



# US export controls

**Make the right decisions –  
A practical guide for executives**



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EXPORT CONTROLS

AEB

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# Importance of export controls

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As a senior manager in your business, your focus is highly likely to be on the bottom line: increasing productivity, reducing costs, developing innovative products, and winning new customers. Export control compliance does not inherently add value to a service or product and some companies therefore regard it as a burden. After all, compliance can't really be considered a revenue-generating portion of the company.

The financial impact of export controls should not, however, be viewed only through the lens of government fines and penalties. A higher probability financial risk arises from delays and costs when companies discover licensing irregularities and while corrective action is taken.

Companies which fail to implement effective export control compliance programs risk jeopardizing their business operations and reputations. Effective compliance programs are the best way to prevent violations from occurring in your company, protect your business reputation, and secure your brand image.

## Purpose of export controls





Most countries have some form of an export control policy, legislation, and enforcement mechanisms in place. The reasons for introducing export control legislation vary according to country, but there are some common themes:

- Ensuring national security, technological advantage, and economic interests by limiting access to sensitive technology
- Concerns about internal repression, regional instability, or human rights violations in other countries
- Preventing proliferation of weapons and technologies, including of weapons of mass destruction
- Complying with international treaty commitments including United Nations trade sanctions or arms embargoes

It is important that companies consider whether their activities

are affected by the applicable legislation in place and whether they require a license to export. In certain circumstances, it may not be possible to export the goods at all to the intended destination. A license may be required based on:

- The nature of the goods or information due to be exported
- The intended destination of the goods
- The ultimate end-use of the goods

It also should be noted that licenses from more than one country may be required for a single shipment. So, for example, a shipment from the UK which includes US components may require both a UK license and a US license. As a company, you must therefore know the following:

- What is being exported?
- Where is the item being exported?
- Who will receive the item?
- How will the item be used?

It is also important to note that exports include physical exports as well as electronic exports of data, software, and technology.

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— US export  
controls

# To whom do they apply?

US export controls apply to companies and individuals exporting from the US to a foreign country. US re-export and/or retransfer controls may apply to any company or person moving US-origin controlled material from one foreign country to another foreign country, or even within a single foreign country. This includes the passing of US controlled technical information to persons of a different nationality<sup>1</sup>.

<sup>1</sup> More information in the white paper “US Export Controls: A Global Challenge”: [www.aeb.com/us-export-controls](http://www.aeb.com/us-export-controls)



# Extraterritoriality

The US government asserts extraterritorial reach when enforcing their export control regimes. This means they will attempt to enforce US laws and/or prosecute export control violations even when a company or individual is not located within the US. This has in the recent past included the extradition of non-US nationals, including from the UK.

# ITAR

The ITAR (International Traffic in Arms Regulations) is a set of regulations that control the export, re-transfer, and temporary import of defense-related articles and services listed on the United States munitions list (USML). The Department of State Directorate of Defense Trade Controls (DDTC) interprets and enforces the ITAR.

# EAR

The EAR (Export Administration Regulations) is a set of rules which regulate the export and re-export of commercial goods and, increasingly as a result of reforms to the US system, military goods. The Department of Commerce Bureau of Industry and Security (BIS) interprets and enforces the EAR, and administers export controls for articles listed on the Commerce Control List (CCL).

# OFAC

The Office of Foreign Assets Control (OFAC) of the US Department of the Treasury administers and enforces economic and trade sanctions against targeted countries, companies, and individuals where they are engaged in activities which threaten US national security or the US economy.

# US Export Control Reform (ECR)

In 2009, the US government launched an Export Controls Reform Initiative (ECR Initiative) with the aim of simplifying US export controls while enhancing US security. Part of this ongoing reform includes the revision of the control lists, which has resulted in many items being moved from the USML list to the CCL under a new 600 series category. This ongoing reform is bringing constant change for companies that trade in US controlled materials<sup>2</sup>.

