

# Microwave Journal

## EXPORT COMPLIANCE: UNDERSTANDING ITAR AND EAR

If your company participates in the aerospace and defense industry, you probably have encountered customs agents, customers and other third parties asking whether you are ITAR compliant. While being ITAR compliant is crucial, companies exporting any goods must also remain compliant with regulations enforced by the US Customs Agency, Department of Commerce (Commerce), the Office of Foreign Asset Control (OFAC), the Census Bureau and many others.

Here is a guide to help you learn the basics of complying with the United States exporting laws, including ITAR, the International Traffic in Arms Regulations promulgated by the US Department of State (State) and enforced by the Office of Defense Trade Controls. This guide will help you understand the various checklists and classifications under federal regulations you must review before exporting your products and technical data, and whether you should seek an export license prior to shipping the product or technical data.

Proper export controls demand further training of your staff from executives to sales to engineering to shipping. If your company exports, it should have in place an export compliance program that includes internal and external training of all ap-

plicable employees on a regular basis. These mechanisms will serve as the first line of defense against an export audit.

Since the events of September 11, 2001, and the passage of the Patriot Act, in the interest of national defense all export enforcement agencies have increased their efforts at catching and convicting those who violate the export laws. While changing almost daily, however, these export laws are not new. ITAR was first promulgated following World War II, and most of the other laws have also been around for quite some time. The events of 9/11 have heightened agency enforcement with the intent, of course, to curb future acts of terror on the US, its territories and its allies.

### IS AN EXPORT LICENSE REQUIRED?

The threshold question for export compliance is whether an export license will be required by one of the federal agencies before you ship your products or technical data to a foreign end-user, or re-export from one foreign location to another. Note that export licenses control the products you ship, not the purchase orders (so, on a single purchase order some products may require a license while others do not).

---

SHAWN CHEADLE  
*Teledyne Cougar Inc.*  
Sunnyvale, CA

### RE-EXPORT

Any shipment or transmission of product or technical data from one foreign country to another foreign country.

## PENALTIES FOR EXPORTING WITHOUT A LICENSE

The penalties for exporting without a license may be severe, including both criminal and civil penalties to the corporation and even the individuals involved. One sales application engineer was recently convicted of exporting without a license and received a five-year prison sentence and two fines each at \$250,000. In this age of corporate executives and Martha Stewart convictions related to securities or obstruction of justice, individual indictments are a key tool that export officials continue to use to demonstrate the heightened scrutiny the US is placing on exports.

### TECHNICAL DATA

Technical Data is defined as follows by the Export Administration Regulations (EAR): Information that is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of *controlled* items requiring a license to export. This information is usually presented in the form of schematics, drawings, photographs and other documentation. This information does not include general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or information in the public domain. This information also does not include marketing information with respect to function or purpose or general system descriptions, including those documents posted on the company's Web site and available to the public domain.

Several US companies have received penalties for export violations, many of which received multi-million dollar fines. US companies found guilty of violating the various laws will generally be debarred from exporting for three years, and may be debarred for much longer.

US export enforcement agencies do have authority to inspect shipping docks and seize shipments. They do so with "guns and badges" enforcement agents. Such an experience can be very damaging to a company, from

the perspective of its employees, its customers and its local community.

## DOES DEPARTMENT OF STATE HAVE JURISDICTION?

To determine whether an export license will be required, you must determine which federal agency has jurisdiction over your products and technical data. For companies designing military or space products, the first step is to determine whether your products or technical data are listed on the US Munitions List (USML). For most RF and microwave manufacturers, this review will require a careful reading of the "components" sections in each USML category.

The State Department uses both the Arms Export Control Act (AECA) and the International Traffic in Arms Regulations (ITAR) to control exports. The USML is listed within ITAR. You can check the latest USML on-line at <http://www.pmdtc.org/reference.htm>.

Typically, a category will cover the big equipment (rockets, launchers, military vehicles and vessels, and space craft, for example). To capture significant components, however, each category will contain a catch-all provision such as "all components used in the items covered by this category if they were specifically designed or modified for military applications."

To determine whether a product is specifically designed or modified for a military application, State uses a special standard of review. This standard of review requires an analysis of why a product was originally designed. That is, what is the genesis of the model? Was the model originally created to meet a specific military or space requirement considered a military use? Commonly, the State Department will look to whether a product was designed based on a customer's specification, including form, fit and function, not just performance.

