

U.S. Export Controls and Government Contracting: Keys to Compliance

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U.S. Export Regulations

- **International Traffic in Arms Regulations (ITAR)**
 - Controls on Things that Go “Boom” (Munitions Items)
 - Department of State, Directorate of Defense Trade Controls (DDTC)
- **Export Administration Regulations (EAR)**
 - Controls on Dual-Use Goods and Technology (items with a commercial and military utility) and purely commercial items
 - Department of Commerce, Bureau of Industry and Security (BIS)
- **Foreign Assets Control Regulations**
 - U.S. Economic Embargoes (Principally Cuba, Iran & Sudan) (Prohibitions on trade with Syria found under EAR)
 - Department of the Treasury, Office of Foreign Assets Control (OFAC)



Overview - Scope of U.S. Regulations

■ Controls on Items – U.S. Regulations Reach:

- All direct exports of products, technology, software or services from the United States.
- Any release of technology to foreign nationals in the United States.
- Foreign manufactured products containing greater than *de minimis* U.S. origin raw materials, components, software or technology.
- Re-exports of U.S. items from any location — jurisdiction follows the items.



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Overview - Scope of U.S. Regulations

■ What is an Export?

- Any item sent from the U.S. to a foreign destination.
- An “item” includes commodities (computers, servers, other equipment) software, technology (design drawings, technical specifications, technical assistance).
- Technology is “deemed” to be exported when provided to non-U.S. nationals within the United States.
- How an item leaves the United States does not matter for export control purposes.
 - Hand carry / air / ocean
 - Electronic / telephone
 - In person



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Overview - Scope of U.S. Regulations

- **Controls on Business Activities**
 - “U.S. Persons” may not engage in any sales, service or financial **transaction involving an embargoed country**, a designated representative of an embargoed country or any sanctioned entity/individual.
 - “U.S. Persons” may not **facilitate** any transaction involving an embargoed country or sanctioned entity/individual.
 - “U.S. Persons” may not engage in any sales, service or financial transaction with any **national of Cuba**, wherever located.
 - “U.S. Persons” may not deal in any **product of Cuba**.
 - No person, regardless of nationality may engage in the transshipment of **U.S. origin products** to embargoed countries (3rd country supplier placing an order on a U.S. manufacturer to fill an order in an embargoed country).
 - No “U.S. Person” may knowingly support a project to develop weapons of mass **destruction (chem/bio/nuke), nuclear or ballistic missiles in certain countries**.
- **Who is a U.S. person?**
 - U.S. citizens and permanent resident aliens (green card holders).
 - Corporate entities organized under U.S. law.
 - Branch offices of U.S. corporations.



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ITAR: Controls on Things that Go “Boom” (Munitions Items)

- Control the export to ALL countries of defense articles (including technical data and software).
- Control the transfer of any ITAR-controlled (munitions) technical data or software to a foreign national, wherever located – includes “exposure” to technical data or data rich environment in the United States.
- Brokering defense articles is also controlled; includes U.S. persons involved in any way in the transfer of munitions items, both foreign and U.S.
- DDTC registration required for manufacturers, brokers or exporters of defense articles.



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Controls on Things that Go “Boom” (Munitions Items)

- Defense articles include all components, parts, accessories, attachments and associated equipment for items contained on the U.S. Munitions List (22 CFR 121).
- Defense articles also include any items (including technical data and software) that are specifically designed, developed, configured, adapted, or modified for a military application – product modifications made at request of defense contractor or military customer.
- “Technical Data”
 - Includes: information in any form – blueprints, drawings, manuals, documentation, correspondence, websites, visual inspection.
 - Excludes: basic marketing information on function or purpose or general system descriptions.
- “Defense Service” defined broadly to include furnishing assistance relating to a defense article or military training.



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Military Product/Technology Controls U.S. Munitions List – Defense Articles and Services

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



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Types of Munitions Licenses

License for Export or Temporary Import

- DSP-5: Permanent export of unclassified defense articles or technology.
 - Information required: Country of ultimate destination; End use; End user; Description of item exported
- DSP-73: Temporary export of unclassified defense articles or technology.
 - Information required: Country of destination; Reason for temporary export; Description of item temporarily exported
- DSP-61: Temporary import of unclassified defense articles or technology.
 - Information required: Foreign owner; Foreign end user; Purpose of import (i.e., modifications, overhaul, etc.); Description of technology temporarily imported
- DSP-85: Permanent or temporary export of classified defense articles or technology.
 - Information required: Foreign end user; Specific purpose of item; Description of item to be exported

Duration: 4 years or when total authorized quantity and dollar value has been shipped, whichever occurs first.

