

The EAR – an overview of available licence exceptions



Licence exceptions can be complex but they are able to offer exporters of items subject to the EAR a host of cost, time and efficiency benefits. Ed Krauland and Anthony Rapa review the pros and cons of licence exceptions, arguing that they can be a useful tool for the compliance department when mastered.

The broad jurisdictional reach of the Export Administration Regulations ('EAR') is well known among trade compliance professionals. Perhaps less known, but of significant benefit, is the range of licence exceptions available to exporters and re-exporters of items 'subject to' the EAR, including companies located outside the United States. These licence exceptions can be highly complex, but are quite helpful if mastered.

Global impact of the EAR

The EAR control not only exports out of the United States, but also – in contrast to other regimes such as the EU Dual-Use Regulation – all exports and re-exports worldwide of items 'subject to' the EAR, regardless of the nationality or location of the person exporting or re-exporting the item. In this way, EAR controls attach to an item and follow it around the world. Bolstering the global reach of the EAR is the broad concept of what is 'subject to' the EAR, a term that includes not only US-origin items, but also non-US items that incorporate more than a *de minimis* level of US controlled content or are the 'direct product' of certain US technology.

Where an item is subject to the EAR, export and re-export licensing requirements can be triggered. Such items include those set out on the Commerce Control List ('CCL'), which consists of relatively high-tech items subject to broad licensing requirements under the multilateral Wassenaar Arrangement, along with a range of items controlled for export to currently designated and some former state sponsors of terrorism (including Cuba, Iran, North Korea, Sudan, and Syria). Lower-tech items that are subject to the EAR but not listed on the CCL are designated as 'EAR99', and are

controlled for export to certain embargoed destinations, such as Cuba, North Korea, Syria, and the Crimea region.

Given the worldwide application of the EAR, a non-US company engaged in the export of items subject to the

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EAR must consider the requirements set out in the EAR, as administered by the US Department of Commerce, Bureau of Industry and Security ('BIS'). This obligation is in addition to the company's duty to comply with the export laws of the jurisdiction in which it operates. A non-US company can find itself subject to the web of licensing requirements described above, and could be required to apply for and administer BIS licences – unless a licence exception applies.

Licence exceptions – overview

The EAR provide for a range of licence exceptions that relieve exporters of the burden of applying for a licence under certain circumstances. The licence exceptions reflect the US government's judgement that for certain less sensitive transactions – for example, shipments of limited value, temporary exports, and carrying of personal baggage – a strict licensing requirement would not be practical or in the interests of the United States. Other licence exceptions recognise the need to be flexible where strict control would be directly at odds with practical

commercial considerations, such as Licence Exception 'ENC' for encryption items, which broadly permits exports of highly controlled items under certain circumstances. Furthermore, certain licence exceptions express a preference for certain countries allied with the United States, and are intended to facilitate exports to those countries without significant administrative burden.

The complete list of licence exceptions, set out 15 C.F.R. Part 740, are shown in the box on the following page.

Advantages of using licence exceptions

The main advantage of using a licence exception is that it provides relief from the requirement to apply for a licence. This can be invaluable for a company engaged in exports or re-exports of items subject to the EAR, particularly companies dealing in a large volume of such items.

Notably, the resources needed to apply for and administer a BIS licence are not insignificant. This includes the following:

- Registering with the BIS 'SNAP-R' system;
- Accurately describing the particulars of a transaction to facilitate BIS review of the licence application;
- Understanding and adhering to the conditions and limitations imposed on the use of an export licence once received, and making sure all relevant parties to a transaction are appropriately informed thereof;
- Keeping track of the approved quantities, values, and destinations under a licence, as well as the licence expiration date, and applying for a renewal of the licence as needed;

- Transferring licences in the event of a change in the name of the company, corporate reorganisation, merger, or acquisition.

Additionally, a licensing requirement can have a significant impact on the timing of order fulfilment, and can inject an element of unpredictability into the business. For example, where a customer places an order on an urgent basis for an item subject to a licensing requirement, a company can find itself scrambling to apply for a licence, which can take weeks or even months to obtain. This can lead to significant commercial challenges.

A licence exception can relieve an exporter or re-exporter of the challenges described above. Significantly, it should be noted that practically all licence exceptions are equally available to both US and non-US companies alike.

Of course, where a licensing requirement is in effect, all companies are obligated to comply. However, if a licence exception is potentially available, it is very much a worthwhile endeavour for a company to assess whether it can make use of the exception.

Disadvantages of using licence exceptions

The main disadvantage of using a licence exception is that the requirements and conditions of a particular licence exception can be complex. For example, there can be limitations or restrictions regarding which items are eligible for use of a licence exception (e.g., a licence exception cannot be used for items subject to missile technology controls), the circumstances under which the items can be exported without a licence, and eligible destinations under the licence exception. These are set forth in the text of each licence exception, which are themselves enumerated in part 740 of the EAR. Additionally, section 740.2 of the EAR imposes restrictions applicable to all licence exceptions, which themselves can be complex, and can be overlooked if an exporter is focused only on the requirements of a particular licence exception.