The phrase "configured" also appears in the components clauses on the USML. For a product to be configured for military or space, State looks to whether the design requires a different arrangement of the product that is specifically for military or space use. That raises a live issue as to whether putting a standard device

through various screening levels really rises to the level of "configured," especially where the device structure is not arranged for this application.

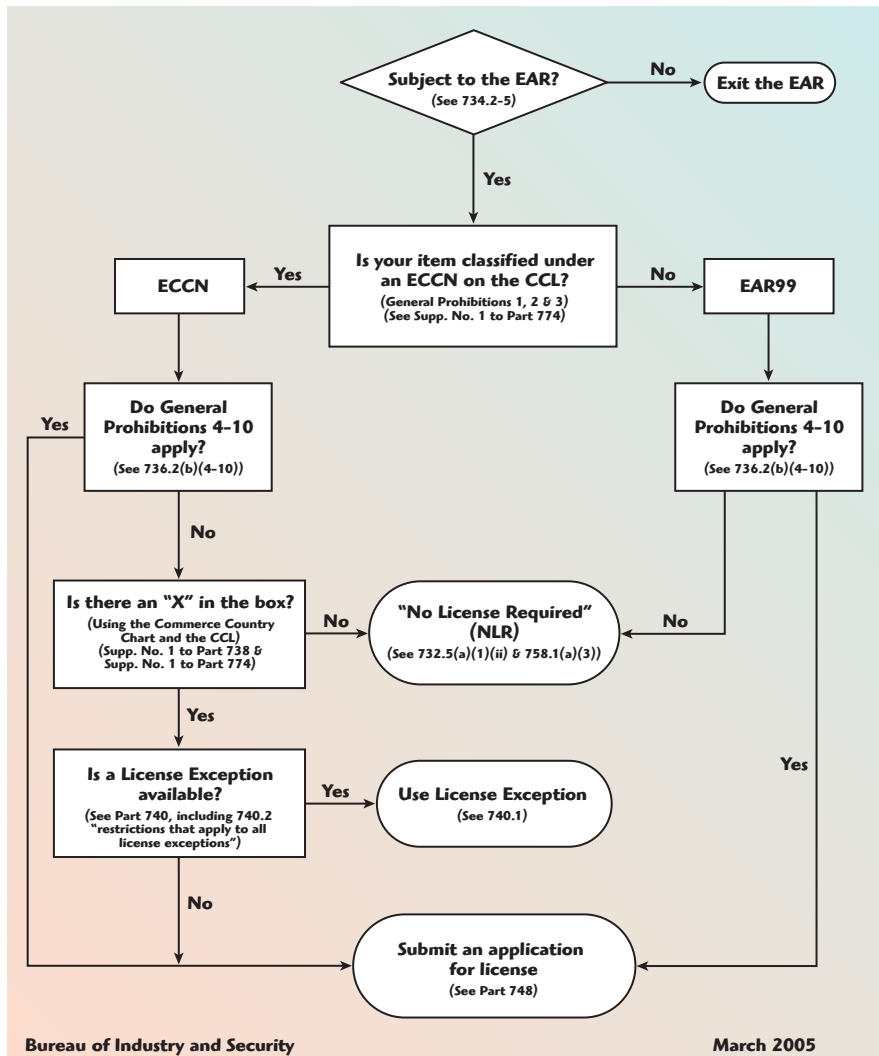
Exporting classifications frequently require engineering to help determine whether a company's products meet the frequency, power and other critical parameters of various components listed on the USML. If your products or technical data are listed on the USML, then your company must be registered with the State Department and you must apply for an export license through State. To do so, State prefers that applicants use its on-line application process (ELLIE, or its new version DDTTC).

Also, in determining whether the end-use is really defined as a military application, note the difference between a component designed for the mess hall dishwasher versus that designed for a missile or military radio. State would not consider the dishwasher a "military use" as a radio or missile would be, and thus such dishwasher components are not necessarily covered by the USML. State prefers to review export control classification based upon whether a device will be used in a "military way" for offensive or defensive purposes and not based upon simple service to the military.

