

Export Control & International Trade Compliance

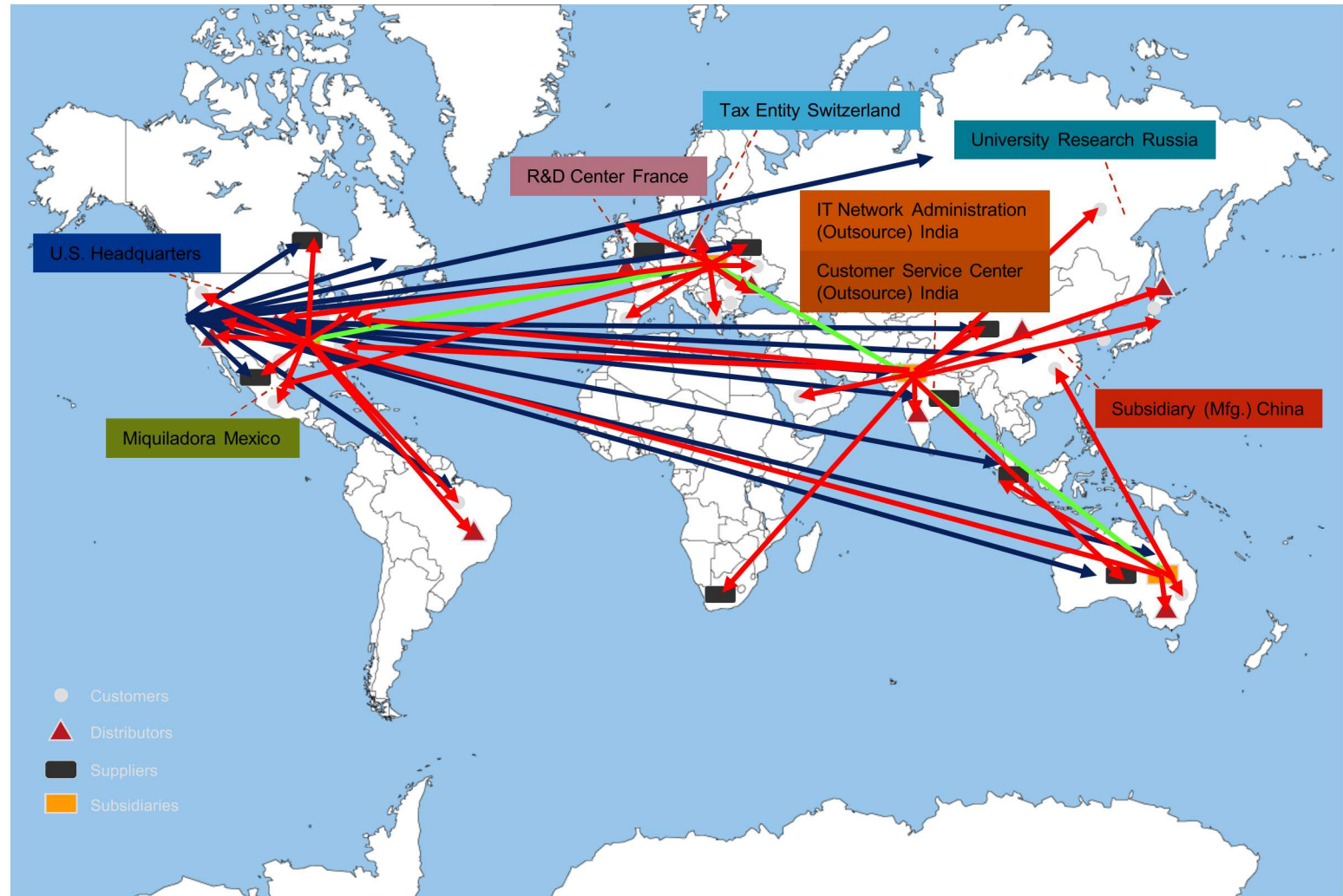
Robert Kearsley, Senior Empowered Official

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You & Export Controls

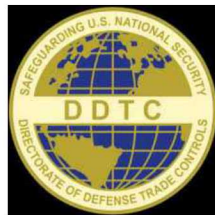
- If you manage contracts for your company, you are familiar with terms that require your company to comply with applicable laws and regulations including export controls.
- Depending on the size of your company, trade compliance may or may not be your specific responsibility.
- At a minimum, you should be aware of your company's trade compliance policies, processes, and the issues and export control laws and regulations that affect your business.

