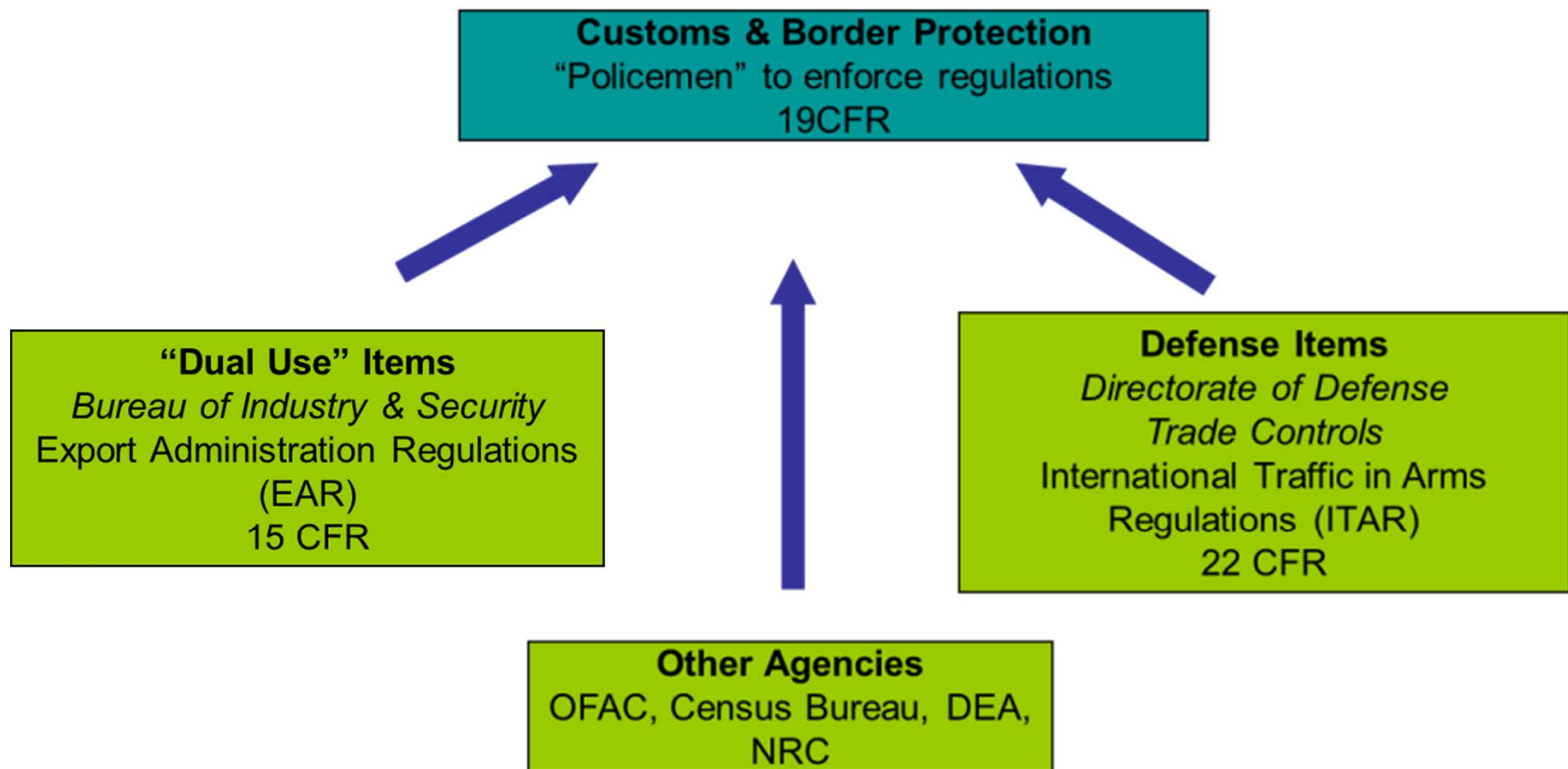


# Deemed Exports and Export Control Regulations



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# Overview: Who Regulates What?



# Export Jurisdiction

Exports fall under the jurisdiction of either:

- The Export Administration Regulations (EAR) for dual-use items (Department of Commerce), or
- The International Traffic in Arms Regulations (ITAR) for defense articles (Department of State)



# Overview: What are Exports?

## **Tangible Exports**

- Shipments through a US port via air, ocean, truck, rail, mail, etc.

