



BIS UPDATE 2017 CONFERENCE ON EXPORT CONTROLS AND POLICY



Licensing Best Practices: EAR License Application Processing and Issuance




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Overview

- Preparing a License Application
 - A clear and thorough description is critical
- The Licensing Process
 - Interagency Review
 - Common Agency Concerns
 - License Review Period
 - Dispute Resolution
- License Conditions
- License Denials



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Preparing a License Application: A Thorough Application

- On the license application
 - Define the item(s) in terms of the technical parameter(s) of the ECCN(s)
 - If technology, define what will and will not be transferred
 - Identify the specific end-uses
 - Provide any information you know about the ultimate consignee/end-user(s)
 - Provide information on any internal controls in place to mitigate the risk of diversion or unauthorized end-users/end-uses
 - For 600-series items, cite prior equivalent DDTC approvals
- BIS licenses authorize exports/reexports to and among the end-users listed on license, so craft the license application accordingly.



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The Licensing Process: Interagency Review

- Ensures that the U.S. Government decision on a license application draws on the breadth and scope of the government's expertise
- Reviewing agencies have common national security and foreign policy interests, but unique perspectives.
- Reviewing Agencies:
 - Department of Commerce
 - Technical issues (National Security, Non-proliferation and others)
 - Economic issues
 - Department of Defense
 - National security issues – Brings the technical expertise of the Services focused on an individual export/reexport
 - Department of Energy
 - Nuclear and missile issues
 - Department of State
 - Foreign policy issues



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The Licensing Process: Common Reviewing Agency Concerns

- Parties to the transaction:
 - What are their roles?
 - What do you know about the parties?
 - What is your source for information?
- End-use concerns:
 - Is there a balance between the product's capability and the proposed end-use?
 - Is there excess capability? Why?
 - What is the risk of diversion?
- Controls:
 - What controls are in place to prevent diversion?
 - Are the controls realistic?
 - Do the parties understand the controls?
 - Are the controls documented?
 - Who will conduct monitoring?

Target known agency concerns in your license application!



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The Licensing Process: License Review Period

- The Department of Commerce must review the application and refer it to the reviewing agencies within 9 days of receipt.
- Reviewing agencies have 30 days to respond with recommendations.
- If the reviewing agencies concur on the disposition of the license application, it will be:
 - Approved
 - Approved with conditions
 - Denied



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License Conditions (Standard Scope Condition)

- Many licenses are approved with a standard statement of scope: (see § 750.7(a) of the EAR).
- Goal is to eliminate the inclusion of requirements and prohibitions included in the Export Administration Regulations (EAR) as conditions on validated licenses. If proposed conditions negatively impact the proposed transaction, let us know, and propose alternate language.



Standard Scope on All Licenses

- “Unless limited by a condition set forth below, the export, reexport or transfer (in-country) authorized by this license is for the item(s), end-use(s), and parties described in the license application and any letters of explanation. The applicant is responsible for informing the other parties identified on the license, such as ultimate consignees and end-users, of the license’s scope and of the specific conditions applicable to them. BIS has granted this license in reliance on representations the applicant made in the license application, letters of explanation, and other documents submitted.”



Why Do I Still Get Conditions?

- Export Item sensitivity
- End-User Concerns identified during application review
- Lack of specificity/clarity in the stated end-use

Please review proposed conditions and
Respond before we issue the license



The Licensing Process: Dispute Resolution Process



- If the reviewing agencies disagree on the disposition of the license application, BIS will attempt to resolve the issue at the working level.
- If consensus is not possible, the application will enter into the dispute resolution process:
 - Operating Committee (OC) – Career government employees from the reviewing agencies; chaired by BIS
 - Advisory Committee on Export Policy (ACEP) – Presidentially-appointed officials (Assistant Secretary level)
 - Export Administration Review Board (EARB) – Cabinet level
 - President



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License Denials Do Occur







- If your transaction involves General Prohibitions 4 through 10 parties/end-uses/circumstances, the general presumption is denial.
- You will normally have contact with Licensing Officer during the course of review.
- When an interagency decision is made to deny a license application, you will receive an Intent to Deny Letter.
 - May be transmitted via SNAP-R
- You have 20 days to respond with additional information that may overcome our concerns.
- If no response after 20 days, the case will be denied.
- The applicant almost always has the option to request that the case be RWA'd.



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Letters of Explanation

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Overview

- When to include a Letter of Explanation (LOE)
- Role and importance of the LOE
- Tailoring the LOE to the transaction and application



Technology Exports

- Required for technology applications
EAR Part 748, Supplement No. 2
 - Who are the parties to the transaction?
 - Where will the technology or software be used?
 - ECCN for the technology or software
 - Foreign availability of comparable technology or software
 - Form the technology will be released in and uses in which the technology will be employed.
 - Applicant's internal technology control plan



Deemed Exports

- Often helpful to note
 - Does the foreign national:
 - Have strong ties to the U.S.?
 - Intend to become a U.S. citizen or permanent resident?
 - Maintain significant ties to the home country?
 - Provide special expertise or other benefits?
 - Particular expertise or qualifications
 - Scientific and technical papers published and presentations at conferences



Complex Hardware Exports

- “Simple” transaction: single item, single consignee, fixed/static end use
- Many consignees/end users
 - Relationship between consignees/end users
 - Relationship between parties and items
- Many items
 - Application and need of each item for each of the end users
- Complex end uses



Licensing: Standard Scope

Unless limited by a condition set forth below, the export, reexport or transfer (in-country) authorized by this license is for the item(s), end-use(s), and parties described in the license application and any letters of explanation. The applicant is responsible for informing the other parties identified on the license, such as ultimate consignees and end-users, of the license's scope and of the specific conditions applicable to them. BIS has granted this license in reliance on representations the applicant made in the license application, letters of explanation, and other documents submitted.



Standard Scope and LOEs

- License authorizes the transaction as represented in the LOE only
- An export, reexport, or in-country transfer that materially differs from that described in the LOE requires another authorization
- LOEs provide an opportunity to place boundaries around, or “self-condition,” technology, deemed export, and complex hardware licenses



LOEs should be precise ...

- The LOE should reflect the proposed transaction
 - Templates: review, tailor and update content
- Address EAR concerns specifically
 - A SOW, grant proposal, etc. is not an LOE
 - Describe what items will and will not be exported, who will and will not have access to them, and how they will and will not be used



... but not brittle

- Review your LOEs carefully – carve-outs and other stipulations are binding
- Currently, no “revision” process for material changes to validated licenses
- If your transaction grows to exceed that represented in the LOE, new authorization (new license, license exception, etc.) needed
 - Additional end users, items and end uses

