

SURVIVING UNITED STATES EXPORT CONTROLS POST 9/11: A MODEL  
COMPLIANCE PROGRAM

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Program Foreword

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September 11, 2001 (“9/11”) will stand as a defining moment in U.S. export controls. Viewed from the distance of several years, it is now evident that 9/11 brought to the glare of public awareness the troubling reality that non-state terrorists threaten the core of the United States. The prior prevailing view that terrorism was something that affected foreign venues was one of the many

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casualties of that day. Another victim of 9/11 was the previously held belief that export controls were merely an irritating part of federal trade controls that were more a nuisance than anything else. It was clear that the 9/11 terrorists and their supporters relied on access to U.S.-origin technologies and financial networks to achieve their scheme.<sup>2</sup> It was also clear that throughout the world there were (and are) many other terrorists waiting for the funds and technology required to harm the United States.<sup>3</sup>

9/11 is not the only noteworthy date in the recent chronology of export controls, but it was qualitatively different from the others. Other salient events in the last half of the 1900s have included the conclusion of World War II, the Cold War, and the first Iraqi conflict. Unlike 9/11, these other events placed the United States in conflict with governments, that is, state-actors. As the United States and its allies considered how to keep these state-actors from acquiring technology that could be used offensively or defensively, the focal point of export controls was relatively clear, well-defined.

For example, during the Cold War, the United States and its allies under the "Coordinating Committee on Multilateral Export Controls" ("COCOM") agreed on an Industrial List of technologies that would be controlled for export to the Eastern Bloc.<sup>4</sup> The analysis was relatively simple for regulators and exporters: "what" is going "where."<sup>5</sup> The "where" answered all the questions regarding use. If it was going to the Eastern Bloc, regulators could conclude reasonably that it would be used to the advantage of the communist state to the detriment of the Free World.<sup>6</sup> That meant that licenses were frequently denied and exports restricted.<sup>7</sup>

The end of the Cold War and the first Iraqi conflict changed the equation. On the one hand, regulators had an incentive to support technological development of former Soviet states.<sup>8</sup> On the other hand, regulators saw after the first Gulf War how Iraq had diverted dual-use or commercial items for military purposes.<sup>9</sup>

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2. See NATIONAL COMMISSION ON TERRORIST ATTACKS AGAINST THE UNITED STATES ("9/11 COMMISSION"), THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, EXECUTIVE SUMMARY 1, 14 (2004), at [http://www.gpoaccess.gov/911/pdf/cover\\_execsummary.pdf](http://www.gpoaccess.gov/911/pdf/cover_execsummary.pdf) (last visited Feb. 18, 2005).

3. See 9/11 COMMISSION, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 362-63 (2004), at <http://a257.g.akamaitech.net/7/257/2422/22jul20041130/www.gpoaccess.gov/911/pdf/sec12.pdf> (last visited Feb. 18, 2005).

4. See Nunn-Wolfowitz Task Force Report: Industry "Best Practices" Regarding Export Compliance Programs 4, at <http://www.usexportcompliance.com/Papers/nunnwolfowitz.pdf> (last visited Feb. 18, 2005).

5. See Department of Commerce, Bureau of Industry and Security, Compliance and Enforcement: Export Management Systems Guidelines Introduction, at <http://www.bxa.doc.gov/ExportManagementSystems/pdf/emsintro.pdf> (last visited Feb. 18, 2005).

6. See Nunn-Wolfowitz Task Force Report, *supra* note 4.

7. See Bureau of Industry and Security, Compliance and Enforcement: Export Management Systems Guidelines Introduction, *supra* note 5.

8. See Department of Commerce, Office of International Technology, Technology Administration, International Technology Programs, Russia Technology Dialogue, at [http://www.technology.gov/International/Europe/p\\_Russia.html](http://www.technology.gov/International/Europe/p_Russia.html) (last visited Feb. 18, 2005).

9. Douglas Jehl, *Who Armed Iraq? Answers the West Didn't Want to Hear*, N.Y. TIMES, July 18,

Regulators also learned how countries, such as Brazil, supported Iraq's military development by diverting otherwise lawful exports from the United States.<sup>10</sup> The equation now centered on "use" and "users."<sup>11</sup> Even an export to an erstwhile ally might be diverted for proliferation purposes if the "user" was unreliable.<sup>12</sup>

9/11 only underscored for the U.S. public what regulators had learned during the first Gulf War: the "use" of an export and the "user" were the critical questions.<sup>13</sup> The country of destination became almost secondary as the focus of regulatory controls went to "end-use" and "end-user."<sup>14</sup> The new goal was to keep important technologies from those who would proliferate weapons of mass destruction and their delivery systems.<sup>15</sup> This focus, however, put a new emphasis—and responsibility—on the exporter. This is where Tara Dunn's model program comes in.

Not surprisingly, post-9/11, enforcement of export controls has taken a new importance. Violations are considered a breach of "homeland security" and export controls are a new darling of federal prosecutors across the country.<sup>16</sup> U.S. companies, therefore, have only one choice: comply. The rules are too important and the penalties too great to treat export controls as if they were some other paperwork obligation.<sup>17</sup> Ms. Dunn's model program provides clear guidance for companies facing this compliance burden.

While her program is designed to meet the business activities of a fictional company, the methodology reflected in her program is directly applicable to other companies. Counsel for exporting companies would do well to review the model program and apply it as a rubric to develop a tailored export compliance program.

Ms. Dunn's work on this project was exemplary. The quality of her program resulted in her receiving the 2004 Holland & Hart Private International Law Award. This was the first time the scholarship award was won by an entry other than a traditional legal paper. All of us at Holland & Hart are proud of her achievement and to have had the opportunity to support this fine aspiring lawyer.

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1993 at E5, available at 1993 WLNR 3365960.

10. *Id.*

11. *See id.*

12. *See id.*; Bureau of Industry and Security, Compliance and Enforcement: Export Management Systems Guidelines Introduction, *supra* note 5.

13. *See* 9/11 COMMISSION, THE 9/11 COMMISSION REPORT *supra* note 3 AT 380-81; *see also* JEHL *supra* note 9; *see also* Bureau of Industry and Security, Compliance and Enforcement: Export Management Systems Guidelines Introduction, *supra* note 5.

14. *See* Bureau of Industry and Security, Compliance and Enforcement: Export Management Systems Guidelines Introduction, *supra* note 5.

15. *See* Bureau of Industry and Security, Compliance and Enforcement: Export Management Systems Guidelines Introduction, *supra* note 5.

16. *See* Justice Ready to Step Up Criminal Prosecution of Export Violations, THE EXPORT PRACT. Nov. 2003, at 7.

17. *See* 22 U.S.C. § 2778(c) (2004) (criminal penalties under the Arms Export Control Act); 15 C.F.R. § 746.3(b) (2004) (criminal penalties under the Export Administration Regulations [hereinafter the "EAR"]); 22 C.F.R. § 127.7 (debarment under the International Traffic in Arms Regulations); 15 C.F.R. § 764.3 (a)(2) (denial of export privileges under the EAR); 15 C.F.R. § 764.3 (c)(2) (2004) (cross-debarment by the Department of State for violations of the EAR); 15 C.F.R. § 764.3(c)(2)(ii)(B) (debarment from government contracts by the Department of Defense for violations of the EAR).

## Program Introduction

Mark D. Menefee<sup>18</sup>

When a law enforcement officer looks at a company, one of the first questions he or she asks him or herself will be: “Are these people good guys or bad guys?” Much is at stake for the officer. Initial information about the company’s activities helps the officer decide not only how to begin the inquiry but, more importantly, how best to protect the safety of the officer and his or her fellow officers when dealing with the company. An investigator approaching an unknown office building is taking a personal safety risk no less than a police officer approaching a car that has been pulled over on the highway. While an officer investigating a so-called “white collar crime” will be typically less likely to encounter a violent response from the person under investigation than, say, an officer investigating a drug smuggling operation, the training for federal criminal investigators emphasizes the possibly fatal consequences to the officer from making incorrect assumptions about the level of threat posed by a person who is the subject of the officer’s initial questions.

If you were a federal agent charged with responsibility for investigating white collar crimes such as export control violations or securities fraud, and felt keenly the need to make a quick and accurate first assessment of whether a company consists of good guys who may have made a technical mistake, or terrorist supporters who wouldn’t hesitate to defraud other companies in order to accomplish their mission, and who are completely willing to kill you in the process, what would be your test? On an interpersonal level, your initial “gut reaction” about the truthfulness of the people you meet and interview will tell you a great deal—but only about those individuals, not necessarily about the corporation as a whole. Is there some other information, at the corporate level, that could help you quickly assess the character of the whole organization?

At the initial stage of an investigation the single best indicator of whether a company is law abiding is whether the company has an effective compliance program. “According to available information, only 2 of the 865 corporations sentenced for federal crimes during the last eight years had effective compliance programs. Of the 143 organizations sentenced under Chapter 8 in 2002, *not one maintained any type of compliance program whatsoever.*”<sup>19</sup> These sentencing statistics must be understood properly. It does not follow from these statistics that a company can avoid possible criminal liability by merely officially adopting a

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18. Of Counsel, Baker & McKenzie LLP. Former Director, Office of Export Enforcement, Bureau of Industry and Security, U.S. Department of Commerce.

19. *Revised Definition of Effective Compliance and Ethics Program in the United States Sentencing Guidelines Takes Effect on November 1, 2004*, CORPORATE COMPLIANCE CLIENT ALERT (Baker & McKenzie LLP, North America), November 2, 2004 at 3 [hereinafter “Baker & McKenzie Client Alert”]. “Chapter 8” refers to Chapter 8 of the United States Sentencing Guidelines on Sentencing Organizations. U.S. SENTENCING GUIDELINES MANUAL § 8 (2004).

compliance program. What does follow is that there is a strong correlation between crimes committed by corporations and a complete disregard of their compliance responsibilities by the management of those corporations.<sup>20</sup> In other words, companies whose managers choose not to take their compliance responsibilities seriously are flying blind. They are significantly more likely to commit violations of complex regulatory regimes, such as those governing exports, than companies that maintain reasonably effective compliance programs.<sup>21</sup> They also are much more likely to generate the sort of “smoking gun” memos and email that reveal full well their negligence or their knowing and willing intent to violate laws impeding their short term business plans. An experienced federal investigator knows that when he or she finds a company operating without an effective compliance program, the odds are in favor of discovering evidence of a crime.

The vast majority of business people have absolutely no desire to commit regulatory crimes. But small- and medium-sized companies must make difficult choices about how to come up with the money needed to insure a reasonable degree of compliance. Start-up companies find regulatory compliance to be especially difficult to fund. In the area of export controls, where the regulations are quite complex, the costs of running an effective compliance program can be very high. However, because export controls safeguard the national security of the United States and its allies, the penalties for violations can be devastating. It is not uncommon for violators to be subject to criminal and civil fines as well as denials of export privileges; often penalties will be imposed not only against the corporation but against the midlevel managers or senior executives as well.<sup>22</sup> Small- and medium-sized firms, and their owners, are especially susceptible to multiple penalties.

Tara Dunn’s model compliance program provides a great service to the international business community. Her program can help a smaller company, or a new start-up firm, reduce its initial export compliance costs while achieving a sophisticated level of compliance. If a company will take to heart the importance of complying with U.S. export controls and use Ms. Dunn’s model program as its standard, it will be able to manage its risks effectively and economically. Moreover, not only will the company detect potentially illegal transactions and avoid being pulled into diversion schemes, it also could use the compliance program as a form of strategic planning for potential overseas markets. Ms. Dunn’s model program might strike a reader who is unfamiliar with the nuances of export controls as being overly elaborate and complex, with too much technical terminology. It is not. In fact, the very careful and detailed legal analysis

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20. See Baker & McKenzie Client Alert *supra* note 19, at 3.

21. See Baker & McKenzie Client Alert *supra* note 19, at 3.

22. See, e.g., 22 U.S.C. § 2778(c) (2004) (criminal penalties under the Arms Export Control Act); 15 C.F.R. § 764.3(b) (2004) (criminal penalties under the Export Administration Regulations); 22 C.F.R. § 127.7 (2004) (debarment under the International Traffic in Arms Regulations); 15 C.F.R. § 764.3 (a)(2) (2004) (denial of export privileges under the Export Administration Regulations); 15 C.F.R. § 764.3 (c)(2)(ii) (2004) (cross-debarment by the Department of State for violations of the Export Administration Regulations); 15 C.F.R. § 764.3(c)(2)(ii)(B) (2004) (debarment from government contracts by the Department of Defense for violations of the Export Administration Regulations).

underlying her program needs to be understood by the management of a company when they consider implementing their own compliance program. Managers will need to take the model program and adapt it to fit their company's particular markets, product lines, and business processes. Then they will be able to simplify parts of the model program to fit the level of training and understanding of the employees who will actually implement the program. This is as it should be. What is important is that they begin with a model program that actually gets the law right, and that provides the specific legal basis for particular components. This model compliance program does just that.

I commend Ms. Dunn for her stellar work in developing such a detailed and clear program to assist companies in developing effective export compliance programs. She has laid the groundwork for companies to conduct their export business in ways that are both legal and smart. I also would like to express my respect and appreciation to the University of Denver Sturm College of Law, the law firm of Holland & Hart, and the Denver Journal of International Law and Policy for sharing her fine work with the international business community.

## A. PREFACE

In today's post 9/11 world, non-compliance with U.S. export controls is simply not an option. A single export violation subjects a company to a range of potential sanctions: fines of up to \$1 million per violation, a loss of export privileges, and debarment from government contracts.<sup>23</sup> After the terrorist attacks of 9/11, enforcement of these controls has become a Department of Justice priority.<sup>24</sup> The potential penalties and renewed enforcement initiatives highlight the importance of recommending, developing, and implementing organization-specific export compliance programs for entities engaged in international trade.<sup>25</sup> In addition to decreasing the risk of violations, an export compliance program serves a critical corporate governance function. For an entity engaged in international trade, an export compliance program can provide information and controls necessary for the principal executive officers to certify periodic reports, and for management to report on internal controls over financial reporting as required under Sarbanes-Oxley.<sup>26</sup> Further, in the event of a violation, an effective export compliance program may factor significantly against prosecuting the organization and/or support a downward departure in criminal penalties.<sup>27</sup>

Much has been written about the importance of and relevant considerations for developing an export compliance program. Unlike much of the existing scholarship on the topic, this model program articulates specific procedures for compliance with the primary U.S. export controls at the operational level of a hypothetical client. While no effective export compliance program is 'one size fits all,' this model program provides practitioners representing small to mid-cap

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23. 22 U.S.C. § 2778(c) (2004) (criminal penalties under the Arms Export Control Act); 15 C.F.R. § 764.3(b) (2004) (criminal penalties under the Export Administration Regulations [hereinafter the "EAR"]); 22 C.F.R. § 127.7 (2004) (debarment under the International Traffic in Arms Regulations [hereinafter the "ITAR"]); 15 C.F.R. § 764.3 (a)(2) (2004) (denial of export privileges under the EAR); 15 C.F.R. § 764.3 (c)(2)(ii) (2004) (cross-debarment by the Department of State for violations of the EAR); 15 C.F.R. § 764.3(c)(2)(ii)(B) (2004) (debarment from government contracts by the Department of Defense for violations of the EAR).

24. *Justice Ready to Step Up Criminal Prosecution of Export Violations*, THE EXPORT PRACTITIONER, Volume 17, No. 11 (Nov. 2003) at 7. See also Robert Block, *U.S. Cracks Down on Technology Exports to Iran: Concern Grows Over Access to Conventional Weapons By Hostile States, Terrorists*, WALL STREET JOURNAL, Feb. 24, 2005, at A1.

25. Under the "deemed export rule," U.S. companies that employ foreign nationals under circumstances where these employees have access to controlled technologies are considered to be exporting the controlled technology. See *infra* notes 106-119 and accompanying text. As used in this article, the term "engaged in international trade" refers both to physical exports and to exports of technology under the deemed export rule.

26. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 §§ 302, 906, 404 (2002).

27. Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components and U.S. Attorneys, *Principles of Federal Prosecution of Business Organizations*, (Jan. 20, 2003), at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm) [hereinafter "Thompson Memo"] (last visited Mar. 1, 2005); U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (2004); *id.* § 8B2.1. On January 12, 2005, in a 5-4 opinion, the United States Supreme Court held that the Sentencing Guidelines are advisory, rather than mandatory. *United States v. Booker*, No. 04-104, 04-105, 2005 WL 50108 (Jan. 12, 2005) (5-4 decision) (Breyer, J., majority opinion, in part).

companies with a template for developing a comprehensive export compliance program.

Part 1 of this preface discusses the 'beyond export compliance benefits' of an export compliance program. Part 2 sets forth the hypothetical client facts and specific design considerations for the model program.

1. BEYOND EXPORT COMPLIANCE: THE EXPORT COMPLIANCE PROGRAM'S  
CRUCIAL ROLE IN CORPORATE GOVERNANCE AND MINIMIZING THE IMPACT OF  
VIOLATIONS

Principally, an effective export compliance program furthers vital policy objectives behind export control laws. These include national security, foreign policy, anti-terrorism, and non-proliferation.<sup>28</sup> In addition to promoting these policy objectives, an export compliance program can have an important impact on the corporate governance practices of organizations engaged in international trade and may serve to mitigate the impact of inadvertent export violations. Three recent and significant legal developments expanded the 'beyond export compliance benefits' of effective compliance programs for business organizations: (1) the Sarbanes-Oxley Act of 2002's section 302 and 906 certifications, and section 404 disclosure requirements; (2) the Department of Justice's Thompson Memo, outlining principles for federal prosecution of business entities; and (3) the November 2004 amendments to the U.S. Sentencing Guidelines for Sentencing Organizations defining an "effective compliance and ethics program" for mitigating penalties.<sup>29</sup> For organizations engaged in international trade that are subject to the Securities and Exchange Commission's ("SEC") reporting requirements, these developments underscore the critical need to develop and implement a company-specific export compliance program and increase the value of establishing and maintaining a comprehensive compliance program.<sup>30</sup>

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28. 22 U.S.C. § 2778(a) (2004); 15 C.F.R. § 730.4 (2004).

29. Sarbanes-Oxley Act of 2002 §§ 302, 906, 404; Thompson Memo, *supra* note 27; U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f); *id.* § 8B2.1.

30. Recent SEC action suggests that a comprehensive, firm-wide compliance program designed to address regulatory matters such as the Foreign Corrupt Practices Act can be an important tool in complying with federal securities laws. *See* Press Release, SEC Sues the Titan Corporation for Payments to Election Campaign of Benin President, 2005-23, at 2-3 at <http://www.sec.gov/news/press/2005-23.htm> (Mar. 1, 2005); Complaint at ¶ 58, p. 16; Securities and Exchange Commission v. Titan Corp. (D. C.) (Civ. A. No. 05-0411), at <http://www.sec.gov/litigation/complaints/comp19107.pdf> (Mar. 1, 2005).

a. SARBANES-OXLEY CONSIDERATIONS: CERTIFICATIONS UNDER SECTIONS 302 AND 906; MANAGEMENT'S ANNUAL REPORT ON INTERNAL CONTROLS OVER FINANCIAL REPORTING UNDER SECTION 404

Under Sarbanes-Oxley section 302, a reporting company's chief executive officer and chief financial officer must personally certify that based on their knowledge there are no material misstatements of material fact or omissions of fact that would make an annual report on Form 10-K or quarterly report on Form 10-Q misleading.<sup>31</sup> Further, the officers must certify that they are responsible for establishing and maintaining the organization's disclosure controls and procedures.<sup>32</sup> Section 302's disclosure controls and procedures are broader than internal controls over financial reporting, and include risk assessment procedures specific to the company's business, including compliance with certain government regulations.<sup>33</sup> Further, section 906 requires the principal executive and financial officers to certify that any periodic report containing financial statements fully complies with the Securities and Exchange Commission ("SEC") rules and regulations governing such reports.<sup>34</sup> The SEC has expressly concluded that in evaluating disclosure controls and procedures, management should examine the company's compliance with other laws and regulations "to ensure that [it makes] required disclosure of legal or regulatory matters . . . ."<sup>35</sup>

In addition to these certifications, Sarbanes-Oxley section 404 requires management to report annually on the company's internal controls over financial reporting.<sup>36</sup> Importantly, the Public Company Accounting Oversight Board has

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31. Sarbanes-Oxley Act of 2002 § 302; 17 C.F.R. §§ 240.13a-14, 240.15d-14 (2004); 17 C.F.R. § 229.601(b)(31) (2004).

32. See *supra* note 29.

33. Certification of Disclosure in Companies' Quarterly and Annual Reports, Exchange Act Release No. 46427 [2002 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 86,720, at 86,131 (Aug. 28, 2002), available at <http://www.sec.gov/rules/final/33-8124.htm>, at 7-8; *id.* at 86,133 n.73, available at <http://www.sec.gov/rules/final/33-8124.htm>, at 10 n.73 (noting, "for example, for some businesses, an assessment and evaluation of operational and regulatory risks may be necessary") (last visited Mar. 3, 2005).

34. Sarbanes-Oxley Act of 2002 § 906; 18 U.S.C. § 1350 (2002); 17 C.F.R. §§ 240.13a-14(b), 240.15d-14(b); 17 C.F.R. § 229.601(b)(32) (2004).

35. Frequently Asked Questions: Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, Exchange Act Release 46427, [2004 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 87,262, at 81,001 (Oct. 6, 2004), available at <http://www.sec.gov/info/accountants/controlfaq1004.htm> (Question 10); see also, Linda L. Griggs, Requirements for Disclosures about Internal Control over Financial Reporting, RR Donnelly RealCorporateLawyer.com, at <http://www.realcorporatelawyer.com/faqs/404.html> (last visited Feb. 3, 2005); PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, Auditing Standard No. 2: An Audit of Internal Control Over Financial Reporting Performed in Conjunction with An Audit of Financial Statements (Mar. 9, 2004) ¶ 15 at 145, at [http://pcaobus.org/Rules\\_of\\_the\\_Board/Documents/Rules\\_of\\_the\\_Board/Auditing\\_Standard\\_2.pdf](http://pcaobus.org/Rules_of_the_Board/Documents/Rules_of_the_Board/Auditing_Standard_2.pdf) (last visited Mar. 1, 2005).

36. Sarbanes-Oxley Act of 2002 § 404 (2002); 17 C.F.R. §§ 240.13a-15, 240.15d-15 (2004); 17 C.F.R. § 229.308 (2004). Although initially required as part of a company's annual report on Form 10-K ("10-K"), on November 30, 2004, the SEC granted certain accelerated filers an additional 45 days beyond the date of 10-K to provide management's report on internal controls over financial reporting. Press Release, SEC Postpones Filing Date for Internal Control Reports for Some Accelerated Filers,

concluded that the lack of an effective regulatory compliance program can be a deficiency in internal controls over financial reporting.<sup>37</sup>

Export violations subject the company to the risk of substantial fines, a loss of export privileges, and debarment from government contracts, penalties that may materially impact its operations.<sup>38</sup> Because Sarbanes-Oxley requires certification that the company's quarterly and annual reports are not misleading, and requires management to annually assess and report on internal controls over financial reporting, detailed knowledge of potential export violations is critical to companies engaged in international trade. Absent an effective export compliance program, the certifying officers of an organization engaged in international trade will not have adequate information to assess whether the company is making all required disclosures of regulatory matters or whether the company's internal controls are sufficient to identify export liabilities that should be disclosed in its periodic reports.<sup>39</sup> As a result, the certifying officer will be unable to make the required certifications and will be obligated to disclose deficiencies in both the company's disclosure controls and procedures and its internal controls over financial reporting as required under the Securities Exchange Act of 1934.<sup>40</sup> Therefore, any reporting company engaged in international trade must carefully and critically evaluate its exposure to export control regulations and penalties for non-compliance. If compliance costs or penalties could be material, the company should develop and implement an effective export compliance program in order to meet these certification and reporting requirements.

b. THE THOMPSON MEMO: U.S. DEPARTMENT OF JUSTICE'S PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS<sup>41</sup>

In addition to the important role an export compliance program has in corporate governance, it also may help the organization avoid prosecution in the event of an export violation. In January 2003, Deputy Attorney General Larry D. Thompson issued a memorandum outlining the Department of Justice's ("DOJ") principles for prosecuting business organizations ("Thompson Memo").<sup>42</sup> Generally, under the doctrine of *respondeat superior*, the illegal acts of the organization's employees, directors, officers, or agents may warrant prosecution of the organization, if the acts were taken within the scope of the individual's duties

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2004-162, (Nov. 30, 2004) at <http://www.sec.gov/news/press/2004-162.htm> (last visited Mar. 3, 2005).

37. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, Auditing Standard No. 2: An Audit of Internal Control Over Financial Reporting Performed in Conjunction with An Audit of Financial Statements (Mar. 9, 2004) ¶ 140 at 186, at [http://pcaobus.org/Rules\\_of\\_the\\_Board/Documents/Rules\\_of\\_the\\_Board/Auditing\\_Standard\\_2.pdf](http://pcaobus.org/Rules_of_the_Board/Documents/Rules_of_the_Board/Auditing_Standard_2.pdf) (last visited Mar. 1, 2005).

38. See *supra* note 23.

39. See *supra* notes 35 and 37 and accompanying text.

40. 17 C.F.R. §§ 240.13a-14, 240.15d-14 (2004) (certification of disclosure controls and procedures); 17 C.F.R. §§ 240.13a-15, 240.15d-15 (internal controls over financial reports).

41. Thompson Memo, *supra* note 27.

42. Thompson Memo, *supra* note 27, at 1.

and were intended, in part, to benefit the corporation.<sup>43</sup> According to the DOJ, charging corporations for their agents' wrongdoing benefits the public by creating mass deterrence and by decreasing the risk of further public harm.<sup>44</sup>

The Thompson Memo stresses the importance of scrutinizing the "authenticity of a corporation's cooperation," and specifically directs prosecutors' attention to the effectiveness of the organization's corporate governance practices.<sup>45</sup> In particular, one of the nine relevant factors in the charging decision is the existence and adequacy of the organization's compliance program.<sup>46</sup> Although an ineffective "mere[ly] paper" compliance program, or even the existence of an apparently effective program alone does not support a decision not to charge the organization, a compliance program reasonably designed to detect and prevent misconduct evidences a level of voluntary self-policing that may warrant more lenient treatment.<sup>47</sup> The DOJ instructs that strict application of *respondeat superior* may be unwarranted if the organization has an effective compliance program and the wrongdoing is limited to one "rogue employee."<sup>48</sup> The weight given to an organization's compliance program depends on the design, effectiveness, and managerial commitment to enforcing the program.<sup>49</sup> This organizational commitment turns on whether the project is adequately staffed, funded, and audited for effectiveness.<sup>50</sup> In addition, prosecutors are directed to consider whether the program is truly designed to detect the specific potential misconduct most likely in the corporation's particular business and industry.<sup>51</sup> Notably, a compliance program that does not incorporate regulatory guidance aimed at the organization's industry is unlikely to justify a decision not to bring charges.<sup>52</sup>

In addition to factoring against prosecution, an effective compliance program may influence two of the other nine factors for making charging determinations.<sup>53</sup> First, the corporation's "timely and voluntary disclosure of wrongdoing" and cooperation can justify leniency.<sup>54</sup> A compliance program that effectively detects wrongdoing through self-auditing or internal investigations gives the organization

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43. Thompson Memo, *supra* note 27, at 2.