Proper use of licence exceptions can present certain challenges. First, an assessment of whether a licence

Available licence exceptions

Shipments of Limited Value (LVS)

(§ 740.3) Authorises the export of a single shipment of items of limited value to destinations included in BIS Country Group B (listed in Supplement No. 1 to Part 740 of the EAR).

Shipments to Country Group B Countries

(GBS) (§ 740.4) Authorises exports of certain items to Country Group B.

Civil End-Users (CIV) (§ 740.5)

Authorises the export of certain items to certain destinations if the items are for civil end use.

Technology and Software Under

Restriction (TSR) (§ 740.6) Authorises the export of certain software and technology to Country Group B.

Computers (APP) (§ 740.7)

Authorises the export of certain high-tech computers, and related source code and technology, to certain 'Computer Tier' countries.

Temporary Imports, Exports, Re-exports, and Transfers (In-Country) (TMP)

(§ 740.9) Authorises temporary exports to certain destinations under certain circumstances, including exports of tools of trade, kits of replacement parts, items for exhibition, items to be tested or repaired abroad, items necessary for news-gathering purposes, and items for use by a subsidiary of a US company.

Servicing and Replacement of Parts and Equipment (RPL) (§ 740.10)

Authorises the export to certain destinations of certain replacement parts on a one-for-one basis.

Governments, international organisations, international inspections under the Chemical Weapons Convention, and the International Space Station (GOV)

(§ 740.11) Authorises exports of items for official use by the US government, as well as for use in certain multilateral efforts.

Gift parcels and humanitarian donations

(GFT) (§ 740.12) Authorises exports of certain gifts and donations.

Technology and Software – Unrestricted

(TSU) (§ 740.13) Authorises exports of operation technology and software, sales technology and software, software updates, mass market software, and certain publicly available encryption software.

Baggage (BAG) (§ 740.14) Authorises persons to carry certain items as personal baggage.

Aircraft, Vessels, and Spacecraft (AVS)

(§ 740.15) Authorises export of aircraft and vessels for temporary sojourn abroad, spare parts for permanent use on a vessel or aircraft, and spacecraft and components for research purposes.

Additional Permissive Re-exports (APR)

(§ 740.16) Authorises certain re-exports between and among certain countries.

Encryption Commodities, Software, and Technology (ENC) (§ 740.17)

Authorises certain exports of encryption items.

Agricultural Commodities (AGR)

(§ 740.18) Authorises the export of agricultural commodities to Cuba.

Consumer Communications Devices

(CCD) (§ 740.19) Authorises the export of personal communications devices and software to Cuba and Sudan.

Strategic Trade Authorisation (STA)

(§ 740.20) Authorises the export of certain items, including certain defence articles that have transitioned from control under the International Traffic in Arms Regulations (ITAR) to the EAR, to 36 countries.

Support for the Cuban People (SCP)

(§ 740.21) Authorises the export to Cuba of items for use in improving living conditions, developing private industry, strengthening civil society, improving communications, and exhibition and demonstration.

exception is available can involve a commitment of resources and require a detailed understanding of the transaction at issue. Second, there can be some ambiguity as to whether a licence exception is available, which may not be ideal for a company that is highly risk adverse, or which is dealing with counterparties that are risk adverse.

Furthermore, while licence exceptions are quite beneficial, they are not a panacea. This is because a licence

exception can impose certain restrictions, such as the restriction on further unlicensed transfers of items exported under Licence Exception STA. Moreover, for certain licence exceptions, such as ENC, there are recordkeeping and reporting requirements not entirely dissimilar from requirements in the licensing context. Additionally, certain licence exceptions authorising the export of technology provide that nationals of certain countries are not authorised to

receive the subject technology, which could trigger a licensing requirement for a company seeking to share such technology with its third-country national employees.

Conclusion

Overall, licence exceptions can be of significant benefit to exporters and re-exporters, although they can be complex, and may require detailed analysis before they can be used. Notably, BIS encourages exporters and re-exporters to use licence exceptions, since they reflect US policy, reduce the burden for both exporters/re-exporters and BIS staff, and reduce obstacles and costs that can inhibit trade.

As explained above, licence exceptions are generally available to exporters and re-exporters, and are

transparently published in the EAR. While licence exceptions may not

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always be applicable, a compliance department can add value to the business by becoming familiar with the parameters of the exceptions, and deploying them as appropriate in order

to reduce costs, avoid scheduling impacts, solidify customer relationships through supply chain certainty, expand market presence, and bolster the company’s competitiveness.

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