

Complying with the International Traffic in Arms Regulations (ITAR)

Leading the Way (5/29/19)



Introduction: Today's Speaker



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Agenda

Today's presentation will address:

- Overview and Scope of the ITAR
- Determining What is Subject to the ITAR
- Complying with DDTC Registration Requirements
- ITAR Licensing and Exemptions
- Voluntary Disclosures, Enforcement, and Penalties
- DDTC Guidelines for Developing an Effective ITAR Compliance Program



What is the Purpose of Export Controls?

- To address military or regional stability concerns that impact U.S. national security;
- To promote U.S. foreign policy objectives;
- To enforce treaty obligations and international commitments;
- To deal with concerns about the declared or suspected end-use or end-user of the export (generally human rights, criminal, weapons proliferation, or terrorism concerns); and
- For economic protection.



Q: Why do General Dynamics partners care about ITAR compliance?

A: To gain and maintain business!

- ◆ “Seller certifies by its commencement with performance of this Order that it will comply with all applicable laws, executive orders, rules, regulations and ordinances (including those controlling imports and exports and those establishing environmental requirements). Seller also agrees to obtain all necessary permits and licenses required.”
- ◆ “Before providing export controlled technical data and/or hardware to prospective lower-tier bidders and suppliers, it is your responsibility to ensure that the intended recipient is eligible to receive it.”

Sample language from published GDEB Terms and Conditions





Q: Why do General Dynamics partners care about ITAR compliance?

- “As a prospective subcontractor/subcontractor to EB, you must satisfy the following criteria:
 - ◆ Be registered with the U.S. State Department, when required (Applies to U.S. Suppliers only)...
 - ◆ Have developed and implemented a written Access Control Plan/Technology Control Plan to prevent unauthorized disclosures of export-controlled hardware and technical data. (Applies to all intended recipients at every tier.)...
 - ◆ Ensure that appropriate U.S. State Department approvals and/or licenses are obtained for all prospective foreign suppliers and subcontractors before providing them with, or with access to, export-controlled hardware, technical data, software, and information...
 - ◆ Include in lower-tier solicitations and subcontracts all subcontract requirements of these Terms and Conditions, the letter contract/purchase order, and all other documents applicable thereto, that are required to be flowed down...”

Sample language from published GDEB Terms and Conditions





What is the Scope of the ITAR?

International Traffic in Arms Regulations (ITAR)

- Controls on military items and technology
- Department of State, Directorate of Defense Trade Controls (DDTC)
- Arms Export Control Act (AECA)
- 22 CFR Parts 120-130



What is a “Defense Article?”

- The ITAR control “defense articles”
- An article is a “defense article” if it is:
 - Listed on the United States Munitions List (USML)
 - Or provides the equivalent performance capabilities of a defense article listed on the USML
 - Anything later determined to provide a critical military or intelligence advantage such that it warrants control under this subchapter.
- Defense articles can include the physical form, models, mockups, forgings, castings, unfinished products, and technical data (including software)

(22 C.F.R. § § 120.3, 120.6)

What is “Technical Data?”

“*Technical Data*” →

Information that is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles.

This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation.

(22 C.F.R. § 120.10)



What are “Defense Services?”

- Furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;
- Furnishing to foreign persons of any [ITAR-controlled] technical data...whether in the United States or abroad; or
- Military training of foreign units and forces.

(22 C.F.R. § 120.9)





What is an Export?

- An actual shipment or transmission out of the United States
 - ◆ including the sending or taking of a defense article out of the United States in any manner
- Releasing or otherwise transferring technical data to a foreign person in the United States
 - ◆ a “deemed export”
 - ◆ “Release means inspection by foreign persons of a defense article that reveals technical data to a foreign person or exchanges with foreign persons of technical data in the United States or abroad
- Performing a defense service on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad
(22 C.F.R. § § 120.17, 120.50)



What is an Export?

Any item sent from the United States to a foreign destination

- An “item” includes commodities (computers, servers, other equipment), software, technology (design drawings, technical specifications, technical assistance)
- How an item leaves the United States does not matter for export control purposes:
 - Email or “File Share” Transfer
 - