

## *Answers to Frequently Asked Export Questions*

**Q: Has September 11 resulted in any additional restrictions on my company's ability to export products overseas?**

**A:** While the events of September 11 have not resulted in significant legislative or regulatory changes, there has clearly been a step up in export enforcement efforts, particularly which respect to controls over exports to specific end-users and for specific end-uses. There is an increased burden on U.S. exporters to exercise reasonable care in screening their customers to ensure that they are not on any list of prohibited endusers. There is also an increased obligation to ensure that products, even those that typically are commercial in nature, will end up in the destination to which they are shipped and are used for the purpose for which they were intended. The U.S. government expects exporters to be on the lookout for "red flags," which are abnormal circumstances in a transaction that suggest that an export may be destined to an inappropriate end-use, end-user, or destination. These circumstances heighten the obligation on the part of the exporter to make further inquiry. A failure to do otherwise could expose that exporter to significant civil or criminal liability, even if there were no intent to violate the law.

**Q: How do I know if one of my products requires an export license?**

**A:** Several U.S. government agencies issue export licenses for products, services, and technology. If you export military products, you will probably

need to register with the U.S. State Department and obtain export licenses for overseas sales. If you make items connected to nuclear power or weapons, you will need an export license from the Nuclear Regulatory Commission or the Department of Energy.

Most companies make products or sell services that can be used for commercial purposes only or for both commercial and military uses. Some commercial products that can be used for military, or other "sensitive, national security" uses may require a license from the Department of Commerce. The Commerce Department uses a list to classify these products in different categories. Most products fall into categories that do not require an export license (think pencils, hammers). The products that are classified as controlled for export can be exported to many destinations without a license, but there are certain export destinations that require a license.

Too many people assume that the products they sell do not require a license for export. The only way to determine if your products require a license is to classify them according to the Department of Commerce's list. Every exporter should classify their products according to the Department of Commerce list.

An export license is also required when an exporter has information that the product, service, or technology will be used for the development, production, stockpiling, or use of chemical or biological weapons, nuclear weapons, or missiles in certain

countries. Thus, even a smoke detector that a U.S. exporter “knows” will be used to help develop a chemical weapon (almost certainly) requires an export license.

**Q: Can I get into trouble if I export a product overseas, and my customer reexports the product?**

**A:** Maybe. U.S. export laws make exporters responsible for the end-use of products and technology exported from the United States. For example, even items that do not normally require an export license because the technology is not that sensitive require export licenses if the exporter has information that the item will be used in the design, development, production, stockpiling, or use of chemical or biological weapons in a country of concern.

If you exported the product using an export license from the U.S. government, the foreign customer who received the product probably needs a “re-export” license in order to send that product to a third country.

**Q: What if they re-export the product to an embargoed country like Iran, Iraq, Libya, or Cuba?**

**A:** U.S. products may not be re-exported to embargoed countries like Iran, Iraq, Libya, and Cuba without an export license unless certain very limited exceptions apply.

To prevent re-exports that are not authorized by U.S. law, your export documentation should include a destination control statement and you should do your best to know your customer and watch out for suspicious signals regarding your export project.

**Q: Can I make a sale to someone overseas through my web site and avoid U.S. export regulations?**

**A:** No. Trying to use your website to avoid U.S. export regulations may be considered evasion of the export laws. Such evasion can be punished with substantial fines and other penalties, including jail time in certain situations. Most software sales on the internet do not require an export license, but software containing certain encryption and other sensitive technology may require review and/or export licensing by the Department of Commerce prior to export. Different issues arise if you are selling non-U.S. products entirely overseas.

**Q: My purchaser has asked me to complete a NAFTA certificate for exports to Canada and Mexico; should I just sign the form and send it?**

**A:** No. Before certifying that your product is of NAFTA origin, you must confirm that the product meets the applicable rule of origin. The rules of origin under NAFTA are complex and product-specific. Even if you have produced your product in the United States, it may not qualify as NAFTA origin if you used imported components or materials, or if you do not have certifications from your supplier confirming that the components or materials you use are of NAFTA origin. Therefore, before certifying that your product is of NAFTA origin you must undertake the appropriate detailed NAFTA origin analysis, and you must have the records to support your analysis. Completing a false NAFTA certification could subject your company to additional duties and penalties in the U.S., Canada, and Mexico, in addition to potential commercial disputes with your purchaser.

### ABOUT THE INTERNATIONAL TRADE & CUSTOMS PRACTICE

As one of the largest and most highly regarded international trade and customs practices in the United States, Kelley Drye Collier Shannon assists clients with a full range of importing and exporting activities. We are experts in protecting domestic manufacturers against unfairly traded goods and helping companies overcome barriers to entry in foreign markets.

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