



Obama's America: Defense & Government Contracts



OFAC, BIS, ITAR, FCPA
Due Diligence and Real Cases

PRESENTED BY

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U.S. Export Controls

- U.S. Department of the Treasury – **Office of Foreign Assets Control**
- U.S. Department of Commerce – **Bureau of Industry and Security**
- U.S. Department of State – **Directorate of Defense Trade Controls**
- Other agencies as needed for specialized issues or skilled review – (NRC, DOE, DOD, PTO)



General Questions to Ask

- What Countries are Involved in the Transaction?
- What is being Exported? For what use?
- Who are you Dealing with ?
- Is it a Prohibited or Controlled Transaction?
- Will the Transaction involve a Re-Export or Transshipment?
- Will the Export involve Defense Articles or Services?

Know Your Buyer – Always Check The Lists

- Specially Designated Nationals and Blocked Persons List (SDN), includes:
 - Specially Designated Narcotics Traffickers List (SDNT)
 - Specially Designated Terrorists List (SDT)
 - Nonproliferation - Weapons of Mass Destruction Parties List (WMD)
- If the Commodity is “Dual-Use”, Check BIS Lists
 - Denied Persons List; Entity List, Unverified List
- If the Commodity is “Defense Article”, Check DDTC Lists
 - Debarred List; Nonproliferation Sanctions Lists



OFAC

U.S. Department of Treasury Office of Foreign Assets Control

Administers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States.



OVERVIEW OF OFAC

31 C.F.R. Parts 500 - 598



- Sanctions promulgated via Presidential Executive Order or by Congressional legislation
- Restricts or Prohibits Trade with certain Nations, Groups and Persons targeted by the Sanctions
- Typically target Specific Countries, but also Specifically Designated Nationals and Blocked Persons (SDNs)
- Sanctions can apply General Prohibitions on Trade to or from a Country, or allow some trade under Licenses issued by OFAC

WHO IS SUBJECT TO OFAC REGULATIONS?

- All U.S. Persons must comply with OFAC regulations, including all U.S. Citizens and Permanent Resident Aliens regardless of where they are located
- All Persons and Entities within the United States
- All U.S. Incorporated Entities and their Foreign Branches
 - In the case of certain programs, such as those regarding Cuba and North Korea, all foreign subsidiaries owned or controlled by U.S. companies also must comply
- Certain Programs also require Foreign Persons in possession of U.S.-Origin Goods to comply
 - Sudan and Syria sanctions specifically prohibit re-export of U.S. goods



KNOW THE DESTINATION

- OFAC Administers a number of U.S. Economic Sanctions and Embargoes that Target Geographic Regions and Governments
- Comprehensive Sanctions Programs (*i.e.*, essentially a total trade and financial embargo) include Burma (Myanmar), Cuba, Iran and Sudan
- Non-Comprehensive Programs include other Specific Countries, Regimes or Persons

COMPREHENSIVE SANCTIONS

- Burma (Myanmar)
 - No importation of Burma products and no investment in or export of financial services to Burma. Restrictions on export of any goods.
- Cuba
 - Almost a complete and total embargo on any trade. Vessels carrying goods to or from Cuba may not enter U.S. ports.
- Iran
 - Essentially a complete and total embargo on imports from or exports to Iran, including financial dealings.
- Sudan
 - With few exceptions, imports from and exports to most areas of Sudan are prohibited.

COMPREHENSIVE SANCTIONS

- These comprehensive sanctions generally prohibit U.S. persons from approving, financing, facilitating or guaranteeing ANY transaction with the targeted countries.
- They most often cover the activities of foreign branches and subsidiaries of U.S. companies.
- OFAC policy is generally a denial of any license application for transactions with these targeted countries.

NON-COMPREHENSIVE SANCTIONS

- Countries include the Western Balkans, Belarus, Cote d'Ivoire (Ivory Coast), Democratic Republic of the Congo, Iraq (Individuals or Entities on SDN List), Liberia (Former Regime of Charles Taylor), Persons Undermining the Sovereignty of Lebanon or Its Democratic Processes and Institutions, North Korea, Syria and Zimbabwe.
- Includes other programs targeting individuals or entities that could be located anywhere. Those programs currently relate to Foreign Narcotics Traffickers, Foreign Terrorists, WMD Proliferators.



PROHIBITED TRANSACTION

- Prohibited Transactions are Trade or Financial Transactions and other Dealings in which U.S. Persons May Not Engage unless Authorized by OFAC or Expressly Exempted by Statute.
 - Because each program is based on different foreign policy and national security goals, prohibitions may vary between sanction programs.
- Are there Exceptions to the Prohibitions?
 - Yes. OFAC often provides general licenses authorizing the performance of certain categories of transactions. OFAC may also issue specific licenses on a case-by-case basis under certain limited situations and conditions.