<sup>2</sup> More information in the white paper “Navigating the US Export Control Reform”: [www.aeb.com/us-export-control-reform](http://www.aeb.com/us-export-control-reform)

# Is your business implementing the following checks?



## **Critical goods**

What are you exporting? Refer to USML Part 121 of the ITAR or Export Control Classification Number (ECCN) on the EAR Commerce Control list (CCL).



## **Critical countries**

Where are you exporting to? Refer to ITAR, which requires authorization to all destinations and EAR ECCN and Commerce Country Chart (CCC), which usually determine license requirements.



## **Critical business partners**

Who will receive your item? Refer to Entity List, Treasury Department Specially Designated National and Consolidated Sanctions List, etc.

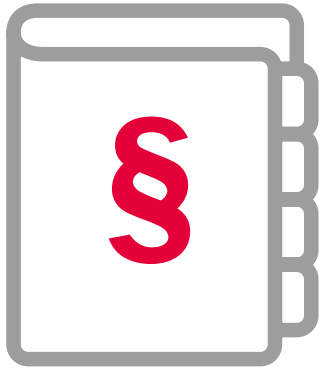


## **Critical end-use**

What will your item be used for? Refer to Part 744 of the EAR.

**— Know your re-  
sponsibilities**

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## Company

Exporting controlled goods, data, software, or technology without the proper license is a criminal offence. It is the responsibility of senior management in a company to ensure that an effective corporate export compliance program is in place and that standards are upheld to ensure adherence to all applicable export control laws and regulations.

Companies that violate export control laws and regulations may face penalties including fines, denial of export privileges, asset forfeiture, and inclusion on restricted party lists. So, it is important to have a continuing program in place to keep employees advised of the applicable provisions of the export control laws, regulations, and requirements of every jurisdiction under which the company operates.

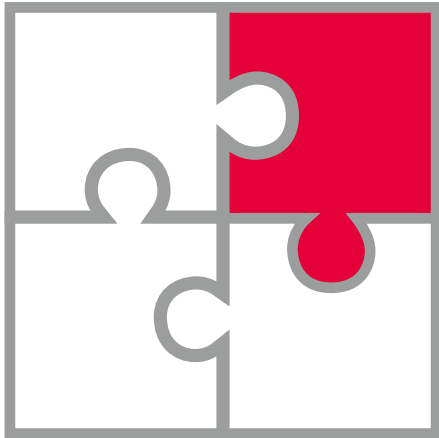


## Management commitment

Experience demonstrates that companies can never achieve an effective program of export control compliance without full commitment and support from senior management. Management must lead by example and ensure that export control compliance is ingrained in the company culture across all divisions. This means that the Board of Directors should be knowledgeable about corporate compliance and oversee the compliance office.

It is essential that management foster a compliance-oriented culture in the company, provide sufficient resources and training for a successful compliance program, and initiate regular communication of the company's commitment to full compliance with export control regulations.





## Successor liability

Businesses can even be held liable for violations of export control laws committed by companies that they acquire. Therefore, they need to be very careful to fully scrutinize the export control practices of any company they plan to acquire. Failure to scrutinize an acquired company's export practices properly can lead to liability being imposed on the acquiring company, regardless of whether the violation occurred before or after closing the acquisition.

## Individual accountability

In general, companies rather than individuals are held accountable for export control violations. Providing that company owners, directors, and officers are deemed to be acting in good faith and with the best interests of the corporation at heart, there is typically a reluctance to pursue individual liability, although this can vary from country to country.

Personal liability may be applied if the individual is found to have acted in a criminal or fraudulent manner, breached the fiduciary duties to the company, or if the company is found to be the “alter ego” of an individual. This situation may be set to change, however.