44. Thompson Memo, *supra* note 27, at 1-2.

45. Thompson Memo, *supra* note 27, at 1.

46. Thompson Memo, *supra* note 27, at 2-3. The Thompson Memo's nine factors are: (1) the "nature and seriousness of the offense," (2) the "pervasiveness of wrongdoing within the corporation," (3) the "corporation's history of similar conduct," (4) "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate" (5) the "existence and adequacy of the corporation's compliance program," (6) the "corporation's remedial actions," (7) any collateral consequences, (8) the "adequacy of prosecution of individuals," and (9) the "adequacy of remedies such as civil or regulatory enforcement actions." *Id.*

47. Thompson Memo, *supra* note 27, at 6.

48. Thompson Memo, *supra* note 27; *see id.* at 2.

49. Thompson Memo, *supra* note 27, at 6-7.

50. Thompson Memo, *supra* note 27, at 7.

51. Thompson Memo, *supra* note 27, at 6.

52. Thompson Memo, *supra* note 27, at 6.

53. Thompson Memo, *supra* note 27, at 4-5 (cooperation and voluntary disclosure); *see also id.* at 6-7 (restitution and remediation).

54. Thompson Memo, *supra* note 27, at 4.

the information necessary to make such disclosure.<sup>55</sup> Second, an organization that develops a compliance program or improves an existing program in response to a violation exemplifies a willingness to cooperate and make restitution, another factor weighing against prosecution.<sup>56</sup>

Although an export compliance program's inherent value lies in preventing wrongdoing in the first instance, the Thompson Memo highlights the additional benefits of an effective compliance program should a violation occur.<sup>57</sup>

c. THE NOVEMBER 2004 AMENDMENTS TO THE U.S. SENTENCING GUIDELINES FOR SENTENCING ORGANIZATIONS<sup>58</sup>

The U.S. Supreme Court's January 2005 decision in *United States v. Booker*<sup>59</sup> held that the U.S. Sentencing Guidelines ("Guidelines") are no longer mandatory, but rather, advisory.<sup>60</sup> The November 1, 2004 amendments to the Guidelines nevertheless provide a detailed framework for evaluating an organization's compliance program for the purposes of mitigating criminal penalties.<sup>61</sup> Based on a multi-year review of the organizational guidelines and Sarbanes-Oxley's directive that the U.S. Sentencing Commission review and amend the Guidelines so they "are sufficient to deter and punish organizational misconduct," the 2004 amendments introduced a separate guideline for an "Effective Compliance and Ethics Program."<sup>62</sup> To meet this criteria, an organization must "exercise due diligence to prevent and detect criminal conduct," and "promote an organizational culture" to encourage "ethical conduct and a commitment to compliance with the law."<sup>63</sup> The Sentencing Guidelines define effectiveness to require that a program both prevent and detect criminal conduct.<sup>64</sup>

To establish the requisite due diligence and promote a culture of compliance, an organization must meet seven minimum requirements:<sup>65</sup>

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55. Thompson Memo, *supra* note 27, at 5-6. The DOJ notes that the effect of an organization's voluntary disclosure is subject to the regulatory limitations of the governing authority. *Id.* For instance, only the first corporation to cooperate with the Antitrust Division qualifies for amnesty. *Id.*

56. Thompson Memo, *supra* note 27, at 7.

57. Thompson Memo, *supra* note 27, at 6, 5, 7.

58. U.S. SENTENCING GUIDELINES MANUAL, ch. 8 (2004). On January 12, 2005, in a 5-4 opinion, the United States Supreme Court held that the Sentencing Guidelines are advisory, rather than mandatory. *United States v. Booker*, No. 04-104, 04-105, 2005 WL 50108 at \*27 (Jan. 12, 2005) (5-4 decision) (Breyer, J., majority opinion, in part).

59. *Booker*, No. 04-104, 04-105, 2005 WL 50108 at \*27.

60. *Id.*

61. *Id.* While the decision severed the provisions of the Guidelines that made them mandatory, federal courts must continue to consult the Guidelines. *Id.* (stating, "The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing"). See also U.S. SENTENCING GUIDELINES MANUAL, at § B2.1, U.S. SENTENCING GUIDELINES MANUAL, at § 8A1.1, cmt. historical background; U.S. SENTENCING GUIDELINES MANUAL, at § 8C2.5(f).

62. U.S. SENTENCING GUIDELINES MANUAL, § 8B2, cmt. background; *id.* § 8B2.1.

63. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a)(1)-(2).

64. *Id.* § 8B2.1(a)(2).

65. *Id.* § 8B2.1(b)

1. Focus on Prevention and Detection – The organization must develop a program to “establish standards and procedures to prevent and detect criminal conduct.”<sup>66</sup>

2. High-Level Program Commitment – The organization must commit to the compliance program at every level of the organization, with particular emphasis on the board of directors or a committee of the board, and executive management.<sup>67</sup> The board or governing authority must be knowledgeable in both the content and operation of the program, and is charged with exercising “reasonable oversight” over the implementation and effectiveness of the program.<sup>68</sup> Further, high-level personnel, defined to include directors, executive officers, managers of a major functional business unit of the organization, or individuals with substantial ownership interests, must ensure that the compliance program is effective.<sup>69</sup> While executive management may delegate the day-to-day operational responsibility to lower-level personnel, ultimate responsibility for the effectiveness of the program cannot be delegated.<sup>70</sup> To ensure the board or governing authority is sufficiently informed as to the effectiveness of the compliance program, the individual with daily, operational responsibility over the program must make annual reports on the program’s effectiveness to the board or a committee of the board.<sup>71</sup> Further, management must allocate adequate resources to the individual with operational oversight of the program, must vest him with appropriate authority, and must provide him with direct access to the board, committee of the board, or governing authority.<sup>72</sup>

3. Avoid Inconsistent Delegations of Responsibility – The organization must take reasonable efforts not to delegate compliance program authority to employees who have engaged in criminal conduct or taken actions that are inconsistent with the compliance program.<sup>73</sup> The guideline’s “known or should have known” standard warrants individual screening of employees, with a particular focus on the recency of illegal activity or misconduct.<sup>74</sup>

4. Ongoing Training and Communication – The organization must conduct ongoing training and communicate the program’s standards and procedures to the entire organization, including the board, management, and employees.<sup>75</sup> In some circumstances, it may also be appropriate to provide this training to the organization’s agents.<sup>76</sup>

5. Ongoing Audit Requirement; Mechanisms for Anonymous Reporting –

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66. *Id.* § 8B2.1(b)(1).

67. *See id.* § 8B2.1(b)(2).

68. *Id.* § 8B2.1(b)(2)(A).

69. *Id.* § 8B2.1(b)(2)(B). Application note 1 to § 8B2.1 defines “high level personnel” by incorporating by reference the definition of “high level personnel” in the commentary to § 8A1.2. *Id.* § 8B.1 cmt. n.1.; *id.* § 8A1.2 cmt. n.3.

70. *Id.* § 8B2.1(b)(2)(B)-(C).

71. *Id.* § 8B2.1(b)(2)(C).

72. *Id.*

73. *Id.* § 8B2.1(b)(3).

74. *See id.* § 8B2. cmt. n.4.

75. *Id.* § 8B2.1(b)(4).

76. *Id.*

The organization must monitor and audit the compliance program, and periodically evaluate the program's effectiveness.<sup>77</sup> While not required, the organization may establish procedures allowing employees to make anonymous or confidential requests for further guidance, or to report criminal conduct.<sup>78</sup> Such mechanisms can increase program effectiveness by promoting compliance and active employee participation without fear of retaliation.<sup>79</sup>

6. Create Incentives and Disciplinary Measures – The organization must provide performance incentives for compliance and establish disciplinary measures for criminal conduct or failure to prevent or detect such conduct.<sup>80</sup> While these measures are not specifically required as a component of the compliance program rather than exist as part of the company's personnel review procedures, discipline for program violations should be case specific.<sup>81</sup>

7. Respond Reasonably to Criminal Conduct – Should criminal conduct occur, the organization must respond to prevent further violations.<sup>82</sup> Upon discovery of a violation, the organization should evaluate whether changes or modifications to the compliance program are warranted.<sup>83</sup> Even in the absence of criminal conduct, organizations should update or modify their compliance programs as needed, after periodic review and assessment, to ensure that the program continually meets each of the seven requirements.<sup>84</sup>

In addition to these minimum requirements, the Guideline's Application Notes emphasize that compliance programs should be designed specifically for each organization, taking into account an organization's industry, size, and prior misconduct.<sup>85</sup> Compliance programs that do not conform to industry practices, or meet regulatory standards for compliance programs for specific industries, are unlikely to qualify as effective programs.<sup>86</sup>

Smaller organizations are not expected to implement compliance programs that are as elaborate, costly, and formal as programs required of larger organizations.<sup>87</sup> For example, smaller organizations may implement effective compliance programs that are directly managed by the board; that provide training through routine, but informal staff meetings; that rely on existing personnel, rather than adding additional staff; and that incorporate procedures from existing, well-regarded compliance programs of similar organizations.<sup>88</sup> Besides industry and

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77. *Id.* § 8B2.1(b)(5).

78. *Id.* § 8B2.1(b)(5)(C).

79. *Id.* The Sentencing Commission expressly recognizes that procedures allowing for anonymity and confidentiality have both value and limitations, and that the Sentencing Guidelines are intended to allow an organization "maximum flexibility" in designing a system best suited to the organization's culture. *Id.* § 8B2.1 historical notes.

80. *Id.* § 8B2.1(b)(6).

81. *Id.* § 8B2.1 cmt. n.5.

82. *Id.* § 8B2.1(b)(7).

83. *Id.*

84. *Id.* § 8B2.1(c).

85. *Id.* § 8B2.1 cmt. n.2(A).

86. *Id.* § 8B2.1 cmt. n.2(B).

87. *Id.* § 8B2.1 cmt. n.2(C)(iii).

88. *Id.*

size considerations, organizations should review their prior business history to identify risk of particular types of criminal conduct.<sup>89</sup>

In sum, an organization may qualify for decreased criminal penalties if it exercises due diligence and promotes the requisite culture of compliance through its export control program.<sup>90</sup> By meeting the seven minimum criteria of an “Effective Compliance and Ethics Program,” an export compliance program should not only deter or detect a potential misconduct, but also qualify the corporation for more favorable treatment in the event of a violation.<sup>91</sup>

## 2. HYPOTHETICAL CLIENT FACTS AND MODEL PROGRAM DESIGN CONSIDERATIONS

### a. HYPOTHETICAL CLIENT FACTS: XYZ, LLC<sup>92</sup>

This model export compliance program was developed for XYZ, LLC, a hypothetical, small-cap technology startup. The program addresses export controls under the Export Administration Regulations,<sup>93</sup> Arms Export Control Act,<sup>94</sup> International Emergency Economic Powers Act,<sup>95</sup> and Foreign Corrupt Practices Act.<sup>96</sup>

Tom Johnson, a former engineering professor, founded XYZ, LLC (“XYZ”) to service a large contract for a well-known defense contractor, QRS. During his tenure at the university and under a contract with QRS, Johnson developed vision-recognition technology, including the original code that underlies most XYZ products. Several of these university projects were funded directly by the Department of Defense (“DOD”). The core of XYZ’s technology is an image recognition feature that allows equipped computers to understand images as discrete as road signs and product variants. XYZ’s products include a basic vision recognition package and other software products that enhance products ranging from computer-driven machine tools to aviation training programs. XYZ’s non-U.S. customers include automakers, space programs, launch-technology companies, and government highway projects. Because XYZ’s products are developed specifically for each purchaser, company sales contracts often require extensive back-and-forth with the customer, including customer visits to XYZ’s Colorado office. At the expiration of the contract period, the software automatically disables, unless the licensed user renews the contract and receives a

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89. *Id.* § 8B2.1 cmt. n.6(A)(iii).

90. *Id.* § 8C2.5(f).

91. *Id.*

92. The hypothetical client, XYZ, LLC and the hypothetical client facts are fictional. Part II.A is a summarized presentation of the hypothetical facts provided by Professor Trip Mackintosh for his course, “International Business Transactions, Federal Regulation,” at the University of Denver Sturm College of Law, Spring Semester, 2004.

93. 15 C.F.R. §§ 730-74 (2004). These sections of the Code of Federal Regulations comprise the Export Administration Regulations, or “EAR.”

94. 22 C.F.R. §§ 120-27 (2004). These sections of the Code of Federal Regulations comprise the International Traffic in Arms Regulations, or “ITAR.”

95. 50 U.S.C. §§ 1701-1706 (2001).

96. 15 U.S.C. §§ 78dd-1 to 78dd-3 (1998).

software key from XYZ.

XYZ has small sales, engineering, coordination, and accounting departments. Many of XYZ's sales and engineering employees are university students from India and Pakistan. In addition to CEO Johnson, XYZ has one other executive officer—in-house counsel and CFO, Bob Decisis. In addition to his executive duties, Decisis manages the team that coordinates projects between the sales and engineering groups. XYZ's sales team consists of trained engineers. The company's engineering team consists of twenty part-time code writers who write for specific applications in response to customer needs.

#### b. DESIGN CONSIDERATIONS: THE MODEL COMPLIANCE PROGRAM

This model program incorporates advice on export compliance “best practices” from the Department of State, Department of Commerce and the Nunn-Wolfowitz Task Force Report: Industry “Best Practices” Regarding Export Compliance Programs.<sup>97</sup> Practitioners reviewing the model program should note four additional considerations.

First, the model program was not designed to include incentives and discipline within the compliance program itself. Instead, the program was developed on the assumption that such procedures would be implemented directly through XYZ's employee compensation and performance reviews.

Second, due to the customer-specific technology requirements for XYZ's products, the model program does not include a product matrix. Practitioners developing export compliance programs for companies selling mass-produced products should consider developing matrix of company products with their appropriate classifications under the U.S. Munitions List or Commerce Control List.<sup>98</sup>

Third, the model program was created as a paper-based program, but larger clients might be best served with a web or intranet-based program. An electronic program can incorporate technology to track participation in training and performance of program steps by individual employees, allowing the organization to document training and track compliance with required procedures.

Lastly, while the model program is footnoted for publication purposes, practitioners might consider creating compliance programs without extensive footnotes. Frequent citation to legal authority can detract from the straight-forward

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97. Department of State, Bureau of Political Military Affairs, Office of Defense Trade Controls, Guidelines for DTC Registered Exporters/Manufacturers Compliance Program, *at* [http://www.pmdtc.org/docs/Compliance\\_Programs.pdf](http://www.pmdtc.org/docs/Compliance_Programs.pdf) (last visited Feb. 3, 2005); Department of Commerce, Bureau of Industry and Security, Compliance and Enforcement: Export Management Systems, *at* <http://www.bxa.doc.gov/ExportManagementSystems/Default.htm> (last visited Jan. 23, 2005); Nunn-Wolfowitz Task Force Report: Industry “Best Practices” Regarding Export Compliance Programs, *at* <http://www.usexportcompliance.com/Papers/nunnwolfowitz.pdf> (last visited Feb. 3, 2005).

98. 22 C.F.R. § 121 (2004) (U.S. Munitions List); 15 C.F.R. § 774 (2004) (Supp. I-III 1998, 2003, 2003) (Commerce Control List).

writing style necessary to make the program both readable and understandable to non-legal employees learning to comply with these complex controls.

B. XYZ, LLC EXPORT COMPLIANCE PROGRAM – BEGINS ON NEXT PAGE

**XYZ, LLC**  
**EXPORT COMPLIANCE PROGRAM<sup>99</sup>**

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99. This model program is for general informational purposes and is not intended as legal advice. The requirements of an effective export compliance program for any particular company depend on the organization's operational circumstances and technologies. The author and the Denver Journal of International Law and Policy expressly disclaim any responsibility for the adaptation or use of this program.

**EXPORT COMPLIANCE PROGRAM – TABLE OF CONTENTS**

Each department’s Export Compliance Program instructions are customized to reflect the differing nature of each department’s work. Use this table of contents to determine which sections apply to your department.

All departments should begin with the **OVERVIEW** and read through **PART IX**. From there, turn to your specific department’s section for further instruction.

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**PART I – LETTER FROM TOM JOHNSON, CEO**

MM/DD/YYYY

RE: Open Letter to All Employees – XYZ Export Compliance Program

Dear XYZ Employees:

Over the past two years, XYZ has grown from a small technology startup to a respected player in the global intelligent sensing software industry. Together, we have taken a vision and built our company with the skill, dedication, and energy of each of you. Today, I ask each of you for a further commitment to XYZ's continued long-term success.

XYZ's growth brings new challenges in many areas. One of the most important things we can do is create systems to help our growing company comply with U.S. law. Export laws are of particular importance, both for our company and for the security of the United States. Because these laws protect national security and seek to avoid increasing the military capabilities of certain foreign countries, export violations carry significant penalties at both the individual and company level.<sup>100</sup> These penalties include substantial fines, loss of export control privileges, being barred from work on U.S. government contracts, and even jail time.<sup>101</sup> Each of us at XYZ must take our obligations seriously, and we must make a company-wide commitment to *value compliance over any sale*.

As part of our commitment to compliance, XYZ is implementing an Export Compliance Program, which translates these regulations into user-friendly steps that put compliance within the reach of every one of our employees. To implement the program, we will hold company-wide training sessions this month. Further, we will conduct annual refresher training and make compliance advice available on a daily basis. Despite the significant cost of this program, XYZ management firmly believes that non-compliance carries much larger consequences for our employees, our company, and our country.

Even with the best compliance program, however, mistakes can and may happen. XYZ's Compliance Program provides a step-by-step guide should you make a mistake, have a concern, or suspect a violation. The most important thing you can do if you suspect a problem is to bring it to our attention so we can correct it immediately. To that end, we have created a new position, Export Compliance Officer. Should you ever have a concern or question, contact our Export Compliance Officer, John Complaisant, at (303)123-0911 or jcomp@XYZ.com. The Compliance Program also provides detailed instructions about other methods of reporting concerns or violations, such as anonymous reporting to an export-trained lawyer outside the company or contacting XYZ management. We can only remedy problems if we know about them, so we ask you to join us in placing the utmost importance on export compliance.

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100. 22 U.S.C. § 2778(a) (2004); 15 C.F.R. § 730.6 (2004); *see also* 22 U.S.C. § 2778(c); 15 C.F.R. § 764.3(b)(2)(i)-(ii) (2004).

101. 22 U.S.C. § 2778(c); 15 C.F.R. § 764.3(b)(2)(i)-(ii).

We value the commitment each of you has made to XYZ's success. Together, we can continue our pledge to the long-term success of our company and to the safety of our country. Thank you for your vision, support, and dedication.

Sincerely,

Thomas Johnson  
Chief Executive, XYZ, LLC

**PART II – XYZ COMPLIANCE PROGRAM – OVERVIEW****PART II.A – OVERVIEW**

XYZ, LLC is committed to achieving excellence in the global intelligent sensing software industry. In this mission, XYZ must be dedicated to compliance with U.S. export laws. To that end, it is XYZ's corporate policy to *value compliance over any sale*. XYZ's Export Compliance Program provides instruction for our employees in every department, because it takes every one of us to achieve this commitment to compliance.

This **PART II OVERVIEW** section is designed as a broad overview of the purpose of the laws, the scope of their coverage, the agencies that enforce these laws, and the importance of compliance. These sections provide a general overview of the laws, but do not provide specific instructions for compliance. Later sections of this program, designed specifically for each department, will provide the detailed information you need for compliance. If you read this **PART II OVERVIEW** section and have a general understanding of the purpose and scope of the laws, you have successfully achieved the goal of this section.

Throughout this program, the pages assigned to your department have a space in the lower left-hand corner for you to initial each page.<sup>102</sup> Initial and date the page when you have read and understood the section. If you are confused or do not fully understand any part of your assigned sections, ask your supervisor for clarification, or contact XYZ's Export Compliance Officer, John Complaisant, at (303)123-0911 or jcomp@XYZ.com.

**PART II.B – PURPOSE BEHIND UNITED STATES EXPORT CONTROL LAWS**

U.S. export control laws serve a very important global function. These laws protect U.S. national security, support U.S. foreign policy, control proliferation, and prevent terrorism activities.<sup>103</sup> They also seek to avoid increasing the military capabilities of certain individuals, groups, and foreign countries by controlling defense articles and services and items that can be used for defense purposes.<sup>104</sup> Not only are U.S. export laws aimed at preventing the spread of these threats, but they are also designed to ensure the safety of our armed forces in conflict.<sup>105</sup> Today, more than ever, compliance with these laws is crucial.

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102. The running footer for the XYZ, LLC Export Compliance Program read: "Initials \_\_\_\_\_, Date \_\_\_\_\_ • Need Assistance? Go to intranet: **COMPLIANCE 911** for contacts and instructions." This footer has been excluded from the model program for formatting purposes, but should be included on every page of the program.

103. 22 U.S.C. § 2778 (a); 15 C.F.R. § 730.6.

104. 22 U.S.C. § 2751 (2004).

105. *See id.*

## PART II.C – SCOPE OF U.S. EXPORT CONTROL LAWS

### 1. Definition of “Export”

U.S. export control laws broadly define the term “export.”<sup>106</sup> Due to the broad definition, the scope of these laws is not always intuitive.<sup>107</sup> Any item that is transferred from a U.S. person to a foreign person is an export.<sup>108</sup> Examples of items are commodities, software, technology, and technical information.<sup>109</sup> Certain items with potential military uses, such as software and encryption codes are strictly controlled.<sup>110</sup> The transfer or export of the item can be by any method.<sup>111</sup> Exports can happen by mail, fax, uploading/downloading via the web, by e-mail, by face-to-face conversation, or even by phone.<sup>112</sup>

### 2. Definition of “Foreign Person”

Under the laws, a foreign person is any person who is not a “U.S. Person.”<sup>113</sup> A U.S. Person is a: (1) U.S. Citizen (including U.S. companies, such as XYZ); (2) Permanent Resident Alien; or (3) Political Refugee protected under the Immigration and Naturalization Act.<sup>114</sup>

### 3. Location of Transfer

Under U.S. export control laws, it does not matter where the transfer takes place.<sup>115</sup> U.S. Persons must abide by the law even when overseas.<sup>116</sup> Furthermore, an export can take place in the United States if technology is transferred to a foreign person here.<sup>117</sup> Under the law, this is a “deemed export” that is still subject to export controls.<sup>118</sup> The justification for this rule is that at some point, the foreign national might return to their home country.<sup>119</sup>

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106. See 22 C.F.R. § 120.17 (2004); 15 C.F.R. § 734.2(b) (2004).

107. See 22 C.F.R. § 120.17; 15 C.F.R. § 734.2(b).

108. See 22 C.F.R. § 120.17; 15 C.F.R. § 734.2(b)(1)-(b)(2), (a)(1).

109. See 22 C.F.R. §§ 120.17, 120.6 (2004); 15 C.F.R. § 734.2(a)(1), (b)(1)-(b)(2).

110. 22 C.F.R. §§ 120.6, 120.2 (2004).

111. 22 C.F.R. § 120.17; 15 C.F.R. § 734.2(b)(1)-(3).

112. See 22 C.F.R. § 120.17; 15 C.F.R. § 734.2(b)(1)-(3).

113. 22 C.F.R. § 120.16 (2004).

114. 22 C.F.R. §§ 120.15, 120.16 (2004).

115. *Id.* § 120.17; 15 C.F.R. § 734.2(b)(1).

116. 22 C.F.R. § 120.17; 15 C.F.R. § 734.2(b)(2)(i).

117. 22 C.F.R. § 120.17; 15 C.F.R. § 734.2(b)(2)(ii).

118. See 22 C.F.R. § 120.17; 15 C.F.R. 734.2(b)(2)(ii).

119. See 22 C.F.R. § 120.17; 15 C.F.R. 734.2(b)(2)(ii).

#### 4. Embargoes/Denied Parties

Export laws enforce embargoes against certain countries.<sup>120</sup> U.S. embargoes may prohibit travel to, contact with, or business transactions with parties in specified countries.<sup>121</sup> Many of these economic and trade sanctions involve United Nations or other international mandates.<sup>122</sup> In addition to these sanctions, U.S. Persons (remember, this includes U.S. companies) cannot do business with certain foreign nationals suspected of terrorism or who have ties to terrorist organizations.<sup>123</sup>

#### 5. Anti-Boycott and Anti-Corruption Laws

U.S. laws prohibit U.S. Persons from participating in boycotts of countries friendly to the United States.<sup>124</sup> These laws require that U.S. Persons do not participate in illegal boycotts and require U.S. Persons to avoid participation and to report any invitation to participate in an illegal boycott.<sup>125</sup>

In addition to anti-boycott controls, U.S. law forbids U.S. Persons from offering or giving a payment or thing of value to a foreign government official with the intent to improperly influence the individual.<sup>126</sup>

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120. See Office of Foreign Asset Control, Sanctions Program and Country Summaries, at <http://www.treas.gov/offices/enforcement/ofac/sanctions/index.html> (last visited Jan. 23, 2005).

121. 15 C.F.R. §§ 746.2-746.3, 746.7-746.8 (2004) (restrictions on exports to Cuba, Iraq, Iran, and Rwanda); 15 C.F.R. § 732.3(i) (2004).

122. 15 C.F.R. § 730.8(a)(4)(iii) (2004); see also, e.g., Exec. Order No. 13,315, 68 Fed. Reg. 52,315 (Aug. 28, 2003) (blocking property of former Iraqi officials, in accord with U.N. Security Council Resolution 1483 of May 22, 2003).

123. See 15 C.F.R. § 744.12 (2004); *id.* § 744 (Supp. IV 2001).

124. See 15 C.F.R. § 760.2 (2004).

125. See *id.*; 15 C.F.R. § 760.5(a) (2004).

126. 15 U.S.C. §§ 78dd-1, 78dd-2 (2004).

## 6. Examples of XYZ Transactions Covered by U.S. Export Laws

- Sending software to a customer overseas, or making software available on our web or FTP site that a customer could download (even though the site is hosted in the United States, and the customer completes the download independently)<sup>127</sup>
- Furnishing a defense service, by training a foreign person (whether in the United States or abroad) to use XYZ software that was designed or adapted for military use<sup>128</sup>
- Sharing technical data or know-how with a foreign person (could be a customer or co-worker) in person, by phone, live-web support, e-mail, or at a trade show (whether in the United States or abroad)<sup>129</sup>
- Incorporating XYZ software into a foreign made item that a customer sends to you and then shipping the item back to the customer<sup>130</sup>

## 7. Hiring New Employees

Because sharing technical data with foreign persons in the United States can be an export under U.S. laws, each potential hire must be screened prior to employment for badge/classification requirements.<sup>131</sup>

Each XYZ department must submit the name of potential hires to the Compliance Screeners in the Accounting department *prior* to hiring them. Further, you must *wait* for approval before hiring any employee. Failure to do so can result in a violation.

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127. See 22 C.F.R. § 120.17 (2004); 15 C.F.R. § 734.2(b)(2) (2004).

