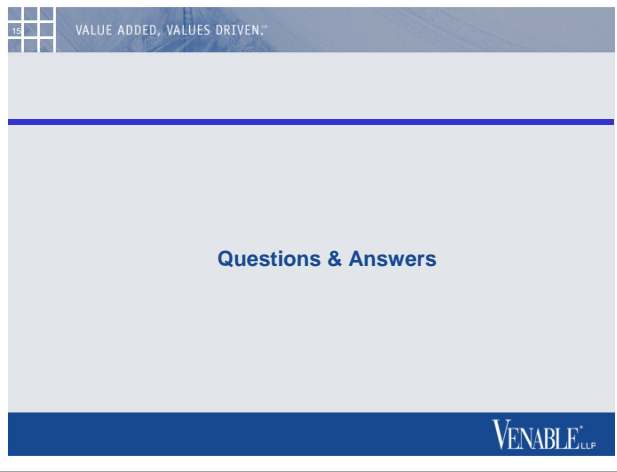
Additionally, the EAR contain expansive language regarding violations and any such "attempt, conspiracy, and aiding or abetting." (See 15 C.F.R. § 764.2(a)). Related activities are also prohibited, for example, to "transport, finance, forward ... with knowledge that a violation ... has occurred, is about to occur, or is intended to occur in connection with the item." (See 15 C.F.R. § 764.2(e)). Also prohibited is the unauthorized alteration of any license or export control documentation. (See 15 C.F.R. § 764.2(j)). It is also important to bear in mind that the civil penalties and administrative sanctions can be imposed on a strict liability basis.

Investigations – Detention and Seizure

Both the U.S. Department of Commerce (BIS' Office of Export Enforcement) and U.S. Customs and Border Protection ("CBP") have investigative and enforcement authority. These investigators will also typically work with the U.S. Attorney in the development of a potential criminal case. CBP also have authority to detain and seize items which it believes the items are being exported in violation of the export control laws. Preliminary investigations will be conducted following a detention to determine if the export is legal, resulting in a lift of the detention. Otherwise, the goods may be seized.

BIS Enforcement – Charging Letters & Self-Disclosure

Either the Office of Export Enforcement or Office of Antiboycott Compliance may begin administrative enforcement proceedings by issuing a charging letter, which shall constitute a formal complaint stating that there is reason to believe that a violation of the EAA, the EAR, or any order, license or authorization has occurred. It will provide the essential facts about the alleged violation, the applicable regulatory provisions, and give notice of the sanctions available. What follows may include an answer (or default finding), discovery, a pre-hearing conference, a hearing and either a decision by an administrative law judge or a settlement. (See part 766 of the EAR).



QUESTIONS ?

Please reach me as follows:

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829

Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com

Web: www.venable.com

Cases may be settled before the service of a charging letter or after. In some instances, the government will provide a "proposed" charging letter in an effort to reach a settlement before pursuing a full investigation and hearing.

The regulations also provide for self-disclosure, which is regarded as a mitigating factor in determining administrative sanctions, if any, will be pursued. BIS recently issued a proposed rule entitled "Penalty Guidance in the Settlement of Administrative Enforcement Cases" (see 68, Fed. Reg. 54402 (Sept. 17, 2003)) in order to further assist companies in identifying how BIS makes penalty determinations in such cases. The proposed guidance identifies both general factors, such as the destination for the export and the degree of willfulness involved in the violations, as well as specific mitigating and aggravating factors that are typically taken into account.

Mitigating factors include a voluntary self-disclosure; the existence of an effective export compliance program; when the violation was an isolated occurrence; if authorization for the export would likely have been granted; and clean prior record, cooperation and certain other enumerated factors. Aggravating factors are identified as including a deliberate effort to conceal or hide a violation; conduct demonstrating a serious disregard for export compliance responsibilities; the significance of the violation in terms of the sensitivity of the item or reason for control; false statements regarding an embargoed destination; a significant quantity and value of shipments; concurrent violations with other regulations; and the lack of a systematic export compliance program, among others.

The proposed rule also discusses the discretion exercised in issuing charging letters and in settling particular cases. The public records are replete with examples of entities, both in the U.S. and abroad, and persons who have violated U.S. export control laws and have been fined or have lost their export privileges. Importantly, fines and penalty cases have been brought against persons in the U.S. and abroad.

Sanctions Violations may result in either administrative, criminal, or other sanctions, with significant corresponding penalties.

Administrative sanctions include:

- (1) Civil penalties of up to U.S.\$11,500 per violation (unless involving national security, then up to U.S.\$100,000 per violation). The payment may be made a condition to the granting, restoring, or continuing validity of any export license and the payment may be deferred or suspended.
- (2) Denial of Export Privileges restricting the ability of the persons from engaging in export and re-export transactions, which may be imposed as a sanction or as a protective measure. It may also revoke or suspend all existing licenses issued and may restrict dealings in which that person may benefit from an export transaction.
- (3) Exclusion from Practice. Any person acting as an attorney, accountant, consultant, freight forwarder, or other representative capacity may be excluded from practice before BIS.