International Trade Compliance Landscape



Controlling Agencies, Laws & Regulations

- **U.S. Department of Commerce, Bureau of Industry & Security (“BIS”)**
 - **Legal Authority:** Export Administration Act (lapsed but in effect under the authority of the International Economic Powers Act), Export Control Reform Act & Export Administration Regulations (“EAR”) (15 C.F.R. 730-774)
 - **Jurisdictional Control:** Export and re-export of items identified in 10 categories on the Commerce Control List (“CCL”), and not under the jurisdiction of another agency
- **U.S. Department of State, Directorate of Defense Trade Controls (“DDTC”)**
 - **Legal Authority:** Arms Export Control Act (“AECA”) & International Traffic in Arms Regulations (“ITAR”) (22 C.F.R. 120-130)
 - **Jurisdictional Control:** Export, re-export and temporary import of defense articles, defense services, and technical data as identified in 21 categories on the U.S. Munitions List (“USML”)



Controlling Agencies, Laws & Regulations

- **U.S. Department of Treasury, Office of Foreign Assets Control (“OFAC”)**
 - **Legal Authority:** Presidential Orders, Trading with the Enemy Act, and Foreign Assets Control Regulations (31 C.F.R. 500-599)
 - **Jurisdictional Control:** Economic and trade sanctions (i.e., investment bans, freezing of assets, etc.), import transactional embargoes, and other commercial activities, such as travel-related restrictions.
- **U.S. Nuclear Regulatory Commission (“NRC”)**
 - **Legal Authority:** Atomic Energy Act and NRC Regulations (10 C.F.R. 110)
 - **Jurisdictional Control:** Export of nuclear equipment and material.



Controlling Agencies, Laws & Regulations

- **U.S. Department of Energy, National Nuclear Security Administration (“NNSA”), Office of Nonproliferation and Arms Control**
 - **Legal Authority:** Atomic Energy Act and DOE Regulations (10 C.F.R. 810)
 - **Jurisdictional Control:** Controls the export of unclassified nuclear technology and assistance.
- **U.S. Department of Energy, National Nuclear Security Administration (“NNSA”), Office of Defense Programs**
 - **Legal Authority:** Atomic Energy Act and NNSA Policy Letter 23 (“NAP-23”)
 - **Jurisdictional Control:** Nuclear weapon-related import and export activities.



Understanding the Extraterritoriality of U.S. Law

- Has the item, wherever manufactured, been exported from the U.S.?
- Is the item or service subject to U.S. export controls?
- Does the item that is shipped from one country to another country contain U.S. content (i.e., commodities, software or technology)?
- Does the service involve an item subject to U.S. export controls?
- Is the item or service subject to a U.S. export license or agreement?



