

EXPORT AUTHORIZATION DETERMINATIONS

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1.0 PURPOSE

All export control regimes require authorizations for certain activities. The identification and proper use of required export authorizations is therefore a critical component of compliance for any exporting organization. Organizations must have procedures and controls in place to identify export authorization requirements and prohibitions under any applicable country's export regulations, and to obtain any required authorizations for their exports, reexports, intangible exports, in-country transfers or brokering activities.

The classification and destination of the exported item, and in some cases the end uses or end users, will generally determine the applicable authorization requirements, if any, as well as which type or types of export authorization may be used to satisfy those requirements.

2.0 REQUIREMENTS

2.1 Authorization Determination Procedures

2.1.1 Mandatory Authorization Determination for Transactions Subject to Export Control Laws

All transactions covered by export control laws – potentially including exports, reexports, intangible exports, in-country transfers or brokering – must be reviewed to determine any export authorization requirements and prohibitions. This includes analyses of the item's classification, intended destination(s), end-use(s) and end-user(s) to ensure that all potential authorization requirements or prohibitions are identified and addressed.

In cases where multiple countries have jurisdiction over an export or reexport, an organization must determine the export classification and licensing requirements of the country of export as well as those of any country that has extraterritorial jurisdiction over the transaction. Authorizations from multiple countries may be required.

2.1.2 Required Elements of Authorization Determination Procedures

To make these determinations, organizations should have a documented procedure assigning responsibility for gathering the information about a particular export required to determine if the export is permitted and whether an authorization is required. This procedure should, at a minimum, establish and delegate responsibilities as to the following:

Identifying the country or countries whose regulations apply.

- Identifying prohibited exports and those subject to export authorization requirements, including a system of tools that:
 - Captures item classification decisions for a given item of hardware, software, technology or service as well as details regarding the destination;
 - Captures information about the end user and end use involved in a given transaction, as well as any transactional abnormalities (sometimes called “red flags”), to identify authorization requirements or prohibitions based on end user, end use and diversion risks;
 - Makes an ultimate determination whether an authorization is required, which types of authorization can be considered and applied to the proposed transaction (see Section 2.2.1);
 - Captures authorization decisions to facilitate consistent application of the procedure;
 - Identifies and treats with greater scrutiny those items or trade patterns that implicate tighter export control rules such as military hardware, technology or services; and
 - Where transactions are not permissible (*i.e.* where a license application for an export is subject to a policy of denial for the given item, destination and/or end-use), holds and manages the potential transaction to closure.
- Automated processes to hold transactions that require an authorization until the appropriate person verifies the authorization is obtained, implemented and ready for use or that an authorization is not needed. This procedure should establish clear criteria for when and by whom an Authorization “hold” can be removed to allow an export to proceed.
- Business process planning for authorization requirements, such as assessment of export authorization requirements at an appropriately early stage of business activity and making contracts or quotes contingent on securing export authorizations
- Multiple layers of transaction review to identify and confirm authorization requirements and ensure adequate preparation and use of export authorizations.
- Training for those that will be involved in determining authorization requirements and obtaining and documenting authorizations.

2.2 Authorization Application or Documentation Procedures

Where the export authorization determination process indicates that a proposed transaction requires an authorization, organizations should have documented procedures for choosing which authorization will be used, obtaining the authorization and maintaining appropriate records. This procedure should, at a minimum, incorporate the following elements:

2.2.1 Identifying Available Export Authorizations

Where a proposed transaction or other activity requires an export authorization, the authorization can be obtained in the following ways:

- Identification and analysis of license exception provisions provided for in the export control list and/or implementing laws and regulations to determine eligibility of the proposed transaction.
- Identification and analysis of open or general licenses granted by the relevant export licensing authority to determine eligibility of the proposed transaction.
- Identification of existing authorizations held by the organization or others that may be relied upon to authorize the transaction in question.
- If an existing license, license exception or general license is not available, identification of individual or specific licenses that may be obtained from the relevant export licensing authorities.

2.2.2 Choosing an Export Authorization

In some cases only one type of export authorization is available for a particular export transaction (usually this will be a specific or individual license). Where this is the case, the organization must place the transaction on hold until the authorization is obtained.