128. See 22 C.F.R. § 120.9 (2004).

129. See 22 C.F.R. § 120.17(3)-(4); 15 C.F.R. § 734.2(b)(2)-(3).

130. 22 C.F.R. § 120.17; 15 C.F.R. § 734.2(b)(2)(ii).

131. See *supra* note 130.

**PART II.D – COMPLIANCE PROGRAM KEY PERSONNEL**

In order to execute this program, XYZ has made several personnel changes. The following people are the primary contacts for export control. A detailed list of how to handle suspected problems follows in **PART III, COMPLIANCE 911**.

This section should familiarize you with individuals you can use as resources in the export process.

**1. John Complaisant, Compliance Officer – (303)123-0911 – jcomp@XYZ.com**

As Compliance Officer, John is XYZ's expert on export control compliance. We selected John for this position because he has worked in Bob Decisis's group since XYZ's start-up and he has an in-depth understanding of our projects, systems and operations. John has received intensive training in export control laws in order to help each XYZ employee make good compliance decisions. In addition to overseeing the program, John provides advice to the Compliance Screeners and applies for required licenses. John is available for your questions and concerns. If you ever suspect a violation or believe you have made a mistake, you can contact John for assistance. If necessary, he will bring in Outside Counsel for assistance.

**2. Bob Decisis, In-House Counsel and Chief Financial Officer, Head of Coordination Team – (303)123-1411 – bdecisis@XYZ.com**

Bob worked with Tom Johnson, CEO, to raise the necessary funding to start XYZ. He oversees the Coordination Team (which includes John Complaisant, our Compliance Officer.) His responsibilities under the Export Control Program include general oversight and periodic reviews of the various departments and compliance control functions. He also reviews all contracts for the required certifications and declarations.

**3. Anne Comptable and Compliance Screeners, Accounting Department – (303)123-4444 – acomptable@XYZ.com**

As the Vice President of Accounting, Anne has extensive experience in the finance and contracts for XYZ's projects.

Each employee in the Accounting department has been trained as a Compliance Screener. The Compliance Screeners will perform initial screens on potential customers and employees for license requirements.

**4. Jane L. Doe, ABC Firm, LLP, Outside Counsel – (303)999-9999 – jldoe@abclaw.com**

As Outside Counsel, Jane understands the critical importance of compliance with U.S. export control laws. Should you ever have a concern, suspect a violation, or believe you may have made a mistake, you can contact her *anonymously* to make a report.

## PART IIE – AGENCIES THAT CONTROL U.S. EXPORTS

### 1. Who Controls Exports

The two main government agencies that administer and enforce U.S. export law are the U.S. Department of State and the U.S. Department of Commerce.

### 2. State Department

The State Department controls “defense articles” and “defense services.”<sup>132</sup> Generally, the State Department controls items and services that are ‘born military,’ meaning that they were designed, modified or adapted for military application.<sup>133</sup> Because of the inherent military value of these items, they are strictly controlled.<sup>134</sup>

### 3. Commerce Department

The Commerce Department controls “dual use” items, which are those items which have both commercial and military or proliferation applications.<sup>135</sup> Many commercial items, which may not have *obvious* military uses, are controlled by the Commerce Department.<sup>136</sup> Because some items are mainly commercial in nature, the Commerce Department Rules allow for more or less control, depending on the item.<sup>137</sup> The Commerce Department also administers U.S. anti-boycott laws.<sup>138</sup>

### 4. Other Agencies

The Treasury Department enforces embargoes that further U.S. foreign policy and security goals.<sup>139</sup> Anti-corruption laws are enforced by the Department of Justice.<sup>140</sup>

A general understanding that the State Department controls items and services that are inherently military and that the Commerce Department regulates dual-use items is sufficient knowledge about these particular agencies for the purpose of this **OVERVIEW** section.

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132. 22 C.F.R. §§ 120.2, 120.17 (2004).

133. 22 C.F.R. § 120.3 (2004).

134. 22 C.F.R. §§ 120.6, 120.2 (2004). The Department of State determines, with consent of the Department of Defense, which items are covered by the U.S. Munitions List. 22 C.F.R. § 120.3; 15 C.F.R. § 730.3 (2004).

135. 15 C.F.R. § 730.3.

136. *See id.*

137. *See id.*; 15 C.F.R. § 730.7 (2004) (noting that few exports covered by the Commerce Department require application to the Bureau of Industry and Security for a license).

138. 15 C.F.R. §§ 760.1-760.5 (2004).

139. *See* 15 C.F.R. § 730.4 (2004).

140. *See* 15 U.S.C. §§ 78dd-1(d)(1)-(d)(2), 78dd-2(e)(1)-(e)(2) (2004).

**PART II.F – IMPORTANCE OF COMPLIANCE – COST OF VIOLATIONS**

Violations of U.S. export laws carry substantial penalties. Individuals are subject to fines of up to \$1 million and/or up to ten years in prison, per violation.<sup>141</sup> Companies face penalties of up to \$1 million or five times the value of the transaction, per violation.<sup>142</sup> Because of the broad scope of the laws, each business transaction could involve several violations. In addition, individuals and companies may forfeit the goods or proceeds from a transaction that occurs in violation of these laws.<sup>143</sup>

The government may further penalize violations by taking away export privileges, by prohibiting other parties from doing business with companies and individuals who have violated the law, and by barring companies who violate the law from working on government contracts.<sup>144</sup> Bear in mind that most of XYZ's business over the past two years has been in conjunction with QRS, a large government contractor. A loss of the ability to work with QRS would have devastating effects on XYZ's viability.

Because the cost of violations is so great to every one of us, XYZ takes compliance extremely seriously. Although these penalties are daunting, compliance is within everyone's reach. XYZ has developed this Export Compliance Program to prevent costly violations. Each step of the program describes how to comply and where to turn for help.

Further, XYZ has developed a special section of the program in **PART III** called **COMPLIANCE 911**. It describes in detail how to address questions, concerns, suspicions, or problems. XYZ's goal is to resolve compliance problems in an efficient, confidential manner. We can only resolve issues and support our employees if each of us is committed to identifying and reporting potential problems.

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141. 22 U.S.C. §2778 (c) (2004).

142. 15 C.F.R. § 764.3(b)(2)(i)-(ii) (2004).

143. 22 C.F.R. § 127.6 (2004); 15 C.F.R. § 764.3(c)(2)(i).

144. *See supra* note 23.

**PART III – COMPLIANCE 911 – HOW TO ADDRESS CONCERNS, SUSPICIONS, OR PROBLEMS**

**IF YOU SUSPECT A PROBLEM OR VIOLATION:**

If you suspect a problem or violation, **don't panic**. These laws are complex, and mistakes can happen. The most important thing you can do is to **contact us**. It is extremely important that you bring any concern to our attention immediately, so that we can correct the problem and minimize any potentially negative consequences. If you believe there has been a violation, suspect you have made a mistake, or are presented with a situation you do not know how to handle, follow the **COMPLIANCE 911 PROTOCOLS**.

**COMPLIANCE 911 PROTOCOLS:**

1. **Don't panic.**
2. **Stop the transaction immediately.** If the transaction involves a shipment of goods, stop the shipment. If the transaction involves communication with a foreign person, terminate the communication.
3. **Retain all records.** Records can form the basis of a defense or help document the steps of the transaction that led to the concern.
4. **Contact any of the following people to report the concern.** If you would like to report *anonymously*, contact Jane L. Doe, Outside Counsel, at the number below.
  - a. John Complaisant – Compliance Officer – (303)123-0911 – jcomp@XYZ.com
  - b. Bob Decisis – In-House Counsel/CFO – (303)123-1411 – bdecisis@XYZ.com
  - c. Anne Comptable – Accounting/Compliance Screening – (303)123-4444 – acomptable@XYZ.com
  - d. Tom Johnson – CEO – (303)123-7777 – tjohnson@XYZ.com
  - e. Jane L. Doe – Outside Counsel – (303)999-9999 – jldoe@abclaw.com
5. **Maintain confidentiality.** After properly reporting the incident, keep the matter confidential. This will allow us to thoroughly assess the situation. Talking about the matter may jeopardize any attorney/client privilege that may exist.
6. **Wait for further instruction.** If you have contacted XYZ management, we will immediately contact Outside Counsel and then determine the best course of action. If you have contacted Outside Counsel directly, she will provide you with instructions directly.

You can access the **COMPLIANCE 911 PROTOCOLS** and the **COMPLIANCE 911 Contact List** on the XYZ intranet link entitled **COMPLIANCE 911**.

**PART IV – AVOIDING INADVERTENT VIOLATIONS – CUSTOMER ‘RED FLAGS’****PART IV.A – BE ALERT TO ‘RED FLAGS’**

Often, avoiding violations is as simple as being alert to ‘red flags’ that may signal that a customer presents a risk of a violation.<sup>145</sup> Being aware of common signals that can indicate an individual is trying to obtain U.S. exports unlawfully can help you avoid making a mistake.<sup>146</sup> The best and safest approach to compliance is to be careful not to ‘self-blind.’<sup>147</sup> Under the law, we each have an affirmative duty to know certain information related to our transactions.<sup>148</sup> Ostrich-like behavior or avoiding hearing ‘bad’ information does not protect anyone from liability.<sup>149</sup>

**PART IV.B – LOOKING FOR RED FLAGS IS AN ONGOING DUTY**

The best way to avoid violations is to be on the alert for red flags at *all* times. Just because a customer has not shown red flags at the beginning of the transaction does not mean they may not exhibit red flags later in the transaction.

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145. 15 C.F.R. § 732 (Supp. III 1997).

146. *See id.* § 732 (Supp. III(b) 1997).

147. *Id.* § 732 (Supp. III(a)(3) 1997).

148. *See id.* § 732 (Supp. III(a)(2) 1997). The knowledge required under the EAR depends on the situation. *See id.* If ‘red flags’ are present, they create an affirmative duty to inquire further. *Id.* Absent ‘red flags,’ it is appropriate to rely on a customer’s representations. *Id.*

149. *Id.* § 732 (Supp. III(a)(3) 1997).

#### PART IV.C – RED FLAGS TO LOOK OUT FOR

Later sections of the program will address how to conduct a specific screening for red flags. In this section, however, it is important to familiarize yourself with potential red flags so that you can be on the lookout for these signs throughout your work.<sup>150</sup> Don't be afraid to 'hold up' a sale or 'kill the deal.' It is much more important to contact someone to discuss the concern instead of going ahead with the transaction.<sup>151</sup> Remember, compliance is *more important than any sale*.

If you see a red flag or have *any* doubts, do not continue the transaction.<sup>152</sup> Treat it like a suspected violation and utilize the **COMPLIANCE 911 PROTOCOLS**, located in **PART III** or on the XYZ intranet at the link entitled **COMPLIANCE 911**.

1. The customer's name or address is similar to someone who comes up on an individual screening list.<sup>153</sup> Often, individuals on screening lists go by several names or share addresses. The accounting department Compliance Screener will conduct this screen.

2. The customer is reluctant to offer information about the end-use of the item.<sup>154</sup> For example, when you ask the customer about the software's end-use or inform the customer that XYZ requires a certification of end use, the customer hesitates or does not call back for several days. Sales and engineering employees should be alert for this.

3. XYZ's software capabilities do not fit the customer's line of business, such as a plant nursery or construction equipment business inquiring about XYZ's high-resolution image recognition software.<sup>155</sup> Sales and engineering employees should be alert for this.

4. XYZ's software is incompatible with the technical level of the country it will be shipped to, such as a third-world country that does not have either a space or engineering industry.<sup>156</sup> Sales, engineering, and accounting employees should be alert for this.

5. The customer has little or no business background in either the engineering or space industry.<sup>157</sup> Sales and engineering employees should be alert for this.

6. The customer is willing to pay cash up front, which would be unusual because XYZ's customers generally pay with letters of credit or staged cash payment during the development of the software for the contract.<sup>158</sup> Sales and accounting employees should be alert for this.

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150. *See id.* § 732 (Supp. III(b) 1997).

151. *See id.* § 732 (Supp. III(a)(6) 1997).

152. *See id.*

153. *See infra* Part X.II.A.

154. 15 C.F.R. § 732 (Supp. III(b)(1) 1997).

155. *Id.* § 732 (Supp. III(b)(2) 1997).

156. *Id.* § 732 (Supp. III(b)(3) 1997).

157. *Id.* § 732 (Supp. III(b)(4) 1997).

158. *Id.* § 732 (Supp. III(b)(5) 1997).

7. The customer is unfamiliar with the basic functionality of sensing software or image recognition technology.<sup>159</sup> Sales and engineering employees should be alert for this.
8. The customer declines the training and maintenance services that XYZ provides as part of each software contract.<sup>160</sup> Sales, engineering, and accounting employees should be alert for this.
9. The customer is vague about delivery dates or wants deliveries made to odd destinations, such as Post Office boxes, remote locations or destinations that are far away from the customer's place of business.<sup>161</sup> Sales and accounting employees should be alert for this.
10. The customer gives a freight forwarder as the product's final destination.<sup>162</sup> Sales and accounting employees should be alert for this.
11. The shipping route is abnormal, such as a customer with a reported ultimate destination in France routing the delivery through India.<sup>163</sup> Sales and accounting employees should be alert for this.
12. The customer requests unusual packaging, such as asking for an unmarked box or providing their own packaging materials.<sup>164</sup> Sales and accounting employees should be alert for this.
13. The buyer is evasive or makes contradictory statements about the software's use, such as stating that they will use the software in a plant in Colorado but making frequent references to their engineering facility in China.<sup>165</sup> Sales and engineering should be alert for this.

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159. *Id.* § 732 (Supp. III(b)(6) 1997).

160. *Id.* § 732 (Supp. III(b)(7) 1997).

161. *Id.* § 732 (Supp. III(b)(8) 1997).

162. *Id.* § 732 (Supp. III(b)(9) 1997).

163. *Id.* § 732 (Supp. III(b)(10) 1997).

164. *Id.* § 732 (Supp. III(b)(11) 1997).

165. *Id.* § 732 (Supp. III(b)(12) 1997).

**PART V – ANTI-BOYCOTT PROTECTIONS****PART V.A – AVOIDING AND REPORTING ILLEGAL BOYCOTTS**

U.S. anti-boycott laws are designed to prevent U.S. Persons (including U.S. companies) from participating in boycotts against countries friendly to the United States.<sup>166</sup> This can be confusing, because you *must* comply with U.S. sanctions and embargoes, but you *cannot* comply with invitations to participate in embargoes against countries friendly to the United States.<sup>167</sup>

Participation in any boycott of a country friendly to the United States is prohibited.<sup>168</sup> Currently, your primary concern is the Arab League Boycott of Israel.<sup>169</sup> This long-standing boycott is aimed at Israel, with people who do business with Israel, or those who do business with parties the Arab League places on its “black list.”<sup>170</sup>

Therefore, if your project involves countries in the Arab League, be on the alert for inquiries about whether XYZ does business with Israel or with companies who do business with Israel. Such questions are invitations to participate in the boycott and must be reported.<sup>171</sup> More information on the reporting requirement is in the section below called **PART V.C.2 – POSITIVE OBLIGATIONS**.<sup>172</sup>

Also prohibited are agreements to discriminate against others based on race, religion, sex, national origin, or nationality.<sup>173</sup>

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166. 15 C.F.R. §§ 760.2(a), 760.1(a), (e) (2004).

167. 15 C.F.R. § 760.2(a).

168. *Id.*

169. See Bureau of Industry and Security, Department of Commerce, Office of Antiboycott Compliance, at <http://www.bxa.doc.gov/antiboycottcompliance/oacrequirements.html> (last visited Feb. 3, 2005).

170. Eugene Kontorovich, *The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions?*, 4 CHI. J. INT'L L. 283, 286-88 (2003).

171. 15 C.F.R. §§ 760.2(a), 760.5(a)(1) (2004).

172. See *infra* Part V.C.

173. 15 C.F.R. § 760.2(b).

**PART V.B – ARAB LEAGUE MEMBER STATES<sup>174</sup>**

Jordan  
United Arab Emirates  
Bahrain  
Tunisia  
Algeria  
Djibouti  
Saudi Arabia  
Sudan  
Syria  
Somalia

**PART V.C – NEGATIVE AND POSITIVE OBLIGATIONS**

Under U.S. Anti-Boycott law, there are both negative and positive obligations.<sup>175</sup> The **negative** obligations are things you *cannot* do, and the **positive** obligations are things you *must* do. The boycott you should currently be concerned with is the Arab League Boycott of Israel, but keep in mind that any minimal request for information might be part of an illegal boycott.<sup>176</sup>

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174. See League of Arab States: Member States, at [http://www.arableagueonline.org/arableague/english/level2\\_en.jsp?level\\_id=11](http://www.arableagueonline.org/arableague/english/level2_en.jsp?level_id=11) (last visited Jan. 16, 2005).

175. See 15 C.F.R. § 760.2(a), (b) (prohibitions against participating in boycotts and against discrimination); 15 C.F.R. § 760.5(a) (requirement to report invitations to participate in boycotts).

176. See Bureau of Industry and Security, Department of Commerce, Office of Antiboycott Compliance, at <http://www.bxa.doc.gov/antiboycottcompliance/oacrequirements.html> (last visited Feb. 3, 2005).

**1. Negative Obligations – Things You Cannot Do:**

**a.** Agree to refuse or refuse to do business with companies located in boycotted countries, businesses organized in boycotted countries, or blacklisted companies<sup>177</sup>

**b.** Agree to furnish or furnish information about business with boycotted countries, businesses organized in boycotted countries or blacklisted companies<sup>178</sup>

You *may* be able to provide a Certificate of Origin that attests that the software was manufactured in the United States.<sup>179</sup> These forms are available on the intranet under **COMPLIANCE/FORMS**.<sup>180</sup>

**c.** Agree to discriminate against others based on race, religion, sex, national origin, or nationality<sup>181</sup>

**d.** Agree to furnish or furnish information about race, religion, sex, national origin, or nationality<sup>182</sup>

**e.** Pay with or accept letters of credit that include requirements that violate any of these negative obligations<sup>183</sup>

**f.** Agree to follow the laws of countries participating in a prohibited boycott<sup>184</sup> (see the list of Arab League members in **PART V.B**), which may include requirements to comply with the Arab League Boycott of Israel

To avoid this problem, you *may* agree to follow the laws of a country *unless the laws conflict with U.S. law*.<sup>185</sup>

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177. 15 C.F.R. § 760.2(a), (d).

178. *Id.*

179. 15 C.F.R. § 760 (Supp. I pt. I 1979).

180. The model program does not include a sample certificate of origin. For more information on certificate of origin, *see id.*

181. 15 C.F.R. § 760.2(b).

182. *Id.* § 760.2(c).

183. *Id.* § 760.2(f).

184. *Id.* § 760.2(a)(5).

185. 15 C.F.R. § 760 (Supp. I pt. II(A) 1979).

## 2. Positive Obligations – Things You Must Do:

### a. Report any invitation to participate in a boycott<sup>186</sup>

An invitation includes:

- Being asked to *comply* with the boycott<sup>187</sup>
- Being asked to *furnish information* that helps the country carry out the boycott<sup>188</sup>

b. If you believe you have received an invitation to participate in an illegal boycott, **do not** furnish information or answer questions, **STOP** the transaction, and immediately contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com.

## PART V.D – HOW TO CONTINUE IN A TRANSACTION AND AVOID VIOLATIONS

It is possible to *receive an invitation* to participate in a boycott but *stay in compliance* and complete the transaction by avoiding participation in the boycott and making the proper report.<sup>189</sup>

For example:

- If a customer asks you to agree to follow the laws of Syria:
  - You could respond that you would be willing to “follow the laws of Syria unless these laws conflict with U.S. law.”<sup>190</sup>
  - You would need to contact John Complaisant, XYZ’s Compliance Officer, so that he could make the required report.<sup>191</sup> As long as you report the invitation and do not comply with the request, you could continue the transaction.<sup>192</sup>
- If a customer asks you if you will certify that the software does not use any Israeli-based technology:
  - You could respond by saying, “I am not able to answer that question, but I can provide a Certificate of Origin.”<sup>193</sup>
  - This would require contacting John Complaisant so that he could report the invitation.<sup>194</sup>

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186. *Id.* § 760.5(a)(1) (2004).

187. *Id.*

188. *Id.*

189. *See id.* §§ 760.2, 760.5(a)(1).

190. *See id.* § 760 (Supp. I pt. II(A) 1979).

191. *Id.* § 760.5(a).

192. *See id.*

193. *Id.* § 760 (Supp. I pt. I 1979).

194. *Id.* § 760.5(a).

## PART VI – ANTI-BRIBERY PROTECTIONS

Under U.S. anti-bribery laws, U.S. citizens, nationals, residents and businesses are prohibited from giving a corrupt payment to a foreign government official for the purpose of influencing a decision of the official in his official capacity.<sup>195</sup>

### PART VI.A – PROHIBITED PAYMENTS

Specifically, a “corrupt payment” is the payment of money or an offer or promise to give *anything* of value to influence the official in his official capacity, to influence the official to violate his/her lawful duty, or to seek an improper advantage.<sup>196</sup> For example, making a contribution to the private school the official’s children attend, or making charitable contributions to the official’s favored charity could be a corrupt payment, if made with the intent to obtain an improper advantage or to secure the official’s action in his/her official capacity.<sup>197</sup>

Under the law, even making an offer of payment, as long as it is made with the intent to influence, obtain improper advantage, or induce improper influence, is all that is required for a violation.<sup>198</sup> Even if the official refuses to accept the benefit, or accepts the benefit but does not take the desired action, it is still a violation.<sup>199</sup>

### PART VI.B – LIMITED EXCEPTIONS FOR COMMON BUSINESS PRACTICES AND PAYMENTS

Certain common business practices, such as paying the costs of a foreign official to travel to a plant for a plant visit may be legal.<sup>200</sup> In addition, certain payments as part of routine government action *may* be allowed.<sup>201</sup> Because the exceptions are *extremely limited*, you must contact XYZ’s Compliance Manager, for preauthorization for any payment to a foreign official.<sup>202</sup> Contact John Complaisant, at (303)123-0911 or jcomp@XYZ.com for pre-approval and the instructions for reimbursement for these limited, pre-approved transactions.

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195. See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (2004).

196. *Id.*

197. *Id.*

198. 15 U.S.C. §§ 78dd-1(a)(1), 78dd-2(a)(1). Under the statute, both offers and payments are prohibited. *Id.*

199. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

200. 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2).

201. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b).

202. 15 C.F.R. § 760.5 (2004).

### PART VI.C – THIRD PARTY PAYMENTS CAN CREATE LIABILITY

If a third party, such as a XYZ project partner makes an illegal payment, XYZ can still be liable, even if our employees have *no knowledge* of the payment.<sup>203</sup> Therefore, it is extremely important to let our project partners, agents, and market makers know that they must abide by U.S. law.<sup>204</sup> Non-compliance is grounds for XYZ to unilaterally terminate the contract. If you ever suspect that a project partner may violate or has violated anti-bribery law, report your concerns immediately to John Complaisant, Compliance Officer, at (303)123-0911 or [jcomp@XYZ.com](mailto:jcomp@XYZ.com).

### PART VI.D – HIGH RISK PROJECTS

Even though XYZ employees are strictly prohibited from making an illegal payment or offer, you may receive a request for corrupt payment from a foreign official. Certain XYZ projects may be at higher risk than others for violations of anti-bribery laws. When a foreign government has regulatory control over a large infrastructure project such as XYZ's South American Highway Project, this may create an incentive for officials to request bribes or 'payoffs' in exchange for favorable treatment on the project. Further, some countries are considered to present a higher risk for bribery requests or inadvertent violations.<sup>205</sup> When the Compliance Screener initially screens your **NEW CONTACT FORM**, he will perform a specific screen and let you know when the project may be particularly at risk for bribery issues.

If you are notified that the project is at increased risk because of the specific countries involved, proceed with caution. If you have any questions or concerns during the project, contact John Complaisant, Compliance Officer, at (303)123-0911 or [jcomp@XYZ.com](mailto:jcomp@XYZ.com).

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203. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

204. *Id.*

205. See Transparency International, *Corruption Perceptions Index 2004*, at <http://www.transparency.org/cpi/2004/cpi2004.en.html#cpi2004> (last visited Feb. 14, 2005).

**PART VII – RECORDKEEPING****PART VII.A – DOCUMENTING COMPLIANCE STEPS AND EXPORT DECISIONS**

A well-documented export procedure is an integral part of complying with export laws and defending against any possible liability. Throughout this program, employees will receive instructions on how to complete screening checklists, document consultations, and record the analytical process used to make export decisions. In addition to the documentation required by each step, you *must* keep *all records* of correspondence and negotiations.<sup>206</sup> Following these procedures is an extremely important part of the compliance process and allows XYZ to document the analysis underlying export transactions.

**PART VII.B – RECORD RETENTION**

Under U.S. export laws, these records must be kept for a minimum of five years, and occasionally longer.<sup>207</sup> As a rule, keep all records for at least five years.<sup>208</sup> In accordance with XYZ's Document Retention Policy, after the five-year term has expired, you must get written permission from John Complaisant, Compliance Officer, before sending any export records to document destruction.

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206. 22 C.F.R. § 122.5(a) (2004); 15 C.F.R. § 762.6(a) (2004).

207. 22 C.F.R. § 122.5(a); 15 C.F.R. § 762.6(a).

208. 22 C.F.R. § 122.5(a); 15 C.F.R. § 762.6(a).

## PART VIII – TRAINING AND ACCOUNTABILITY

### PART VIII.A – INITIAL TRAINING

Upon the implementation of this program, all current XYZ employees will undergo an intensive training procedure designed to help all employees be sure that they are following the steps necessary for compliance.<sup>209</sup> All new hires will be trained prior to beginning work.

### PART VIII.B – ANNUAL REFRESHER TRAINING

Refresher training will be conducted annually for all employees.<sup>210</sup> If at any time you feel you would benefit from additional guidance or training, contact the Compliance Officer, John Complaisant, at (303)123-0911 or [jcomp@XYZ.com](mailto:jcomp@XYZ.com).

### PART VIII.C – COMPANY AUDITS

In order to be sure that our program is effective, XYZ will complete internal and external audits from time to time as counsel deems necessary.<sup>211</sup> Outside Counsel will direct these audits.<sup>212</sup>

### PART VIII.D – DUTY TO REPORT

The duty to report questions, problems, concerns, and suspected violations as described in the section entitled **COMPLIANCE 911** is an *ongoing requirement* for each employee at XYZ. As outlined in that section, you may report either to management or anonymously to Outside Counsel. Rather than viewing compliance as an extra task, consider *compliance* the *foremost commitment* of your job.

Should an outside party contact you regarding XYZ's compliance program or export procedures, you are *not* obligated to speak with them. If you feel more comfortable, you may request that XYZ provide you with representation before you respond to any third party. It is, however, XYZ's policy to cooperate with the government, and as such, the company is happy to provide you with representation in response to any inquiry.