Risk Analysis

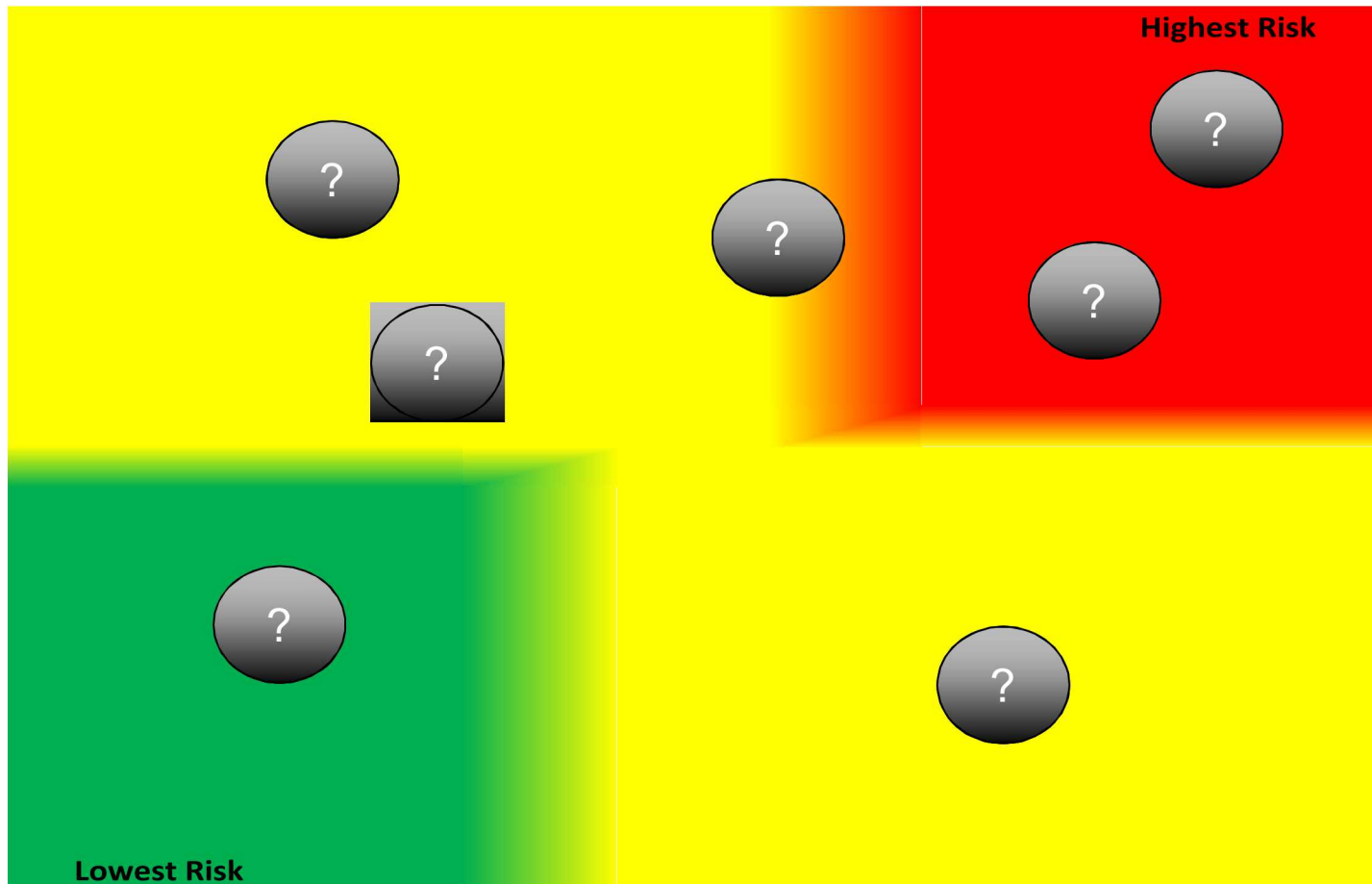
■ Risk Profile (Non-exhaustive list)

- Does your company manufacture export-controlled commodities, software or technology?
- Do you hire foreign nationals?
- Do you have international sales or services?
- Do you source non-US vendors?
- Do you contract with the U.S. Government (including national laboratories)?
- Do your customers have foreign subsidiaries or sub-contractors?



Risk Matrix (Example)

- Your company's trade compliance risk is dependent on your business and internal controls



Your Customers

- **What do you know about your customers, your company's order and trade compliance processes?**
 - Do your written agreements include an export control clause that sets forth each parties responsibility to comply with the relevant export control laws and regulations?
 - Extra due diligence is required for sales to customers in 'Sensitive Countries' (e.g., China, Russia, Middle East countries).
 - Knowing your customer's business
 - Customer sells items associated with military applications
 - Customer sells items in "diversion risk" countries (e.g., Hong Kong, UAE)
 - Customer does business in U.S. sanctioned countries

Your Customers

– Ownership Interests

- Who owns or has a controlling interest in the company?
- U.S. sanctioned entities
 - OFAC 50% Policy
 - » 50% or more ownership (direct or indirect) by a Specially Designated National of a company not on the SDN
 - Non-SDN company is also blocked

– Boycott Language in Agreements

- U.S. persons are prohibited from taking or knowingly agreeing to take certain specified actions (in U.S. commerce) with the intent to comply with, further, or support an unsanctioned foreign boycott (e.g., Arab League boycott of Israel).
- Be aware of transactions involving Middle Eastern countries.
- Boycott language has been found in various documents, such as requests for quote/purchase, tender offers, letters of credit, contracts, custom's documents, power of attorney documents, certificates of origin and transportation instructions/routing guides.

