

*If you have any questions  
about this Advisory,  
please contact:*

JAMES GLASSER  
203.498.4313  
jglasser@wiggin.com

DAVID HALL  
215.988.8325  
dhall@wiggin.com

JOSEPH MARTINI  
203.363.7603  
jmartini@wiggin.com

DAVID RING  
860.297.3703  
dring@wiggin.com

TAHLIA TOWNSEND  
203.498.4339  
ttownsend@wiggin.com

DANIEL GOREN  
203.498.4318  
dgoren@wiggin.com

## Export Basics For The UAV Industry

The U.S. government controls exports for many reasons, but primarily to keep military and other sensitive technology out of the hands of the country's adversaries. For this reason, the U.S. government wants insight into, and oversight of, all exports from the United States in order to review any export against concerns related to national security, foreign policy, human rights, nuclear proliferation, and regional stability. Whether you manufacture Unmanned Aerial Vehicles ("UAVs") for the military or for commercial applications, you must be aware of United States export laws and stay compliant with them. For many UAV manufacturers, this is easier said than done. If your company has not already considered whether its operations comply with the requirements of the International Traffic in Arms Regulations ("ITAR"), the Export Administration Regulations ("EAR"), or the sanctions regimes overseen by the Office of Foreign Assets Control ("OFAC"), below are 10 tips to get you moving toward export compliance.

1. **Know if you are exporting.** Do not make the mistake of believing that your company does not export because it provides only services or sells no products abroad. An export is the transfer of anything controlled to a foreign person or country by any means, anywhere, anytime. Commonly exported items are hardware, technical data, software, and defense services. Exports ordinarily occur in the following ways: tangible shipments via freight forwarder, electronic transmission such as email or

fax, providing foreign persons access to a computer database, oral presentations or conversations, foreign visitors to a work site, foreign employees at your facilities or your sub-tiers', collaboration with foreign designers or graduate students, outsourcing IT or engineering functions to foreign entities, hand carrying items across a border, traveling with laptops or other electronic devices containing controlled data or software, providing visual access to controlled items to a foreign person, or providing training or instruction about a military item to a foreign person. Remember, under the ITAR, if you are in the business of manufacturing, exporting, or temporarily importing defense articles, you must register with the Directorate of Defense Trade Controls.

2. **Know the where and who.** U.S. export law controls items based on their destination, which includes the country they are going to as well as the nationality -- and sometimes also the citizenship -- of any person who receives them. For this reason, it is vital to know not only where you are sending a physical item but also the citizenship and nationality of people with whom you are communicating or who have access to your technology or hardware. Authorization is required for a foreign person to see a controlled item, hear controlled information, or receive controlled hardware. U.S. citizens and permanent residents (green card holders) are considered U.S. persons,

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not foreign persons, regardless of where they were born. However, you may need authorization to transmit hardware, technology, or services to U.S. persons working for foreign companies or working for U.S. companies in locations outside the United States.

3. **Do you have authorization?** Nothing can be exported from the United States without authorization, which means permission from the United States government. Typically authorization takes three possible forms: (1) a license from the cognizant government agency; (2) an exemption or exception to the requirement for a license; or (3) a determination that no license is required for a particular item to go to a particular person or location.
4. **Be aware of the voluntary disclosure regime.** Both the ITAR and the EAR allow companies to submit voluntary disclosures to report export problems the company may have discovered. The Departments of State, Commerce, and Treasury, and the Census Bureau will all consider a timely voluntary disclosure (filed before they learn of the violation by other means) as a mitigating factor in determining any administrative penalties, if any, that should be imposed. However, failure to report a violation that might harm the country's national security and foreign policy interests will be an adverse factor in determining appropriate penalties. For unauthorized exports to certain countries, there is in fact a duty to notify the government.
5. **The military customer is not always right.** Even the United States military must comply with U.S. export and

import laws. Be cautious when you receive a request or instruction from a government military customer since the request does not, by itself, constitute an authorization to export.

6. **Missile Technology Control Regime ("MTCR").** If your product is an UAV, it might be subject to stricter control because the United States is a signatory to the MTCR. As a partner country to the MTCR, the United States scrutinizes license applications for UAVs with certain range (300 kilometers) and payload (500 kilograms) capacities. Note that the MTCR has a unique definition of range that may require you to rethink whether your UAV qualifies. In simple terms, the MTCR controls UAV with a range of 300 kilometers when calculating range as the maximum distance the UAV can fly in one direction in perfect flight conditions when fully fueled. This means one direction even if the UAV loses its data link.
7. **Do not forget about the EAR or ITAR and EAR recordkeeping requirements.** Many UAV manufacturers do business for the U.S. military, but the commercial UAV business is also thriving. UAVs are heavily controlled whether they are designed for the military or not. For this reason, UAV manufacturers must be knowledgeable about both the ITAR and the EAR. Also remember that both the ITAR and the EAR include extensive requirements for creating and preserving records of exports, including exports of technical data and exports performed under exemptions or exceptions, and detailed requirements regarding destination control statements and filing of electronic

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export information (even for “no licenses required” shipments in certain circumstances).

8. **Antiboycott Laws.** Has your company considered the EAR’s antiboycott provisions? These laws prohibit a U.S. person or company from entering agreements in which they refuse to do business with Israel or with blacklisted companies, or that discriminate against other persons based on race, religion, sex, national origin, or nationality. For this reason, you must be certain to review any proposed contract language carefully to avoid violating these provisions by signing a deal that contains prohibited clauses. For example, a prohibited request would be to require the following statement on invoices: “We hereby certify that these products do not involve Israeli-origin parts, materials, labor, or capital.” Failure to comply with U.S. antiboycott laws can result in warning letters, criminal and civil fines, and possible imprisonment.

9. **Train and monitor your employees.** Many export violations occur because an employee acts in his or her own interest or in ignorance of the law. The consequences can be significant reputational damage, monetary fines or even prison. For this reason, you should have firm management commitment to compliance, backed up with function-specific work instructions and training programs in place to educate and guide your employees, and to prevent unauthorized exports, and report unauthorized exports through voluntary disclosures to the United States government.

10. **Avoid embargoed countries and persons.** Doing business with companies in embargoed countries, such as North Korea, Iran, or Cuba, or with people on the denied persons lists violates the OFAC regulations governed by the Department of Treasury regardless of whether the item requires a license under the ITAR or the EAR. Less apparent, however, is that companies must have robust export compliance programs to avoid less obvious violations of the OFAC regulations. For example, if your company does business with another company in China and has knowledge or reason to know that the Chinese company plans to re-export your products to an embargoed country, you may be subject to penalties under the OFAC and EAR regulations.

The above list is only a snapshot of the many considerations UAV manufacturers must keep in mind to stay compliant with U.S. export law. The list does not include other vital requirements involving recordkeeping, filing of appropriate automated export system (“AES”) records, and laws governing imports.

Ultimately, as UAV manufacturers seek to capitalize on global markets for their products, staying compliant with U.S. export law will be an essential element of a successful business. Mastering these laws, however, is easier said than done and requires expertise not yet acquired by many small- to mid-size UAV makers. Failure to comply with these regulations could end in serious consequences—agents at your door, business-closing fines, denial of export privileges, and possible prison sentences. Get ahead of the curve and start planning now for a robust and well-resourced compliance program.

*This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.*