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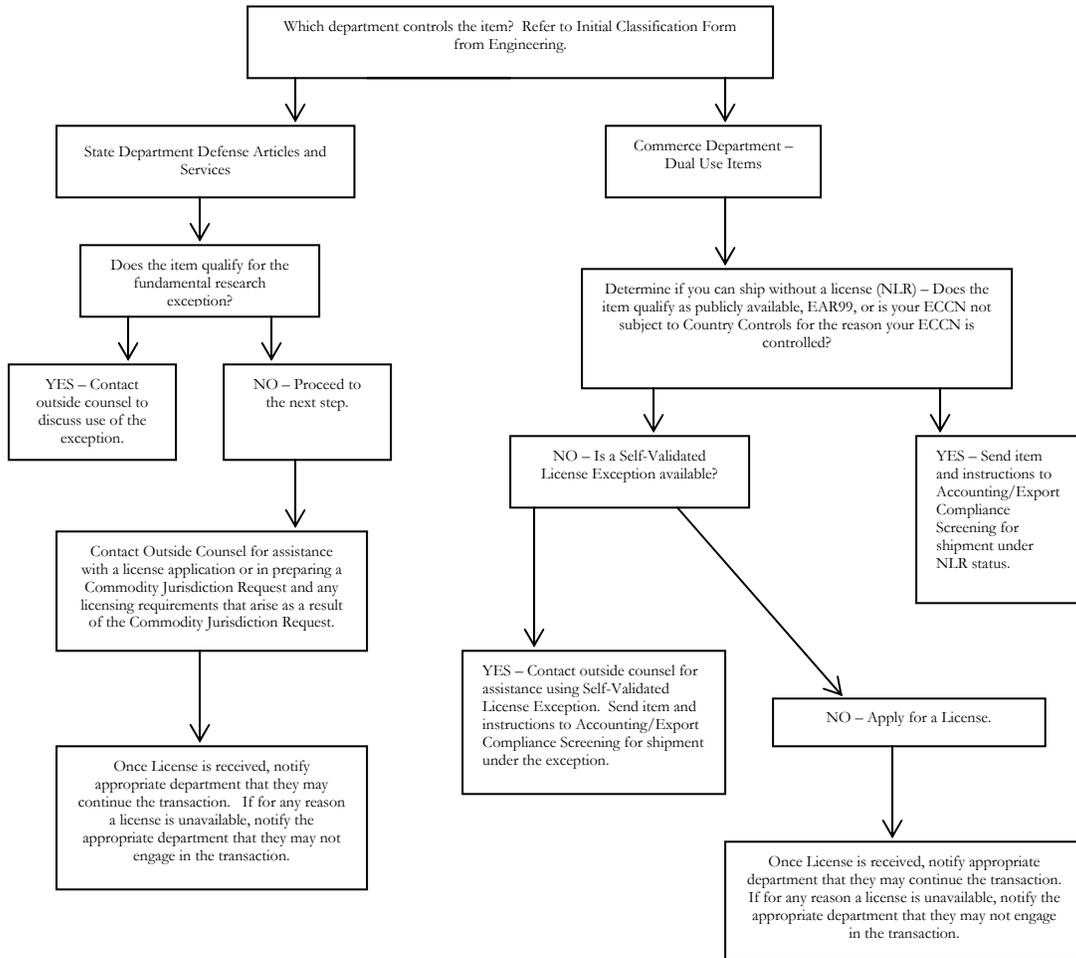
209. See U.S. Bureau of Industry and Security, *Export Management Systems Guidelines, Element 4: Training*, at <http://www.bxa.doc.gov/ExportManagementSystems/pdf/admin4.pdf> (last visited Feb. 23, 2005).

210. *Id.*

211. U.S. Bureau of Industry and Security, *Export Management Systems Guidelines, Element 5: Internal Reviews*, at <http://www.bxa.doc.gov/ExportManagementSystems/pdf/admin5.pdf> (last visited Feb. 23, 2005).

212. *Id.*

**PART IX - XYZ EXPORT DECISION TREE**



**PART X – SALES DEPARTMENT****SALES DEPARTMENT INDEX**

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**PART X.A – KNOWING YOUR CUSTOMER - SALES****1. Salesperson – XYZ’s First Line of Defense**

As a XYZ salesperson, you are uniquely situated. Usually, you are the first point of contact for any potential XYZ customer. This position brings an important responsibility—to make sure you are not inadvertently “exporting” tech data while getting to know the potential customer, and to make sure that XYZ can do business with the lead you are pursuing.<sup>213</sup> Remember, it is XYZ’s policy to *value compliance over any sale*.

**2. Avoiding an Inadvertent Export**

Generally, export laws require a license for the export of technical data.<sup>214</sup> Because many of you are trained engineers, be careful not to reveal technical data about XYZ’s software when talking initially with potential customers.<sup>215</sup> Doing so, before screening procedures are completed and licenses are secured could result in a violation. Further, because certain sanctions prohibit any contact with embargoed countries, even calling a customer in an embargoed country or mailing a brochure could be violation.<sup>216</sup>

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213. See 22 C.F.R. § 120.17(a)(3)-(4) (2004) (defining export of technical data); see also 15 C.F.R. § 734.2(b)(2)-(3) (2004) (defining export of technology or software).

214. See 22 C.F.R. § 120.10 (2004) (defining technical data); see also 15 C.F.R. § 734.2(b)(2), (b)(9) (2004) (defining export of technology or software).

215. See *supra* note 213.

216. See, e.g., 15 C.F.R. §§ 746.2-746.3, 746.7-746.8 (2004) (restrictions on exports to Cuba, Iraq, Iran, and Rwanda); see also 15 C.F.R. § 732.3(i) (2004).

### 3. Screening the Customer

As early as possible in the discussions with a potential customer, submit information about the potential customer to the Accounting Department for an Individual/Country Screen. This may be done by filling out the form in the Forms/Sales section entitled **NEW CONTACT FORM**. This form is also available on the intranet under **COMPLIANCE/FORMS**. Once you have filled out the form, give it to Accounting, for a Compliance Screening of the individual and country.

This screening process will allow XYZ to avoid doing business with individuals who have been banned from receiving exports due to export violations.<sup>217</sup> In some cases, doing business with certain customers will require an export license for similar reasons.<sup>218</sup> This process allows us to identify parties who we can't do business with or with whom business may be transacted only after getting the appropriate license.<sup>219</sup> Vigilance at this step can prevent a violation. Further, by determining that it is safe to pursue business with a customer, you will be able to spend your time selling to customers with whom XYZ can do business.

This screening step also checks the contact's country. A customer's country can be the basis for prohibiting a transaction or trigger a licensing requirement.<sup>220</sup> By learning right away if a license is required, you will you will be able to explain the need for time to get a license, thus avoiding any last-minute surprises.

If you plan to pursue a business lead and have not yet made contact, fill out the **NEW CONTACT FORM** to the best of your ability and submit to Accounting for initial screening. Do not initiate contact until you have received instructions from the Compliance Screener.

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217. 15 C.F.R. § 744.1(a) (2004); *see* 22 C.F.R. § 127.7 (2004) (describing debarment).

218. 15 C.F.R. § 744.2(b) (2004).

219. *See* 22 C.F.R. § 127.7 (debarment); 15 C.F.R. § 744.1(a) (prohibiting exports to certain end-users); 15 C.F.R. § 744.2(b) (license requirement to do business with certain end-users).

220. *See, e.g.*, 15 C.F.R. § 746.1 (2004).

#### 4. Customer-Initiated Contacts

If you meet a contact at a trade show, or a potential customer contacts you, submit the **NEW CONTACT FORM** to Accounting for an initial screen as soon as possible after the initial contact. Limit communications with the contact, to the extent that you can, while you await instructions from the Compliance Screener.

#### 5. Understanding the Results from Compliance Screener's Individual/Country Screens

The initial **INDIVIDUAL/COUNTRY SCREEN** should take less than 48 hours. While you await the results, *do not contact* the potential customer. If the potential customer contacts you, be polite, but try to limit your communication.

The Compliance Screener will either tell you that it is either:

- **OK to Proceed**
  - If it is OK to proceed, date and initial the **CUSTOMER TRACKING FORM** to document that you received the results from the Compliance Screener. Keep the results of the screen in the **CUSTOMER EXPORT FILE**.
  - Go to the **DIVERSION RISK/RED FLAG CHECKLIST**, at **PART X.C**.
- **Stop** – You **cannot** continue the transaction at this time.
  - This does not necessarily mean XYZ cannot work with the customer. It generally means that a license is required. If a license is required, the Compliance Screener will begin the licensing process immediately upon determining that a license is required. Once a license is granted, you will be notified.
    - If you receive an approval, proceed under the directions for **OK to Proceed** directly above this section.
  - If the result is a flat-out denial (because the government has placed the potential customer is on a debarred list), you will be notified with the results of the Individual/Country screen.
  - If the Compliance Screener changes the result to **OK**, document as required above and go to the next step, the **DIVERSION RISK/RED FLAG CHECKLIST**, at **PART X.B**.

**PART X.B – DIVERSION RISK/RED FLAG CHECKLIST – SALES**

In the sales department, you may have the best chance to assess whether or not the customer is a diversion risk—meaning that the customer says one thing but plans to do another.<sup>221</sup> These are the ‘Red Flags’ that were introduced in the Overview section.<sup>222</sup>

Protecting against possible violations requires that you not ‘self-blind’ and that you be aware of signals that may indicate a customer is attempting to obtain U.S. exports illegally.<sup>223</sup> Not knowing ‘bad’ information does not protect you or XYZ from liability.<sup>224</sup> Rather, by actively evaluating each customer, you protect both yourself and the company.

Complete the **DIVERSION RISK/RED FLAG CHECKLIST**. This is available in the Forms/Sales section and on the intranet under **COMPLIANCE/FORMS**.

- If the answer to *any* of the questions is **Yes**, **STOP** the transaction immediately and contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com.
- If the answer to *all* of the questions is **No**, it is **OK to Proceed**, you may continue in the transaction.
  - Date and initial the **CUSTOMER TRACKING FORM** to document that you completed the **DIVERSION RISK/RED FLAG CHECKLIST**. Keep the results of the screen in the **CUSTOMER EXPORT FILE**.
    - Go to the **PROLIFERATION RISK CHECKLIST**, at **PART X.C**.
  - Don’t forget that your impressions about these questions can *change over time*. If later in the transaction you have *any doubts* in your answers to the Diversion Risk/Red Flag Checklist, **stop** the transaction immediately contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com.

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221. *See supra* Part IV.C.

222. *See supra* Part IV.C.

223. 15 C.F.R. § 732 (Supp. III(a)(3) 1997).

224. *Id.* § 732 (Supp. III(a)(2) 1997). The knowledge required under the EAR depends on the situation. *Id.* If ‘red flags’ are present, they create an affirmative duty to inquire further. *Id.* Absent ‘red flags,’ it is appropriate to rely on a customer’s representations. *Id.*

**PART X.C – PROLIFERATION RISK – SALES**

Assessing the customer's business activities is a crucial part of determining whether or not a transaction will require an export license.<sup>225</sup> The customer's business or personal activities can trigger a licensing requirement if the customer is involved in: (1) nuclear activities; (2) the design, development, production, or use of missiles; (3) the design, development, production, stockpiling, or use of chemical or biological weapons.<sup>226</sup> These activities need not be the customer's direct business activity, as indirect involvement can also trigger the licensing requirements.<sup>227</sup> Further, the activities do not have to involve XYZ's software or services to require a license.<sup>228</sup> The fact that the customer is involved in the activities can be all that is required to trigger a licensing requirement if the government determines that doing business with the customer will somehow support the customer's proliferation activities.<sup>229</sup>

Completing this step requires you to inquire with the customer about their business and complete the **PROLIFERATION RISK CHECKLIST**.<sup>230</sup> Some of the information you need to answer the questions may come up in your initial conversations about end-use and end-user. If you don't feel you have obtained enough information about the customer's business while completing the **NEW CONTACT FORM**, you may wish to inquire about the customer's business history during routine conversation.

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225. 15 C.F.R. § 744.2(a) (2004).

226. 15 C.F.R. §§ 744.2, 744.3, 744.4 (2004).

227. 15 C.F.R. § 744.2(a).

228. *Id.* § 744.2(b) (license requirement triggered by high diversion risk).

229. *Id.*

230. *Id.* § 744.2(a) n.1. "Knowledge" with respect to proliferation risk includes "reason to know."

*Id.*

Complete the **PROLIFERATION RISK CHECKLIST**. This is available in the Forms/Sales section and on the intranet under **COMPLIANCE/FORMS**.

- If the answer to *any* of the questions is **Yes**, **STOP** the transaction immediately and contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com. Wait for his instruction before proceeding.
- If the answer to *all* of the questions is **No**, you may continue in the transaction.
  - Date and initial the **CUSTOMER TRACKING FORM** to document that you completed the **PROLIFERATION RISK CHECKLIST**. Keep the results of the screen in the **CUSTOMER EXPORT FILE**.
    - Go to the **CERTIFICATIONS/DECLARATIONS** section at **PART X.D**.
  - Don't forget that your impressions about these questions can *change over time*. If later in the transaction you have *any doubts* in your answers to the Proliferation Risk Checklist, **stop** the transaction and immediately contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com.

**PART X.D – CERTIFICATIONS AND DECLARATIONS – SALES****Certifications and Declarations Are Always Required**

Should a customer inquire, XYZ requires certain certifications and declarations in order to do business. Issues covered include certifications of final destination, end-user, end-use, involvement in proliferation activities, and anti-bribery controls.<sup>231</sup> Violation of these certifications is grounds for XYZ's unilateral termination of any contract.

As part of the compliance procedure, you are *not* responsible for getting these certifications and declarations. Nonetheless, this topic may come up in business negotiations, so you should be aware of XYZ's policies.

If the topic of certifications and declarations comes up during the course of the transaction, the customer's response may raise a 'red flag.'<sup>232</sup> Be familiar with the 'red flags,' and contact the Compliance Officer, John Complaisant, at (303)123-0911 or jcomp@XYZ.com if you have any concerns. A copy of the **DIVERSION RISK/RED FLAG CHECKLIST** is available in this section under Forms/Sales or on the intranet under **COMPLIANCE/FORMS**.

If a customer asks for details regarding the relevant certifications and declarations, contact a Compliance Screener in Accounting.

Now review the procedure for **INITIATING PRODUCTION** at **PART X.E**.

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231. See 22 C.F.R. § 123.9(a)-(c) (2004); 15 C.F.R. § 758.6 (2004).

232. See *supra* Part IV.

**PART X.E – INITIATING PRODUCTION – SALES****1. Steps You Should Have Taken to Reach this Point**

Before you proceed, be sure you have completed each of the steps below. If you are directed to stop (at any step), contact John Complaisant and do NOT proceed.

- a. Submit **NEW CONTACT FORM** to Compliance Screeners for **INDIVIDUAL/COUNTRY SCREEN**<sup>233</sup>
- b. Receive **OK to Proceed** status on the **INDIVIDUAL/COUNTRY SCREEN**<sup>234</sup>
- c. Conduct the **DIVERSION RISK/RED FLAG CHECKLIST** and determine that it is OK to proceed<sup>235</sup>
- d. Conduct the **PROLIFERATION RISK CHECKLIST** and determine that it is OK to proceed<sup>236</sup>
- e. Inform the customer about required **CERTIFICATIONS/DECLARATIONS**<sup>237</sup>
- f. Comply with all **ANTI-BOYCOTT** and **ANTI-BRIBERY LAWS**<sup>238</sup>

**2. Initiating Production**

Once you are certain you have completed each of these steps and do not have any reason to stop the transaction, the project is ready to move to the Engineering Department.

In accordance with XYZ's regular business practices, contact someone on Bob Decisis's Coordination Team to discuss the project. They will route it to the appropriate engineers. Note the date that you sent the project to the Coordination Team on the **CUSTOMER TRACKING FORM**.

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233. *See supra* Part X.A.3.

234. *See supra* Part X.A.4-X.A.5.

235. *See supra* Part X.B.

236. *See supra* Part X.C.

237. *See supra* Part X.D.

238. *See supra* Part V, VI.

**PART X.F – SALES DEPARTMENT FORMS**

**NEW CONTACT FORM – SALES**

NAME OF CONTACT (note any inconsistencies in spelling, nicknames, etc.)

\_\_\_\_\_

PERSON FILLING OUT FORM/INITIAL \_\_\_\_\_/\_\_\_\_\_

DATE COMPLETED \_\_\_\_\_

CONTACT ADDRESS \_\_\_\_\_

DATE OF FIRST CONTACT \_\_\_\_\_

SOURCE OF LEAD/CONTACT (describe in detail) \_\_\_\_\_

\_\_\_\_\_

XYZ PRODUCT CONTACT INTERESTED IN (describe in detail, if known)

\_\_\_\_\_

\_\_\_\_\_

CONTACT'S END USE FOR PRODUCT \_\_\_\_\_

COUNTRY OF PRODUCT'S ULTIMATE DESTINATION \_\_\_\_\_

OTHER INFORMATION YOU BELIEVE WOULD BE HELPFUL

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**CUSTOMER TRACKING FORM – SALES**

NAME OF CONTACT \_\_\_\_\_

CONTACT ADDRESS \_\_\_\_\_

DATE OF FIRST CONTACT \_\_\_\_\_

PERSON FILLING OUT FORM/INITIAL \_\_\_\_\_ / \_\_\_\_\_

**INDIVIDUAL COUNTRY SCREEN** (performed by Compliance Screener)

- Date submitted to Accounting/Compliance Screening \_\_\_\_\_
- Date results returned by Accounting/Compliance Screening \_\_\_\_\_
- Result of Screen: **OK to Proceed** \_\_\_\_\_ **Stop** \_\_\_\_\_
  - If transaction **stopped**, date stopped: \_\_\_\_\_
  - If transaction **resumed** (status change from **Stop** to **OK to Proceed** because license obtained), date resumed: \_\_\_\_\_

**DIVERSION RISK CHECKLIST** (performed by salesperson)

- Date Checklist Completed/Initials \_\_\_\_\_ / \_\_\_\_\_
- Result of Screen: **OK to Proceed** \_\_\_\_\_ **Stop** \_\_\_\_\_
  - If transaction **stopped**, date stopped: \_\_\_\_\_
  - If transaction **resumed** (status change from **Stop** to **OK to Proceed** because license obtained), date resumed: \_\_\_\_\_

**PROLIFERATION RISK CHECKLIST** (performed by salesperson)

- Date Checklist Completed/Initials \_\_\_\_\_ / \_\_\_\_\_
- Result of Screen: **OK to Proceed** \_\_\_\_\_ **Stop** \_\_\_\_\_
  - If transaction **stopped**, date stopped: \_\_\_\_\_
  - If transaction **resumed** (status change from **Stop** to **OK to Proceed** because license obtained), date resumed: \_\_\_\_\_

**Date Project Sent to Coordination Team** (if applicable) \_\_\_\_\_

**DIVERSION RISK/RED FLAG CHECKLIST – SALES**

NAME OF CUSTOMER BEING SCREEENED \_\_\_\_\_

CUSTOMER ADDRESS \_\_\_\_\_

XYZ PRODUCT TO BE PURCHASED (describe in detail) \_\_\_\_\_

CUSTOMER'S END USE FOR PRODUCT \_\_\_\_\_

COUNTRY OF PRODUCT'S ULTIMATE DESTINATION \_\_\_\_\_

PERSON PERORMING SCREEN/INTIAL \_\_\_\_\_ / \_\_\_\_\_

DATE PERFORMED \_\_\_\_\_

\*If the answer to any of these is *yes* or you have *any* doubts, do not continue in the transaction. Contact XYZ's Compliance Manager, John Complaisant, at (303)123-0911 or jcomp@XYZ.com for assistance.

1. The customer is reluctant to offer information about the end-use of the item.<sup>239</sup> For example, when you ask the customer about the software's end use or inform the customer that XYZ requires a certification of end use, the customer hesitates or does not call back for several days. YES\_\_\_ NO\_\_\_
2. XYZ's software capabilities do not fit the customer's line of business, such as a plant nursery or construction equipment business inquiring about XYZ's high-resolution image recognition software.<sup>240</sup> YES\_\_\_ NO\_\_\_
3. XYZ's software is incompatible with the technical level of the country it will be shipped to, such as a third-world country that does not have either a space or engineering industry.<sup>241</sup> YES\_\_\_ NO\_\_\_
4. The customer has little or no business background in either the engineering or space industry.<sup>242</sup> YES\_\_\_ NO\_\_\_
5. The customer is willing to pay cash up front, which would be unusual because XYZ's customers generally pay with letters of credit or staged cash payment during the development of the software for the contract.<sup>243</sup> YES\_\_\_ NO\_\_\_
6. The customer is unfamiliar with the basic functionality of sensing software or image recognition technology.<sup>244</sup> YES\_\_\_ NO\_\_\_
7. The customer declines the training and maintenance services that XYZ provides as part of each software contract.<sup>245</sup> YES\_\_\_ NO\_\_\_

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239. 15 C.F.R. § 732 (Supp. III(b)(1) 1997).

240. *Id.* § 732 (Supp. III(b)(2) 1997).

241. *Id.* § 732 (Supp. III(b)(3) 1997).

242. *Id.* § 732 (Supp. III(b)(4) 1997).

243. *Id.* § 732 (Supp. III(b)(5) 1997).

244. *Id.* § 732 (Supp. III(b)(6) 1997).

245. *Id.* § 732 (Supp. III(b)(7) 1997).

8. The customer is vague about delivery dates or wants deliveries made to odd destinations, such as Post Office boxes, remote locations, or destinations that are far away from the customer's place of business.<sup>246</sup> YES\_\_\_ NO\_\_\_
9. The customer gives a freight forwarder as the product's final destination.<sup>247</sup>  
YES\_\_\_ NO\_\_\_
10. The shipping route is abnormal, such as a customer with a reported ultimate destination in France routing the delivery through India.<sup>248</sup> YES\_\_\_ NO\_\_\_
11. The customer requests unusual packaging, such as asking for an unmarked box or providing their own packaging materials.<sup>249</sup> YES\_\_\_ NO\_\_\_
12. The buyer is evasive or makes contradictory statements about the software's use, such as stating that they will use the software in a plant in Colorado but making frequent references to their engineering facility in China.<sup>250</sup>  
YES\_\_\_ NO\_\_\_

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246. *Id.* § 732 (Supp. III(b)(8) 1997).

247. *Id.* § 732 (Supp. III(b)(9) 1997).

248. *Id.* § 732 (Supp. III(b)(10) 1997).

249. *Id.* § 732 (Supp. III(b)(11) 1997).

250. *Id.* § 732 (Supp. III(b)(12) 1997).

**PROLIFERATION RISK CHECKLIST – SALES**

NAME OF CUSTOMER BEING SCREEENED \_\_\_\_\_

CUSTOMER ADDRESS \_\_\_\_\_

NEW CUSTOMER: YES \_\_\_\_\_ NO \_\_\_\_\_ If yes, list date of last order \_\_\_\_\_

PERSON PERORMING SCREEN/INTIAL \_\_\_\_\_ / \_\_\_\_\_

DATE PERFORMED \_\_\_\_\_

XYZ PRODUCT TO BE PURCHASED (describe in detail)  
\_\_\_\_\_

CUSTOMER'S END USE FOR PRODUCT \_\_\_\_\_

COUNTRY OF PRODUCT'S ULTIMATE DESTINATION \_\_\_\_\_

For the purposes of this **PROLIFERATION RISK CHECKLIST**, whether or not you *know* does not matter. Your assessment should include *actual knowledge*, or a *suspicion* that the answer is *yes*.<sup>251</sup>

1. Do you know, or are there indications that the customer is directly or indirectly involved in any nuclear explosive activities (whether or not related to customer's interest in XYZ software)?<sup>252</sup> YES \_\_\_\_\_ NO \_\_\_\_\_

2. Do you know, or are there indications that the customer is directly or indirectly involved in the design, development, production, or use of missiles (whether or not related to customer's interest in XYZ software)?<sup>253</sup>

YES \_\_\_\_\_ NO \_\_\_\_\_

3. Do you know, or are there indications that the customer is directly or indirectly involved in the design, development, production, stockpiling, or use of chemical or biological weapons (whether or not related to customer's interest in XYZ software)?<sup>254</sup> YES \_\_\_\_\_ NO \_\_\_\_\_

\*If the answer to any of the preceding questions was *yes*, or raised *any* doubts, do not continue in the transaction. Contact XYZ's Compliance Manager, John Complaisant, at (303)123-0911 or jcomp@XYZ.com for assistance.

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251. See 15 C.F.R. § 744.2(a) n.1 (2004).

252. See *id.* § 744.2(a).

253. See *id.* § 744.3(a)(2) (2004).

254. See *id.* § 744.4(a) (2004).

**PART XI – ENGINEERING DEPARTMENT****ENGINEERING DEPARTMENT INDEX**

<b><u>Mandatory Export Compliance Section</u></b>	<b><u>Part</u></b>	<b><u>Date Read/Initials</u></b>
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<b>Compliance 911</b>	III	____/____
Customer Red Flags	IV	____/____
Anti-Boycott Protections	V	____/____
Anti-Bribery Protections	VI	____/____
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Classifying the Item – Commerce Dept.	XI.F	____/____
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**PART XIA – KNOWING YOUR CUSTOMER – ENGINEERING****1. Avoiding an Inadvertent Export**

Generally, export laws require a license for the export of technical data.<sup>255</sup> As an engineer, you are at a particularly high risk for inadvertently revealing technical data. Doing so, before screening procedures are completed and licenses are secured could result in a violation. Revealing technical data in a conversation with a foreign customer or even an employee may require a license.<sup>256</sup> Further, because certain embargos prohibit any contact with sanctioned countries, even calling a customer in an embargoed country or mailing a brochure could be violation.<sup>257</sup>

**2. Licensing Protections**

At the sales level, potential customers are screened for individual and country status that may require a license. Once someone on the Coordination Team contacts you with a pre-screened contact, it is safe to discuss business with the contact.

Further, all employees are screened for potential licensing issues. Following XYZ's Badge/Classification Requirements is all that is required regarding licensing issues with co-workers.

**3. Import Licensing Requirements**

Occasionally, a customer may wish to send you an item to examine for software development or adaptation. To receive this import, a license may be required.<sup>258</sup> Should a customer inquire about sending an item to XYZ, first contact the Compliance Officer, John Complaisant, at (303)123-0911 or jcomp@XYZ.com to see if a license is required. As with any export, an export license may be required to return the item to the customer after examination.<sup>259</sup> Contact John Complaisant for assistance before returning any item.

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255. See 22 C.F.R. § 120.10 (2004); 15 C.F.R. § 734.2(b)(2), (b)(9) (2004).

256. See 22 C.F.R. § 120.17(3)-(4) (2004); 15 C.F.R. § 734.2(b)(2)-(3).

257. 15 C.F.R. §§ 746.2-746.3, 746.7-746.8 (2004) (restrictions on exports to Cuba, Iraq, Iran, and Rwanda); see 15 C.F.R. § 732.3(i) (2004).

258. See 22 C.F.R. § 120.18 (2004).

259. See *id.* § 120.17(a)(1); 15 C.F.R. § 730.5(a) (2004).

**PART XI.B – DIVERSION RISK/RED FLAG CHECKLIST – ENGINEERING**

In the engineering department, you may observe customer behavior signaling a diversion risk—the customer is saying one thing but plans to do another.<sup>260</sup> These are the ‘Red Flags’ that were introduced in the Overview section.<sup>261</sup>

Protecting against possible violations requires that you not ‘self-blind’ and that you be aware of signals that may indicate a customer is attempting to obtain U.S. exports illegally.<sup>262</sup> Not knowing ‘bad’ information does not protect you or XYZ from liability.<sup>263</sup> Rather, by actively evaluating each customer, you protect both yourself and the company.