Your Customers

– End Use Certificates

- Required for certain exports subject to an export license, more frequently used by sellers for any transaction

– Shipping Terms

- INCO terms (e.g., EXW, FOB, DDP) define the responsibilities of sellers and buyers for the delivery of goods under sales contracts.
 - Sets forth, among other things, who has responsibility for customs clearances, including obtaining required export licenses
 - » INCO terms are not regulatory requirements.
 - » The U.S. exporter (“U.S. Principal Party in Interest” or USPPI) is responsible for obtaining required export licenses.
 - For drop shipments (“routed export transactions”) for EAR exports (not ITAR), the U.S. agent for the foreign buyer (“Foreign Principal Party in Interest”) must obtain a power of attorney or other written authorization that sets forth his authority to determine license requirements and obtain an export license.

Your Customers

– Blocking Statutes

- Be aware of statutes that prohibit the extraterritorial application of sanctions by other countries.
 - Canada’s Foreign Extraterritorial Measures Act
 - » In direct response to the Helms-Burton Act which aimed to keep foreign investors away from formerly American-owned companies in Cuba
 - » Canadian individuals and corporations are prohibited from complying with certain U.S. extraterritorial measures that affect trade with Cuba.
 - Regulation (EC) No 2271/96 or the “EU Blocking Statute”
 - » EU’s rebuff of U.S. abandoning the Joint Comprehensive Plan of Action (“JCPOA”) and re-imposing U.S. nuclear-related sanctions on Iran
 - » Prohibits EU companies from complying with U.S. Iran sanctions

Your Customers

– Internal Controls

- Safeguards to protect against the unauthorized export of or access to export-controlled commodities, software or technology without prior Company and U.S. Government authorization
 - Potential export control concerns:
 - » Quality assurance reviews
 - » Customized orders
 - » Proprietary operation manuals/literature
 - » RFPs or RFQs
 - » Meetings, emails, etc.
- Order processing controls to screen (e.g., customer qualification, orders, and after market sales and services) for “restricted parties” and export license requirements

Your Vendors

- **Are you familiar with how your company transacts with vendors for trade compliance purposes?**
 - Written agreement should include assurance by vendor to protect company-provided export-controlled information
 - Internal Controls
 - Vendor qualification process should include “restricted parties” screening
 - Vendor may require your company to complete an End Use Certificate
 - Potential export control concerns:
 - Contracting with an IT service provider
 - Contracting with a financial services/auditor
 - Contracting with vendor with foreign manufacturing or subcontractors

Your Employees

- **Does your company factor in trade compliance in hiring practices?**
 - **Employment Agreements**
 - Leading industry practices include the following:
 - A clause in the agreement whereby the employee agrees to not export or otherwise release export-controlled information to foreign nationals without prior Company and U.S. Government authorization (if required).
 - Upon termination of employment, an exit briefing with the employee to discuss, among other things, the employee's responsibility regarding safeguarding export controlled information.
 - **Internal Controls**
 - Screen employees and contractors against the “restricted parties” lists.
 - Train employees on Company policy, procedures, and relevant U.S. export control laws and regulations

Your Channel Partners

- **How does trade compliance fit into your company's distribution and resale agreements?**
 - Agreement Language
 - Export control
 - Limited sales territory
 - Internal Controls
 - Screen partners against the “restricted parties” list
 - Safeguard technical data transfers
 - Red Flag
 - Does business in U.S. sanctioned countries

Your Company's Trade Compliance Program

- **Leading industry practices for an effective trade compliance program include policies, procedures and appropriate compliance safeguards.**
- **Questions to ask about your program:**
 - Where does the program best fit in the company?
 - Is Senior Management committed to the program?
 - Who are the responsible parties?
 - Is restricted party screening and export licensing tied to order processing, employees, vendors, channel partners, shipping, etc.?
 - Does the company have appropriate safeguards for export-controlled information?
 - How frequently, if at all, are assessments conducted of the program?
 - Who receives training on Company policy, procedures and regulations?
 - How are investigation handled and disclosures to the Government made?
 - What is the company's record retention policy?