## **Intangible Exports**

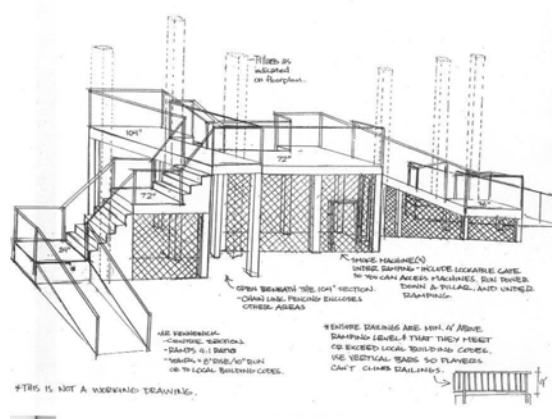
- Electronic transfers (including email, fax and Internet downloads)
- Technical reports, drawings, data or source code released to foreign nationals

## **Re-Exports**

- Shipments from one foreign country to another of US-origin goods or foreign made goods containing certain US-origin parts, components or materials.

# What are Deemed Exports?

- The release of technology or source code to a foreign national within the United States. 15 CFR § 734.2(b)(2)((ii).
- This release is “deemed” to be an export to the foreign national’s home country.



# What are Deemed Exports?

Companies must apply for an export license to release technology if:

- Transferring controlled technologies to foreign nationals in the U.S., and
- Transfer to the foreign national's home country would require an export license



# Technology Exports

- Releases of technology to a foreign country are actual exports to that country
- Examples:
  - Email to a U.S. person working in France for a French-incorporated company
  - Unrestricted U.S. server access by employees of a Chinese subsidiary
  - Bills of Material containing detailed chemical formulas sent to a manufacturer in Mexico

# Why Control Technology Releases?

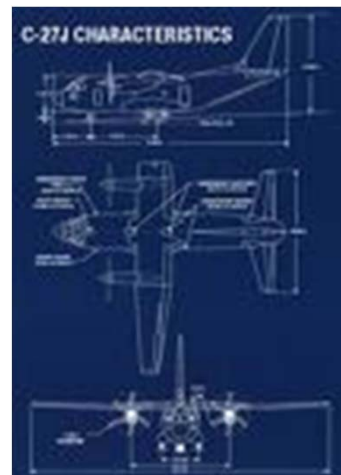
- National Security
- Economic Espionage
  - Stealing Trade Secrets





# Examples of Technical Data

- Source code
- Blueprints
- Drawings
- Photographs
- Instructions
- Certain software related to Defense Articles



# Examples of Disclosures or Transfers

- Discussions
- Site visits
- E-mails
- Product manufacturing, design
- Server access

What are your client's areas of risk?

# Examples of Disclosures or Transfers

- Risk area: tech data provided by 3<sup>rd</sup> party contractors/suppliers/vendors
  - Must also be evaluated for license
    - Petitioner may still be “providing access to” the beneficiary
    - Case example



# What Does “Foreign Person” Mean?

## Foreign Persons are:

- Not U.S. Citizens
- Not Legal Permanent Residents (“green card” holders)
- Not Protected Persons as defined under special provisions of U.S. law (refugees or asylees, or 8 USC § 1324b)



# What Does “Foreign Person” Mean?

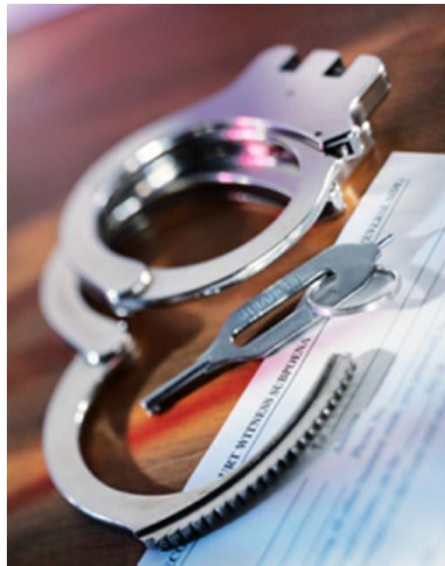
Foreign persons include,  
among many others:

- H1-Bs and L-1s
- Treaty investors/traders
- F-1 students
- And even our Canadian neighbors!



# What Are the Consequences of Violations?

Inadvertent releases of data to foreign nationals drive a large number of disclosure and enforcement cases.



# What Are the Consequences of Violations Under the EAR?

- Civil fines up to \$250,000 per violation or twice the amount of the transaction at issue, whichever is greater; and
- Criminal penalties up to \$1,000,000 per violation, with up to 20 years imprisonment per violation.



# What Are the Consequences of Violations Under the ITAR?

- **Criminal Sanctions:**

- A fine of up to \$1,000,000 or up to ten years in prison, or both, per violation.

- **Civil Sanctions:**

- A fine of up to \$500,000 per violation.

→ Additionally, for any violation of the ITAR either or both of the following may be imposed:

- The denial of export privileges; and/or
- Seizure/Forfeiture of goods.