OFAC REAL CASES

- Stena Bulk LLC - \$426,486.00 for violations of the Sudan sanctions.
- Minxia Non-Ferrous Metals, Inc. - \$1,198,000.00 for violations of the Cuban Assets sanctions.
- A.G. Edwards & Sons, Inc. - \$122,358.35 for violation of the Narcotics Trafficking sanctions.
- Chevron Corp. - \$2,000,000.00 for violation of the Iraqi sanctions (part of an overall \$30 million multi-agency settlement).



BIS

U.S. Department of Commerce Bureau of Industry & Security

- In accordance with the Export Administration Regulations (EAR), charged with export control policy for dual-use commodities, software, and technology. Dual-use items subject to BIS jurisdiction have predominantly commercial uses, but also have military applications. Also enforces the antiboycott provisions of the Export Administration Act.

OVERVIEW OF BIS

15 C.F.R. Parts 730 - 774

- Regulates exports based upon: what is the item, where is it going, who will receive it and what will be the end-use.
- Most items in the U.S. are subject to the EAR; but, the export licensing requirements are narrow.
- An item is an export if it is: leaving the U.S. temporarily; leaving the U.S. but is not for sale (e.g., a gift); going to a wholly-owned U.S. subsidiary in a foreign country; a foreign-origin item exported from the U.S.; transmitted or transhipped through the U.S.; being returned from the U.S. to its foreign country of origin.
- Regulates “Deemed Exports”.



WHO IS SUBJECT TO BIS REGULATIONS?

- The EAR place legal responsibility on persons who have information, authority or functions relevant to carrying out transactions subject to the EAR.
- These persons may include exporters, freight forwarders, carriers, consignees, and other participants in an export transaction.
- The EAR apply not only to parties in the U.S., but also to persons in foreign countries who are involved in transactions subject to the EAR.



BIS CONTROL OVER DEFENSE ITEMS

- Defense or government contract item may not always fall under ITAR.
- Item could be “dual-use” which requires license from BIS, not DDTC.
- BIS has restrictions and requires licensing approval for exports to many countries for the purposes of:
 - Chemical & Biological Weapons
 - Nuclear Non-Proliferation
 - National Security
 - Missile Technology
 - Regional Stability
 - Firearms Control
 - Crime Control
 - Anti-terrorism



BIS EXPORT CONTROLS

- Strict controls on exports to Cuba, Iran, North Korea, Rwanda, Sudan and Syria.
- Restriction on exports to numerous other countries depending on end-use.
- Controls exports based on end-user (need to check BIS' lists).
- Controls and restricts reexports and transfers of U.S. origin goods to various persons or entities.



10 GENERAL PROHIBITIONS

- These prohibitions describe certain exports, reexports, and other conduct that are prohibited, without a license, license exception or determination that no license is required.
- The General Prohibitions summarize your obligations under the EAR and cross reference other parts of the EAR that further define their scope.
- When considering the General Prohibitions, look at Prohibitions 1, 2 and 3 together as they are limited by the parameters specified on the Commerce Control List and Country Chart.
- General Prohibitions 4 through 10 are prohibitions on certain activities that are not allowed without authorization from BIS. They are end-user, end-use and conduct focused requirements and apply to all items subject to the EAR, including EAR99 items.



10 GENERAL PROHIBITIONS

1. Export and reexport of controlled items to listed countries.
2. Reexport and export from abroad of foreign-made items incorporating more than a *de minimis* amount of controlled U.S. content.
3. Reexport and export from abroad of the foreign-produced direct product of U.S. technology and software.
4. Engaging in actions prohibited by a denial order.
5. Export or reexport to prohibited end-uses or end-users.



10 GENERAL PROHIBITIONS

6. Export or reexport to embargoed destinations.
7. Support of proliferation activities.
8. In transit shipments and items to be unladen from vessels or aircraft.
9. Violation of any order, license, terms, and conditions.
10. Proceeding with transactions with knowledge that a violation has occurred or is about to occur.

“DEEMED EXPORT”



- Key Concept for Foreign Companies and Foreign Nationals to Understand
 - An export of technology or source code (except encryption source code) is "deemed" to take place when it is released to a foreign national within the United States.
 - Assuming that a license is required because the technology does not qualify for treatment under EAR99 and no license exception is available, U.S. entities must apply for an export license under the "deemed export" rule when both of the following conditions are met:
 - (1) they intend to transfer controlled technologies to foreign nationals in the United States; and
 - (2) transfer of the same technology to the foreign national's home country would require an export license.