In other cases, a transaction may be eligible for two or more types of export authorizations. In their documented procedures, organizations should assign responsibility for making a decision as to which authorization will be chosen. These decisions should be recorded to ensure consistent use.

For example, certain exports or reexports subject to U.S. jurisdiction may be subject to a license requirement and also be eligible for a license exception, such as the U.S. Strategic Trade Authorization (“STA”) license exception under the Export Administration Regulations. For such an export, a party is free to choose the burden of a license application over the administrative and documentation requirements necessary to use license exception STA. Similarly, in the European Union many licensable transactions are eligible for use of a Community General Export Authorisation (“CGEA”), but use of an applicable CGEA is not mandatory.

2.2.3 Obtaining Specific Licenses

If a specific license is required or is selected as the type of authorization for an export transaction, an organization’s authorization procedures should establish clear responsibilities for the preparation and submission of the license application. This process should, at a minimum, incorporate the following elements:

- Develop and/or gather facts in support of the license application.
- Initial preparation of the license application and sufficient internal review of the application to ensure accuracy and completeness.
- Strategic, forward-looking licensing strategies to ensure that license applications are drafted to cover anticipated export activity with sufficient breadth.
- Final submission and tracking of specific license applications and their approvals.

Once an organization applies for and obtains its specific license, it should trigger application of the Export Authorization Implementation and Use procedure.

2.2.4 Using General Licenses or License Exceptions

If a transaction is subject to an export authorization requirement but is eligible for a general license or license exception, an organization’s authorization process should establish clear responsibilities for the documentation and certification, if necessary, of the organization’s use of the authorization and compliance with any attendant requirements for the chosen authorization. Additional best practices for using authorizations are described in the CEEC Export Authorization Implementation and Use standard.

3.0 RECORDKEEPING

Export authorization determinations are to be clearly documented and records should be maintained that document how such determinations were made. Due to the need to gather and analyze certain types of information repeatedly, the use of checklists or similar tools is advisable. In addition, export authorizations themselves, including contemporaneous documentation of license exception and general license usage, must be documented and available for transactional review. Additional best practices for recordkeeping are described in [CEEC Recordkeeping Standard].

APPENDIX A—DEFINITIONS

Authorization – Any type of governmental grant of power given to an organization that is required for the organization to undertake an export or other activity subject to export controls (e.g. reexports, intangible exports, in-country transfers and brokering activities). For purposes of this standard, an *authorization* includes all kinds of licenses and license exceptions, but does not include scenarios where the applicable regulations indicate no special controls or restrictions for the given export transaction (e.g. NLR transactions in the United States), as these represent scenarios where the government has made a deliberate policy decision not to impose controls in the form of authorization requirements.

License – Governmental authorization for an organization to perform a particular activity subject to export control regulation. This also refers to the actual document or certificate that serves as evidence of the governmental authorization (in countries where such documents are issued). There are generally two kinds of export license:

Individual or Specific License – An individual license or specific license is a government authorization granted in response to a formal application submitted by an organization desiring to undertake activity that is subject to a license requirement under the applicable export control regulations. These licenses apply to specified transactions (i.e. goods, parties, destinations, end uses, etc.) that have been reviewed and approved in advance by the government's export licensing authority. These licenses are generally confidential and not made available to the public.

Open License or General License – An open or general license is a public, published government authorization which authorizes certain types of transactions without prior government review and approval of specific transactions where, prior to issuance of the General License, the same transaction would have required a specific license (or would have been prohibited). The open or general license will specify the criteria for its use (i.e. eligible goods, parties, destinations, end uses, etc.) and limitations. An organization can then self-determine if a proposed export activity is eligible for the open/general license, or whether an individual/specific license is required. Use of some open/general licenses may still require the exporter to register or make some administrative filing with the relevant licensing agency.

License Exception – A license “exception” (also known as a “license exemption” in the U.S. International Traffic in Arms Regulations) is a regulatory provision that eliminates license requirements for otherwise licensable transactions if certain criteria are met (as determined by the exporter).