# Enforcement:

## Criminal Case Example EAR/ITAR

- Retired physics professor J. Reece Roth
- Penalties up to 160 years in prison and over \$15 mill. in fines
- Convicted in Sept. 2008 of:
  - allowing two students (Chinese and Iranian) unrestricted access to information about technology used in U.S. Air Force project.
  - taking documents relating to that project on trip to China in 2006.
  - receiving an emailed report while in China
  - 18-count indictment and **full 18-count conviction**.



# Enforcement:

## Criminal Case Example EAR/ITAR

- Roth reportedly ignored warnings from his university
- Supreme Court denied cert Oct. 3, 2011
- Roth serving 4 years in prison
- Roth's company Atmospheric Glow Technologies received a \$25,000 penalty
  - Co-founder / former student Daniel Sherman received 14-month prison sentence

# Enforcement: Voluntary Disclosure

- Research scientist
- Materials and videos of his lectures for his class “Infrared Technology and Applications”
- Professor thought the link was an internal link, but it was an ordinary Internet link
- Voluntary disclosure to DDTC
- No penalty



# USCIS Form I-129

- U.S. Citizenship and Immigration Services (USCIS) Form I-129 now requires petitioner to certify that:
  - he/she has reviewed the EAR and the ITAR, and
  - determined whether license required from Department of Commerce or State to release technology or technical data.
- I-129, Page 5, Part 6

# USCIS Form I-129

- Applies to workers employed as H-1B, L-1 or O-1A beneficiaries.
- If license required, petitioner must certify it will **prevent beneficiary's access** to controlled technology or data until license is in place
- Petitioners required to complete this section since February 20, 2011

# Form I-129 Certification Section

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## Part 6. Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States

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(For H-1B, H-1B1 Chile/Singapore, L-1, and O-1A petitions only. This section of the form is not required for all other classifications. See Page 3 of the Instructions before completing this section.)

**Check Box 1 or Box 2 as appropriate:**


With respect to the technology or technical data the petitioner will release or otherwise provide access to the beneficiary, the petitioner certifies that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined that:

- ☐ 1. A license is not required from either U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person; or
- ☐ 2. A license is required from the U.S. Department of Commerce and/or the U.S. Department of State to release such technology or technical data to the beneficiary and the petitioner will prevent access to the controlled technology or technical data by the beneficiary until and unless the petitioner has received the required license or other authorization to release it to the beneficiary.

 **er Schulz LLP**

# USCIS Form I-129

- The form covers specific visa categories
- BUT... the deemed export rule applies to all foreign nationals

 Foreign nationals not using Form I-129 are still subject to the EAR and ITAR restrictions

# Additional Considerations

- Immigration attorneys should alert clients to applicable export control requirements
  - Deemed exports to foreign nationals in the U.S.
  - Form I-129, Part 6
  - Watch for red flags:
    - server access
    - drawings, designs, emails, discussions
    - research projects (e.g., Roth case)



# Update on Export Control Reform (ECR)

- President's Export Council Subcommittee on Export Administration (PECSEA)
- Panel on Deemed Exports in Academia, February 2012
- Panel on Deemed Exports in Business, June 2012
  - Practical implementation is an issue for SMEs
  - Outreach efforts

# Questions?

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# U.S. Economic Sanctions Laws

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Presented by  
Marla Thompson Poirot  
Gardere Wynne Sewell

**GARDERE**

June 12, 2012

# Areas to be Covered

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- Prohibited Business Activities
- Potential Individual Liability
- Corporate Structuring Issues

# OFAC Regulations & Sanctions

- Based on national security and U.S. foreign policy interests
- Most issued by the President under the authority of “IEEPA” (Int’l Emergency Economic Powers Act)
- OFAC sanctions are either country-based (Cuba, Iran, Sudan) or list-based (persons or organizations with ties to terrorism, international narcotics trafficking, human rights abuses, the proliferation of WMDs, etc.)

# Government Agencies Involved

- Primarily OFAC (U.S. Treasury Dept.'s Office of Foreign Assets Control)
- Also, the U.S. State Dept.
- Also, the U.S. Commerce Dept. (Bureau of Industry and Security – “BIS”)

# The Reach of OFAC Sanctions: a “U.S. person”

- All U.S. citizens and permanent residents (i.e., green card holders), *wherever located in the world*
- U.S. corporations and all their employees, regardless of location and nationality
- All persons, entities, or property *located in the United States*
- All companies organized in the United States *whether acting in or outside the United States*
- Foreign branches of U.S. companies
- Foreign subsidiaries of U.S. companies