## COMMODITY JURISDICTION LETTER

If you are not sure whether the USML covers your products, you may wish to seek a Commodity Jurisdiction (CJ) letter through State. This process will require submittal of evaluation materials for State to review, and State will use a cross-functional set of agencies (including Commerce) to ensure it determines jurisdiction accurately. Once State determines whether it has jurisdiction over your products, it will issue a CJ letter to your company explaining whether State or Commerce has jurisdiction.

You must hold all purchase orders and technical data from processing until a CJ letter is secured from State, unless otherwise authorized to proceed without the CJ letter concurrently with the CJ letter request (that is, some long lead-time orders may begin concurrently with a CJ letter request). Management and legal shall consult with the State Department's



▲ Fig. 1 Export control decision tree (Supp. No. 1 to Part 732).

Response Team in further determining whether the products or technical data in question are on the USML.

If you are certain that your products or technical data are not covered by the USML, then the Department of Commerce will most likely have jurisdiction.

## JURISDICTION UNDER COMMERCE

The regulations promulgated by Commerce are called the Export Administration Regulations, or EAR. The EAR contains a helpful flowchart (see **Figure 1**) by which export managers may determine whether a license is required by Commerce prior to exporting products or technical data. The flowchart contains steps covering commodity classification, "bad guy and country" checklist reviews and whether an export license is required. The Bureau of Industry

and Security (export enforcement division of the Department of Commerce) offers outstanding training seminars and they are presented in major metropolitan areas nationwide.

Primarily, under the EAR, you must classify your products against the Commerce Control List to see if they have an Export Control Classification Number (ECCN) or will be designated as "EAR99." Most RF and microwave products will fall under Category 3, but you should study all CCL categories to see if your products are listed elsewhere. Where products are not listed as having a designated ECCN, a catch-all phrase at the end of each category will state: "EAR99 Items subject to the EAR that are not elsewhere specified in this CCL Category or in any other category in the CCL are designated by the number EAR99."

Where doubts persist, seek guidance from management, engineering

and legal to properly classify your products. For the latest CCL on-line, visit [http://www.access.gpo.gov/bis/ear/ear\\_data.html](http://www.access.gpo.gov/bis/ear/ear_data.html) and click on your specific product category.

Again, as you can see by the flowchart, just because you have classified products as EAR99 does not necessarily mean that the products may ship as no license required (NLR). You still must consult several prohibitions checklists to determine whether a license is nevertheless required.

## CRUCIAL STEPS UNDER THE EAR

There are ten General Prohibitions listed in the EAR. The first three apply to all ECCN classified products, and Prohibitions 4 through 10 apply to both ECCN and EAR99 classifications. Consult the latest EAR and these General Prohibitions at <http://www.access.gpo.gov/bis/ear/pdf/736.pdf> to ensure compliance with all ten items, when applicable to the classification of the product to be exported.

In some circumstances, a Destination Control Statement is required where product was classified above as having an ECCN (not "EAR99"). A Destination Control Statement advises the recipient of US-origin products of their legal responsibilities and restrictions under US export and re-export regulations.

When a Destination Control Statement is required, place copies of this Statement on all copies of the invoice, bill of lading, airway bill, or other export control document that accompanies the shipment from its point of origin in the US to the ultimate consignee or end-user abroad.

General Prohibitions number Five contains a Red Flags list. Always consult the Red Flags list as defined by BIS at <http://www.bis.doc.gov/Enforcement/redflags.htm> to ensure all aspects of the End-use Certification and other leading indicators of suspicious activity are captured before you export or transfer technical data.

## SPECIAL CONSIDERATIONS

"Technical Data" has been referenced throughout this article along with products because exporting technical data to a foreign national may create a "deemed export" under both State and Commerce. Foreign

nationals include your foreign representatives, foreign customers and even your foreign employees who are not permanent residents (e.g., residing and working here in the US on visas).

#### DEEMED EXPORT

Any release or transmission by *your company personnel or approved representatives* of technical data to a *foreign national* located within the United States.

#### COMPLIANCE PROGRAMS

To ensure compliance with all US export laws, and to follow Commerce's flowchart in detail, all companies in the RF and microwave industry should implement an Export Compliance Program. Even where a company has exported only "EAR99" classified products under the EAR, a compliance program can help prevent shipping EAR99 product to embargoed or restricted countries, denied persons and specially designated nationals. Note that even EAR99 classified products may require a license to export.