“DEEMED EXPORT”



- Any foreign national is subject to the "deemed export" rule except a foreign national who
 - (1) is granted permanent residence, as demonstrated by the issuance of a permanent resident visa (i.e., "Green Card"); or
 - (2) is granted U.S. citizenship; or
 - (3) is granted status as a "protected person" under 8 U.S.C. 1324b(a)(3).
- This includes all persons in the U.S. as tourists, students, businesspeople, scholars, researchers, technical experts, sailors, airline personnel, salespeople, military personnel, diplomats, etc.
- Note: although the deemed export rule may be triggered, this does not necessarily mean that a license is required. For example, the technology may be EAR99 or license exception eligible.



BIS – REAL CASES

- Cryogenic SAS - \$500,000 fine and 2 years probation for exports of cryogenic submersible pumps to Iran.
- MTS Systems Corp. - \$800,000 fine and 2 years probation for omission on license application of nuclear end-use. Six involved individuals denied export privileges for 10 to 15 years.
- EMD Biosciences, Inc. - \$904,500 fine and 2 year suspended denial of export privileges for shipping biological toxins to Canada.
- Lattice Semiconductor Corp. \$560,000 fine for deemed exports to Chinese nationals.

DDTC

Department of State Directorate of Defense Trade Controls

- In accordance with the Arms Export Control Act (AECA) and the International Traffic in Arms Regulations (ITAR), charged with controlling the sale, export and temporary import of defense articles and defense services covered by the United States Munitions List (USML).

OVERVIEW OF ITAR

22 C.F.R. Parts 120 - 130



- Registration of manufacturers, exporters and brokers involved in defense articles or services.
- Licensing for: export or temporary import of defense articles/services; export of technical data; and classified defense articles.
- Regulates defense articles, defense services, related technical data on the US Munitions List (USML) - includes weapons, chemical and biological agents, vehicles, missiles, equipment and all satellites.
- Also regulates items and technology that are “inherently military in nature” – designed to kill/defend against death in a military situation.
- Item is covered if it is “specifically designed, developed, configured, adapted or modified for a military application, and does not have predominant civil applications or performance equivalents.



WHO IS SUBJECT TO ITAR REGULATIONS?

- Any person who engages in the U.S. in the business of manufacturing, repairing, or exporting defense articles, defense services, and technical data.
- Brokers, wherever located, who act as an agent, for others in negotiating or arranging contracts, purchases, sales or transfers of articles/services.
- Any person who sends or takes defense articles out of the U.S. in any manner; discloses (orally or visually) or transfers technical data outside of the U.S. or to a foreign person (*i.e.*, foreign corporations, international organizations, foreign governments, and any agency or subdivision of foreign governments) in any manner; or performing a defense service on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad.

DEFENSE ARTICLES & SERVICES



- Statute provides no strong definitions and the terms are subject to no statutory limitations. However, regulations define the policy of designating an item as defense article or service if it:
 - (a) Is specifically designed, developed, configured, adapted, or modified for a military application, and
 - (i) Does not have predominant civil applications, and
 - (ii) Does not have performance equivalent (defined by form, fit and function) to those of an article or service used for civil applications; or
 - (b) Is specifically designed, developed, configured, adapted, or modified for a military application, and has significant military or intelligence applicability such that control under this subchapter is necessary.
- Intended use of the article or service after its export is not relevant.



USML

USML encompasses the following categories:

- I - Firearms, Close Assault Weapons and Combat Shotguns
- II - Guns and Armament
- III - Ammunition/Ordnance
- IV - Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs & Mines
- V - Explosives, Energetic Materials, Propellants, Incendiary Agents and Their Constituents
- VI - Vessels of War and Special Naval Equipment
- VII - Tanks and Military Vehicles
- VIII - Aircraft and Associated Equipment
- IX - Military Training Equipment and Training
- X - Protective Personnel Equipment and Shelters
- XI - Military Electronics



USML

- XII - Fire Control, Range Finder, Optical and Guidance and Control Equipment
- XIII - Auxiliary Military Equipment
- XIV - Toxicological Agents, including Chemical Agents, Biological Agents, and Associated Equipment
- XV - Spacecraft Systems and Associated Equipment
- XVI - Nuclear Weapons, Design and Testing Related Items
- XVII - Classified Articles, Technical Data and Defense Services Not Otherwise Enumerated
- XVIII - Directed Energy Weapons
- XIX - (Reserved)
- XX - Submersible Vessels, Oceanographic and Associated Equipment
- XXI - Miscellaneous Articles



ITAR REGISTRATION

- All manufacturers, exporters, and brokers of defense articles, defense services, or related technical data, as defined on the USML, are required to register with DDTTC.
- Registration provides the U.S. Government with necessary information on who is involved in certain manufacturing and exporting activities.
- Registration does not confer any export rights or privileges; it is a precondition for the issuance of any license or other approval for export.
- Don't forget registration requirements for brokers!

