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# The Devil is in the Details: Documenting Export Controls Compliance

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Jennifer P. May, J.D.  
Compliance Officer  
Office of Research  
University of Missouri

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# What's required of us?

- **Federal Sentencing Guidelines: Effective Compliance and Ethics Program**

- Response to Sarbanes-Oxley Act of 2002
- In general, requires the "...exercise (of) due diligence to prevent and detect criminal conduct; and otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."
  - *United States Sentencing Commission, Guidelines Manual, §8B2.1(a) (Nov. 2006)*



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# What's required of us?

## ■ **The USSC's 7 Step Program**

- ❑ Establish standards & procedures
  - ❑ Knowledgeable governing authority with reasonable oversight
  - ❑ Authority personnel does not include individuals engaged in illegal activities
  - ❑ Effective training programs
  - ❑ Monitoring, auditing, periodic evaluation, and a reporting system for employees & agents
  - ❑ Consistent enforcement
  - ❑ Respond to non-compliance w/ reasonable steps
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# So where is recordkeeping?

## ■ The USSC's 7 Step Program

- Establish standards & procedures
  - Knowledgeable governing authority with reasonable oversight
  - Reporting system for employees & agents
  - Consistent enforcement
  - Respond to non-compliance w/ reasonable steps
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# But, what is a record?

## *National Archives & Records Administration*

### *36 Code of Federal Regulations (CFR) 1220*

- *Section 1220.14 General Definitions: Records include all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the informational value of the data in them (44 U.S.C. 3301).*
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# In Export Control-speak...

- Export Administration Regulations (EAR) Part 762
    - Recordkeeping
  - International Traffic in Arms Regulations (ITAR) Part 122
    - Registration of Manufacturers and Exporters (122.5), with an additional clause at
    - Part 123.26 Recordkeeping requirement for exceptions.
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# EAR Part 762

## ■ Scope

- Transactions involving restrictive trade practices; exports/reexports; Canadian exports if involving non-U.S./Canadian persons with an interest; or any other transactions subject to the EAR

## ■ Records to be Retained

- Memoranda; Notes; Correspondence; Contracts; Invitations to Bid; Books of Account; Financial Records; Restrictive Trade Practice or Boycott Documents/Reports, and Other records describing those transactions

## ■ Bottom Line: *Anything about Anything!*

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## ITAR Part 122.5

- Maintenance of records by registrants
    - “...maintain records concerning the manufacture, acquisition and disposition (to include copies of all documentation on exports using exemptions and applications and licenses and their related documentation), of defense articles; of technical data; the provision of defense services; brokering activities; and information on political contributions, fees, or commissions furnished or obtained, as required by part 130 of this subchapter.”
  - Bottom Line: *Anything about Anything!*
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# How should I keep records?

- Paper copies?
  - Electronic?
  - Institutional Memory?
  - What's the best way to do it?
    - *Case History*
    - *Paper vs. Electronic*
    - *National Archives Guidance*
    - *EAR & ITAR Regulations*
    - *Questions, Comments, Thoughts, Suggestions*
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# Federal Case History

- Two cases lay the foundations for federal recordkeeping policy regarding email
    - Armstrong v. Executive Office of the President, 1 F.3d 1274 (D.D.C. 1993).
      - a.k.a. **PROFS**
    - Public Citizen v. Carlin 184 F.3d 900 (D.D.C. 1999).
      - a.k.a. **GRS 20**
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# “Iran-Contra” & a “Delete” button

- National Security Council (NSC) email system was expanded in 1985; software called PROFS.
- PROFS system was a key investigative tool in the “Iran-Contra Affair”; primary communications system between Oliver North and National Security Advisor John Poindexter.
- Investigators found that just prior to the wide-spread publicity, North & Poindexter had jointly deleted nearly 6,000 messages
- However, the White House Communications Agency had back-up tapes and the emails were recovered.

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## PROFS continued...

- NSC policy: email is an alternative for “information that would otherwise be handled by phone”; if official record was needed, users should print the email or create a written memo.
- The problem began when, based on the policy, the U.S. National Archives and Records Administration (NARA) told the National Security Archive that all Reagan administration email would be deleted to make way for the Bush administration.
- Due to findings in Iran-Contra, the National Security Archive questioned policy adherence.

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# PROFS continued...

- The argument: Was PROFS (a.k.a. email) a recordkeeping system?
    - ❑ Government: No
      - Print versions contained all information on screen
      - Iran-Contra atypical
    - ❑ Archive: Yes
      - Electronic version unique: metadata such as sender/recipient ID; read receipts; date/time confirmation and system logon/logoff not printed
      - Prints don't automatically invalidate record status
  - Verdict (1993): Email = records
    - ❑ NSC policy improper
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## BUT WAIT!

- NARA released an updated General Records Schedules (GRS) 20 based on the ruling which stated that all Federal Records Act obligations apply to electronic records
  - The updated GRS 20 allowed for deletion of emails if an appropriate recordkeeping copy was made and transferred into a recordkeeping system – paper or electronic
  - But the plaintiffs were not happy! - they *wanted* emails to remain electronic
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# GRS 20

- District Court: Voided GRS 20
  - Electronic communications are “records unique and distinct from printed versions of the same record.” (Carlin 1)
- Appeals Court: Reversed
  - Still good law!
  - Supreme Court denied certiorari

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## GRS 20

“In sum, we do not think the Archivist must, under the RDA, require agencies to establish electronic recordkeeping systems. Nor do we think it unreasonable for the Archivist to permit each agency to choose, based on its own operational needs, whether to use electronic or paper recordkeeping systems. The Archivist’s findings that electronic records are of limited use unless maintained in a recordkeeping system is reasonable as well. Consequently, we uphold his ultimate determination that **a record in electronic form lacks sufficient value to warrant preservation once it is transferred intact to a paper recordkeeping system.**”

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# How should I keep records?

- Lessons learned from case history:
    - ❑ Electronic systems are valid, but not required; operational needs can (*and should!*) be considered in this decision
    - ❑ Deleting electronic records is OK; as long as all the information is available elsewhere
    - ❑ Record management is KEY!
  
  - ***Guidance??***
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# Finding your way

- NARA Website ([www.archives.gov](http://www.archives.gov))
    - Geared for federal agencies, but good start
    - Records Management Self-Evaluation Guide
  - EAR Records Regulations (Part 762)
    - 762.4: Originals required; unless requirements meeting 762.5 Reproduction of Original Records met (aka electronic records)
      - Reproduce on paper, all marks on original, high degree of legibility and readability, initial image and all changes, strict P&Ps, records of record entry
    - Also address retention, inspection, exemptions
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# Finding your way

- ITAR Regulations (Part 122.5)
    - ❑ Electronic records must be able to reproduce all records on paper
    - ❑ High degree of legibility and readability
    - ❑ No alteration once initially recorded without recording all changes, who & when made
    - ❑ Must be available for inspection at all times
    - ❑ Retention addressed
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# What do you do?

- *Questions*
- *Comments*
- *Thoughts*
- *Suggestions*
- *And, of course... **THANKS!***



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Questions later...

*Jennifer May*

*University of Missouri*

*573-882-3841    [mayj@missouri.edu](mailto:mayj@missouri.edu)*

*[research.missouri.edu](http://research.missouri.edu)*