Safeguarding Export-Controlled Information

- Your company likely has certain elements of a “Technology Control Plan” or “TCP”
- Does your company have a policy and/or process for any or all of the following areas?
 - Identification
 - Marking
 - IT network security protocols
 - Email
 - Foreign travel
 - Foreign visitors
 - ‘Clean desk’
 - Data discard
 - Badging
 - Facilities access



Contract Manager's Role in Trade Compliance

- **Although your role may not be to manage your company's trade compliance program, because you manage contract compliance, you should ensure that your company has, at a minimum, the following:**
 - Terms of an agreement that set forth both parties obligations to comply with applicable export control laws and regulations
 - Compliance with U.S. Anti-boycott law
 - Safeguards to protect information from unauthorized access
 - Screening of customers, vendors, etc. against the "restricted parties" lists
 - Documented processes to determine export control requirements for sales, custom purchases, international travel, foreign national hiring etc.
 - Record retention policy that meets statutory requirements
- **In addition to a breach of contract resulting from non-compliance to the relevant export control regulations, a company could incur severe civil and/or criminal penalties and reputational harm.**

Export Control Update

■ Emerging and Foundational Technologies

- Included in the National Defense Authorization Act (“NDAA”) for Fiscal Year 2019, Public Law No: 115-232, Congress enacted the Export Controls Reform Act of 2018 (“ECA”).
- Key purpose of the legislation is to enhance protection of U.S. technology resources by imposing greater restrictions on transfers to foreign nationals (emphasis on China) of certain key emerging and foundational technologies and cybersecurity considered critical to U.S. national security.
- November 19, 2018, BIS published an advance notice of proposed rulemaking (“ANPR”) (83 FR 58201) to elicit comments from the public to assist BIS to define and identify “emerging technologies”. A comment period extension notice for the ANPR was published December 14, 2018 (83 FR 64299). Comments were due no later than January 10, 2019. No date set for a “foundational technologies” ANPR.

Export Control Update

- U.S. technology not already identified on the ITAR’s U.S. Munitions List or EAR’s Commerce Control List are targeted for control for “emerging technologies”, such as cybersecurity, artificial intelligence, machine learning, autonomous vehicles, 3D printing, augmented virtual reality, gene editing, financial technology, semiconductors, robotics, nanotechnology and biotechnology.
- Criteria for identifying emerging and foundational technologies:
 - The development of emerging and foundational technologies in foreign countries;
 - The effect export controls may have on the development of such technologies in the United States; and
 - The effectiveness of export controls on limiting the proliferation of emerging and foundational technologies in foreign countries.

Export Control Update

- Exports of emerging and foundational technologies to countries subject to a U.S. embargo (including an arms embargo, e.g., China, Russia) will require an export license from BIS.
- License process and interagency review process similar to existing processes, with the exception of including the Committee on Foreign Investment in the United States (“CFIUS”).
- Common concerns expressed by industry and universities:
 - Make the technologies more difficult to handle, secure, and commercialize than foreign equivalents not bound by the same restrictions.
 - Impede university collaborations with industry by interfering with fundamental research
 - Reduce the number and quality of skilled personnel critically needed to drive new areas of innovation.

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Thank You



Robert Kearsley is a Senior Empowered Official at Sandia National Laboratories. Robert assists internal customers with international trade and compliance matters. Robert has over 20 years of experience in international trade compliance, including a background in law, government and industry. Robert has advised numerous multinational companies and provided assistance with operational assessments, training, export licenses and agreements, corporate policies and procedures, and investigations/voluntary disclosures.

Robert received his Juris Doctor from Whittier College, a Masters of Public Administration from the University of Southern California, and a BA in Political Science from the University of California, at Santa Barbara.

Robert has written several articles on U.S. export controls and sanctions and has spoken at various trade association events.