ITAR LICENSING



- Any person or company who intends to export or to temporarily import a defense article, defense service, or technical data must obtain prior approval from DDTTC.
- In some instances, even a *proposal* to a potential foreign customer may require DDTTC approval.
- DSP-5 license for foreign national employees working in U.S.
- License exemptions under ITAR more limited than BIS/EAR. Exemptions and/or expedition of licensing approval for NATO/U.K./close allies, but still often have reporting requirements.

TAAAs - MLAs



- Involve more detailed transactions than one-time exports with no follow-up required; once approved, no separate licensing is required.
- Technical Assistance Agreements –
 - TAA is an agreement for the performance of defense services or the disclosure of technical data when working with foreign manufacturer who is producing the end product and ongoing export of data is necessary (production rights and manufacturing know-how cannot be conveyed).
- Manufacturing License Agreement –
 - MLA is an agreement where a U.S. entity grants a foreign person an authorization to manufacture defense articles abroad and which involves
 - The export of technical data, defense article or service; or
 - The use by the foreign person of technical data or defense articles previously exported by the U.S. person.



PROCEED CAUTIOUSLY

- U.S. takes the position that its jurisdiction over exported defense articles continues forever and “irrespective of the number of intermediate transfers” between the original owner and current person in possession of the item.
- Obtain a commodity jurisdiction (CJ) request if uncertain in order to determine whether item or service is covered by the USML.
- Exporter has an affirmative duty to ascertain end-user and end-use.
- Exports of USML items are subject to special export clearance procedures (with which freight forwarders/custom brokers can be unfamiliar).

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DDTC – REAL CASES



- ITT Corp. - \$100 million penalty for exports of military night vision technology to China, Singapore and the U.K.
- Boeing Co. - \$3 million penalty for violating the terms of manufacturing licensing agreements (MLA).
- Lockheed Martin Corp. - \$4 million penalty (\$1 million for remedial compliance measures) for exports of missile technical data to UAE .
- L-3 Communications Corp. – \$1.5 million penalty for the failure of its subsidiary, Titan Corp., to report commissions paid to third parties (ITAR & FCPA violations).

FCPA

- Prohibits U.S. corporations from, directly or indirectly, bribing foreign officials, foreign political parties, or candidates for foreign political office.
- Prohibits the falsification of accounting records with regards to corporate bribery.



OVERVIEW OF FCPA

15 U.S.C. §§ 78dd-1, et seq.

- Criminalizes the act of offering or giving a “thing of value” to a foreign official in order to obtain or retain business, or for an improper business advantage
 - Anti-bribery provisions are enforced by Department of Justice
- Requires publicly-traded U.S. companies to maintain books and records that accurately reflect transactions in reasonable detail; and establishes internal accounting controls designed to ensure that expenditures are authorized by management
 - Accounting provisions are enforced by the Securities and Exchange Commission



WHO IS SUBJECT TO THE FCPA?

- Any U.S. Citizen or Resident, wherever they are located
- Any Other Person who Acts Within the U.S.
- Any U.S. Company
 - Officers, directors, employees
 - Foreign subsidiaries
 - Agents
 - Consultants
- Foreign Companies listed on U.S. Exchanges (Issuers)

ELEMENTS OF AN ANTI-BRIBERY VIOLATION



- Payment, Authorization or Offer to Pay Anything of Value
- To a Foreign Official, Political Party or Candidate
- Directly or Indirectly
- Corruptly
- For the Purpose of
 - Inducing the recipient to do or omit to do any act in violation of lawful duty
 - Influencing an official act or decision of the recipient
 - Inducing the recipient to use his or her influence with a foreign government to affect or influence any governmental act or decision
- In order to Obtain, Retain or Direct Business to any Person

FOREIGN OFFICIAL

An Officer or Employee of -

- Any department, agency or instrumentality of a foreign government
- A public international organization, or
- Any person acting in an official capacity

Includes

- Foreign political party or party official
- Candidate for foreign political office

Depending on their Authority, a Foreign Official might include

- Member of legislative body
- Employee of a state owned enterprise



PAYMENT

- Payment may be made Directly or Indirectly
 - To a relative or any other person which might benefit the official
 - To a third party, knowing that a portion will be paid or offered to the official
- Or Not at All
 - Offense is complete upon offer, promise or authorization of a corrupt payment