Submission: All licenses except for DSP-85 may be submitted electronically.



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Types of Munitions Agreements

Technical Assistance Agreement

- Agreement for the performance of a defense service or the disclosure of technical data, as opposed to an agreement granting a right or license to manufacture defense articles.

Manufacturing License Agreement

- Agreement for the manufacture of defense articles abroad.



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Technology Controls and “Deemed Exports”

“Deemed Exports”

- Under the ITAR, the term “export” includes disclosing or transferring technical data to a foreign person, **whether in the United States or abroad**. Any technical data provided to a non-U.S. person within the United States is deemed to be an export to that person’s home country.
 - **Note:** A disclosure can occur by simply discussing or showing technical data to a non-U.S. person.
 - **Note:** DDTC takes the position that access by a foreign national to a “data rich environment” is a transfer of data to that person. This applies to engineering/product design areas.
- It is essential to ensure that all technical data is clearly identified and controlled. All drawings, specifications, product design and product technical data must be protected from unauthorized delivery to or access by foreign nationals. Safeguards against such disclosure include:
 - Clearly marking files containing ITAR controlled content and storing such files in a controlled location
 - Limiting access to electronic files by maintaining controls on passwords, etc.



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Canadian Exemption - Overview

- Temporary import from Canada and the return to Canada of certain Canadian-origin unclassified Defense Articles.
- Permanent or temporary export to certain Canadian end-users of certain defined Defense Articles, software and technical data.

LIMITATIONS:

Available in very limited circumstances; not a carte blanche for all ITAR-controlled transfers to Canada.

- Limited to certain defense articles, technical data and software.
- Limited end-users (governmental entity or “Canadian-registered person”)
- Limited Defense Services.
- Does not authorize the transfer of defense technology within the United States to Canadian nationals – the “deemed export” rules still apply.
- Limited re-transfer of Defense Articles, software or technical data within Canada to certain end-users.



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Penalties – Can Really Hurt

International Traffic in Arms Regulations

- Debarment from Federal Contracting
- Civil Fines - \$500,000 per violation
- Criminal penalties for willful violations - \$1 million + 10 years imprisonment



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EAR: Controls on Dual-Use Goods and Technology

- All U.S. products and technology are “subject to the EAR” and, therefore, may be controlled for export to embargoed destinations, to certain prohibited or restricted end users, and for prohibited end uses.
- Control the export and re-export to certain countries of products identified on the Commerce Control List (15 CFR Part 774) and specific information (“technology”) necessary for the “development,” “production” or “use” of those products.
- “Technology” includes “technical data” and “technical assistance” – servicing a product is considered to be a transfer of technology.
- “Software” specially designed for the “development,” “production” or “use” of certain products identified on the Commerce Control List (15 CFR Part 774) is similarly controlled.



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Deemed Exports

- Transfer of technology to foreign national within the United States “deemed” to be an export to the home country of the recipient.
 - Plant visits
 - Fax
 - Email
 - In person
 - Intranet
 - Extranet
 - File sharing
- Allowing foreign nationals, wherever located, access to computer files containing U.S. technical data is also controlled.
- License required for “deemed export” if license required for export of technology to home country of foreign national.



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Dual-Use Product/Technology Controls

The Commerce Control List (CCL)

- Category 0** – Nuclear Materials, Facilities, and Equipment
- Category 1** – Materials, Chemicals, “Microorganisms,” and Toxins
- Category 2** – Materials Processing
- Category 3** – Electronics
- Category 4** – Computers
- Category 5** – Telecommunications and “Information Security”
- Category 6** – Sensors and Lasers
- Category 7** – Navigation and Avionics
- Category 8** – Marine
- Category 9** – Propulsion Systems, Space Vehicles