A solid compliance program should contain procedures on acquiring an end-use certification (EUC) from your customers. The EUC will help you determine whether the customer intends to re-export your products, which could in turn violate US export laws. Periodically, State and Commerce enforcement agents will travel abroad to follow your products to their final destination. If your products require an export license to the end-user or country, you and your company are ultimately responsible and liable for the product arriving there legally (with an export license when required).

The compliance program should also require your employees to run verification checks against the screening lists of "bad guys" and restricted countries. See the sidebar for screening list web sites, and note that several companies offer export control software systems that streamline this screening process through a single interface. Do not assume that because your company does not ship to the "bad guys" that you are clear of liability for an export violation. Many cases exist where products are re-exported from an unrestricted country to a final destination or party

without a license where one was required by a US agency.

These lists should be checked at the time an RFQ or order is received, when you suspect a foreign national may acquire technical data or plans to visit your facility, and prior to all international shipments. An authorized, trained export employee should check the name of the end-user, freight forwarder, distributor and end-use country against these lists. If a match exists, this employee should have authority to hold up a shipment, and you must seek an export license immediately. Obviously, the sooner these checks occur prior to product sitting on a dock, the better.

#### TRAINING

A successful compliance program must absolutely have a periodic training component to ensure that authorized export control personnel have sufficient and on-going training. Training should be provided for your company's specific export procedures as well as third party training programs offered by the US agencies, law firms and export consulting firms on the new changes and trends to the export laws.

#### AUDITS

Because export laws and the "bad guy lists" are constantly changing, your export compliance program should be reviewed by qualified, trained staff including in-house counsel, or outside legal or consulting firms, or all of the above. Lawyers who provide legal

#### SCREENING LISTS

**Denied Persons List (DOC):**

<http://www.bis.doc.gov/dpl/Default.shtm>

**Debarred Parties List (State):**

<http://pmdtc.org/debar059.htm>

**Embargoed Country List (DOC):**

[http://www.access.gpo.gov/bis/ear/ear\\_data.html](http://www.access.gpo.gov/bis/ear/ear_data.html)  
(click on Part 746 – Embargoes and Other Special Controls)

**Embargoed Country List (DOC):**

<http://www.pmdtc.org/country.htm>  
(as published by State Department)

**Entities List (DOC):**

<http://www.bis.doc.gov/Entities/Default.htm>

**Unverified List (DOC):**

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

**Foreign Persons List:**

<http://www.pmdtc.org/docs/forper.txt>

**Specially Designated Nationals and Blocked Persons (OFAC):**

<http://www.ustreas.gov/offices/enforcement/ofac/sdn/index.html>

advice on superseded laws risk committing malpractice. You do not want to explain to export officials that your company is guilty of the equivalent because it did not periodically audit its export compliance program for accuracy and completeness against the current laws.

#### RECORD KEEPING

The final element to implementing a successful export compliance program is to require record retention. All records associated with the review of each export, re-export, deemed export, or exports conducted under a license exception should be retained by the company and the responsible individuals for five years from the date the item is exported (that is, the shipment or technical data actually leaves the United States, not just the company's dock or facility, or is re-exported from a foreign country). These records should include but not be limited to end-use certifications, commercial invoices, copies of Shipper's Export Declarations, Destination Control Statements, air waybills or bills of lading, and any internal export control forms, logs and checklists the company uses in its compliance program.

#### VOLUNTARY DISCLOSURES

Each of the enforcement divisions for the agencies discussed in this article offer voluntary disclosure programs where companies discover exports occurred without a license though one was required. The latest trend with voluntary disclosures is that the agencies

**APPLY FOR AN EXPORT LICENSE**

*For the State Department visit:*  
<http://www.pmdtc.org/licenses.htm>  
*For the Department of Commerce visit:*  
<http://www.bis.doc.gov/Licensing/index.htm>

are treating them as mitigating factors in the penalty phase of enforcement. While penalties may be reduced, they are nevertheless levied in many cases due to the seriousness of export control violations and in the interest of national security.

**OTHER AGENCIES CONTROLLING EXPORTS**

Generally, OFAC controls transactions with respect to finances, but OFAC also controls any shipments through or to embargoed countries or shipments using embargoed country vessels. Therefore, certain payments made to your company under international purchase orders may come under the jurisdiction of OFAC as may shipments of your company's product that may be transported on embargoed country carriers or vessels. Note the danger of using a Cuban-owned vessel to transport goods even to a NLR country or party.