There are some recent examples of individuals that have faced civil liability for their company’s compliance violations. And, in 2015, the US Deputy Attorney General issued a memorandum entitled Individual Accountability for Corporate Wrongdoing which stated “One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal

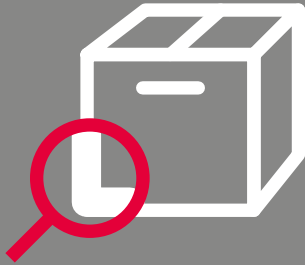


activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public’s confidence in our justice system.”

It is important, therefore, that company owners, directors, and officers take due care and consideration regarding the company’s compliance activities.

## **Consequences of non-compliance**

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The US government has criminal investigators who are responsible for detecting, preventing, investigating, and assisting in the prosecution of illegal exports of controlled commercial and military materials, data, software, or technology. Enforcement agencies in the US are increasingly cooperating with each other in the investigation of export control violations.

The Export Enforcement Coordination Center (E2C2) was established as part of the Export Control Reform initiative to coordinate and enhance criminal, administrative, and related export enforcement activities as a multi-agency center with representation from eight US governmental departments and 15 federal agencies.

The US government views voluntary disclosures as a demonstration of a company's intention to comply with US export controls. It is unusual for a criminal prosecution to proceed where a voluntary disclosure has been made and where the violation was inadvertently made.

Depending on the jurisdiction, penalties for non-compliance range from criminal penalties to civil administrative penalties. Administrative penalties can include loss of exporting privileges, civil financial penalties, or the addition of an individual or company to a restricted party list. Criminal penalties can include prison sentences and very heavy monetary penalties.

Penalties may be deferred or suspended at the discretion of the US government for reasons such as cooperation with investigations and ability to pay the penalty. Voluntary disclosures and effective compliance programs also hold great weight when penalties are determined.

Other potential consequences include loss of reputation and damage to corporate image, pressures from

shareholders/investors, and loss of business. Even before a penalty is imposed, quoted companies with knowledge that a penalty is likely, for example in the course of a voluntary disclosure being processed, may be required to disclose the potential financial liability to market regulators.

It is often the case that under the settlement terms on a consent agreement, a company will be required to heavily invest in their compliance programs. This could include automation of processes through implementation of IT systems, training for staff, and recruitment of a consultant to audit the program.

Is it not a better approach to proactively invest in compliance programs to secure your business and minimize the risk of large penalties and reputational damage?

### **Maximum civil penalty**

Under EAR and economic sanctions: \$250,000 per violation or twice the value of the transaction

Under ITAR: \$1,094,010 per violation

### **Maximum criminal fine**

Under EAR and economic sanctions:

\$1 million per violation

Under ITAR: \$1 million per violation

### **Maximum jail time**

Under EAR and economic sanctions: 20 years

Under ITAR: 10 years

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**— What makes  
an effective  
compliance  
program?**

## Key aspects

The US government publicizes very clearly what they expect from an effective compliance program. In principle, the following should be the main focus:



### **Commitment at the top**

Compliance should be a cultural factor within a company and this is based on the visible commitment of senior executives and management. Such commitment influences investment, attitude, and ultimately the risk of non-compliance.

### **Training and awareness**

To further support the cultural attitude towards compliance, regular employee training is of paramount importance to ensure all teams are aware of their responsibilities. Not all employees will need to know the details of exporting or re-exporting controlled materials, but they may need to be aware of restricted areas, site security, where to seek advice, and importantly, what constitutes an export.







## Screening

To ensure trade does not take place with an individual or entity on one of the restricted party lists, a compliance program must include continued screening against all applicable, published entity lists. Considering the volume of lists, this is not a small undertaking and typically requires software to support this process efficiently.

## Written policies

It is essential to define, document, and communicate corporate policies. In addition to establishing policies, it is crucial to successfully implement and effectively follow them in order to demonstrate due diligence during audits.



## Recordkeeping



To support audits, identification of violations, and voluntary disclosures, records should be easily accessible to support efficient and effective audits.

## Self-audit

To support the ongoing maintenance of a compliance program and to minimize the risk of violations coming to light during an external audit, a company should perform their own, internal audits periodically.