# U.S. persons/companies may not:

- Export, re-export, sell, or supply (directly or indirectly) any goods, technology, or services to **Iran, Cuba, or Sudan**
  - Prohibition includes Cuban nationals
  - Also, entities owned or controlled by the governments of these countries
  - OFAC licensing is possible, but typically only granted for food and medicine



# U.S. persons/companies may not:

- Export any goods, technology, or services to a third country where you know that (1) they are intended for a prohibited country or (2) they are intended for the **use in the production of**, or **commingling with**, or **for incorporation into**, goods, technology, or services to be directly or indirectly supplied, transshipped, or re-exported *predominantly* to a prohibited country

# U.S. persons/companies may not:

- Export, sell, or supply (directly or indirectly) to individuals or entities on the **published lists**:
  - OFAC's Specially Designated Nationals ("SDN") List (individuals or entities owned, controlled by, or acting on behalf of a sanctioned country)
  - Dept. of Commerce's Denied Persons List
  - Dept. of Commerce's Unverified List
  - Dept. of Commerce's Entity List
  - US State Dept.'s Debarred List

# Business Activities Impacted

- Exports
- Re-exports
- Imports
- Investments
- Provision of services
- Participation in JVs
- Parent-subsidiary interactions
- Financial dealings

# U.S. persons/companies may not:

- **Facilitate** activities by non-U.S. persons or businesses that the U.S. person(s) could not engage in directly
  - “Facilitation” is approving, facilitating, financing, or supporting another person’s dealings with prohibited countries, or individuals or entities on the U.S. government’s various published lists

# “Facilitation”

- *Changing* a foreign subsidiary’s processes and procedures to permit a particular transaction or set of transactions to occur *without* U.S. participation is facilitation
- There is facilitation risk with foreign “sister companies” that are not truly independent
- There is risk if there is a divergence of *operational* structure from *legal* structure
- There is risk with joint ventures, joint development projects, etc.

# Other Prohibited Countries/Risk Areas

- More limited OFAC sanctions apply to dealings with **Syria**, **Burma**/Myanmar, and **North Korea**
- The **United Arab Emirates** (“UAE”) is a transshipment point for U.S.-origin items to the Middle East
  - There is a heightened risk of diversion to prohibited areas by going through the UAE, but there are currently no direct sanctions for dealings with or shipments to the UAE

# Enforcement

- Mandatory reporting by banks
  - Financial institutions have automatic screening against these countries and lists
- Whistleblowers
- Counterparties/JV partners
- Competitors
- OFAC/SEC/DOJ

# OFAC Penalties

- Civil penalties up to \$250,000 per violation, or twice the value of the transaction at issue
  - OFAC has Administrative Guidelines that consider willfulness or recklessness of the violation; knowledge/awareness of the conduct at issue; existence of a compliance program; cooperation with OFAC; prior violations; etc.
- Criminal penalties up to \$1 million per violation and/or 20 years imprisonment



# Corporate Structure

## Hypothetical

Taiwanese parent company (“TPC”)

- TPC is *not* subject to OFAC prohibitions, but any of its employees, officers, or directors who are **U.S. persons** (including U.S. subsidiaries) are subject to the sanctions
- Any of TPC’s *non-U.S.* employees, officers, or directors are subject to the sanctions for activities conducted **while in the United States**

# Corporate Structure

## Hypothetical

“TPC – Luxembourg”

European company, subsidiary of TPC

- *Not* subject to OFAC prohibitions, but any individual employees, officers, or directors who are **U.S. persons** are subject to the sanctions

# Corporate Structure

Hypothetical

“USTPC”

US company, subsidiary of/owned by TPC  
(Taiwan)

- USTPC and all USTPC employees, officers, and directors are subject to OFAC prohibitions, wherever located and wherever doing business

# Potential Scenarios/Issues

- TPC (Taiwan) sells directly to Iran.
  - Occasionally they are short product and make up the shortfall on some orders to Iran by purchasing “makeup” product from USTPC to fill those orders
  - PROBLEM
- TPC – Luxembourg sells/markets USTPC products to mostly non-prohibited countries, but occasionally to Iran and Cuba as well
  - PROBLEM

# Potential Scenarios/Issues

- TPC – Luxembourg buys material(s) from USTPC to make various products, some of which are ultimately sold and exported to Iran
  - **DEPENDS ON % OF COMPLETION, % OF SALES, AND USTPC KNOWLEDGE**
- TPC – Luxembourg buys finished product(s) from USTPC and inventories those finished products in Europe until they can be sold, some to prohibited countries
  - **PROBLEM**

# Compliance/Managing Risks

- Compliance Program is essential
  - Ethics Policy/Code of Conduct
  - Training
  - Accounting/Administrative procedures
  - Anonymous hotline
- Disciplinary procedures and action(s) for violations
- Must all be documented

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