After discussing the customer’s product needs, complete the **DIVERSION RISK/RED FLAG CHECKLIST**. This is available in the Forms/Engineering section and on the intranet under **COMPLIANCE/FORMS**.

- If the answer to *any* of the questions is **Yes**, **STOP** the transaction immediately and contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com.
- If the answer to *all* of the questions is **No**, you may continue in the transaction.
- Date and initial the **PROJECT TRACKING FORM** to document that you completed the **DIVERSION RISK/RED FLAG CHECKLIST**. Keep the results of the screen in the **PROJECT FILE**.
  - Go to the **PROLIFERATION RISK** section, at **PART XI.C**.
- Don’t forget that your impressions about these questions can *change over time*. If later in the transaction you have *any doubts* in your answers to the Diversion Risk/Red Flag Checklist, **stop** the transaction immediately contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com.

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260. *See supra* Part IV.

261. *See supra* Part IV.

262. *See* 15 C.F.R. § 732 (Supp. III(a)(3) 1997).

263. *Id.* § 732 (Supp. III(a)(2) 1997). The knowledge required under the EAR depends on the situation. If ‘red flags’ are present, they create an affirmative duty to inquire further. *Id.* Absent ‘red flags,’ it is appropriate to rely on a customer’s representations. *Id.*

**PART XI.C – PROLIFERATION RISK – ENGINEERING****1. Proliferation Risk**

Assessing the customer's business activities is a crucial part of determining whether a transaction will require an export license.<sup>264</sup> The customer's business or personal activities can trigger a licensing requirement if the customer is involved in: (1) nuclear activities; (2) the design, development, production or use of missiles; (3) the design, development, production, stockpiling, or use of chemical or biological weapons.<sup>265</sup> These activities need not be the customer's direct business activity, as indirect involvement can also trigger the licensing requirements.<sup>266</sup> Further, the activities need not involve XYZ's software or services to require a license.<sup>267</sup> The fact that the customer is involved in the activities can be all that is required to trigger a licensing requirement.<sup>268</sup>

**2. Your Role in Assessing Proliferation Risk**

The sales department conducts a proliferation risk screen prior to your work with the customer. Your role is to **be aware** of indicators that signal possible proliferation activities.<sup>269</sup> If at *any* time you suspect that the customer may be involved in any of the above-listed proliferation activities, **stop** the transaction or communications immediately, and contact John Complaisant, compliance Officer, at (303)123-0911 or jcomp@XYZ.com.

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264. See 15 C.F.R. § 744.2(a) (2004).

265. *Id.* §§ 744.2-744.4 (2004).

266. *Id.* § 744.2(a).

267. See *id.* § 744.2(b) (license requirement triggered by high diversion risk).

268. See *id.*

269. *Id.* § 744.2(a) n.1. "Knowledge" with respect to proliferation risk includes "reason to know."  
*Id.*

**PART XI.D – CLASSIFYING THE ITEM – ENGINEERING****1. How the Classification Process Begins**

In some circumstances, the results of screening at the sales department level will mandate the need for a license. In that case, John Complaisant, Compliance Officer, will contact you to discuss product classification for licensing purposes before you begin work on the project.

In other circumstances, the Coordination Team will contact you about a project, but no license application will have been initiated by the time you receive the project. In this case, nothing in the initial screening process triggered a licensing requirement. When you receive a project from the Coordination Team and no license has been obtained, you must recommend a product classification to the Compliance Officer, who will determine whether or not a license is required.

**2. Classification and Your Role in the Licensing Process**

As an engineer, your specific knowledge about software and services will be critical in making the determination about whether or not a license is required. You will not be responsible for license applications, but your classification work will be an important part of the licensing process. This section provides step-by-step instructions on how to assist in the classification.

It is your responsibility to:

- Assist in the classification process upon request from the Compliance Officer or upon being assigned to a project by the Coordination Team
- Complete the **INITIAL CLASSIFICATION FORM**, located under Forms/Engineering or on the intranet under **COMPLIANCE/FORMS**.

### 3. Determining Which Agency Regulates the Export

The two main government agencies that administer and enforce U.S. export law are the Department of State and the Department of Commerce.

The State Department controls “defense articles” and “defense services.”<sup>270</sup> The general State Department rule is that these regulations cover items and services that are ‘born military,’ meaning that they were designed, modified, or adapted for military application.<sup>271</sup> Because of the inherent military value of these items, they are strictly controlled.<sup>272</sup>

The Commerce Department controls “dual use” items, which are those items which have both commercial and military or proliferation applications.<sup>273</sup> Many commercial items, which may not have *obvious* military use, are controlled by the Commerce Department.<sup>274</sup> Because some items are mainly commercial in nature, the Commerce Department Rules allow for more or less control, depending on the item.<sup>275</sup> The Commerce Department also administers U.S. anti-boycott laws.<sup>276</sup>

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270. 22 C.F.R. §§ 120.2, 120.17 (2004).

271. 22 C.F.R. § 120.3(a)-(b) (2004).

272. 22 C.F.R. §§ 120.6, 120.2 (2004) The Department of State determines, with consent of the Department of Defense, which items are covered by the U.S. Munitions List. *Id.* § 120.2.

273. 15 C.F.R. § 730.3 (2004).

274. *See id.*

275. *See id.*; 15 C.F.R. § 730.7 (2004) (noting that few exports covered by the Commerce Department require application to the Bureau of Industry and Security for a license).

276. 15 C.F.R. §§ 760.1-760.5 (2004).

**PART XI.E – CLASSIFYING THE ITEM – ENGINEERING – DEFENSE ARTICLES AND  
DEFENSE SERVICES CONTROLLED BY THE STATE DEPARTMENT**

**1. State Department Export Controls**

Because the State Department controls inherently military articles and services, they will apply in any circumstance where it appears that both the State and Commerce Department rules could apply.<sup>277</sup> For this reason, the classification analysis begins with a determination of whether or not the item or service is controlled by the State Department.

**2. State Department – U.S. Munitions List**

The State Department's rules apply to items on the U.S. Munitions List ("Munitions List").<sup>278</sup> This list covers anything designed, developed, configured, or adapted for military application.<sup>279</sup> Determining whether the Munitions List covers an item is not always easy. Often, it requires a request to the State Department for help in this classification.<sup>280</sup> This request is called a **COMMODITY JURISDICTION REQUEST**.<sup>281</sup>

**3. Your Role in Classifying Software and Services under the Munitions List**

You will not be responsible for making a Commodity Jurisdiction Request, as those are handled by the Compliance Officer. Your role, however, is to help determine if a Commodity Jurisdiction Request is necessary. Your determination that an item or service was designed, developed, configured, or adapted for military application generally means a Commodity Jurisdiction Request will be necessary.<sup>282</sup>

**4. Classification for Software (Technical Data) and Defense Services Based on Final Product**

Under State Department rules, classification of technical data (which includes software) and defense services are *based on the final product* into which they will be integrated.<sup>283</sup> When classifying software, technical data, or defense services, look for completed, end products into which these items will be incorporated. Therefore, even if the software is not by itself inherently military, it can still be covered by the Munitions List.<sup>284</sup> An example would be intelligent sensing software designed for use in guided or ballistic missiles.<sup>285</sup>

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277. See 22 C.F.R. §120.5 (2004); see 15 C.F.R. §734.3(b)(1)(i) (2004).

278. 22 C.F.R. §§ 120.2, 121.1 (2004).

279. 22 C.F.R. § 120.3 (2004).

280. See 22 C.F.R. § 120.4 (2004).

281. *Id.*

282. See *id.*

283. See 22 C.F.R. § 121.1(a).

284. See *id.*

285. See 22 C.F.R. § 121.16 (Item 11) (2004).

## 5. Technical Data and Defense Services Covered by the Munitions List

The Munitions List controls technical data and defense services.<sup>286</sup> Inherently military software or software that will be used for an inherently military end product is covered under technical data on the Munitions List.<sup>287</sup>

## 6. Technical Data

Under the Munitions List, *software* includes (but is not limited to): system functional design, logic flow, algorithms, application programs, operating systems, and support software for design, implementation, test, operation, diagnosis, and repair of defense articles.<sup>288</sup>

Technical data also includes information *other than software* for the design, development, production, repair, or modification of defense articles or services.<sup>289</sup>

## 7. Defense Service

Under the Munitions List, defense services include giving assistance or training to foreign persons (in the United States or abroad) in the design, development, production, repair, or modification of defense articles.<sup>290</sup> Providing assistance with technical data covered by the Munitions List to foreign persons, and providing training or educational publications to foreign persons or a foreign military is providing a defense service.<sup>291</sup>

## 8. Strictly Adhere to All Badging and Classification Rules

From time to time, XYZ may employ foreign persons in non-technical roles. Because the transfer of technical data to a foreign person may require a State Department license, all XYZ Engineers must be vigilant in adhering to XYZ's badge/classification requirements. If you need to review the policy, go to the intranet under BADGE/CLASSIFICATION REQUIREMENTS.<sup>292</sup> This system protects against accidental exports of defense services to unclassified co-workers. Even a quick conversation about encryption code in the hallway, if within earshot of an unclassified co-worker, can be a violation of both the XYZ badge requirements and export laws.<sup>293</sup>

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286. 22 C.F.R. §§ 120.2, 120.17 (2004).

287. See 22 C.F.R. § 120.6 (2004).

288. 22 C.F.R. § 121.8(f) (2004).

289. 22 C.F.R. § 120.10(a)(1) (2004).

290. 22 C.F.R. § 120.9(a)(1) (2004).

291. *Id.* § 120.9(a).

292. These requirements are not included within the model program, but should include mechanisms to allow co-workers to assess whether they can share technical data with an individual without risking a violation of the deemed export rule. See 15 C.F.R. § 734.2(b)(2)(ii) (2004); see also *supra* Part II.C.

293. See 22 C.F.R. § 120.17(a)(4) (2004).

### 9. Munitions List Categories

If you determine that the software/service is likely to be covered under the State Department's Munitions List, note this on the **INITIAL CLASSIFICATION FORM**.

The categories on the Munitions List are as follows. They are also available on the State Department website at <http://pmdtc.org/usml.htm>.<sup>294</sup>

Category	Description
1	Firearms, Close Assault Weapons and Combat Shotguns
2	Guns and Armament
3	N/A
4	Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs, and Mines
5	N/A
6	Vessels of War and Special Naval Equipment
7	Tanks and Military Vehicles
8	Aircraft and Associated Equipment
9	Military Training Equipment
10	Protective Personnel Equipment
11	Military Electronics
12	Fire Control, Range Finder, Optical and Guidance and Control Equipment
13	Auxiliary Military Equipment
14	Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment
15	Spacecraft Systems and Associated Equipment
16	Nuclear Weapons, Design and Testing-Related Items
17	Classified Articles, Technical Data and Defense Services Not Listed in Other Categories
18	Directed Energy Weapons
19	N/A
20	Submersible Vessels, Oceanographic and Associated Equipment
21	Miscellaneous Articles

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294. 22 C.F.R. § 121 (2004), available at Directorate of Defense Trade Controls, U.S. Department of State, Defense Trade Controls – United States Munitions List Categories, <http://www.pmdtc.org/usml.htm>.

#### 10. Exception for Fundamental Research

Under the Munitions List, there is a *licensing exception* for research considered **fundamental research**.<sup>295</sup> Because much of XYZ's software is based on the work that Tom Johnson did at the university, there is a strong possibility that this exception may apply.<sup>296</sup> You are *not* responsible for making the actual determination. You *must*, however, notify John Complaisant, Compliance Officer, of relevant information relating to the possibility of using this exception. Submit this on the **INITIAL CLASSIFICATION FORM**.

Fundamental research is:

- Conducted in engineering at accredited U.S. colleges<sup>297</sup>
- Information ordinarily published/shared broadly in the scientific community<sup>298</sup>

Research is *not* fundamental if:

- It is funded by the U.S. government and the government places controls on the dissemination of the information as part of the funding requirement<sup>299</sup>
- The university agreed to restrictions (from sources other than the government) on the publication of the research<sup>300</sup>

#### 11. Special Licenses for Ongoing Software or Service Projects

A special license is available when a project will involve ongoing use of software or services (but will not grant the customer a right to manufacture the software).<sup>301</sup> If you believe the project may qualify for this special license, check the line called "Ongoing Project/Technical Assistance Agreement May Apply" on the **INITIAL CLASSIFICATION FORM** so that John Complaisant can consider applying for this special license.

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295. 22 C.F.R. §§ 120.11(8), 120.10(a)(5) (2004).

296. *See id.* § 120.11(8).

297. *Id.*

298. *Id.*

299. *Id.* § 120.11(8)(ii).

300. *Id.* § 120.11(8)(i).

301. *See* 22 C.F.R. §120.22 (2004).

## 12. Providing Information to Assist in Commodity Jurisdiction Request

If software or services appear to be subject to the Munitions List, John Complainant will work with Outside Counsel to submit a Commodity Jurisdiction Request to make the final determination. Your job in this process is to provide information that will be the basis for the request. On the **INITIAL CLASSIFICATION FORM**, fill out the section entitled “Commodity Jurisdiction Request Information.”

Part of making an accurate request involves understanding the nature of the software or identity of the final item in which the software or service will be used. In some cases, items that *seem* inherently military will **not** be covered by the State Department’s Munitions List if:

- The application of the item is *predominantly civil* and has a *performance equivalent in civil application*.<sup>302</sup>
  - Performance equivalent is defined by *form, fit, or function*.<sup>303</sup>
  - The *intended use* of the item is *not* relevant to the inquiry (*i.e.* even though an item is being designed for a civil application, if it is not predominantly civil and does not have a performance equivalent in civil application, the item will still be covered by the Munitions List).<sup>304</sup>

## 13. Information You Must Provide for Commodity Jurisdiction Request

The information you will need to provide for the Commodity Jurisdiction Request includes:

- Description of the article or service<sup>305</sup>
- History of the item’s design, development, and use<sup>306</sup>
- Brochures or documents related to the item<sup>307</sup>

## 14. Start the Initial Classification Process Early

Because Commodity Jurisdiction Requests can take forty-five days (and then require licensing after the request is returned), it is important to complete the **INITIAL CLASSIFICATION FORM** as quickly as possible.<sup>308</sup>

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302. 22 C.F.R. § 120.3(a)(ii) (2004).

303. *Id.*

304. *See id.* § 120.3(b).

305. *See* 22 C.F.R. § 120.4(c) (2004).

306. *Id.*

307. *Id.*

308. *See id.* § 120.4(e).

**15. Next Steps**

If you believe State Department rules apply, send your completed **INITIAL CLASSIFICATION FORM** to John Complaisant. He will instruct you on how to proceed. You may be able to do some work while awaiting the license, as long as you aren't providing the customer with technical data or defense services.

**16. If State Department Rules Don't Seem to Apply**

Should you determine that the State Department's Munitions List does *not* appear to cover your software or service, you *must* notify John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com for confirmation of your assessment. Once you have received this confirmation, document this on the **PROJECT TRACKING FORM**, available under Forms/Engineering or on the intranet under **COMPLIANCE/FORMS**. Then, go to the next section, **COMMERCE DEPARTMENT CLASSIFICATION at PART XLF**.

**PART XI.F – CLASSIFYING THE ITEM – ENGINEERING – COMMERCE  
DEPARTMENT CLASSIFICATION**

**1. Your Role in Classifying Software and Services under the Commerce Department Rules**

If you determine that the State Department Rules do not apply and you have gotten approval on this determination from John Complaisant, you will need to classify the item under the Commerce Department rules.<sup>309</sup>

The Commerce Department controls items that can have “dual use,” or both civil and military use.<sup>310</sup> Unlike the controls of the State Department, these are not items or services designed, modified, or adapted for military use. Because there is less “risk” with these items, the classification is more user-friendly. The Commerce Department’s Commerce Control List uses very specific, detailed descriptions.<sup>311</sup> Because our engineers have detailed knowledge of XYZ’s specific projects and services, each engineer will classify their own projects.

**2. Determining the Item/Service’s Export Control Classification Number**

To make a classification under the Commerce Control List, you must determine the item or service’s Export Control Classification Number (“ECCN”).<sup>312</sup> Once you have determined the ECCN, list it on the **INITIAL CLASSIFICATION FORM** and send it to John Complaisant, Compliance Officer.

An ECCN is a 5-character classification:<sup>313</sup>

- The first digit represents the category of the item or service.<sup>314</sup> For example, a first digit of **4** represents computers.<sup>315</sup> Most of XYZ’s software and services will begin with **3**, **4**, **5**, or **6** (3=computers, 4=telecommunications, 5=information security, 6=sensors and lasers).
- The second character, a letter, represents the product group.<sup>316</sup> Most of XYZ’s products will be classified **D**, software.<sup>317</sup>

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309. 22 C.F.R. § 120.5; 15 C.F.R. § 730.3 (2004).

310. 15 C.F.R. § 730.3.

311. See 15 C.F.R. § 774 (Supp. I 1998).

312. See 15 C.F.R. § 738.2(c) (2004).

313. *Id.* § 738.2(d).

314. See *id.*

315. 15 C.F.R. § 738.2(a).

316. *Id.* § 738.2(d).

317. *Id.* § 738.2(b).

### 3. Finding an ECCN

To find an item's ECCN, you may search by:

- Item Classifications listed by *ECCN* (numeric/alpha classifications) at <http://www.access.gpo.gov/bis/ear/pdf/indexnum.pdf><sup>318</sup>
- Item Classification listed by *item names* (alphabetized listing of items) at <http://www.access.gpo.gov/bis/ear/pdf/indexcl.pdf><sup>319</sup>

Once you link to the list, use the binoculars located in the upper toolbar to “jump” to a certain spot in the list. Type in the number (i.e., type **4A001** to get to the first item in the computers category) or name and click return.

### 4. How to Find an ECCN for Technology

When determining the ECCN for technology, if it is *required* for the development, production, or use for *items* on the ECCN, it is classified under the ECCN of the *item the technology is required to develop, produce, or use*.<sup>320</sup>

The *actual use* of the technology (i.e. for a lesser-controlled item) *does not change* the classification of the technology. The ECCN is based on the most *highly-controlled level* applicable for the technology.<sup>321</sup>

### 5. Print and Attach a Copy of ECCN Details

Print and attach a copy of the ECCN details from the Commerce Control List to the **INITIAL CLASSIFICATION FORM**.

### 6. If You Can't Find an ECCN

If you cannot find an ECCN for your item, it is covered by the catch-all category “EAR99.”<sup>322</sup> List “EAR99” in the ECCN blank on the **INITIAL CLASSIFICATION FORM**.

### 7. Questions about Finding an ECCN

If you have any questions or would like help determining the proper ECCN, contact John Complaisant, Compliance Officer, at (303)123-0911 or [jcomp@XYZ.com](mailto:jcomp@XYZ.com) for assistance.

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318. 15 C.F.R. § 774 (Supp. I-III 1998, 2003, 2003), *available at* Export Administration Regulations Database, Numerical Index to the Commerce Control List, <http://www.access.gpo.gov/bis/ear/pdf/indexnum.pdf>.

319. 15 C.F.R. § 774 (Supp. I-III 1998, 2003, 2003), *available at* Export Administration Regulations Database, Alphabetical Index to the Commerce Control List, <http://www.access.gpo.gov/bis/ear/pdf/indexcl.pdf>.

320. *See* 15 C.F.R. § 738.2(a)-(c)

321. *See id.* § 774 (Supp. II pt. 1 2003).

322. *See* 15 C.F.R. § 774.1 (2004).

**8. Next Steps**

Once you have assigned an ECCN, send your completed **INITIAL CLASSIFICATION FORM** to John Complaisant, and document this step on the **PROJECT TRACKING FORM**, located in this section under Forms/Engineering or in the intranet under **COMPLIANCE/FORMS**. Await instruction from John Complaisant on how to proceed. You may be able to do some work while awaiting the license.

**PART XI.G – ENGINEERING DEPARTMENT FORMS**

**PROJECT TRACKING FORM – ENGINEERING**

NAME OF CUSTOMER \_\_\_\_\_

CUSTOMER ADDRESS \_\_\_\_\_

DATE PROJECT RECEIVED FROM COORDINATION TEAM \_\_\_\_\_

PERSON FILLING OUT FORM/INITIAL \_\_\_\_\_/\_\_\_\_\_

**DIVERSION RISK CHECKLIST** (performed by engineer)

- Date Checklist Completed/Initials \_\_\_\_\_/\_\_\_\_\_
- Result of Screen: **OK to Proceed** \_\_\_\_\_ **Stop** \_\_\_\_\_
  - If transaction **stopped**, date stopped: \_\_\_\_\_
  - If transaction **resumed** (status change from **Stop** to **OK to Proceed** because license obtained), date resumed: \_\_\_\_\_

Date **Compliance Manager Approved Decision NOT to Classify** Under State Department Rules (if applicable) \_\_\_\_\_Date **INITIAL CLASSIFICATION FORM** sent to Compliance Manager \_\_\_\_\_

**DIVERSION RISK/RED FLAG CHECKLIST – ENGINEERING**

NAME OF CUSTOMER BEING SCREEENED \_\_\_\_\_

CUSTOMER ADDRESS \_\_\_\_\_

XYZ PRODUCT TO BE PURCHASED (describe in detail) \_\_\_\_\_

CUSTOMER'S END USE FOR PRODUCT \_\_\_\_\_

COUNTRY OF PRODUCT'S ULTIMATE DESTINATION \_\_\_\_\_

PERSON PERORMING SCREEN/INTIAL \_\_\_\_\_/\_\_\_\_\_

DATE PERFORMED \_\_\_\_\_

\*If the answer to any of these is *yes* or you have *any* doubts, do not continue in the transaction. Contact XYZ's Compliance Manager, John Complaisant, at (303)123-0911 or jcomp@XYZ.com for assistance.

1. The customer is reluctant to offer information about the end-use of the item.<sup>323</sup> For example, when you ask the customer about the software's end use or inform the customer that XYZ requires a certification of end use, the customer hesitates or does not call back for several days. YES\_\_\_ NO\_\_\_
2. XYZ's software capabilities do not fit the customer's line of business, such as a plant nursery or construction equipment business inquiring about XYZ's high-resolution image recognition software.<sup>324</sup> YES\_\_\_ NO\_\_\_
3. XYZ's software is incompatible with the technical level of the country it will be shipped to, such as a third-world country that does not have either a space or engineering industry.<sup>325</sup> YES\_\_\_ NO\_\_\_
4. The customer has little or no business background in either the engineering or space industry.<sup>326</sup> YES\_\_\_ NO\_\_\_
5. The customer is willing to pay cash up front, which would be unusual because XYZ's customers generally pay with letters of credit or staged cash payment during the development of the software for the contract.<sup>327</sup> YES\_\_\_ NO\_\_\_
6. The customer is unfamiliar with the basic functionality of sensing software or image recognition technology.<sup>328</sup> YES\_\_\_ NO\_\_\_

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323. See 15 C.F.R. § 732 (Supp. III(b)(1) 1997).

324. See *id.* § 732 (Supp. III(b)(2) 1997).

325. See *id.* § 732 (Supp. III(b)(3) 1997).

326. See *id.* § 732 (Supp. III(b)(4) 1997).

327. See *id.* § 732 (Supp. III(b)(5) 1997).

328. See *id.* § 732 (Supp. III(b)(6) 1997).

7. The customer declines the training and maintenance services that XYZ provides as part of each software contract.<sup>329</sup> YES\_\_\_ NO\_\_\_
8. The customer is vague about delivery dates or wants deliveries made to odd destinations, such as Post Office boxes, remote locations or destinations that are far away from the customer's place of business.<sup>330</sup> YES\_\_\_ NO\_\_\_
9. The customer gives a freight forwarder as the product's final destination.<sup>331</sup>  
YES\_\_\_ NO\_\_\_
10. The shipping route is abnormal, such as a customer with a reported ultimate destination in France routing the delivery through India.<sup>332</sup> YES\_\_\_ NO\_\_\_
11. The customer requests unusual packaging, such as asking for an unmarked box or providing their own packaging materials.<sup>333</sup> YES\_\_\_ NO\_\_\_
12. The buyer is evasive or makes contradictory statements about the software's use, such as stating that they will use the software in a plant in Colorado but making frequent references to their engineering facility in China.<sup>334</sup>  
YES\_\_\_ NO\_\_\_

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329. *See id.* § 732 (Supp. III(b)(7) 1997).

330. *See id.* § 732 (Supp. III(b)(8) 1997).

331. *See id.* § 732 (Supp. III(b)(9) 1997).

332. *See id.* § 732 (Supp. III(b)(10) 1997).

333. *See id.* § 732 (Supp. III(b)(11) 1997).

334. *See id.* § 732 (Supp. III(b)(12) 1997).

**INITIAL CLASSIFICATION FORM – ENGINEERING**

NAME OF CUSTOMER \_\_\_\_\_

XYZ JOB NUMBER \_\_\_\_\_

PERSON FILLING OUT FORM/INITIAL \_\_\_\_\_ / \_\_\_\_\_

DATE COMPLETED \_\_\_\_\_

**SOURCE OF CLASSIFICATION REQUEST:**

REQUEST FROM COMPLIANCE MANAGER \_\_\_\_\_

ENGINEERING – NORMAL PROJECT FLOW \_\_\_\_\_

**AGENCY COVERAGE:**

AGENCY EXPECTED TO CONTROL EXPORT:

STATE \_\_\_\_\_ COMMERCE \_\_\_\_\_

DATE COMPLIANCE MANAGER CONFIRMED THAT STATE  
DEPARTMENT RULES DO NOT APPLY (if applicable) \_\_\_\_\_**STATE DEPARTMENT CLASSIFICATION:**MUNITIONS LIST CATEGORY NUMBER<sup>335</sup> \_\_\_\_\_PROJECT MIGHT BE FUNDAMENTAL RESEARCH?<sup>336</sup> YES \_\_\_\_\_ NO \_\_\_\_\_ONGOING PROJECT/TECHNICAL ASSISTANCE AGREEMENT MIGHT  
APPLY?<sup>337</sup> YES \_\_\_\_\_ NO \_\_\_\_\_**COMMODITY JURISDICTION REQUEST INFORMATION:**<sup>338</sup>

PREDOMINANTLY CIVIL APPLICATION? YES \_\_\_\_\_ NO \_\_\_\_\_

PERFORMANCE EQUIVALENT IN CIVIL APPLICATION (form, fit, and  
function)? YES \_\_\_\_\_ NO \_\_\_\_\_

IF YES TO EITHER OF ABOVE, DESCRIBE IN DETAIL \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_335. *See supra* Part XI.E.1-XI.E.9.336. *See supra* Part XI.E.10.337. *See supra* Part XI.E.11.338. *See supra* Part XI.E.12-XI.E.14.

**COMMERCE DEPARTMENT CLASSIFICATION**<sup>339</sup>

ECCN \_\_\_\_\_

PRINT AND ATTACH COPY OF PAGES LISTING THE ECCN DETAILS  
(check once attached) \_\_\_\_\_

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339. *See supra* Part XI.F.

