



LEGAL ALERT

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Custom Orders That Are More Than You Bargained For

Custom orders are a part of everyday business for U.S. industry. Yet, they can and do expose many unsuspecting companies to one of the most restrictive regulatory schemes in the world, violations of which can include fines of up to \$1,000,000 or five times the value of the items at issue, the denial of export privileges, negative publicity, and imprisonment for up to 10 years.

The Export Administration Regulations ("EAR"), administered by the U.S. Department of Commerce, and the International Traffic in Arms Regulations ("ITAR"), administered by the U.S. Department of State, regulate the export of certain "items," to include physical products, software, and information related thereto. Licenses are required in many cases, and advanced authorization may even be required before a sale of controlled items can be proposed to a foreign entity. The EAR and ITAR also control activities of U.S. persons related to the proliferation of nuclear, chemical, or biological weapons and missile technology, and prohibit exports to certain restricted end-users.

The EAR regulates the export of items with commercial or military applications (also referred to as "dual use" items) and generally requires licenses for the export of items described in the Commerce Control List ("CCL"). Among other things, the CCL includes items that are "specifically designed" for use with certain listed items. For instance, while some types of fiber optics cables are not controlled by the EAR, such items would be controlled if specially designed for use with underwater telecommunication systems that meet certain technical specifications.



The ITAR controls “defense articles,” which consist of items designed, developed, adapted, modified, used, repaired, or manufactured for military or defense purposes. These items are listed on the United States Munitions List (“USML”). The ITAR also controls technical assistance related to defense articles, known as “defense services.”

There is a range of modifications that can trigger ITAR jurisdiction. For instance, changing the size of a component, even if just in length, can be considered significant enough to require licensing under the ITAR if performed for a military end use. Accordingly, using fiber optics in another example, a request to change the size of fiber optics cable for use in a military aircraft or a submarine could trigger ITAR control.

Both the EAR and ITAR require manufacturers to maintain records concerning the manufacture, acquisition, and disposition of controlled items and related information for a period of five years from the expiration of a license, approval, or the date of a transaction, whichever is longer. In addition, and with narrow exceptions, the ITAR requires that all persons engaged in defense article manufacturing register with the Department of State. Even manufacturers who do not engage in exporting must register at a cost of \$1,750 for one year or \$3,500 for every two years. For this requirement to apply, there only needs to be one occasion of manufacturing a defense article. Thus, a company can be required

to register simply by filling one custom order that will be used in a defense article.

Compliance with the EAR and ITAR is complex. To limit the impact of restrictions imposed by the EAR and ITAR, manufacturers must familiarize themselves with the CCL and USML listings related to their product lines, require that all custom orders state the expected end use of requested items, and screen stated end uses against the CCL and USML. When an item is subject to control, registration, licenses, or advanced authorizations must be obtained where required. If an existing product line is not controlled, but the requested custom order will be, manufacturers must decide if filling the order is in their best interest.

For further information, please do not hesitate to contact:

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Our attorneys offer analysis and advisement in the areas of export controls and economic sanctions and foreign direct investment activities for all sizes and types of businesses.