“CORRUPTLY”

- Payment or Offer Intended to:
 - Induce recipient to misuse his or her official position;
 - Influence any official act or decision of a recipient; or
 - Induce a recipient to do or omit to do any act in violation of his or her official duty

LIABILITY FOR INDIRECT PAYMENTS

- U.S. companies can be held liable for the actions of agents (such as foreign subsidiaries, joint ventures, sales representatives) under the FCPA's anti-bribery provisions.
- U.S. companies must ensure that third parties authorized to act on their behalf comply with FCPA.
 - Due diligence and oversight, including written compliance program
 - Written agreements that cover FCPA and include anti-corruption clauses; annual certification of compliance
 - Conduct annual risk assessment and audit as necessary



IN ORDER TO OBTAIN, RETAIN OR DIRECT BUSINESS TO ANY PERSON

- Obtaining or Retaining a Contract
- Obtaining Favorable Regulatory Treatment or Business Advantage
 - Licenses
 - Permits
 - Lower taxes
 - Avoiding adverse government action
 - Zoning variances
 - Product approvals

PERMISSIBLE PAYMENTS

- Facilitating Payments for Routine Gov. Actions
 - Modest payments to government official to expedite or secure performance of routine government actions such as:
 - Obtaining permits, licenses or other official documents;
 - Processing governmental papers, such as Visas and work orders;
 - Providing police protection, mail pickup and delivery;
 - Providing phone service, power and water supply;
 - Loading and unloading cargo, or protecting perishable products;
 - Scheduling inspections associated with contract performance or delivery of goods;
 - Similar actions
- Corporate Policy should Require Financial and Legal Review Prior to Making or Offering such Payments



AFFIRMATIVE DEFENSES

- Compliance with Written Foreign Law
 - The payment, gift, offer, or promise of anything of value was lawful under the written laws and regulations of the foreign official's country.
- Reasonable/Bona Fide Business Expenses
 - Travel and lodging expenses incurred by the foreign official and directly related to the promotion, demonstration, or explanation of products or services; or
 - Payments made in connection with the promotion or demonstration of company products or services (e.g., demonstration or tour of a plant), or in connection with the execution of a particular contract with a foreign government.

FCPA “RED FLAGS”



- Whether the country has a reputation of corruption
- News reports of corruption
- Family or business ties of an agent with a government official
- The agent’s reputation with the U.S. Embassy and local banking officials
- The agent is recommended by a government official
- Agent insists that his or her role not be disclosed
- Agent has no experience in the business
- Agent has inadequate staff or facilities
- Agent resists certifying compliance with FCPA
- Agent asks for payment in cash or in another country
- Last minute requests for more money



ACCOUNTING PROHIBITIONS

- False Entries on Books
- Unrecorded Funds
- Supporting Documentation for Disbursements that Does not Accurately Reflect the True Purpose of the Disbursements
- Over-Invoicing or Under-Invoicing

The FCPA's accounting provisions apply to publicly held U.S. Companies, considered "issuers" under the Exchange Act of 1934, including officers, directors, employees, foreign subsidiaries, agents and consultants. In addition foreign companies listed on U.S. state exchanges are also covered by the anti-bribery and accounting provisions of the FCPA.

CONSEQUENCES OF A VIOLATION



- **OFAC –**
 - Criminal penalties can include fines from \$50,000 to \$10,000,000 and imprisonment from 10 to 30 years.
 - Civil penalties range from the greater of \$250,000 or twice the amount of each underlying transaction up to \$1,075,000 for each violation.
- **BIS –**
 - Criminal penalties can reach 20 years imprisonment and \$1 million per violation.
 - Civil penalties can reach the greater of \$250,000 per violation or twice the amount of the transaction that is the basis of the violation.
 - Denial of export privileges.
- **DDTC –**
 - Criminal fines of a maximum of \$1,000,000 per violation; imprisonment of up to ten years.
 - Civil penalties of up to \$500,000 per violation.
 - Debarment.
- **FCPA –**
 - Criminal fines of up to \$2 million (corporation), \$100,000 (individuals); or twice the benefit sought by the bribe.
 - Civil action may be brought by DOJ for a fine against the corporation as well as any officer, employee or agent
 - Competitor may bring a civil action seeking treble damages.
 - Barred from doing business with the U.S. government.



This presentation is intended to provide a general overview of the provisions of U.S. export control statutes and regulations and is not intended to substitute for the advice of counsel on specific issues related U.S. export control and compliance.

If you have additional questions, please contact:

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