

**U.S. DEPARTMENT OF COMMERCE  
BUREAU OF INDUSTRY AND SECURITY  
OFFICE OF EXPORTER SERVICES  
EXPORT MANAGEMENT AND COMPLIANCE  
DIVISION**

**FREIGHT FORWARDER GUIDANCE**



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# Freight Forwarder Guidance

Members of the international forwarding community play a key role in ensuring the security of the global supply chain, stemming the flow of illegal exports, and helping to prevent Weapons of Mass Destruction (WMD) and other sensitive goods and technologies from falling into the hands of proliferators and terrorists.

## Responsibilities of the Forwarding Community

Forwarding agents have compliance responsibilities under the Export Administration Regulations (EAR) even when their actions are dependent upon information or instructions given by those who use their services. However, hiring an agent, whether a freight forwarder or some other agent, to perform various tasks, does not relieve a party of its compliance responsibilities.

Agents are responsible for the representations they make in filing export data. Moreover, no person, including an agent, may proceed with any transaction knowing that a violation of the EAR has, is about to, or is intended to occur. It is the agent's responsibility to understand its obligations.



Agents, especially those acting as the "exporter" in routed export transactions (see below), should understand the "Know Your Customer" guidance and "Red Flags" found in supplement no. 1 to part 732 of the EAR. Agents and exporters should determine if Red Flags are present, exercise due diligence in inquiring about them, and ensure that suspicious circumstances are not ignored. Failure to do so could constitute a violation of the EAR.

Agents should be thoroughly familiar with the ten General Prohibitions set forth in part 736 of the EAR, and with the violations outlined in part 764 of the EAR. Engaging in prohibited conduct or committing the violations set out in the EAR may subject violators to significant penalties -- up to 20 years imprisonment and fines of up to \$1,000,000 upon

criminal conviction, and penalties of up to \$250,000 per violation and/or a denial of export privileges for administrative offenses.

## **Routed and Non-Routed Export Transactions**

Primary responsibility for compliance with the EAR falls on the "**principal parties in interest**" (PPI) in a transaction. Generally, the PPIs in an export transaction are the U.S. seller and foreign buyer. See the following parts and sections of the EAR for additional information: section 748.5, regarding parties to a transaction; part 758 on export clearance; and relevant definitions in part 772.

In a "**routed export transaction**," in which the foreign PPI authorizes a U.S. agent to facilitate the export of items from the United States, the U.S. PPI obtains from the foreign PPI a writing in which the foreign PPI expressly assumes responsibility for determining licensing requirements and obtaining authorization for the export. In this case, the U.S. agent acting for the foreign PPI is the "exporter" under the EAR, and is responsible for determining licensing authority and obtaining the appropriate license or other authorization for the export.

An agent representing the foreign PPI in this type of routed export transaction must obtain a power of attorney or other written authorization in order to act on behalf of the foreign PPI.

In this type of routed export transaction, if the U.S. PPI does not obtain from the foreign PPI the writing described above, then the U.S. PPI is the "exporter" and must determine licensing authority and obtain the appropriate license or other authorization. This is true even if the transaction is considered a routed export transaction for purposes of filing electronic export information pursuant to the Foreign Trade Regulations (15 C.F.R. part 30).

In a routed export transaction in which the foreign PPI assumes responsibility for determining the appropriate authorization for the export, the U.S. PPI obtains from the foreign PPI a writing wherein the foreign PPI expressly assumes responsibility for determining licensing requirements and obtaining licensing authority. The EAR requires the U.S. PPI to furnish the foreign PPI and its agent, upon request, with the correct Export Control Classification Number (ECCN) or sufficient technical information to determine the ECCN. In addition, the U.S. PPI must provide the foreign PPI and its agent with any information that it knows will affect the determination of license authority. The U.S. PPI also has responsibility under the Foreign Trade Regulations (15 C.F.R. part 30) to provide certain data to the agent for the purposes of filing electronic export information.

