

ITAR and the Supply Chain: Getting Stuck in the Middle

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Initial Question??

- WHY WOULD A COMPANY NOT WANT TO UNDERSTAND OR COMPLY WITH EXPORT CONTROLS?

Why have export controls?

- National Security
- Foreign Policy
- Domestic Economic Policy
- Natural Resources
- International Agreements

Case Study: BAE Systems UK

- **History:** Major issues with foreign transaction policies:
 - Foreign Corrupt Practices Act (FCPA), United Kingdom Investigations, etc.
- **March 2010** with Department of Justice:
 - Plea Agreement concerning 2,591 violations of the ITAR and false statements
 - Criminal Penalty: \$400 million
- **May 2011** with DDTC:
 - Settled Alleged ITAR Violations Civilly
 - Civil Penalty: \$79 Million + Extensive Remedial Action Program for Four Years
 - Three Non-U.S. Affiliates Denied Licensing

Case Study: BAE Systems UK (Cont.)

- Lessons Learned (from reading between the lines):
 - **Partners** = Cooperation is key.
 - Third party relationships (distributors, commercial agents, “brokers,” consultants, etc., are the targeted link)
 - Documentation and Recordkeeping are key.
 - Understanding compliance requirements is key.
 - Who do you represent?

Primary Regulations

- **International Traffic in Arms Regulations (“ITAR”)**
 - 22 CFR 130 et. seq.
 - Military/Space Goods, Technology and Services
 - State Dept., Directorate of Defense Trade Controls
 - **Export Administration Regulations (“EAR”)**
 - **Foreign Assets Control Regulations (“FACR”) and Certain Acts**

Principal Mechanics of Export Controls (ITAR or otherwise)

- What are the characteristics of the item?
- Where is it going?
- How will it get there?
- Who will use?
- Why is it being sent?
- How will it be used? (“end use”)

- **Control exports of defense articles, defense services, related technology**
 - Defense article is any item on the United States Munitions List (“USML”)
 - Items are generally those specifically designed, developed, configured, adapted or modified for military application.
- **USML controls the export of most satellites, components and technology**
 - Several categories of space qualified items remain on the CCL
- **Requires registration by all U.S. manufacturers of defense articles, defense service providers, and brokers**
- **License required for ALL exports TO ALL destinations, unless specific exemptions apply**
- **Impose disclosure requirements for commission payments**

The United States Munitions List

I	Firearms, Close Assault Weapons and Combat Shotguns	XI	Military Electronics
II	Guns and Armament	XII	Fire Control, Range Finder, Optical and Guidance and Control Equipment
III	Ammunition / Ordnance	XIII	Auxiliary Military Equipment
IV	Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs & Mines	XIV	Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment
V	Explosives and Energetic Materials, Propellants, Incendiary Agents and their Constituents	XV	Spacecraft Systems and Associated Equipment
VI	Vessels of War and Special Naval Equipment	XVI	Nuclear Weapons, Design and Testing Related Items
VII	Tanks and Military Vehicles	XVII	Classified Articles, Technical Data and Defense Services Not Otherwise Enumerated
VIII	Aircraft and Associated Equipment	XVIII	Directed Energy Weapons
IX	Military Training Equipment and Training	XIX	[Reserved]
X	Protective Personnel Equipment and Shelters	XX	Submersible Vessels, Oceanographic and Associated Equipment
		XXI	Miscellaneous Articles

Scope of Export Controls

- Exports
- Re-exports
- Deemed exports
- Foreign manufactured products incorporating U.S. controlled technology
- Overseas activities of U.S. persons
- Transactions with persons, entities, governments

What is an “Export?”

- Actual shipment of an item outside the U.S.
- Electronic or digital transmission
- Visual inspection in or outside the U.S.
- Written or oral disclosure to a foreign nation in U.S.
- Actual use or application on behalf of or for the benefit of foreign person or entity

What is a “Reexport?”

- Shipment of U.S.-origin item from one foreign country to another foreign country
- A shipment of a foreign produced item containing U.S. origin parts, from one country to another
- Shipment from one foreign country to another of an item manufactured abroad based on U.S. technology.

What is a “Deemed Export?”

- **ITAR 120.17:** -- “Export [includes]...[d]isclosing (including oral or visual disclosure) or transferring technical data to a foreign person [or]...[p]erforming a defense service on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad”
 - “**Disclosing.** . technical data to a foreign person, whether in the U.S. or abroad.” (ITAR §120.17(4))
 - “**Performing** a defense service on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad.” (ITAR §120.17(5))

What is a Defense Service? – 22 CFR § 120.9

- The furnishing of assistance (including training) to foreign persons, whether in the U.S. or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles
- The furnishing to foreign persons of any technical data controlled under the ITAR, whether in the U.S. or abroad
- Military training

Penalties for Noncompliance

- Civil fines
- Criminal fines and imprisonment
- Revocation of export licenses and privileges
- Seizure and Forfeiture
- Deportation of foreign national employees
- Loss of government contracts
- Negative publicity
- Sarbanes-Oxley disclosures
- Shareholder derivative actions

Compliance Programs

Minimum Requirements

- Reasonably designed, implemented and enforced to prevent and detect violations
- In writing
- Establish Management Commitment (letter from CEO)
- Compliance Officer & Staff (organization)
- Registration, classification, and licensing processes (for a distributor – whose responsibility is this?)
- Audits (internal and external)
- Notification (internal and external)
- Documentation (Contracts and Certifications) and Recordkeeping
- Training

Questions?

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