**PART XII – ACCOUNTING/EXPORT COMPLIANCE SCREENING DEPARTMENT****INDEX**

<b><u>Mandatory Export Compliance Section</u></b>	<b><u>Part</u></b>	<b><u>Date Read/Initials</u></b>
CEO's Letter	I	___/___
Overview	II	___/___
<b>Compliance 911</b>	III	___/___
Customer Red Flags	IV	___/___
Anti-Boycott Protections	V	___/___
Anti-Bribery Protections	VI	___/___
Recordkeeping	VII	___/___
Training and Accountability	VIII	___/___
Export Decision Tree	IX	___/___
<b>ACCOUNTING/EXPORT SCREENING SECTIONS</b>	<b>XII</b>	___/___
Individual/Country of Ultimate Destination Screens	XII.A	___/___
Potential Employees/Deemed Export Rule	XII.B	___/___
Letters of Credit and Methods of Payment	XII.C	___/___
Reimbursements/Anti-Bribery Protections	XII.D	___/___
Contracts, Invoices & Other Documents	XII.E	___/___
Pre-Shipment Verification & Software Keys	XII.F	___/___
Forms – Accounting/Compliance Screening	XII.G	___/___

**PART XII.A – INDIVIDUAL/COUNTRY SCREEN (POTENTIAL CUSTOMERS) –  
ACCOUNTING/EXPORT COMPLIANCE SCREENING DEPARTMENT**

**1. Screening Individuals/Countries**

Potential customers, their countries, and the countries of ultimate destination for XYZ products must be screened to determine if export licenses are required. These screens can be done using the **INDIVIDUAL/COUNTRY SCREEN** form, available at the end of this section under **FORMS – ACCOUNTING/COMPLIANCE SCREENING** or on the intranet under **COMPLIANCE/FORMS**.

**2. Requests from Sales Department**

The sales department will submit customer information for screening on the **NEW CONTACT FORM**. Screen the individual and the country following the links on the **INDIVIDUAL/COUNTRY SCREEN** form. The directions for screening are right on the form.

To search lists, link to the list. Use the binoculars, located in the upper toolbar to find and “jump” to sections of the list.

**3. Individual or Country Matches**

If the countries or individuals match (or are very similar to a name or address on a list), contact John Complaisant, Compliance Officer, at (303)123-0911 or [jcomp@XYZ.com](mailto:jcomp@XYZ.com) so he may begin the licensing process.

File the completed **INDIVIDUAL/COUNTRY SCREEN** form in the **CUSTOMER FILE**. Notify the salesperson via email (read receipt requested) that they must **STOP** the transaction. Print the email, including the read receipt, and file it in the **CUSTOMER FILE**. If and when a license is obtained, the Compliance Officer will notify the salesperson that they may resume the transaction. You will be copied on this email. Print a copy of the email for the **CUSTOMER FILE**.

**4. Corruption/Bribery Risk**

Follow the link on the **INDIVIDUAL/COUNTRY SCREEN** form.<sup>340</sup> If the customer’s country is listed in the *last 50* countries on the list (those deemed most susceptible to corruption risk), notify the salesperson via email (read receipt requested).<sup>341</sup> Your message should be a simple warning to let them know that the customer’s country has a high risk of corruption or illegal bribery and that they should take the utmost caution in the transaction. Print the email, including the read receipt, and file it in the **CUSTOMER FILE**.

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340. See *infra* Part XII.G (Individual/Country Screen Forms).

341. See Transparency International, *Corruption Perceptions Index 2004*, at <http://www.transparency.org/cpi/2004/cpi2004.en.html#cpi2004> (last visited Feb. 14, 2005).

**PART XII.B – INDIVIDUAL SCREEN (POTENTIAL EMPLOYEES) –  
ACCOUNTING/EXPORT COMPLIANCE SCREENING DEPARTMENT**

Under export control laws, potential employees who are **not** U.S. Persons may require licenses to receive certain data or training.<sup>342</sup> Exports can take place in the United States, even on the XYZ campus, if technology is transferred to a foreign person here.<sup>343</sup> The law presumes that at some point, a foreign national will return to their home country.<sup>344</sup> This is the *deemed export rule*.<sup>345</sup> For this reason, all XYZ departments will submit names and addresses of potential hires to you for screening prior to hire.

When any department notifies you by email of a potential hire, screen the name against the Individuals section of the **INDIVIDUAL/COUNTRY SCREEN** form.

- If there are **ANY** matches, notify John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com so he can apply for a license. File the completed form in the **POTENTIAL EMPLOYEE FILE**.
- If there are **NO** matches, notify the appropriate department via email (read receipt requested) that they may hire the employee. Print a copy of the email, including the read receipt, and file it in the **POTENTIAL EMPLOYEE FILE**.

For more information on the deemed export rule, go to <http://www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html>.<sup>346</sup>

If you have any problems, concerns, or questions, contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com.

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342. See 22 C.F.R. § 120.17 (2004); 15 C.F.R. §§ 734.2(b)(1)-(3) (2004).

343. See *supra* note 342.

344. 15 C.F.R. § 734.2(b)(2)(ii).

345. *Id.*

346. Bureau of Industry and Security, U.S. Department of Commerce, “*Deemed Export*” *Questions and Answers*, at [www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html](http://www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html) (last visited Feb. 14, 2005).

**PART XII.C – LETTERS OF CREDIT AND METHODS OF PAYMENT –  
ACCOUNTING/EXPORT COMPLIANCE SCREENING DEPARTMENT**

**1. Letters of Credit – High Risk for Illegal Boycott Violations**

In the accounting department, it is critical that you be aware of the laws against participating in illegal boycotts.<sup>347</sup> Often, conditions in letters of credit specify that the customer or vendor follows the laws of a certain country or certify the origin of products.<sup>348</sup> You *must* review each letter of credit to make sure it does not violate U.S. Anti-Boycott laws.<sup>349</sup>

Review the **ANTI-BOYCOTT PROTECTIONS** section located at **PART V** for details.<sup>350</sup> If you have any questions or concerns, contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com.

**2. Methods of Payment – Be Alert for Red Flags**

The way customers pay for XYZ software and services may present ‘red flags’ in the transaction.<sup>351</sup> Because most of XYZ’s customers pay by staged cash payments, other methods or sources of payment may indicate a risk of diversion or other illegal activity such as illegal transfers of funds.<sup>352</sup> Review the section entitled **CUSTOMER RED FLAGS** at **PART IV** to review the red flag indicators if you have any concerns. Contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com if anything about the customer’s payment seems suspicious.

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347. *See supra* Part V.

348. *See* 15 C.F.R. 760.2(f) (2004).

349. *Id.*

350. *See supra* Part V.

351. *See supra* Part IV.

352. *See* 15 C.F.R. § 732 (Supp. III(b)(5) 2005).

**PART XII.D – REIMBURSEMENTS AND ANTI-BRIBERY PROTECTIONS –  
ACCOUNTING/EXPORT COMPLIANCE SCREENING DEPARTMENT**

**All Requests to Pay Customer Expenses Require Pre-Approval**

Due to the complexity of anti-corruption laws, all requests to cover expenses for trips, entertainment, etc. require pre-approval from John Complaisant.<sup>353</sup> Should an employee inquire about being reimbursed or getting approval for expenses, contact John Complaisant, at (303)123-0911 or jcomp@XYZ.com.

**PART XII.E – CONTRACTS, INVOICES AND OTHER DOCUMENTS –  
ACCOUNTING/EXPORT COMPLIANCE SCREENING DEPARTMENT**

**1. Certifications and Declarations Required in Contracts**

XYZ requires certain certifications and declarations in order to do business. Issues covered include final destination, end-user, end-use, involvement in proliferation activities, and anti-bribery controls. Violation of these certifications is grounds for XYZ to unilaterally terminate any contract.

To enact and enforce these requirements, the following clauses **must** be in **all** contracts. They are available on the intranet under **COMPLIANCE/CONTRACTS**.<sup>354</sup>

- Certification of Final Destination
- Certification of End-Use and End-User
- Certification of Non-Proliferation
- Agreement to Abide by U.S. Anti-Bribery Laws

**2. License Numbers Required on All Invoices, Bills of Lading, and Shipping Documents**

All invoices, bills of lading, and shipping documents must include the proper license number and other designation as required by the State or Commerce Department.<sup>355</sup> John Complaisant, Compliance Officer, will provide this information to you once he obtains the required license.

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353. *See supra* Part VI.

354. These certifications and agreements are not included in the model program. For more information, *see infra* Part XII.E.3 (addressing final destination and end use); *infra* Part IV (addressing non-proliferation protections); *supra* Part VI (addressing anti-bribery protections).

355. *See* 22 C.F.R. § 123.22 (2004); 15 C.F.R. § 732.5 (2004).

### 3. Shippers Export Declaration – Invoices, Bills of Lading, and Shipping Documents

This language *must* be printed on *all* XYZ invoices, bills of lading, and shipping documents for items sent with a **State Department** License:

*“These commodities are authorized by the U.S. Government for export only to [country of ultimate destination] for use by [end-user]. They may not be transferred, transshipped on a non-continuous voyage, or otherwise be disposed of in any other country, either in their original form or after being incorporated into other end-items, without the prior written approval of the U.S. Department of State.”*<sup>356</sup>

The following language *must* be printed on all XYZ invoices, bills of lading, and shipping documents for items covered by **Commerce Department** rules or licenses:

*“[These/this] [commodities, technology, software] [were/was] exported from the United States in accordance with the Export Administration Regulations. Diversion contrary to U.S. law is prohibited.”*<sup>357</sup>

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356. 22 C.F.R. § 123.9(b) (2004).

357. 15 C.F.R. § 758.6 (2004).

**PART XII.F – VERIFICATIONS – PRE-SHIPMENT & PRIOR TO SENDING  
SOFTWARE KEYS – ACCOUNTING/EXPORT COMPLIANCE SCREENING  
DEPARTMENT**

**1. Quarterly Customer/List Verifications**

Once per quarter, screen all open customer files against the lists on the **INDIVIDUAL/COUNTRY SCREEN** list.<sup>358</sup> This will identify any changes in customer or country status that could lead to an inadvertent violation. If you get a match, **STOP** any ongoing or potential transactions (by notifying the sales or engineering department) and contact John Compliant, Compliance Officer, at (303)777-7911 or jcomp@XYZ.com.

**2. Pre-Shipment – Final Verification**

When Engineering sends you a final item to be packaged for shipment, re-run the customer and country through the **INDIVIDUAL/COUNTRY SCREEN**. If the customer or country matches *any* lists, **STOP** the transaction and immediately contact John Compliant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com. Keep a copy of the **PRE-SHIPMENT INDIVIDUAL/DESTINATION SCREEN** in the **CUSTOMER EXPORT FILE**.

**3. Requests for Software Keys – Verification and Re-Certification Required**

XYZ software comes with an internal “bomb” which causes the software to become disabled at the end of the contract period unless the user obtains a software key from XYZ. As a condition to providing the key to disable the bomb, you must re-screen the customer and country using the **INDIVIDUAL/COUNTRY SCREEN** form. Further, the customer must re-certify their uses and agreement to comply with U.S. law. This agreement is available on the XYZ intranet under **CONTRACT EXTENSION/RECERTIFICATION**.

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358. See, e.g., Bureau of Industry and Security U.S. Department of State, *Export Management Systems Guidelines, Denied Persons Screen*, at 34, at <http://www.bxa.doc.gov/exportmanagementsystems/pdf/screen1.pdf> (last visited Feb. 14, 2005) (describing the need for a process for updating customer lists).

**PART XII.G – ACCOUNTING/EXPORT COMPLIANCE SCREENING DEPARTMENT  
FORMS**

**INDIVIDUAL/COUNTRY SCREEN (POTENTIAL CUSTOMERS) –  
ACCOUNTING/COMPLIANCE SCREENER**

NAME OF CUSTOMER BEING SCREEENED \_\_\_\_\_

ADDRESS \_\_\_\_\_

XYZ PRODUCT TO BE PURCHASED (describe in detail) or INVOICE  
NUMBER \_\_\_\_\_

CUSTOMER'S END-USE FOR PRODUCT \_\_\_\_\_

COUNTRY OF PRODUCT'S ULTIMATE DESTINATION \_\_\_\_\_

PERSON PERORMING SCREEN/INTIAL \_\_\_\_\_ / \_\_\_\_\_

DATE PERFORMED \_\_\_\_\_

PURPOSE of SCREEN:

Initial Screen \_\_\_\_\_ Pre-Shipment \_\_\_\_\_ Software Re-certification \_\_\_\_\_

**SCREENING INDIVIDUALS**

Look for the customer's name on the following six lists:

- 1. Denied Persons List** – <http://www.bxa.doc.gov/dpl/thedeniallist.asp>.<sup>359</sup>

MATCH? YES \_\_\_ NO \_\_\_

If **re-screening** a party screened in the last 90 days, go to the recent update site (for a faster screen of the Denied Parties List). Go to <http://www.bxa.doc.gov/dpl/recentchanges.asp>.<sup>360</sup> MATCH? YES \_\_\_ NO \_\_\_

- 2. Debarred List** – [www.pmdtc.org/debar059.htm](http://www.pmdtc.org/debar059.htm).<sup>361</sup> MATCH?

YES \_\_\_ NO \_\_\_

- 3. Specially Designated Nationals** – [www.treas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf](http://www.treas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf).<sup>362</sup> MATCH? YES \_\_\_ NO \_\_\_

359. 15 C.F.R. § 764 (Supp. I. 2002), Bureau of Industry and Security U.S. Department of Commerce, *The Denied Persons List*, available at <http://www.bxa.doc.gov/dpl/thedeniallist.asp> (last visited Feb. 14, 2005).

360. Bureau of Industry and Security, U.S. Department of Commerce, *Recent Changes to the Denied Persons List*, at <http://www.bxa.doc.gov/dpl/recentchanges.asp> (last visited Feb. 14, 2005).

361. 22 C.F.R. § 127.7 (2004), Directorate of Defense Trade Controls, U.S. Department of State, *List of Statutorily Debarred Parties, July 1988-April 2004*, available at <http://www.pmdtc.org/debar059.htm>.

362. Office of Foreign Assets Control, U.S. Department of Treasury, *Specially Designated Nationals and Blocked Persons*, at <http://www.treas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf> (last visited Feb. 23, 2005).

**4. Federal Register** – [http://www.access.gpo.gov/bis/fedreg/ear\\_fedreg.html](http://www.access.gpo.gov/bis/fedreg/ear_fedreg.html).<sup>363</sup>  
Look for list updates. MATCH? YES\_\_\_ NO\_\_\_

**5. Entity List** – <http://www.access.gpo.gov/bis/ear/pdf/744spir.pdf>.<sup>364</sup>  
MATCH? YES\_\_\_ NO\_\_\_

**6. Unverified List** –  
[http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified\\_parties.html](http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified_parties.html).<sup>365</sup>  
MATCH? YES\_\_\_ NO\_\_\_

**Interpreting the results of the Individual Screen:**

- If *any* of the above is a match, immediately contact John Complaisant at (303)123-0911 or [jcomp@XYZ.com](mailto:jcomp@XYZ.com).
- If *none* of the above match, the individual has **passed** this section of the screen.

**COUNTRY SCREEN**

Look for the customer's country on the following two lists:

**1. Office of Foreign Asset Control Embargo List** –  
<http://www.treas.gov/offices/enforcement/ofac/sanctions/>.<sup>366</sup> MATCH?  
YES\_\_\_ NO\_\_\_

**2. Office of Defense Trade Control Arms Embargo List** –  
<http://pmdtc.org/country.htm>.<sup>367</sup> MATCH? YES\_\_\_ NO\_\_\_

**Interpreting the results of the Country Screen:**

- If *any* of the above is a match, immediately contact John Complaisant at (303)123-0911 or [jcomp@XYZ.com](mailto:jcomp@XYZ.com).
- If *none* of the above match, the customer has **passed** this section of the screen.

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363. U.S. Government Printing Office, *Federal Register Rules Affecting the Export Administration Regulations*, at [http://www.access.gpo.gov/bis/fedreg/ear\\_fedreg.html](http://www.access.gpo.gov/bis/fedreg/ear_fedreg.html) (last visited Feb. 23, 2005).

364. 15 C.F.R. § 774 (Supp. IV 2001), Bureau of Industry and Security, U.S. Department of Commerce, *Entity List*, available at <http://www.access.gpo.gov/bis/ear/pdf/744spir.pdf> (last visited Feb. 14, 2005).

365. Bureau of Industry and Security, U.S. Department of Commerce, *Unverified List*, at [http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified\\_parties.html](http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified_parties.html) (last visited Feb. 14, 2005).

366. Office of Foreign Asset Control, U.S. Treasury Department, *Sanctions Program and Country Summaries*, at <http://www.treas.gov/offices/enforcement/ofac/sanctions/> (last visited Feb. 23, 2005).

367. 22 C.F.R. § 126.1 (2004), Directorate of Defense Trade Controls, U.S. Department of State, *Embargo Reference Chart*, available at <http://pmdtc.org/country.htm> (last visited Feb. 14, 2005).

**CORRUPTION/BRIBERY RISK SCREEN**

Compare customer's country and project location against the Transparency International website for corruption/bribery risk:

<http://www.transparency.org/cpi/2004/cpi2004.en.html#cpi2004>.<sup>368</sup>

**Interpreting the results of the Individual Screen:**

- If the country is listed in the last **50** countries on the list (countries at the end of the list being at higher risk for corruption or bribery), notify the salesperson requesting the screen, and tell them to proceed with *caution*.<sup>369</sup>
- If the country is not in the bottom 50 on the list, you don't need to do anything further.

**INDIVIDUAL/COUNTRY SCREEN RESULTS (Potential Customers)****Individual Screen**

\_\_\_\_\_ Matched on any list, if **yes**, date John Complaisant notified \_\_\_\_\_

\_\_\_\_\_ Did not have any matches

**Country Screen**

\_\_\_\_\_ Matched on any list, if **yes**, date John Complaisant notified \_\_\_\_\_

\_\_\_\_\_ Did not have any matches

**Corruption/Bribery Screen**

Country in bottom 50 on Transparency.org website,<sup>370</sup> notified salesperson OK to proceed with *caution*

\_\_\_\_\_ Country not in bottom 50

**STATUS:**

**OK to PROCEED**\_\_\_\_\_, or

**STOP** to await licensing or further instruction from John Complaisant\_\_\_\_\_.

Date employee notified\_\_\_\_\_.

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368. Transparency International, *Corruption Perceptions Index 2004*, at <http://www.transparency.org/cpi/2004/cpi2004.en.html#cpi2004> (last visited Feb. 14, 2005).

369. *See id.*

370. *Id.*

**INDIVIDUAL/COUNTRY SCREEN (POTENTIAL EMPLOYEES) –  
ACCOUNTING/COMPLIANCE SCREENER**

NAME OF POTENTIAL EMPLOYEE BEING SCREENED \_\_\_\_\_

ADDRESS \_\_\_\_\_

PERSON PERFORMING SCREEN/INITIAL \_\_\_\_\_/\_\_\_\_\_

DATE PERFORMED \_\_\_\_\_

**SCREENING POTENTIAL EMPLOYEES**

Look for the customer's name on the following list:

- 1. Denied Persons List** – <http://www.bxa.doc.gov/dpl/thedeniallist.asp>.<sup>371</sup>

MATCH? YES \_\_\_ NO \_\_\_

If **re-screening** a party screened in the last 90 days, go to the recent update site (for a faster screen of the Denied Parties List). Go to <http://www.bxa.doc.gov/dpl/recentchanges.asp>.<sup>372</sup> MATCH? YES \_\_\_ NO \_\_\_

- 2. Debarred List** – [www.pmdtc.org/debar059.htm](http://www.pmdtc.org/debar059.htm).<sup>373</sup> MATCH?

YES \_\_\_ NO \_\_\_

- 3. Specially Designated Nationals** –

[www.treas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf](http://www.treas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf).<sup>374</sup> MATCH? YES \_\_\_ NO \_\_\_

- 4. Federal Register** – [http://www.access.gpo.gov/bis/fedreg/ear\\_fedreg.html](http://www.access.gpo.gov/bis/fedreg/ear_fedreg.html).<sup>375</sup>

Look for list updates. MATCH? YES \_\_\_ NO \_\_\_

- 5. Entity List** – <http://www.access.gpo.gov/bis/ear/pdf/744spir.pdf>.<sup>376</sup>

MATCH? YES \_\_\_ NO \_\_\_

371. 15 C.F.R. § 764 (Supp I 2002), Bureau of Industry and Security, U.S. Department of Commerce, *The Denied Persons List*, available at <http://www.bxa.doc.gov/dpl/thedeniallist.asp> (last visited Feb. 14, 2005).

372. Bureau of Industry and Security, U.S. Department of Commerce, *Recent Changes to the Denied Persons List*, at <http://www.bxa.doc.gov/dpl/recentchanges.asp> (last visited Feb. 14, 2005).

373. 22 C.F.R. § 127.7 (2004), Directorate of Defense Trade Controls, U.S. Department of State, *List of Statutorily Debarred Parties, July 1988-April 2004*, available at <http://www.pmdtc.org/debar059.htm> (last visited Feb 14, 2005).

374. Office of Foreign Assets Control, U.S. Department of Treasury, *Specially Designated Nationals and Blocked Persons*, at <http://www.treas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf>, (last visited Feb. 15, 2005)

375. U.S. Government Printing Office, *Federal Register Rules Affecting the Export Administration Regulations*, at [http://www.access.gpo.gov/bis/fedreg/ear\\_fedreg.html](http://www.access.gpo.gov/bis/fedreg/ear_fedreg.html) (last visited Feb. 23, 2005).

376. 15 C.F.R. § 744 (Supp. IV 2001); Bureau of Industry and Security, U.S. Department of Commerce, *Entity List*, at <http://www.access.gpo.gov/bis/ear/pdf/744spir.pdf> (last visited Feb. 14, 2005).

**6. Unverified List –**

[http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified\\_parties.html](http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified_parties.html).<sup>377</sup>

MATCH? YES\_\_\_ NO\_\_\_

**Interpreting the results of the Individual Screen:**

- If *any* of the above is a match, immediately contact John Complaisant at (303)123-0911 or [jcomp@XYZ.com](mailto:jcomp@XYZ.com).
- If *none* of the above match, the individual has **passed** the screen.

**INDIVIDUAL/COUNTRY SCREEN RESULTS (Potential Employees)****Individual Screen**

\_\_\_\_\_ Matched on any list, if **yes**, date John Complaisant notified \_\_\_\_\_

\_\_\_\_\_ Did not have any matches

**STATUS:**

**OK to PROCEED** \_\_\_\_\_, or

**STOP** to await licensing or further instruction from John Complaisant \_\_\_\_\_

Date employee notified \_\_\_\_\_

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<sup>377</sup>. Bureau of Industry and Security, U.S. Department of Commerce, *Unverified List*, at [http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified\\_parties.html](http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified_parties.html) (last visited Feb. 14, 2005).

**PART XIII – COORDINATION TEAM****COORDINATION TEAM INDEX**

<b><u>Mandatory Export Compliance Section</u></b>	<b><u>Part</u></b>	<b><u>Date Read/Initials</u></b>
CEO's Letter	I	____/____
Overview	II	____/____
<b>Compliance 911</b>	III	____/____
Customer Red Flags	IV	____/____
Anti-Boycott Protections	V	____/____
Anti-Bribery Protections	VI	____/____
Recordkeeping	VII	____/____
Training and Accountability	VIII	____/____
Export Decision Tree	IX	____/____
<b>COORDINATION TEAM SECTIONS</b>		
Sales Department Section	X	____/____
Engineering Department Section	XI	____/____
Knowing Your Customer	XIII.B	____/____
Diversion Risk/Red Flags	XIII.C	____/____
Contract Certification Clauses	XIII.D	____/____
Forms/Coordination Team	XIII.E	____/____

**PART XIII.A – REQUIRED READING – SALES AND ENGINEERING DEPARTMENT SECTIONS – COORDINATION TEAM**

**Required Reading – Sales and Engineering Department Sections**

As the go-between group that coordinates work between the Sales and Engineering Departments, it is critical that you understand their functions in the export compliance process. Be sure you have completed the reading requirements for **both** the **SALES** and **ENGINEERING SECTIONS**, at **PARTS X AND XI** before going any further.

You can initial the sections in their **SALES** and **ENGINEERING INDEXES** in your copy of the Compliance Program manual to document your completion of these steps.

**PART XIII.B – KNOWING YOUR CUSTOMER – COORDINATION TEAM**

**1. Danger of Export Violations in Early Contacts**

Generally, export laws require a license for the export of technical data.<sup>378</sup> Be careful not to reveal technical data about XYZ's software when talking initially with potential customers.<sup>379</sup> Doing so, before screening procedures are completed and licenses are secured could result in a violation. Further, because certain sanctions prohibit any contact with embargoed countries, even calling a customer in an embargoed country or mailing a brochure could be violation.<sup>380</sup>

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378. See 22 C.F.R. § 120.10 (2004); 15 C.F.R. §§ 734.2(b)(2), (b)(9) (2004).

379. See 22 C.F.R. § 120.17(3)-(4) (2004); 15 C.F.R. §§ 734.2(b)(2)-(3).

380. 15 C.F.R. §§ 746.2-746.4, 746.7-746.8 (2004) (restrictions on exports to Cuba, Iraq, Iran, and Rwanda); 15 C.F.R. § 732.3(i) (2004).

## 2. Screening the Customer

As early as possible in the discussions with a potential customer, submit information about the potential customer to the Accounting Department for an **INDIVIDUAL/COUNTRY SCREEN**. This may be done by filling out the form in the Forms/Coordination Team section entitled **NEW CONTACT FORM**. This form is also available on the intranet under **COMPLIANCE/FORMS**. Once you have filled out the form, give it to Accounting, for a Compliance Screening of the individual and country.

This screening process will allow XYZ to avoid doing business with individuals who have been banned from receiving exports due to export violations.<sup>381</sup> In some cases, doing business will require obtaining an export license for similar reasons.<sup>382</sup> This process allows us to identify parties who we can't do business with or with whom business may be transacted only after getting the appropriate license.<sup>383</sup> Vigilance at this step can prevent a violation. Further, by determining that it is safe to pursue business with a customer, you will be able to spend your limited time working on customers with whom XYZ can do business.

This screening step also checks the contact's country, which can prohibit a transaction or merely trigger a licensing requirement.<sup>384</sup>

## 3. Pursuing New Leads

If you plan to pursue a business lead and have not yet made contact, fill out the **NEW CONTACT FORM** to the best of your ability and submit to a Compliance Screener in Accounting for **INDIVIDUAL/COUNTRY SCREEN**. *Do not forward* contacts to the Sales Department without instructions from the Compliance Officer after receiving results of this screen. If you are given approval to proceed, send a copy of the approval with the contact information to the Sales Department.

If you meet a contact at a trade show, or the potential customer contacts you, submit the **NEW CONTACT FORM** to Accounting for an initial screen as soon as possible after the initial contact. Do not continue communicating with the contact, to the extent that you can control it, while you await instructions from the Compliance Officer. If you are given approval to proceed, send a copy of the approval with the contact information to the Sales Department.