In a transaction that is not a routed export transaction, if the U.S. PPI authorizes an agent to prepare and file the export declaration on its behalf, the U.S. PPI is the “exporter” under the EAR and is required to:

- (A) provide the agent with the information necessary to complete the AES submission;*
- (B) authorize the agent to complete the AES submission by power of attorney or other written authorization; and*
- (C) maintain documentation to support the information provided to the agent for completing the AES submission.*

If authorized by either the U.S. or foreign PPI, the agent is responsible for:

- (A) preparing the AES submission based on information received from the U.S. PPI;*
- (B) maintaining documentation to support the information reported on the AES submission; and*
- (C) upon request, providing the U.S. PPI with a copy of the AES filed by the agent.*

Both the agent and the PPI who has authorized the agent are responsible for the correctness of each entry made on an AES submission. Good faith reliance on information obtained from the PPI can help protect an agent, but the careless use of "No License Required," or unsupported entries, can get an agent into trouble. Agents without the appropriate technical expertise should avoid making commodity classifications and should obtain support documentation for ECCNs.

Additionally, upon written request, Census will provide companies with twelve months of AES data free of charge every 365 days. The Census Bureau’s Foreign Trade Division currently provides U.S. PPIs, and other filers requesting their AES data, with all ten data elements required in routed export transactions.

## **Mitigating the Risk and Building a Private-Sector/Public-Sector Partnership**

As noted above, forwarders may be subject to criminal prosecution and/or administrative penalties for violations of the EAR. BIS has not hesitated to hold forwarders liable for participating in illegal transactions. Bad publicity alone can cost companies incalculable sums, in terms of future business, not to mention costs associated with lengthy and costly litigation, or administrative or criminal penalties. For example, in August 2009, after a government investigation lasting for more than five years, DHL reached a \$9,444,744 Settlement Agreement with BIS and Treasury’s OFAC in a case involving hundreds of shipments to Iran, Sudan, and Syria, and a failure to adhere to government recordkeeping requirements.

This case, and many others involving forwarders, demonstrate the need for forwarders to know their customers and be aware of suspicious circumstances and Red Flags that may

be present in an export transaction. When presented with Red Flags, forwarders have an obligation to inquire about the facts of the transaction, evaluate all of the information after inquiry and refrain from engaging in the transaction if the Red Flags cannot be resolved. These steps help protect not only the forwarder but also the forwarder's client, who may be unknowingly engaging in a prohibited transaction.

Forwarders can take steps to mitigate their own and their clients' risks of liability by establishing a compliance program that scrutinizes export transactions and checks the parties to transactions against BIS's and other U.S. Government agencies' various Lists to Check (see <http://www.bis.doc.gov/complianceand enforcement/liststocheck.htm>). Forwarders should also familiarize themselves with the types of activities to avoid in suspicious transactions as described in the BIS publication, Don't Let This Happen to You, also on the BIS website. See <http://www.bis.doc.gov/complianceand enforcement/dontletthishappentoyou-2008.pdf>.

Although in a non-routed transaction the primary burden of compliance rests with the U.S. PPI, section 758.3 of the EAR states that "[a]ll parties that participate in transactions subject to the EAR must comply with the EAR." Therefore, some compliance responsibility also rests with the freight forwarder. Parts 744, 760, 736, 732 supplement no. 3, and 764, among others, discuss how export transactions may not be conducted with certain parties, that dealing with certain parties may have additional licensing requirements, that dealing with certain parties should raise Red Flags for exporters, and that certain countries, activities, and items have certain restrictions under the EAR.

While the EAR allows flexibility in the manner in which U.S. companies meet these compliance requirements in a number of different methods, BIS strongly recommends that all parties dealing with export transactions maintain a vigorous and effective Export Management and Compliance Program (EMCP), incorporating the nine key elements (check the EMCP weblink at <http://www.bis.doc.gov/complianceand enforcement/emcp.htm>), and especially the screening of all parties to transactions, as part of their overall due diligence.

BIS, however, also recommends striking the right balance. Compliance activities would differ depending on the nature of the items being exported and the destinations to which they are exported, but err on the side of caution to ensure that our U.S.-origin dual-use goods and technologies are exported in compliance with the EAR.

Freight forwarders and exporters are symbiotically situated to work together to develop compliance procedures for their mutual benefit and sustainability. Building compliance partnerships and sharing compliance strategies with each other and other parties to transactions as part of Standard Operating Procedures will give all involved a competitive edge. Once the investment is undertaken and the procedures are in place and continually maintained, export transactions will proceed predictably, safely, and with consistent application of the appropriate research and analysis of parties and uses/applications. The more compliance processes are integrated into existing business processes, the more

seamless your entire export process will be. As you share and learn compliance techniques with your business partners and build synergies while also building business relationships, you will ensure your mutual longevity and bottom lines.

