

*The International
Trade Compliance
And Operations
Experts for
129 years!*

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5/30/2008

Are your exports “subject to the EAR”?

What does this mean: “subject to the EAR”? It means, does the commodity technology or software being exported from the United States fall within the regulatory scope of the Export Administration Regulations (EAR) (15 CFR part 730-774), published and enforced by the Bureau of Industry and Security (BIS)?

Part 734.3 of the EAR defines, in detail, the scope of the EAR. In general, and to be quite simple, the regulatory scope of the EAR covers ALL commodities, technology and software leaving the U.S. (whether or not they are of U.S. origin) with but two exceptions. The exceptions are:

1. Technology and software that is in the public domain; is available with unrestricted access; is available at no or nominal cost, and
2. Commodities, technology or software that fall under the exclusive jurisdiction of another federal agency of the U.S. Government.

The first exception speaks to technical data, technological information and software that is readily available to the public at large in, say, public libraries, at retail sale to anyone, or over the Internet. It may be technical specifications for a company’s product but it is really marketing literature that is freely distributed. Within the software definition is mass market software that does not have an encryption key length greater than 64-bits. Though many mass market software products can be quite expensive they remain available to anyone willing to pay the price and are intended to be installed by the purchaser/user.

A somewhat overly simple way to think about this exception is: if the technical data or technology fell into the hands of your closest business competitor, would it be disastrous to your company? If the answer is yes, then it is clearly not in the public domain and you should consider it to be “subject to the EAR”. Refer to the Export Administration Regulations prior to export.

As to the second exception, in the U.S. many commodities, technologies and software fall within the regulatory scope of federal agencies other than BIS. Part 734.3(b) defines these agencies and provides a general outline of the scope of their regulations. As an exporter, it is critical to know which federal agency has the jurisdiction over what it is you are about to export.

Continued...

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Are your exports “subject to the EAR”? *Continued*

Some of these are almost obvious but an exporter should not simply operate on assumptions. For example:

The Department of State, Directorate of Defense Trade Controls governs the export of defense articles and services as defined on the U.S. Munitions List. If what you are exporting has a probable, predominant or exclusive military application then you must turn to the International Traffic in Arms Regulations.

The Department of the Treasury, Office of Foreign Assets Control (OFAC) administers very broad financial transaction controls. These regulations are broad because in controlling financial transactions they are thus controlling whether or not you can do any business with a foreign entity. If you can't do business with them then you certainly cannot export anything to them.

The Department of Energy administers controls over the export and reexport of technology related to the production of special nuclear materials. The U.S. Nuclear Regulatory Commission regulates the export and reexport of commodities related to nuclear reactor vessels. The Drug Enforcement Administration has jurisdiction over the export of certain narcotics and those drugs defined as “dangerous”.

If the commodity, technology or software does not fall into one of these two exceptions then it is “subject to the EAR”. An exporter might think that because it manufactures Styrofoam cups or lawn mowers that such items are not controlled at export from the U.S. What's a terrorist going to do with a lawn mower? Since neither commodity falls within one of the two exceptions then they are both “subject to the EAR” and the exporter is obligated to fulfill all the requirements imposed by the Export Administration Regulations prior to the goods departing the U.S.