The Office of Antiboycott Compliance enforces US law prohibiting US firms from recognizing a foreign boycott not sanctioned by the United States. The Arab League boycott of Israel is the principal foreign economic boycott that US companies must be concerned with today. The antiboycott laws, however, apply to all boycotts imposed by foreign countries that are unsanctioned by the United States. The antiboycott rules prohibit companies from entering into:

- Agreements to refuse or actual refusal to do business with or in Israel or with blacklisted companies.
- Agreements to discriminate or actual discrimination against other

persons based on race, religion, sex, national origin or nationality.

- Agreements to furnish or actual furnishing of information about business relationships with or in Israel or with blacklisted companies.
- Agreements to furnish or actual furnishing of information about the race, religion, sex, or national origin of another person.

There are some key reporting requirements for your company under the antiboycott laws. Management must submit quarterly reports showing requests employees received in the previous quarterly period to take certain actions to comply with, further, or support an unsanctioned foreign boycott. Under the Tax Reform Act, management must also report "operations" in, with, or related to a boycotting country or its nationals and requests received to participate in or cooperate with an international boycott. The Treasury Department publishes a quarterly list of "boycotting countries." Consult this web page to learn how to report: <http://www.bis.doc.gov/antiboycottcompliance/oacquirements.html#whatcovered>.

The US Census Bureau, through its Foreign Trade Division and the US International Trade Commission, controls exports to the extent that it requires a commodity number classification for virtually every commodity or material exported. The Census Bureau uses these classifications to simply count total commodities exported. This classification system is known as the Harmonized Tariff Schedule (HTS). Consult the latest HTS to classify your company's products to be exported and assign each product a corresponding HTS number: <http://www.usitc.gov/tata/hts/bychapter/index.htm>.

The Office of Management and Budget (OMB), meanwhile, governs the North American Industry Classification System (NAICS, pronounced, "Nakes"), which also

requires counting those commodities made in Canada and Mexico. (In 1997, the OMB revised the old Standard Industrial Classification (SIC) numbering system into the current NAICS numbering system, and then modified the 1997 version of NAICS in 2002. The 2002 NAICS is the current version to use as of the date of this publication; the next published version of NAICS is scheduled for 2007.) However, the intent of NAICS is to capture data on the manufacturers and producers of commodities more so than the commodities themselves. Consult the latest version of NAICS to classify your company's products at <http://www.census.gov/epcd/www/naics.html>. When shipping documentation and catalogs or other items that are not manufactured goods, review NAICS for their separate classification numbers.

**SEEK LEGAL ADVICE**

This article is intended to provide the reader with accurate and authoritative information regarding export compliance. It was not published as legal advice. If you require legal or other expert advice, you should seek the services of a competent attorney in your jurisdiction or another export professional. Many communities will have attorneys who practice in the area of international law, which often covers US export laws and foreign treaties. In addition, several reputable consulting firms serve companies in all areas of export compliance. ■



**Shawn Cheadle** was formerly general counsel, corporate secretary, and regional vice president of Cougar Components Corp., where he ran Cougar's Colorado facility. Since the acquisition of Cougar Components by Teledyne Technologies, he is now serving as

assistant secretary and senior contracts counsel of Teledyne Cougar Inc. In his new role, his primary practice areas include contracts, defense priority ratings, export compliance, and merger and acquisition support. He has been a member of the Colorado Bar and Denver Bar Association since 1995. He sits on the Board of Directors for the Association of Corporate Counsel, Colorado chapter, where he is first vice president and vice president, communications. He received his juris doctor degree from the University of Denver, College of Law, and his BA in English from San Jose State University.

**TABLE OF AUTHORITIES**

<b>AECA</b>	Arms Export Control Act (22 USC 2778)
<b>ITAR</b>	International Traffic in Arms Regulations (22 CFR Parts 120 to 130)
<b>EAR</b>	Export Administration Regulations (15 CFR Parts 730 to 774)
<b>ANTIBOYCOTT</b>	
<b>TAX REFORM ACT</b>	
<b>HTS</b>	Harmonizing Tariff Schedule of the United States (USITC Publication 3745) Wassenaar Arrangement ( <a href="http://www.wassenaar.org/">http://www.wassenaar.org/</a> )