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381. 22 C.F.R. § 127.7 (2004); 15 C.F.R. § 744.1(a) (2004).

382. *See, e.g.*, 15 C.F.R. § 744.2(b) (2004).

383. *See* 22 C.F.R. § 127.7; 15 C.F.R. § 744.1(a); 15 C.F.R. § 744.2(b).

384. 15 C.F.R. §§ 746.1(a)(1), 746.1 (2004).

**PART XIII.C – DIVERSION RISK/RED FLAGS – COORDINATION TEAM**

Always bear in mind the Red Flags that were introduced in the **OVERVIEW** section at **PART IV**.<sup>385</sup> If a potential customer engages in suspicious behavior, do not forward the contact to the Sales Department without first discussing your concerns with John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com.

**PART XIII.D – CONTRACT REVIEW – COORDINATION TEAM****Higher Level Review Required on Certification/Declaration Clauses of All Contracts**

As the department that reviews all XYZ contracts, it is important to be sure that the required Certifications and Declarations are in all company contracts.<sup>386</sup> These clauses require our customer and business partners to follow U.S. export laws. Further, they give us the opportunity to unilaterally terminate any contract should the other party violate these certifications.

As you review contracts, make sure the required certifications/declarations are included. These are available on the intranet under **COMPLIANCE/CONTRACTS**. Once you have included these clauses, Bob Decisis *must* review and approve the clauses. Document the date of Bob's review and approval and file it in the **PROJECT CONTRACT FILE**.

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385. *See supra* Part IV.

386. 22 C.F.R. §123.9(b) (2004); 15 C.F.R. § 758.6 (2004); *see also supra* Part XII.E.

**PART XIII.E – COORDINATION TEAM FORMS**

**NEW CONTACT FORM – COORDINATION TEAM**

NAME OF CONTACT (note any inconsistencies in spelling, nicknames, etc.)

\_\_\_\_\_

PERSON FILLING OUT FORM/INITIAL \_\_\_\_\_ / \_\_\_\_\_

DATE COMPLETED \_\_\_\_\_

CONTACT ADDRESS \_\_\_\_\_

DATE OF FIRST CONTACT \_\_\_\_\_

SOURCE OF LEAD/CONTACT (describe in detail) \_\_\_\_\_

\_\_\_\_\_

XYZ PRODUCT CONTACT INTERESTED IN (describe in detail, if known)

\_\_\_\_\_

CONTACT'S END USE FOR PRODUCT \_\_\_\_\_

COUNTRY OF PRODUCT'S ULTIMATE DESTINATION \_\_\_\_\_

OTHER INFORMATION YOU BELIEVE WOULD BE HELPFUL

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**PART XIV – EXPORT COMPLIANCE OFFICER****EXPORT COMPLIANCE OFFICER INDEX**

<b><u>Mandatory Export Compliance Section</u></b>	<b><u>Part</u></b>	<b><u>Date Read/Initials</u></b>
CEO's Letter	I	____/____
Overview	II	____/____
<b>Compliance 911</b>	III	____/____
Customer Red Flags	IV	____/____
Anti-Boycott Protections	V	____/____
Anti-Bribery Protections	VI	____/____
Recordkeeping	VII	____/____
Training and Accountability	VIII	____/____
Export Decision Tree	IX	____/____
<b>Handling Compliance 911 Reports</b>	XIV.A	____/____
Individual/Country Screens – Potential Customers	XIV.B	____/____
Deemed Export Rule – Potential Employees	XIV.C	____/____
Responding to Employees' Questions or Concerns	XIV.D	____/____
Licensing Process Flowchart	XIV.E	____/____
Applying For State Department Licenses	XIV.F	____/____
Commodity Jurisdiction Requests	XIV.G	____/____
Commerce Department Rules	XIV.H	____/____

Shipping Without a License (NLR)	XIV.I	____/____
Option 1 – Publicly Available	XIV.I.1	____/____
Option 2 – EAR99	XIV.I.2	____/____
Option 3 – No Controls for ECCN/Country	XIV.I.3	____/____
Self-Validated License Exceptions	XIV.J	____/____
Self-Validated License Exception Example	XIV.K	____/____
Applying for a Commerce Department License	XIV.L	____/____
Forms/Compliance Officer	XIV.M	____/____

**PART XIV.A – HANDLING COMPLIANCE 911 REPORTS – EXPORT COMPLIANCE OFFICER**

**1. If an Employee Contacts you under the COMPLIANCE 911 PROTOCOLS**

- a. Make sure** the employee has **stopped the transaction, communication, or shipment.**
- b.** Remind the employee to **retain all records.**
- c.** Remind employee to maintain **confidentiality.**
- d. Immediately contact** Jane L. Doe, Outside Counsel, at (303)999-9999 or jldoe@abclaw.com. She will assist you in handling the matter.
- e. Document** the receipt of the report and the date you contacted OutsideCounsel in the **COMPLIANCE 911 REPORTS** folder.

**2. Consider the Benefits of Voluntary Disclosure**

In the event that an investigation conducted in conjunction with and at the direction of Outside Counsel discovers a possible violation, voluntary reporting of the violation to the appropriate government agency can be a mitigating factor in the assessment of penalties.<sup>387</sup> Outside Counsel will discuss this option and the possible risks and benefits of pursuing this course of action should this matter arise.

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387. 22 C.F.R. § 127.12(a) (2004); 15 C.F.R. § 764.5(a) (2004); *see also supra* notes 54-55 and accompanying text (discussing voluntary disclosure as a factor weighing against prosecuting the organization).

**PART XIV.B – INDIVIDUAL/COUNTRY SCREEN (POTENTIAL CUSTOMERS) –  
EXPORT COMPLIANCE OFFICER**

**1. Individual/Country Screen**

If a customer's name or country matches Commerce or State Department lists, the Compliance Screener will notify you. Some matches mean there is an absolute prohibition against doing business with the party.<sup>388</sup> In other cases, it will necessitate getting a license.<sup>389</sup>

**2. Complete Bans on Transactions**

If a potential customer's name comes up as a match on the following lists, it is a complete ban on doing business with the party. Should the Compliance Screener notify you of a match, confirm it by searching the match at the appropriate website.

**a. Denied Persons List** – <http://www.bxa.doc.gov/dpl/thedeniallist.asp>.<sup>390</sup>

If **re-screening** a party screened in the last 90 days, go to the recent update site (for a faster screen of the Denied Parties List). Go to <http://www.bxa.doc.gov/dpl/recentchanges.asp>.<sup>391</sup>

**b. Debarred List** – <http://www.pmdtc.org/debar059.htm>.<sup>392</sup>

**c. Specially Designated Nationals** – <http://www.treas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf>.<sup>393</sup>

**d. Federal Register** – [http://www.access.gpo.gov/bis/fedreg/ear\\_fedreg.html](http://www.access.gpo.gov/bis/fedreg/ear_fedreg.html).<sup>394</sup>  
Look for list updates.

If you confirm a match, notify the Compliance Screener immediately so that they can notify the employee requesting the screen of the total ban. If the name is close to a name on the above lists, contact Jane L. Doe, Outside Counsel, at (303)999-9999 or [jldoe@abclaw.com](mailto:jldoe@abclaw.com) for advice on how to proceed. Document the date you checked the lists and the date you discussed the matter with Outside Counsel in the **COMPLIANCE CONSULTATION FILE**.

388. 15 C.F.R. § 744.12 (2004); *see also* 15 C.F.R. §§ 746.2-746.4, 746.7-746.8 (2004) (restrictions on exports to Cuba, Iraq, Iran, and Rwanda); *id.* §732.3(i) (2004).

389. 15 C.F.R. § 746.1 (a)-(b) (2004).

390. 15 C.F.R. § 764 (Supp. I 2002); Bureau of Industry and Security, U.S. Department of Commerce, *The Denied Persons List*, available at <http://www.bxa.doc.gov/dpl/thedeniallist.asp>.

391. Bureau of Industry and Security, U.S. Department of Commerce, *Recent Changes to the Denied Persons List*, at <http://www.bxa.doc.gov/dpl/recentchanges.asp> (last visited Feb. 20, 2005).

392. 22 C.F.R. § 127.7 (2004); Directorate of Defense Trade Controls, U.S. Department of State, *List of Statutorily Debarred Parties, July 1988-April 2004*, available at <http://www.pmdtc.org/debar059.htm> (last visited Feb. 20, 2005).

393. Office of Foreign Assets Control, U.S. Department of Treasury, *Specially Designated Nationals and Blocked Persons*, at <http://www.treas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf> (last visited Feb. 25, 2005).

394. U.S. Government Printing Office, *Federal Register Rules Affecting the Export Administration Regulations*, at [http://www.access.gpo.gov/bis/fedreg/ear\\_fedreg.html](http://www.access.gpo.gov/bis/fedreg/ear_fedreg.html) (last visited Feb. 20, 2005).

### 3. Transactions That Require a License (at a minimum)

If a potential customer's name comes up as a match on the following lists, a license will be required, but is not guaranteed to be granted, in order to do business with the party. Should the Compliance Screener notify you of a match, confirm it by searching the name on the appropriate website.

**a. Entity List** – <http://www.access.gpo.gov/bis/ear/pdf/744spir.pdf>.<sup>395</sup>

**b. Unverified List** –

[http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified\\_parties.html](http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified_parties.html).<sup>396</sup>

**c. Office of Foreign Asset Control Embargo List** –

<http://www.treas.gov/offices/enforcement/ofac/sanctions/>.<sup>397</sup>

**d. Office of Defense Trade Control Arms Embargo List** –

<http://pmdtc.org/country.htm>.<sup>398</sup>

If you confirm a match, notify the Compliance Screener immediately, and notify the employee requesting the screen of the need to wait while you apply for a license.

**i.** Document the date you checked the lists and the date you notified the Compliance Screener and the employee of the need to wait for a license in **COMPLIANCE CONSULTATION FILE**.

**ii.** Contact the Engineering department to have them complete an **INITIAL CLASSIFICATION FORM**, so that you can determine whether to apply for a State or Commerce License.

**iii.** Upon receipt of the **INITIAL CLASSIFICATION FORM** from Engineering, follow the directions for applying for a license under the appropriate agency.

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395. 15 C.F.R. § 744 (Supp. IV 2001), Bureau of Industry and Security, U.S. Department of Commerce, *Entity List*, available at <http://www.access.gpo.gov/bis/ear/pdf/744spir.pdf> (last visited Feb. 20, 2005).

396. Bureau of Industry and Security, U.S. Department of Commerce, *Unverified List*, at [http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified\\_parties.html](http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified_parties.html) (last visited Feb. 20, 2005).

397. Office of Foreign Asset Control, U.S. Treasury Department, *Sanctions Program and Country Summaries*, at <http://www.treas.gov/offices/enforcement/ofac/sanctions/> (last visited Feb. 20, 2005).

398. 22 C.F.R. § 126.1 (2004); Directorate of Defense Trade Controls, U.S. Department of State, *Embargo Reference Chart*, available at <http://pmdtc.org/country.htm> (last visited Feb. 20, 2005).

**PART XIV.C – DEEMED EXPORT RULE – POTENTIAL EMPLOYEES – EXPORT  
COMPLIANCE OFFICER**

**1. Deemed Export Rule**

Under export control laws, potential employees who are **not** U.S. Persons may require licenses to receive certain data or training.<sup>399</sup> Exports can take place in the United States, even on the XYZ campus, if technology is transferred to a foreign person here.<sup>400</sup> The law presumes that at some point, a foreign national will return to their home country.<sup>401</sup> This is the *deemed export rule*.<sup>402</sup> The Compliance Screeners will screen all potential employees against the lists below. If they find a match, they will contact you. In the event of a match, contact Jane L. Doe, Outside Counsel, at (303)999-9999 or jldoe@abclaw for guidance on what licenses may be required and if XYZ's **BADGE/CLASSIFICATION REQUIREMENTS** can adequately prevent possible violations if a license is required.

**a. Denied Persons List** – <http://www.bxa.doc.gov/dpl/thedeniallist.asp>.<sup>403</sup>

If **re-screening** a party screened in the last 90 days, go to the recent update site (for a faster screen of the Denied Parties List). Go to <http://www.bxa.doc.gov/dpl/recentchanges.asp>.<sup>404</sup>

**b. Debarred List** – <http://www.pmdtc.org/debar059.htm>.<sup>405</sup>

**c. Specially Designated Nationals** – <http://www.treas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf>.<sup>406</sup>

**d. Federal Register** – [http://www.access.gpo.gov/bis/fedreg/ear\\_fedreg.html](http://www.access.gpo.gov/bis/fedreg/ear_fedreg.html).<sup>407</sup>  
Look for list updates.

**e. Entity List** – <http://www.access.gpo.gov/bis/ear/pdf/744spir.pdf>.<sup>408</sup>

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399. 22 C.F.R. § 120.17 (a)(3)-(4) (2004); 15 C.F.R. § 734.2(b)(2)(ii) (2004).

400. *See supra* note 383.

401. *See supra* note 383.

402. *See supra* note 383.

403. 15 C.F.R. § 764 (Supp. I 2002); Bureau of Industry and Security, U.S. Department of Commerce, *The Denied Persons List*, available at <http://www.bxa.doc.gov/dpl/thedeniallist.asp> (last visited Feb. 20, 2005).

404. Bureau of Industry and Security, U.S. Department of Commerce, *Recent Changes to the Denied Persons List*, at <http://www.bxa.doc.gov/dpl/recentchanges.asp> (last visited Feb. 20, 2005).

405. 22 C.F.R. § 127.7 (2004); Directorate of Defense Trade Controls, U.S. Department of State, *List of Statutorily Debarred Parties, July 1988-April 2004*, available at <http://www.pmdtc.org/debar059.htm> (last visited Feb. 20, 2005).

406. Office of Foreign Assets Control, U.S. Department of Treasury, *Specially Designated Nationals and Blocked Persons*, at <http://www.treas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf> (last visited Feb. 25, 2005).

407. U.S. Government Printing Office, *Federal Register Rules Affecting the Export Administration Regulations*, at [http://www.access.gpo.gov/bis/fedreg/ear\\_fedreg.html](http://www.access.gpo.gov/bis/fedreg/ear_fedreg.html) (last visited Feb. 23, 2005).

408. 15 C.F.R. § 744 (Supp. IV 2002); Bureau of Industry and Security, U.S. Department of Commerce, *Entity List*, available at <http://www.access.gpo.gov/bis/ear/pdf/744spir.pdf> (last visited Feb. 20, 2005).

**f. Unverified List –**

[http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified\\_parties.html](http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified_parties.html).<sup>409</sup>

For more information on the **deemed export rule**, go to <http://www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html>.<sup>410</sup>

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409. Bureau of Industry and Security, U.S. Department of Commerce, *Unverified List*, at [http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified\\_parties.html](http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified_parties.html) (last visited Feb 23, 2005).

410. Bureau of Industry and Security, U.S. Department of Commerce, “*Deemed Export*” *Questions and Answers*, at <http://www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html> (last visited Feb. 23, 2005).

**PART XIV.D – RESPONDING TO EMPLOYEES' QUESTIONS OR CONCERNS –  
EXPORT COMPLIANCE OFFICER**

**1. Diversion Risk/Red Flags**

If a customer provides indications that they may be a diversion risk under the **DIVERSION RISK/RED FLAG CHECKLIST**, employees will contact you.<sup>411</sup> Contact Jane L. Doe, Outside Counsel, at (303)999-9999 or jldoe@abclaw.com to discuss any reported concerns.

**2. Proliferation Risk**

If an employee suspects that a customer may be involved in proliferation activities such as nuclear activities; the design, development, production, or use of missiles; or the design, development, production, stockpiling, or use of chemical or biological weapons, they will notify you. Upon this notification, you will need to apply for a **Commerce Department license** if the potential export falls under Commerce Department rules.<sup>412</sup> Contact the Engineering department to have them complete an **INITIAL CLASSIFICATION FORM**, so that you can determine whether to apply for a State or Commerce License.

**3. Anti-Boycott Protections**

If an employee contacts you with suspicions or concerns regarding an illegal boycott, follow the steps for handling reports under **COMPLIANCE 911 PROTOCOLS** while you investigate.<sup>413</sup> Identify any invitations to participate and any employee response to such invitation.<sup>414</sup> Contact Jane L. Doe, Outside Counsel, at (303)999-9999 or jldoe@abclaw.com to discuss any possible violations and to complete any reports of invitations required under the law.<sup>415</sup>

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411. 15 C.F.R. § 732 (Supp. III 1997); *see also supra* Part IV.

412. 15 C.F.R. §§ 744.2(a), 744.3(a), 744.4(a) (2004).

413. *See supra* Part V.

414. *See* 15 C.F.R. §§ 760.2-760.5 (2004).

415. *See id.*

#### 4. Anti-Bribery Protections

Employees have been explicitly instructed that any requests for reimbursement or requests to cover expenses must be approved by the Compliance Officer, in order to avoid the payment of illegal bribes.<sup>416</sup>

In some cases, certain common business practices, such as paying the costs of a foreign official to travel for a plant visit and certain ministerial payments are allowed under the law.<sup>417</sup> It is important that XYZ employees understand that they are *not* to identify potential exceptions to the general ban against payments. Instead, only you can make this determination.

Exceptions under the Anti-Bribery laws include payments to facilitate *routine government actions*.<sup>418</sup> Examples would be obtaining permits or licenses and getting utilities or phone lines connected. Payments that are *lawful under the laws of the particular foreign country* also are an exception to the general ban on payments.<sup>419</sup>

As a general rule, avoid reimbursing officials for expenses incurred. Rather, let XYZ incur the expenses directly. This creates a paper trail documenting actual use of the payment.

Contact Jane L. Doe, Outside Counsel, at (303)999-9999 or [jl DOE@abclaw.com](mailto:jl DOE@abclaw.com) to discuss whether a proposed payment might qualify for an exception. It is extremely important that you document the sources of information used to approve any payment in the **COMPLIANCE CONSULTATION FILE**.

#### 5. Import and Export of Customer Item

Engineers may contact you regarding the temporary import of customer items for projects. Often these imports require a license.<sup>420</sup> Further, once the item enters the United States, even if it belongs to a customer, XYZ may need a license to return the item, because the item becomes subject to U.S. export laws when it enters the United States.<sup>421</sup> Contact Jane L. Doe, Outside Counsel, at (303)999-9999 or [jl DOE@abclaw.com](mailto:jl DOE@abclaw.com) for assistance with these issues.

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416. See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (2004).

417. 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2); *id.* §§ 78dd-1(b), 78dd-2(b).

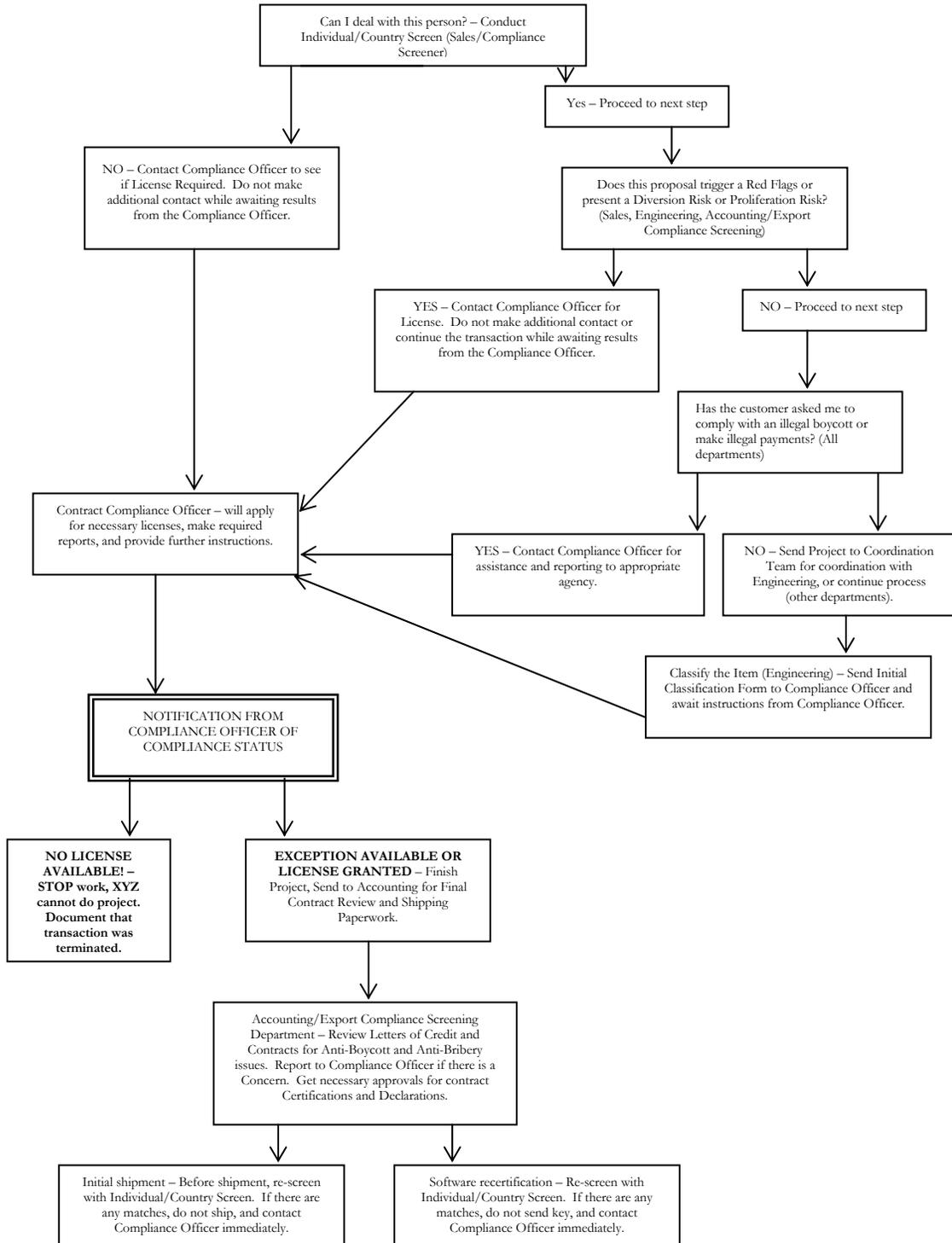
418. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b).

419. 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(2).

420. 22 C.F.R. § 120.18 (2004).

421. 22 C.F.R. § 120.17(a)(1) (2004); 15 C.F.R. § 730.5(a) (2004).

**PART XIV.E- XYZ LICENSING PROCESS – EXPORT COMPLIANCE OFFICER**



**PART XIV.F – APPLYING FOR STATE DEPARTMENT LICENSES – EXPORT  
COMPLIANCE OFFICER**

**1. State Department Licenses**

Upon your request (after an **INDIVIDUAL/COUNTRY SCREEN** indicates the need for a license) or after receiving a project, the Engineering department will fill out an **INITIAL CLASSIFICATION FORM**. If they determine that an item is inherently military because it was designed, modified, or adapted for military application, they will indicate that its export is controlled by the State Department’s U.S. Munitions List (“Munitions List”).<sup>422</sup>

Once the engineer has determined that the item is subject to the Munitions List and a State Department license is required, they will provide the following information on the **INITIAL CLASSIFICATION FORM**:

- A proposed Munitions List **category number**<sup>423</sup>
- Whether they believe the item may be the product of fundamental research and qualify for a licensing exception<sup>424</sup>
- Whether they believe the project is ongoing in nature and may qualify for licensing under a Technical Assistance Agreement<sup>425</sup>
- Relevant information for preparation of a **Commodity Jurisdiction Request**<sup>426</sup>

**2. If Engineering Does Not Think the State Department Controls the Export**

If the Engineering Department determines that the potential export is **not** controlled by the State Department, they will ask for your approval of this determination on their **INITIAL CLASSIFICATION FORM**. If you agree with their determination, sign off on the form and return it to the employee. Keep a copy in the **COMPLIANCE CONSULTATION FILE**. Go to the next section, **EXPORTS UNDER COMMERCE DEPARTMENT RULES** at **PART XIV.H**.

If you are unsure whether or not State Department rules apply, continue through this section. If you still do not feel comfortable making the determination, contact Jane L. Doe, Outside Counsel at (303)999-9999 or jldoe@abclaw.com for assistance.

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422. 22 C.F.R. § 120.3(a) (2004).

423. *Id.* § 121 (2004).

424. *Id.* §§ 120.11 (a) (8), 120.10(a)(5) (2004).

425. *Id.* § 120.22 (2004).

426. *Id.* § 120.4 (2004).

### 3. Fundamental Research Licensing Exception

Under the Munitions List, there is a licensing exception for fundamental research.<sup>427</sup> Because much of XYZ's software is based on the work that Tom Johnson did at the university, there is a strong possibility that this exception may apply.

Fundamental research is:

- Conducted in engineering at accredited U.S. colleges<sup>428</sup>
- Information ordinarily published/shared broadly in the scientific community<sup>429</sup>

Research is not fundamental if:

- It is funded by the U.S. government and the government places controls on the dissemination of the information as part of the funding requirement<sup>430</sup>
- The university agreed to restrictions (from sources other than the government) on the publication of the research<sup>431</sup>

### 4. Technical Assistance Agreements

A Technical Assistance Agreement is available if a project will involve ongoing use of software or services (but will not grant the customer a right to manufacture the software).<sup>432</sup>

### 5. Using the Fundamental Research Exception and Technical Assistance Agreements

Contact Jane L. Doe, Outside Counsel, at (303)999-9999 or [jl DOE@abclaw.com](mailto:jl DOE@abclaw.com) for assistance determining whether an export qualifies as fundamental research or if a Technical Assistance Agreement may apply.

### 6. Determining that a State Department License is Required

To make a final determination that a State Department license is required, you must make a Commodity Jurisdiction Request.<sup>433</sup> See **PART XIV.G** for details on preparing a **COMMODITY JURISDICTION REQUEST**.

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427. *Id.* § 120.11 (a)(8).

428. *Id.*

429. *Id.*

430. *Id.* § 120.11(8)(ii).

431. *Id.* § 120.11(8)(i).

432. *See id.* § 120.22 (2004).

433. *Id.* § 120.4 (2004).

**PART XIV.G – COMMODITY JURISDICTION REQUEST WITH STATE  
DEPARTMENT – EXPORT COMPLIANCE OFFICER**

Commodity Jurisdiction Requests are complex applications to the State Department for determination whether or not the Munitions List covers the potential export.<sup>434</sup> The Munitions List *does not cover* items that are *predominantly civil* and have a *performance equivalent* in civil application.<sup>435</sup> The key to a Commodity Jurisdiction Request is to identify and adequately describe the predominantly civil nature of the item and its performance equivalent in civil application, if applicable.<sup>436</sup>

- **Performance equivalent** is defined by *form, fit, or function*.<sup>437</sup>
- The *intended use* of the item is *not* relevant to the inquiry. For example, even though an item is being designed for a civil application, if it is not predominantly civil and does not have a performance equivalent in civil application, the item will still be covered by the Munitions List.<sup>438</sup>

**1. Information Required for Commodity Jurisdiction Request**

Engineering will provide the information you will need to provide for the Commodity Jurisdiction Request with the **INITIAL CLASSIFICATION FORM**:

- Description of the article or service<sup>439</sup>
- History of design, development and use<sup>440</sup>
- Brochures or documents related to the item<sup>441</sup>

For more information on the documents required for a Commodity Jurisdiction Request, go to <http://www.pmdtc.org/docs/cj.pdf>.<sup>442</sup>

**2. Filing a Commodity Jurisdiction Request**

Once you have compiled the information for a commodity jurisdiction request, contact Jane L. Doe, Outside Counsel, at (303)999-9999 or [jldoe@abclaw.com](mailto:jldoe@abclaw.com) for preparation of the request.