- Perhaps the most important consideration is that an effective compliance program requires ongoing application of the above principles and not a “fire and forget” approach. Compliance is a continuous effort and requires commitment and investment of time and money.

## Software, consultancy, and training

Global supply chains involve highly complex networks subject to a number of trade regulations and export control laws from around the world. Given this, along with the need to ensure compliance with continuously changing legal requirements, it is imperative that companies have the appropriate level of compliance support for their businesses.

### Export control consultants



... can provide practical advice to companies. They can support the development and implementation of an effective corporate export compliance program and keep companies abreast of changes to international export control policy and political developments. Furthermore, they can provide guidance on managing complex export control matters, conduct risk analyses, and deliver custom-tailored business training.

## Training

...is an essential component of any effective export control compliance program. It is important that all employees of an organization are aware of applicable export control regulations, know what is expected of them, are familiar with non-compliance consequences, and understand what actions they need to take to ensure compliance.

There is a wide variety of training available including that provided by private sector companies and government agencies. The Bureau of Industry and Security and the Directorate of Defense Trade Controls, for example, both offer training programs:

- [www.bis.doc.gov/index.php/compliance-a-training/export-administration-regulations-training](http://www.bis.doc.gov/index.php/compliance-a-training/export-administration-regulations-training)
- [www.pmdtdc.state.gov/outreach/index.html](http://www.pmdtdc.state.gov/outreach/index.html)



## Software systems

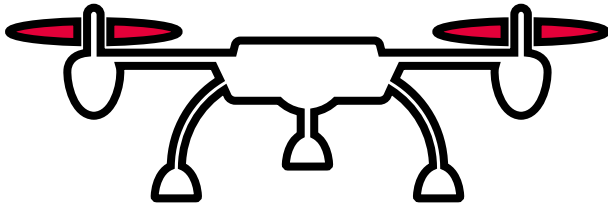
...are a very cost-effective means of ensuring export control security without slowing down business processes. Specialized export control software solutions can typically be integrated into ERP systems and provide automated checks for export license requirements and restricted parties. This reduces the reliance on manual processes and therefore reduces costs, minimizes errors, and improves the level of information available to auditors.

Some software solutions feature automated data updates to ensure that you are always checking against the most up-to-date version of the export control regulations. The best systems enable you to comply with all relevant regulations, mitigate supply chain risks, increase efficiency, and demonstrate due diligence to regulatory authorities.



**— Compliance  
of the future**





Export controls and compliance will become even more challenging and important in the coming decades. One key concern is the increasing importance of non-physical movements.

Post-Cold War export control legislation typically focused in large part on the movement of physical goods. What is becoming increasingly clear, however, is that the ratio between physical movements of goods and non-physical transfers of data is shifting.

## Technological advances

We live in a society where computers and technology occupy a central part of our lives. New concepts such as the Internet of Things (IoT) – where devices connected together over the Internet talk to us and with each other – are set to change our lives significantly. 3D printing, drones, fully unmanned automated distribution centres, to name just a few of these technologies, will push compliance programs of the future beyond what they are today.

3D printing, for example, is becoming more widely used in the aerospace and defense sector. Some major companies are already using it for rapid prototypes and a small number of production components. Components no longer necessarily need to be manufactured in one country and shipped to another where they will be used, but can be produced directly by the final consignee in the destination country through 3D print technology instead. This highlights the importance of controlling blueprints for 3D-printed components given that digital information is all that's required for anyone to produce the same physical item.

Similar concerns relate to the nuclear industry. Specialist 3D printers (capable of handling maraging steel) and CAD files for nuclear components need to be tightly controlled to prevent potential nuclear proliferation.

## **Increasing threat and control levels**

Alongside benefits of technological advances, there are also threats. The seamless, intangible, and borderless transfer of data means that cyber crime and information terrorism are on the rise and will also impact on how we view compliance.

