

## **Avoid Costly Errors: The Basics (and Beyond) of ITAR and EAR Controlled Item Marking Requirements**

Is your company accurately marking its import- and export-controlled items and technology? If you have not recently reviewed the controlled item marking practices of the company, or have not yet adopted a formal marking policy or procedure, now is the time to make sure the company is following applicable regulations.

Controlled item marking is a regulatory requirement in both the International Traffic in Arms Regulations (“ITAR”) and the Export Administration Regulations (“EAR”). Accordingly, accurate marking of items subject to the authority of those federal agencies must be a fundamental element of any effective internal trade controls program.<sup>1</sup>

Overlooking this basic requirement can be a costly mistake, leading to significant fines for regulatory non-compliance. But the good news is that controlled item marking can be, in most companies, quickly brought up to required minimums for compliance.

To help you review your company’s internal controls, we’ve prepared the following overview of the current regulatory requirements for marking export-controlled items.

### **ITAR and EAR Required Markings**

As a part of former President Obama’s Export Control Reform initiative in 2016, the Department of Commerce, Bureau of Industry and Security (“BIS”) – administrators of the EAR – and the Department of State, Directorate of Defense Trade Controls (“DDTC”) – administrators of the ITAR – both issued simultaneous final rules revising their respective bodies of regulation with regard to controlled item marking requirements. Specifically, both DDTC and BIS harmonized the language for the declaration statement that must accompany some commodities when transferred outside of the United States or to foreign persons or entities.

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<sup>1</sup> A commodity jurisdiction determination must be performed to determine what regulatory agency has authority over a commodity (hardware, technology, and software). For more information on how to make a commodity jurisdiction determination, refer to Torres Law’s *Export Jurisdiction and Classification – Quick Reference Guide* available in the [Mondaq Advice Centre](#).

The basic purpose of the requirement for an export declaration statement on shipping documents is to provide explicit notice to foreign parties that the commodity received is subject to U.S. export control laws, and that the commodity may not be used or retransferred in contradiction to U.S. law. Prior to the issuance of the final rules, both the EAR and the ITAR included a requirement to provide an export declaration statement, known as a “Destination Control Statement” (“DCS”), on export shipping documents for controlled items. Both versions varied, however, in specific language and applicability requirements. As a result of the final rules, effective November 15, 2016,<sup>2</sup> the specific language of the DCS is now the same for both agencies and can be used for shipments of commodities that are either ITAR or EAR controlled, or a combination of both.

The harmonized DCS language and how to apply it in export shipments is as follows:

“These items are controlled by the U.S. Government and authorized for export only to the country of ultimate destination for use by the ultimate consignee or end-user(s) herein identified. They may not be resold, transferred, or otherwise disposed of, to any other country or to any person other than the authorized ultimate consignee or end-user(s), either in their original form or after being incorporated into other items, without first obtaining approval from the U.S. government or as otherwise authorized by U.S. law and regulations.”

- DCS Requirements for Items Controlled for Export Under the ITAR:<sup>3</sup>
  - Applies to **tangible** exports only (marking intangible exports is discussed further below);
  - The harmonized DCS must be included as an integral part of the commercial invoice and must be used **verbatim** as stated in the regulation (as quoted above); and,
  - The following elements are also required in the commercial invoice:
    - Name of the country of ultimate destination;
    - Name of the end-user; and
    - License number or applicable exemption citation.
  - If shipping EAR-controlled items in a combined shipment with ITAR-controlled items, the Export Control Classification Number (ECCN) for the EAR items must also be included on the commercial invoice.
  
- DCS Requirements for Items Controlled for Export under the EAR:<sup>4</sup>
  - Applies to **tangible** exports only (except it is NOT required for shipments under License Exception BAG (Baggage), GFT (Gift Parcels and Humanitarian Donations), or EAR99 items); and,
  - The harmonized DCS must be included as an integral part of the commercial invoice and must be used **verbatim** as stated in the regulation (as quoted above).

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<sup>2</sup> The Federal Register document implementing the changes to the EAR is available here: [Revisions to the EAR-Harmonized Destination Control Statement](#). The Federal Register document implementing the changes to the ITAR is available here: [Amendment to the ITAR-Destination Control Statement](#)

<sup>3</sup> See [ITAR §123.9\(b\)](#) “Country of Ultimate Destination and approval of reexports or retransfers.”

<sup>4</sup> See [EAR §758.6](#) “Destination Control Statement and Other Information Furnished to Consignees.”

- If shipping any item designated as ECCN 9x515 or any “600 series” item (items with the last three digits of the ECCN numbered 600 through 699), the ECCN must be included on the commercial invoice.

It is important to note that in the Federal Register document mandating use of the harmonized DCS, BIS makes several statements encouraging companies to adopt the practice of including a DCS for *all* EAR-controlled item shipments, even those designated as EAR99.

## **Intangible Item Marking**

In reviewing the above requirements for use of the DCS, the word “tangible” clearly stands out. Since the statutes address only marking of tangible exports, then non-tangible exports are not required to be marked, right? Well, the answer to that question is not quite that straight forward.

Intangible commodities, such as technical information, software, manufacturing know-how, training, and performance of services, are also controlled for export under both the ITAR and the EAR. Disclosure and release of ITAR-controlled technical information (oral or visual) and provision of ITAR-controlled services to foreign persons or entities is considered an export (ITAR §120.17). Under the EAR, releasing or transferring EAR-controlled technology or software source code to a foreign person or entity, even if the transfer occurs within the United States, is considered a “deemed export” (EAR §734.13). Under both regimes, technical information does not have to cross U.S. borders to be subject to U.S. export controls. Therefore, internal controls on the dissemination of technical information should address some form of marking or designation to avoid unauthorized exports.

One of the most common forms of technical information is technical drawings. Although not explicitly required by regulation, placing an export declaration statement on a technical drawing is a good practice to prevent that technical information from being disclosed to foreign entities, both within the company and outside the U.S., without proper authorization.

Here are some examples of markings that can be placed on technical drawings, or included in the text of electronic transmissions (e.g. e-mail, electronic file transfers, and fax):

- For EAR-controlled technical information:

“EXPORT CONTROLLED - This information may be subject to the Export Administration Regulations (EAR) pursuant to 15 C.F.R. Parts 730-774. Transfer of this data by any means to a Non-U.S. Person, whether in the United States or abroad without the proper U.S. government authorization is strictly prohibited. Violations of the EAR may be subject to both criminal and administrative penalties under the Export Control reform Act of 2018 (50 U.S.C. §§ 4801-4852).”

- For ITAR-controlled technical data:

“EXPORT CONTROLLED - This information may be subject to the International Traffic in Arms Regulations (ITAR) pursuant to 22 C.F.R. Part 120-130. Transfer of this data by any means to a Non-U.S. Person, whether in the United States or abroad without the proper U.S. government authorization is strictly prohibited. A violation of the ITAR may be subject to both criminal and administrative penalties under the Arms Export Control Act of 1976 (as amended).”

It is important to note the distinction between the harmonized DCS required by EAR §758.6 and ITAR §123.9(b) for tangible shipments of controlled items versus applying an export declaration statement as a good practice to an intangible technology export. If an electronic (intangible) version of a technical drawing is printed and shipped to a foreign person or entity, the technical drawing is then subject to the controls described above for tangible exports.

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Remember, determining the accurate marking for export-controlled commodities, both tangible and intangible, first requires that an accurate jurisdiction determination be made so that the correct regulatory requirements can be applied. The Torres Law firm can assist in performing jurisdiction determinations, establishing controlled item marking protocols, and any other trade related matters. Please contact us for more information.

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