EAR99 – Items that do not fall into any of the above categories



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Penalties – Can Really Hurt

Export Administration Regulations

- Denial of Export Privileges
- Debarment from Federal Contracting
- Civil Fines - \$250,000 or 2X the amount of the transaction, whichever is greater
- Criminal penalties for willful violations
 - Individual - \$1 million and/or up to 20 years imprisonment
 - Corporate - \$1 million or 5X value of exports



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OFAC: U.S. Economic Embargoes

- U.S. persons generally are prohibited from direct or indirect involvement in, or facilitating, any transaction involving an embargoed country or with any OFAC-listed individual or entity.
- Generally, “U.S. persons” are prohibited from exporting goods, technology or services to an embargoed country, to the government of an embargoed country, or to an agent of that government.
- Services include technical (product support), as well as financial (financing an export transaction or writing insurance).
- Facilitation of a transaction that would be prohibited if performed by a U.S. person is also prohibited.



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Countries of Concern

General Embargoes

- Cuba** Unilateral U.S. embargo includes product exports and re-exports, product imports (including foreign products with Cuban components or raw materials), financial services exports, financial transactions and U.S. person involvement (includes dealing in property in which a Cuban entity has an interest); also includes all transactions with Cuban nationals, wherever located; reaches all controlled foreign subsidiaries of U.S. corporations.
- Iran** Unilateral U.S. embargo includes product exports, some product re-exports, product imports, financial services exports, financial transactions and U.S. person involvement; does not reach controlled foreign subsidiaries of U.S. corporations.
- Syria*** Prohibition on export and reexport of most U.S.-origin products and technology; reaches U.S. items wherever located [administered by BIS under EAR, not by OFAC].
- Sudan** U.S. embargo includes product exports, some product reexports, product imports, financial services exports, financial transactions and U.S. person involvement; does not reach controlled foreign subsidiaries of U.S. corporations. [Note: Pursuant to Executive Order 13412 of October 13, 2006, certain activities in certain areas of Sudan are exempt from the embargo.]



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Countries of Concern (Continued)

Limited Embargoes

- Balkans
- Belarus
- Burma (Myanmar)
- Ivory Coast (Cote d'Ivoire)
- Iraq
- Liberia
- North Korea (import only)
- Zimbabwe



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Entities of Concern

OFAC's SDN List

- OFAC also maintains comprehensive sanctions programs targeted at:
 - Terrorists and terrorist organizations
 - Narcotics traffickers and narcotics kingpins
 - Entities engaged in activities relating to the proliferation of weapons of mass destructions
- Entities that are subject to such sanctions are identified on the List of Specially Designated Nationals and Blocked Persons (“SDN List”), which is frequently updated and expanded by OFAC.



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Penalties – Can Really Hurt

OFAC's Regulations

- Debarment from Federal Contracting
- Civil Fines - \$250,000 or 2X the amount of the transaction, whichever is greater
- Criminal penalties for willful violations
 - Individual - \$1 million and/or up to 20 years imprisonment
 - Corporate - \$1 million or 2X the gross gain
- May also involve violation of the Export Administration Regulations



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Elements of an Internal Controls Program

- Develop a written Internal Controls Program (ICP), including a foreign visitors control program.
- Conduct periodic self-assessment of risk and audit results.
- Establish internal mechanism for employees to communicate compliance concerns.
- Train and periodically refresh employees on internal compliance program.
- Designate a export compliance officer to manage the ICP and provide appropriate internal legal and staff resources.
- Screen all transactions and business relationships for (i) countries of concern, (ii) involvement of individuals or entities subject to sanction, and (iii) for possible nuclear, chemical or biological weapons or ballistic missile connections.
- Review all business operating processes and procedures for involvement of U.S. persons in transactions involving embargoed destinations.



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Elements of an Internal Controls Program

- Classify all products, materials, product design and development technology, product manufacturing technology, and product design and manufacturing software according to the EAR, ITAR or other applicable local regulations
- Determine license requirements and prevent unauthorized exports/transfers.
- Global engineering and sourcing: ensure the engineering and sourcing is aware of applicable trade controls, both dual-use and sanctions.
- Foreign national employees: identify all employees who are not U.S. Persons and prevent unauthorized access to controlled technical data.
- Ensure all servers with controlled technical data appropriately protected: file protection, system administrators are U.S. nationals, controlled technical data not accessible in overseas facility, and all technical support/service performed by U.S. nationals.



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