These are not simply export control risks but touch on other areas, too. The data being transferred also involves intellectual property – yours or someone else's. Are you adequately protecting technology that may have taken years to develop but requires only moments to steal? If the data is compromised, are your IT systems capable of providing assurance of data integrity for future production of what may be safety-critical components?

Legislation is another area where companies face challenges. In our interconnected, modern world where

businesses source from all around the world and sell in a global marketplace, companies need to look at export control legislation in multiple jurisdictions. The number of countries that have export control legislation in place is also increasing, which leads to additional regulatory requirements, for example, in the area of commodity code classification or origins and preferences.

## **Your time to act is now**

Export control compliance is a challenging and fast-moving area. It's important that you not only keep an eye on changes and trends, but also act when needed: now. Technological advances, increasing threats, and every-changing legislation all mean that things will get increasingly complex and challenging. Implementing an effective export control compliance program that is robust enough to cope with current challenges and is flexible enough to facilitate future requirements is of utmost importance in protecting your business operations and reputation.

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**— Return on  
investment of  
compliance  
programs**



## Protecting brand image

According to American business magnate Warren Buffett, “It takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you’ll do things differently.”

Companies often spend significant amounts of money, time, and resources to develop their brand image. Integrity, trustworthiness, reliability, and transparency often form key elements of this. Unfortunately, however, it’s easy to lose a good brand image in a very short time if the right protective measures are not taken.

There have been many recent examples of global business brands that have suffered massive dents to their brand image: banks involved in systematic aiding of tax avoidance or media companies failing to put measures in place to prevent cyber attacks on customer accounts.

## Avoiding penalties

Prevention is better than cure, as they say. Criminal fines, administrative penalties, and costs associated with defending against enforcement actions can impose a massive burden on a company’s finances. Effective export control compliance programs are the best way to avoid such penalties in your company.







## Penalty mitigation

It's far better if you are able to detect potential problems and violations before the enforcement authorities do so. If things do go wrong, your company can make a voluntary self-disclosure (VSD) of any issues. Typically, this will lead to a government warning letter or significantly reduced penalties.

## Shareholder value

Damage to brand image and significant financial penalties can have a very direct impact on the shareholder value of the company. In one recent case, a company's share price dropped by 25% when it was disclosed that its equipment was found to have been illegally shipped to Iraq.

It is extremely important, therefore, to ensure that an effective export control compliance program is in place to avoid such financial impacts. When a company stock suffers such a significant reduction in value, it also creates the risk of derivative legal action by shareholders against the directors for breach of fiduciary duty.



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— **About**

## This book

This document provides qualified, unbiased information on export controls. It deals with laws and regulations, standards, technologies, solutions, or processes – analyzed and explained by experts. It reflects current understanding at the time it is written – subsequent changes in the underlying circumstances cannot be ruled out.

## The authors

Founded in 1979, AEB is a global enterprise with over 400 employees and 5,000 customers. AEB helps businesses standardize and automate global trade and supply chain processes with the ASSIST4 integrated software suite. AEB solutions integrate international trade and logistics processes, embedding customs clearance, export controls, and preference management in solutions that manage the global supply chain. The result is a faster, smoother, more efficient flow of goods. ASSIST4 also brings greater transparency to the supply chain and makes it possible to monitor and control shipments all the way to their final destination.

The consulting firm David Hayes Export Controls was established in 2007 to provide professional advice to companies affected by export controls or to those considering entering the market place. The director and founder of the company, David Hayes, is a leading export control consultant in the UK and brings a wealth of experience from the Export Control Organisation and executive compliance roles in Fortune 500 companies, with special focus on ITAR, EAR, and OFAC sanctions. David Hayes Export Controls provides expert advice on UK and EU controls on military and dual-use items and also to businesses dealing with US companies, as suppliers, customers, or partners.

## — Contact us

Please contact us in case of questions or if you would like to discuss the topic further.

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