Even if forms like the BIS-711, the Destination Control Statement, and the Letter of Acceptance of License Conditions are not required by the EAR from your overseas business partners, as part of your own compliance processes, you may wish to draft a document including language similar to these and require their use in certain situations to enhance compliance.

Concerning documentation requirements, refer to the EAR's part 762 (applicable to all transactions subject to the EAR) regarding records that have to be maintained, records that don't have to be maintained, requirements for producing records, retention period, etc. There are also recordkeeping requirements from, *inter alia*, Customs (19 CFR part 163), the Department of State (ITAR and 22 CFR part 122.5), the Census Bureau (15 CFR 30.66(c)), and Treasury's OFAC (31 CFR part 501).

BIS's Export Management and Compliance Division (EMCD, at 202-482-0062 and through the BIS website) is available to assist with compliance questions; our Outreach and Educational Services Division (OESD, at 202-482-4811, 949-660-0144, and through the BIS website) is available to assist with general questions involving exporting, and, for licensing issues, it may be helpful to speak with one of BIS's expert Licensing Officers who deals with your particular line of products. Your local Export Enforcement Field Office would also be able to give you guidance; to find your local office call (202) 482-1208, or check the BIS Program Offices website at <http://www.bis.doc.gov/about/programoffices.htm#ee>, and for a regulatory perspective, you may also contact BIS's Regulatory Policy Division (RPD) at (202) 482-2440 and through the BIS website.

Notably for freight forwarders, in the EAR, see, *inter alia*, sections 758.1 through 758.6, 748.4, and 750.7(d). Section 758.3(b) notes the difference in definitions between Census and BIS for the term "exporter." Section 758.8 discusses the return or unloading by forwarders, or other entities, of shipments at the direction of U.S. government officials, and part 730, supplement no. 3, notes that export control responsibilities for Ocean Freight Forwarders are with the Federal Maritime Commission's Office of Freight Forwarders.

You may additionally set up information briefings, whereby you invite EMCD, Customs and Border Protection (CBP), BIS's Export Enforcement, and/or representatives from other government entities to make presentations to your company and your business partners, in order to support you in educating all regarding compliance. Make use of the BIS website and the other government websites, and send staff to BIS seminars and seminars offered by other government agencies.

Parties who believe they may have committed a violation of the EAR are encouraged to submit a Voluntary Self Disclosure (VSD) to BIS. VSDs are an important indicator of a party's desire to bring their export activities into compliance, and also may provide important information to BIS helping to identify foreign proliferation networks. Parties submitting VSDs may be eligible for significant reductions in administrative penalties, and those with well-implemented EMCPs may expect further significant reductions of administrative penalties. Procedures for submitting VSDs may be found in section 764.5 of the EAR. The procedures detailed in section 764.5 do not apply to VSDs involving violations of the antiboycott provisions of the EAR. Procedures for submitting VSDs for boycott violations are found in section 764.8 of the EAR.

The Office of Export Enforcement (OEE) and the Office of Exporter Services (OExS, which includes EMCD, OESD, and RPD) welcome the opportunity to work with the international forwarding community to help ensure compliance with U.S. export requirements. While it is important to protect yourselves and your clients from engaging in transactions that might constitute violations, it is equally important that BIS be able to fulfill its mission of keeping the most sensitive goods out of the most dangerous hands. Development of effective, well-integrated and well-implemented EMCPs, prompt notification by forwarders to OEE of suspicious transactions, and assistance to OEE Special Agents in gathering the evidence necessary to disrupt illicit proliferation networks and bringing export violators to justice, are important steps in helping to achieve these private-sector and public-sector goals.

**If you have reason to believe a violation is taking place or has occurred, you may report it to the Department of Commerce by calling its 24-hour hot-line number: 1 (800) 424-2980. Or, if you prefer, use our web form (at <https://www.bis.doc.gov/forms/eeleadsntips.html>) to submit a confidential tip.**

*Please note that use of the form will not generate any return e-mail to you, so that the information you submit will remain confidential.*