

Is Your Software Transmission Subject to U.S. Export Controls under the EAR?

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The release of software may require an export control license from the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") under the Export Administration Regulations (the "EAR"). Software delivery has evolved from a physically transferred product to a product now most often disseminated through electronic transmissions of the software code. This evolution diminished the interaction between software suppliers and customers, while increasing the access for customers around the world to a broad range of software products. The EAR, however, makes no distinction between software transferred through the physical shipment of tangible items and electronic transmissions.

A software export under the EAR includes "any release of technology or software subject to the EAR in a foreign country," or any release of "source code subject to the EAR to a foreign national." The latter example is commonly known as a deemed export. The actions comprising a release of software and technology are broad, extending beyond the physical export of tangible goods or electronic transmissions. These actions include the visual inspection by foreign nationals, exchanges of information, or the application of personal knowledge or technical experience acquired in the United States.

The EAR applies to items on the Commerce Control List ("CCL"), classifying the items by Export Control Classification Numbers ("ECCN"). Moreover, the regulations contain an important "catch-all" category known as "EAR 99" for all items not specifically listed on the CCL, but covered by the EAR. Because the EAR is expansive, the items covered by the EAR 99 catch-all are also expansive. By definition, the reach of EAR export controls extends to (i) all items exported from the United States, (ii) all U.S.-origin items wherever located, (iii) foreign-made commodities "bundled" with U.S.-origin software, and (iv) qualified foreign made direct software.

The ECCN for controlled software predominantly informs the level of export restriction under the EAR. The ECCN provides a precise description of the item, the reason for control (e.g. anti-terrorism), and information as to pertinent license exceptions. A key determinant as to the level of control for software under the EAR is the presence of data encryption. Many unique definitions and specifications expansively control encryption software, even when embedded within software with mostly non-encryption functionality. Also, all items, whether classified as EAR 99 or under a specific ECCN, must comply with the ten general prohibitions under the EAR. Among these general prohibitions are the end-user and end-use restrictions.

Even with the broad classification of software items under EAR 99, some items remain excluded from control under the EAR. For example, the EAR excludes publicly available software from control, although this exclusion does not generally include encryption software. Information is publicly available when "published" by becoming "generally accessible to the interested public in any form." Specifically, software publication occurs "when it is available for general distribution for free or at a cost that does not exceed the cost of reproduction or distribution"

License exceptions under the EAR may be available to export-controlled software depending on the ECCN description, the applicable general prohibitions, and other qualifying factors. Typical license exceptions which may be available for your software transaction include the following: civil end-users ("CIV"); governments, international organizations, international inspections under the Chemical Weapons Convention, and the International Space Station ("GOV");

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baggage ("BAG"); limited value shipment ("LVS"); temporary imports, exports and re-exports ("TMP"); computers ("APP"); technology and software under restriction ("TSR"); technology and software-unrestricted ("TSU"); and, encryption commodities and software ("ENC").

The EAR embargo restrictions may prohibit software transmissions ordinarily permitted under an EAR license exception. Pursuant to General Prohibition Six, license exceptions are generally unavailable for controlled software exports to countries embargoed under the EAR. However, part 746 of the EAR sets forth a positive list of license exceptions which may be available for software transmissions to customers residing in embargoed countries such as Cuba, North Korea, Syria and Iraq. Moreover, General Prohibition Seven prohibits the export of software transmissions, covered by the EAR, originating from the United States, when intended for a banned purpose, such as nuclear proliferation. These end-user and end-use restrictions arising from the general prohibitions usually prohibit a software transmission without a license.

For further information as to whether a license exception or license may be appropriate for your software transmission, we invite you to contact Miller Canfield's Export Control Team. Visit the Export Control Team's webpage for other export control articles and alerts, as well as updates on U.S. Export Control Reform.

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