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434. *See id.*

435. *Id.* § 120.3(a)(i)-(ii) (2004).

436. *See id.*

437. *Id.* § 120.3(a)(ii).

438. *See id.* § 120.3(b).

439. *See id.* § 120.4(c) (2004).

440. *Id.*

441. *Id.*

442. Directorate of Defense Trade Controls, U.S. Department of State, *Guidelines for Preparing Commodity Jurisdiction Requests*, at <http://www.pmdtc.org/docs/cj.pdf> (last visited Jan. 25, 2005).

### **3. Begin the Initial Classification Process Early**

Because Commodity Jurisdiction Requests can take up to forty-five days (and then require licensing after the request is returned), it is important to complete the **INITIAL CLASSIFICATION FORM** as quickly as possible.<sup>443</sup>

### **4. Appealing the Results of a Commodity Jurisdiction Request**

The results of the Commodity Jurisdiction Request are not final, they may be appealed.<sup>444</sup> If you strongly disagree with the State Department's determination, contact Jane L. Doe, Outside Counsel, at (303)999-9999 or [jldoe@abclaw.com](mailto:jldoe@abclaw.com) to discuss the possibility of an appeal.

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443. *See* 22 C.F.R. §120.4(e).

444. *Id.* § 120.4(g).

**PART XIV.H – EXPORTS UNDER COMMERCE DEPARTMENT RULES – EXPORT  
COMPLIANCE OFFICER**

**1. Exports Covered by the Commerce Department**

If the export is not covered by the State Department, you must determine whether it is subject to Commerce Department rules.<sup>445</sup> The Commerce Department covers items considered “dual use,” or those that may have both civilian and military application.<sup>446</sup> Almost any item can fall under the Commerce Department rules. Under these rules, your export may:

- Be eligible for export *without* a license<sup>447</sup>
- Be eligible for export under a *license exception* (a self-validated license the exporter “grants” themselves, a “Self-Validated License Exception”)<sup>448</sup>
- Require a license<sup>449</sup>

**2. Refer to the Initial Classification Form from Engineering**

To determine what requirements apply to your export under the Commerce Department Rules, you will need to refer to the Export Classification Control Number (“ECCN”) assigned by the Engineering and the ECCN details the Engineer attached to the **INITIAL CLASSIFICATION FORM**.<sup>450</sup>

**3. Steps under Commerce Department Rules**

Under the Commerce Department rules, follow these steps:<sup>451</sup>

- a. Determine whether a license is required or you can ship without a license – **No License Required – NLR**
- b. If a license is required, search for an exception (a **Self-Validated License Exception**)
- c. If there is no exception, **apply for a license**

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445. See 22 C.F.R. § 120.5 (2004); 15 C.F.R. § 730.3 (2004).

446. 15 C.F.R. § 730.3.

447. See *id.* §§ 732.1(d)-(e) (2004).

448. See *id.* § 732.4(a) (2004).

449. See *id.* § 732.1(d) (2004).

450. See *id.* § 738.2(c) (2004).

451. See *id.* § 732.1; see also *id.* § 732 (Supp. II 1997).

**PART XIV.I – SHIPPING WITHOUT A LICENSE UNDER COMMERCE DEPARTMENT RULES – (NLR) – EXPORT COMPLIANCE OFFICER**

Under the Commerce Department rules, a Commerce Department license is not required if:

- It is software or technology that is **publicly available**,<sup>452</sup>
- The item is **EAR99**,<sup>453</sup> or
- There are **no controls** on the **country of ultimate destination** for the **reasons** your particular export's ECCN is controlled.<sup>454</sup>

**1. NLR Option 1 – Publicly Available Software/Technology**

Software or technology can be exported under NLR status if the following three conditions are met:

- a. The technology or software is **publicly available**.<sup>455</sup>
- b. The technology or software is *not being used* in support of **proliferation** activities.<sup>456</sup>
- c. The technology or software is *not encryption code*, **ECCN 5D002**.<sup>457</sup>

You *cannot use* the NLR status if the individual is on the **DENIED PERSONS LIST** in the **INDIVIDUAL/COUNTRY SCREEN**.<sup>458</sup> You must **apply for a license**. Go to **PART XIV.L**.

**a. Publicly Available**

*Publicly available* means the software or technology is available to the public in the form of periodicals, books, electronic, or any other media; readily available at libraries; covered by patents or published patent applications; released at conferences open to the public.<sup>459</sup> *Software* is considered *publicly available* when it is available through general distribution at a cost not exceeding the cost of reproducing and distributing it.<sup>460</sup>

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452. 15 C.F.R. § 734.3(b)(3) (2004).

453. See 15 C.F.R. §§ 732.3(d)(5), 732.3(g)-(l), *but see infra* note 466 (describing the potential need for a license for EAR99 items being reexported to Iran).

454. 15 C.F.R. § 738.4(a)(2) (2004).

455. *Id.* § 734.3(b)(3).

456. *Id.* §§ 744.2-744.4 (2004).

457. *Id.* § 774 (Supp. I 1998).

458. *Id.* §§ 736.2(b)(4), 744.1(c) (2004).

459. *Id.* §§ 734.3(b)(3), 734.7(a) (2004).

460. *Id.* § 734.7(b) (2004).

**b. Not Used in Proliferation Activities**<sup>461</sup>

The Sales and Engineering departments screen for customer proliferation activities. Contact the salesperson on the project for a copy of their **PROLIFERATION RISK CHECKLIST** from the **CUSTOMER FILE**.

In addition, contact the engineer on the project to confirm that there were no indications that the customer is involved in proliferation activities. Document these communications in the **PROJECT LICENSING FILE**.

**c. Not ECCN 5D002**<sup>462</sup>

The Engineer will have provided an ECCN on the **INITIAL CLASSIFICATION FORM**. If the ECCN is *not* **5D002**, file the **INITIAL CLASSIFICATION FORM** with the **PROJECT LICENSING FILE**.

If your export meets all of these requirements, go to **PART XIV.I.4** for further instructions.

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461. *Id.* § 736.2(b)(7).

462. *Id.* § 734.3(b)(3).

## 2. NLR Option 2 – Item is EAR99

Exports classified as EAR99 can be exported under NLR status if the following six conditions are met:<sup>463</sup>

- a. The item is **EAR99**.<sup>464</sup>
- b. The **CUSTOMER SCREENS** did not specifically trigger the need for a license.<sup>465</sup>
- c. The export is not going to an **embargoed destination**.<sup>466</sup>
- d. The export is **not being used** in support of **proliferation** activities.<sup>467</sup>
- e. The shipment will **not travel through** or be **temporarily unloaded** in: Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Cambodia, Cuba, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Laos, Latvia, Lithuania, Mongolia, North Korea, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan or Vietnam.<sup>468</sup>
- f. The technology or software is **not encryption code, ECCN 5D002**.<sup>469</sup>

You *cannot use* the NLR status if the individual is on the **DENIED PERSONS LIST** in the **INDIVIDUAL/COUNTRY SCREEN**.<sup>470</sup> You must **apply for a license**. Go to **PART XIV.L**.

### a. Item is EAR99

The Engineer will have provided an ECCN on the **INITIAL CLASSIFICATION FORM**. If the item classification is **EAR99**, file the **INITIAL CLASSIFICATION FORM** with the **PROJECT LICENSING FILE**.

### b. Customer Screens Did NOT Trigger Need for License<sup>471</sup>

The Coordination Team will contact you if any screens indicated the need for a license. All departments will contact you if they have concerns about any customer or transaction that might trigger the need for a license. If the article is to be exported or reexported to Iran, contact Outside Counsel for assistance in determining whether any additional licensing requirements may apply.<sup>472</sup>

463. *See id.* § 732.3(d)(5).

464. *Id.*; *see also infra* note 466.

465. *See supra* Part XII.A; 15 C.F.R. § 732.3(g)-(h) (2004).

466. 15 C.F.R. § 732.3(i) (2004). In certain circumstances, re-export of an EAR99 item to Iran may *not* be subject to a licensing requirement under the EAR (NLR), but *still* be subject to a licensing requirement under the Office of Foreign Asset Controls [hereinafter "OFAC"]. *Id.* § 746.7. Exports made in violation of OFAC licensing requirements also violate the EAR. *Id.* § 746.7 (prohibiting exports or re-exports to Iran of items subject to both the EAR and OFAC's Iranian Transactions Regulations without OFAC authorization). The author extends special thanks to Mark D. Menefee for pointing out and clarifying this overlap of Commerce and Treasury Department regulations.

467. *Id.* § 732.3(j).

468. *Id.* §§ 732.3(k), 736.2(b)(8)(ii) (2004).

469. *Id.* § 734.3(b)(3).

470. *Id.* §§ 736.2(b)(4), 744.1(c) (2004).

471. *See supra* Part XII.A; 15 C.F.R. § 732.3(g)-(h).

472. *See supra* note 466.

**c. Not Going to Embargoed Destination**

The Compliance Screeners screen for embargoed destinations. Contact the Compliance Screener on the project for a copy of their **INDIVIDUAL/COUNTRY SCREEN** from the **CUSTOMER FILE**. File a copy of this the **INDIVIDUAL/COUNTRY SCREEN** in the **PROJECT LICENSING FILE**.

**d. Not Used in Proliferation Activities**

The Sales and Engineering Departments screen for customer proliferation activities. Contact the salesperson on the project for a copy of their **PROLIFERATION RISK CHECKLIST** from the **CUSTOMER FILE**.

**e. Export will Not Travel through or Be Unloaded in the Prohibited Countries<sup>473</sup>**

Contact Accounting for details on the country of ultimate destination and shipment route of the proposed export. Compare this against the list above. File a copy of this information in the **PROJECT LICENSING FILE**.

**f. Not ECCN 5D002<sup>474</sup>**

The Engineer will have provided an ECCN on the **INITIAL CLASSIFICATION FORM**. If the ECCN is *not* **5D002**, file the **INITIAL CLASSIFICATION FORM** with the **PROJECT LICENSING FILE**.

If your export meets all of these requirements, go to **PART XIV.I.4** for further instructions.

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473. *See supra* Part XIV.H.2.

474. 15 C.F.R. § 734.3(b)(3).

### 3. NLR Option 3 – No Country Controls for Reason Your ECCN is Controlled

Exports that are not controlled for reasons the Commerce Department controls exports to your country of ultimate destination can be exported under NLR status if the following three conditions are met:

- a. The **combination** of your **ECCN** and **Country** of ultimate destination do not require a license.<sup>475</sup>
- b. The **CUSTOMER SCREENS** did not specifically trigger the need for a license.<sup>476</sup>
- c. The export is not going to an **embargoed destination**.<sup>477</sup>
- d. The export is **not being used** in support of **proliferation** activities.<sup>478</sup>
- e. The shipment will **not travel through** or be **temporarily unloaded** in: Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Cambodia, Cuba, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Laos, Latvia, Lithuania, Mongolia, North Korea, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan or Vietnam.<sup>479</sup>

#### a. ECCN and Country Chart Combination

Determine whether your item or technology's ECCN is controlled for the reasons shipment to the country of ultimate destination is controlled.<sup>480</sup>

- Review the ECCN details attached to the **INITIAL CLASSIFICATION FORM** from Engineering. Determine the reason(s) for control.<sup>481</sup>
- Cross reference the **Country Chart**, at <http://www.access.gpo.gov/bis/ear/pdf/738spir.pdf>.<sup>482</sup> If the reason your ECCN is controlled is *not* marked with an X, continue with the steps to determine if you can make the export under NLR designation.<sup>483</sup>

#### b. Customer Screens Did NOT Trigger Need for License<sup>484</sup>

The Coordination Team will contact you if any screens indicated the need for a license. All departments will contact you if they have concerns about any customer or transaction that might trigger the need for a license.

475. *Id.* § 738.4(a) (2004).

476. *See supra* Part VII.A; 15 C.F.R. § 732.3(g)-(h) (2004).

477. 15 C.F.R. § 732.3(i) (2004).

478. *Id.* § 732.3(j).

479. *Id.* §§ 732.3(k); 736.2 (b)(8)(ii) (2004).

480. *Id.* § 738.4(a).

481. *Id.* § 738.2(d)(2)(i) (2004).

482. *Id.* § 738 (Supp. I 2003), Export Administration Regulations Database, Supplement I to Part 738, available at <http://www.access.gpo.gov/bis/ear/pdf/738spir.pdf> (last visited Feb. 12, 2005).

483. 15 C.F.R. § 738.4(a)-(b) (2004).

484. *See supra* Part VII.A; 15 C.F.R. § 732.3(g)-(h).

**c. Not Going to Embargoed Destination**

The Compliance Screeners screen for embargoed destinations. Contact the Compliance Screener on the project for a copy of their **INDIVIDUAL/COUNTRY SCREEN** from the **CUSTOMER FILE**. File a copy of this the **INDIVIDUAL/COUNTRY SCREEN** in the **PROJECT LICENSING FILE**.

**d. Not Used in Proliferation Activities**

The Sales and Engineering Departments screen for customer proliferation activities. Contact the salesperson on the project for a copy of their **PROLIFERATION RISK Checklist** from the **CUSTOMER FILE**.

**e. Export will Not Travel through or Be Unloaded in the Prohibited Countries<sup>485</sup>**

Contact Accounting for details on the country of ultimate destination and shipment route of the proposed export. Compare this against the list above. File a copy of this information in the **PROJECT LICENSING FILE**.

If your export meets all of these requirements, go to **PART XIV.I.4** for further instructions.

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485. *See supra* Part XIV.H.3.

#### 4. Exporting Under NLR (No License Required) Status

If the export meets the requirements of the *publicly available exception*, the *EAR99 exception* requirements, or is *not controlled for the reasons the country of its ultimate destination is controlled*, it may be exported without a license.<sup>486</sup> All invoices, bills of lading, and shipping documents must specify “NLR.”<sup>487</sup> Inform Accounting they may use the NLR designation in the license fields on all paperwork. If the reason the export has NLR status is because the export is *EAR99*, it should be listed on paperwork as “NLR-EAR99.”<sup>488</sup> Document these steps in the **PROJECT LICENSE FILE**.

#### 5. Remember, NO NLR Status for Exports to Denied Persons

Remember, if the potential customer or employee matched on the **DENIED PERSONS LIST** on the **INDIVIDUAL/COUNTRY SCREEN**, you *cannot* export to them under NLR status.<sup>489</sup> You must **apply for a license**. Go to **PART XIV.L**.

#### 6. If the Export Does NOT Qualify for NLR Status

If the export does not qualify for NLR status, go to the next step, **FINDING EXCEPTIONS** at **PART XIV.J**.

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486. 15 C.F.R. § 734.3(b)(3) (2004) (not subject to the EAR because technology or software is publicly available); *id.* § 732.3(d)(5) (exports classified as EAR99); *id.* § 738.4(a)(2)(ii)(B) (export not controlled with respect to reason for control and destination).

487. 15 C.F.R. § 758.1(g)(3) (2004).

488. *Id.*

489. *Id.* § 736.2(b)(4) (2004).

**PART XIV.J – SELF-VALIDATED LICENSE EXCEPTIONS UNDER COMMERCE  
DEPARTMENT RULES – EXPORT COMPLIANCE OFFICER**

**1. Self-Validated License Exceptions**

As long as your export is not further limited by the Commerce Department Rules, you may be able to export under a **SELF-VALIDATED LICENSE EXCEPTION**. Essentially, this is a license you grant to yourself.<sup>490</sup>

**2. NO Self-Validated License Exceptions for Denied Persons**

If the individual matched on the **DENIED PERSONS LIST** on the **INDIVIDUAL/COUNTRY SCREEN**, you *cannot* use a Self-Validated License Exception.<sup>491</sup> You need to **apply for a license**. Go to **PART XIV.L**.

**3. No Express Limitation on Using Self-Validated License Exceptions**

There are *two lists* to check for *express limitation* on using Self-Validated License Exceptions. These will require you to reference the ECCN that Engineering assigned the project on the **INITIAL CLASSIFICATION FORM**.

- Section 740 of the Commerce Department rules:<sup>492</sup> <http://www.access.gpo.gov/bis/ear/pdf/740.pdf><sup>493</sup> – use the binoculars in the upper toolbar to “jump” to §740.2. If your ECCN is listed in §740.2, contact Jane L. Doe, Outside Counsel, at (303)999-9999 or [jldoe@abclaw.com](mailto:jldoe@abclaw.com) to determine whether you can use a Self-Validated Exception.
- Section 742 of the Commerce Department rules:<sup>494</sup> <http://www.access.gpo.gov/bis/ear/pdf/742.pdf><sup>495</sup> – use the binoculars in the upper toolbar to see if your ECCN is listed in §742, contact Jane L. Doe, Outside Counsel, at (303)999-9999 or [jldoe@abclaw.com](mailto:jldoe@abclaw.com) to determine whether you can use a Self-Validated Exception.

If your ECCN is *not* on either list, continue to search for a Self-Validated License Exception.

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490. *Id.* § 740.1(a) (2004).

491. *See id.* §§ 736.2(b)(4)(i), 740.2(a)(2).

492. *See id.* § 740 (2004).

493. *Id.* § 740 (Supp. I 2001), Export Administration Regulations Database– License Exceptions, available at <http://www.access.gpo.gov/bis/ear/pdf/740.pdf> (last visited Feb. 12, 2005).

494. 15 C.F.R. § 742 (2004).

495. *Id.*; Export Administration Regulations Database, Part 742 – Control Policy – CCL Based Controls, available at <http://www.access.gpo.gov/bis/ear/pdf/742.pdf> (last visited Feb. 12, 2005).

**PART XIV.K – SELF-VALIDATED LICENSE EXCEPTION EXAMPLE – EXPORT COMPLIANCE OFFICER**

There are many different Self-Validated License Exceptions.<sup>496</sup> These can be found at <http://www.access.gpo.gov/bis/ear/pdf/740.pdf> in §§740.3-740.18.<sup>497</sup>

One commonly applicable Self-Validated License Exceptions is described in step-by-step detail below as an example. Contact Jane L. Doe, Outside Counsel, at (303)999-9999 or [jldoe@abclaw.com](mailto:jldoe@abclaw.com) for assistance using a Self-Validated License Exception for the first time or if you determine that a license exception in §740 of the Commerce Department Rules other than those described in this manual may apply.

When reviewing the Self-Validated License Exceptions, remember that the specific exception *must* be listed as an *available exception* under your export's ECCN as determined by Engineering on the **INITIAL CLASSIFICATION FORM**.<sup>498</sup>

**1. Example of Self-Validated License Exception - Limited Value Shipments Self-Validated License Exception (LVS)**

LVS Exception requires:<sup>499</sup>

- a. That LVS be an available License Exception for your ECCN<sup>500</sup>
- b. That the *value of the shipment not exceed* the LVS amounts for the *individual shipment* or cause the *annual value* of all shipments of this particular ECCN to *exceed* the LVS annual allowance for the ECCN<sup>501</sup>
- c. The *country of ultimate destination* must be on **Country Group B**<sup>502</sup>

**2. Consider Whether the Export Qualifies for the LVS Exception****a. Confirm that LVS is an Available Exception for your ECCN**

Refer to the ECCN information attached to the **INITIAL CLASSIFICATION FORM** from Engineering. Confirm that under *License Exceptions*, LVS is an available exception.

**b. Determine the LVS Limits for Your ECCN**

Refer to the ECCN information attached to the **INITIAL CLASSIFICATION FORM**. The *LVS per shipment* is the amount next to the LVS exception.<sup>503</sup> The *Annual LVS Limit* is 12 times the amount of the *LVS per shipment*.<sup>504</sup>

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496. See 15 C.F.R. §§ 740.3-740.18 (2004).

497. *Id.*; Export Administration Regulations Database, Part 740 – License Exceptions, available at <http://www.access.gpo.gov/bis/ear/pdf/740.pdf> (last visited Feb. 12, 2005).

498. 15 C.F.R. § 738.2(d)(2)(ii) (2004).

499. See *id.* § 740.3.

500. See *id.* § 738.2(d)(2)(ii).

501. *Id.* § 740.3(c)-(d).

502. *Id.* § 740.3(b).

503. See *id.* § 774 (Supp. I 1998).

504. *Id.* § 740.3(d)(2).

**c. Country of Ultimate Destination is on Country Group B**

Go to <http://www.access.gpo.gov/bis/ear/pdf/740spir.pdf>. and use the binoculars to “jump” to “Country Group B.”<sup>505</sup> Determine whether or not your country of ultimate destination is on Country Group B. Print a copy of Country Group B and file in the **PROJECT LICENSE FILE**.

**3. If You Determine the Export Qualifies for a Self-Validating License Exception**

Contact Jane L. Doe, Outside Counsel, at (303)999-9999 or [jldoe@abclaw.com](mailto:jldoe@abclaw.com) if you would like to confirm the availability of this Self-Validating License Exception. Document that the exception is available in the **PROJECT LICENSE FILE** and notify **Accounting** about how to use this Self-Validating License Exception on export documents.

**4. Other Self-Validating License Exceptions to Consider**

As noted above, there are many Self-Validating License Exceptions available. All of the exceptions listed in § 740 of the Commerce Department Rules should be considered. A few exceptions may be of particular relevance for XYZ’s business:

- Technology and Software Under Restriction (TSR) – § 740.6<sup>506</sup>
- Computers (CTP) – § 740.7<sup>507</sup>
- Technology and Software Unrestricted (TSU) – § 740.13<sup>508</sup>
- Encryption Commodities and Software (ENC) – § 740.17<sup>509</sup>

Contact Jane L. Doe, Outside Counsel, at (303)999-9999 or [jldoe@abclaw.com](mailto:jldoe@abclaw.com) for questions about any of these Self-Validating License Exceptions and assistance in walking through the specific requirements of each exception.

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505. *Id.* § 740 (Supp. I 2001), Export Administration Regulations Database, available at <http://www.access.gpo.gov/bis/ear/pdf/740spir.pdf> (last visited Feb. 12, 2005).

506. 15 C.F.R. § 740.6 (Supp. I 2001), Export Administration Regulations Database, available at <http://www.access.gpo.gov/bis/ear/pdf/740spir.pdf> (last visited Feb. 12, 2005).

507. *Id.* § 740.7 (Supp. I 2001), Export Administration Regulations Database, available at <http://www.access.gpo.gov/bis/ear/pdf/740spir.pdf> (last visited Feb. 12, 2005).

508. *Id.* § 740.13 (Supp. I 2001), Export Administration Regulations Database, available at <http://www.access.gpo.gov/bis/ear/pdf/740spir.pdf> (last visited Feb. 12, 2005).

509. *Id.* § 740.17 (Supp. I 2001), Export Administration Regulations Database, available at <http://www.access.gpo.gov/bis/ear/pdf/740spir.pdf> (last visited Feb. 12, 2005).

**PART XIV.L – APPLYING FOR A COMMERCE DEPARTMENT LICENSE – EXPORT COMPLIANCE OFFICER**

Should you determine that your export does not qualify for NLR status or a Self-Validating License Exception, you will need to apply for an Individual Validated License.<sup>510</sup> You can find information on Commerce Department Licenses at <http://www.bxa.doc.gov/Licensing/facts1.htm>.<sup>511</sup>

The Commerce Department has a user-friendly on-line license processing system called “SNAP.”<sup>512</sup> Details are available at <http://www.bxa.doc.gov/Licensing/facts5.htm>.<sup>513</sup> Contact Jane L. Doe, Outside Counsel, at (303)999-9999 or [jldoe@abclaw.com](mailto:jldoe@abclaw.com) for assistance on how to participate in SNAP.

Once you receive an approved license, notify Accounting so they may complete the shipping paperwork, and document this step in the **PROJECT LICENSING FILE**.

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510. 15 C.F.R. §§ 748.4, 748.6 (2004).

511. *Id.*, Bureau of Industry and Security, U.S. Department of Commerce, *Licensing Facts*, available at <http://www.bxa.doc.gov/Licensing/facts1.htm> (last visited Feb. 12, 2005).

512. *See* 15 C.F.R. § 748.7(a) (2004).

513. *Id.*: Bureau of Industry and Security, U.S. Department of Commerce, *Licensing Facts*, available at <http://www.bxa.doc.gov/Licensing/facts5.htm> (last visited Feb. 12, 2005).

**PART XIV.M – EXPORT COMPLIANCE FORMS – EXPORT COMPLIANCE OFFICER**

**PROJECT LICENSING FORM –EXPORT COMPLIANCE OFFICER**

NAME OF CUSTOMER \_\_\_\_\_

XYZ JOB NUMBER \_\_\_\_\_

Agency Controlling Export: State \_\_\_\_\_ Commerce \_\_\_\_\_

Compliance Officer Name/Initial \_\_\_\_\_/\_\_\_\_\_

Date File Opened \_\_\_\_\_

Date License Obtained (or exception determined, if applicable) \_\_\_\_\_

Date Accounting or Applicable Department Notified With Licensing Details on  
How to Proceed \_\_\_\_\_**State Department Licenses**Munitions List Category Number<sup>514</sup> \_\_\_\_\_Fundamental Research Exception?<sup>515</sup> YES \_\_\_\_\_ NO \_\_\_\_\_Technical Assistance Agreement Sought/Received?<sup>516</sup> YES \_\_\_\_\_ NO \_\_\_\_\_**Commodity Jurisdiction Request Information.**<sup>517</sup>

Predominantly Civil Application? YES \_\_\_\_\_ NO \_\_\_\_\_

Performance Equivalent in Civil Application (form, fit, and function)?

YES \_\_\_\_\_ NO \_\_\_\_\_

Date Commodity Jurisdiction Request Completed/Submitted \_\_\_\_\_

**File Copy of**

CJR Application (date) \_\_\_\_\_

Results from State Department in Project Licensing File (date) \_\_\_\_\_

514. *See supra* Part XIV.G.515. *See supra* Part XIV.F.3.516. *See supra* Part XIV.F.4.517. *See supra* Part XIV.G.

**Commerce Department Licenses**ECCN:<sup>518</sup> \_\_\_\_\_Individual on Denied Parties List?<sup>519</sup> YES\_\_\_\_ NO\_\_\_\_ If YES, apply for licenseEligible to ship without a license/NLR?<sup>520</sup> YES\_\_\_\_ NO\_\_\_\_

If YES, list reason\_\_\_\_\_

Self-Validating License Exception Applies?<sup>521</sup> YES\_\_\_\_ NO\_\_\_\_

If YES, list applicable exception\_\_\_\_\_

License Required? YES\_\_\_\_ NO\_\_\_\_

If YES, Date applied\_\_\_\_\_, Date received\_\_\_\_\_

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518. *See supra* Part XIV.H.2.

519. *See supra* Part XIV.I.5.

520. *See supra* Part XIV.I4.

521. *See supra* Part XIV.J.