Criminal sanctions include:

- (1) General Fine for a knowing violation or conspiracy of the greater of 5 times the value of the exports or re-exports or U.S.\$50,000, or imprisonment for up to 5 years, or both.
- (2) Willful violations of EAA, or EAR or a license or order controlled for foreign policy purposes: Fines up to U.S.\$ 1,000,000; and, for an individual, a shall of not more than U.S.\$250,000, or up to 10 years imprisonment, or both.
- (3) Other Criminal sanctions may also be prosecuted under other provisions of U.S. law, including 18 U.S.C. § 371 (conspiracy), 18 U.S.C. § 1001 (false statements), 18 U.S.C. §§ 1341, 1343, and 1346 (mail and wire fraud), and 18 U.S.C. §§ 1956 and 1957 (money laundering).

Other sanctions:

- (1) Statutory sanctions on account of actions related to weapons proliferation.
- (2) Seizure and forfeiture (50 U.S.C. app. § 2411(g); 22 U.S.C. § 401)).
- (3) Cross debarment by the U.S. Department of State, Defense, or other agencies suspending the right to contract with the U.S. government or deny export privileges.

The potential sanctions associated with all of the above programs reveal the importance of understanding how the U.S. export control regime may affect your business. Certainly, given the potential downside, care must be taken to ensure that your procedures support the compliance with these programs. This is ever more important as cross-border trade between the U.S. and Canada expands.

1 VALUE ADDED, VALUES DRIVEN.™

**Export Controls & Enforcement --
Legal Traps and Tips**
April 17, 2007

Organized by: Maryland/Washington, DC District Export Council, Inc.
Baltimore U.S. Export Assistance Center (USEAC)

Co-sponsors: Maryland Port Administration
Maryland Department of Business & Economic Development

Lindsay B. Meyer, Esq.
Venable LLP
Tel. 202-344-4829
LBMeyer@Venable.com

VENABLE^{LLP}

QUESTIONS ?

Please reach me as follows:

LINDSAY B. MEYER
Venable LLP

Telephone: (202) 344 - 4829

Facsimile: (202) 344 - 8300

E-Mail: LBMeyer@Venable.com

Web: www.venable.com



LINDSAY B. MEYER, ESQ.

Lindsay is a partner and Chair of the International Trade and Customs Practice at Venable LLP. She holds a J.D. from George Washington University, National Law Center and is a licensed U.S. Customs Broker.

Extensive Trade, Customs and Export Control Experience. For twenty years, Lindsay has provided International Trade and Customs advice at Venable where she heads its International Practice, located in Washington, D.C., concentrating on Customs & International Trade matters, including representation during U.S. Customs Focused Assessments, NAFTA Audits, C-TPAT, ISA Programs, Detentions, Forfeitures, Seizures, other Customs-related matters. She regularly provides strategic customs and trade counseling to Fortune 100 clients, by conducting Pre-Assessment Compliance Reviews including corporate-wide, multi-location assessments and training programs, and by representing companies before the U.S. Bureau of Customs and Border Protection, the Court of International Trade, and U.S. Court of Appeals for the Federal Circuit. Lindsay has extensive experience counseling companies on compliance with export controls regulated by the Departments of Commerce, State and Treasury and performing Export Control Assessments. Lindsay has also successfully represented companies in antidumping duty investigations and reviews before the U.S. Department of Commerce and International Trade Commission and on appeal. Lindsay also advises clients on **International Transactional** matters, where she counsels on strategic sourcing, sales and distribution arrangements in the U.S. and abroad; the use of foreign agents, affiliated offices, and joint ventures.

Venable LLP's Client Base. As one of *The American Lawyer's* top 100 law firms, Venable LLP has lawyers practicing in all areas of corporate and business law, litigation, intellectual property and government affairs. Venable serves corporate, institutional, governmental, nonprofit and individual clients in the U.S. and around the world from its base of operations in and around Washington, DC. Likewise, Lindsay's clients range from multinational manufacturers to start-up enterprises from a wide variety of industries including high technology, chemical, petrochemical, pharmaceutical, automotive, avionics, space control equipment, steel, and retail industries.

Speaking Engagements / Publications / Memberships. Lindsay is also very active in business and trade associations related to her profession, and in her fourth term as Chair of the International Trade and Customs Committee for the ABA's Section of Administrative Law and Regulatory Practice, is a member of the American Association of Exporters and Importers, and is serving her second term under her appointment by the U.S. Secretary of Commerce to the Maryland-Washington District Export Council.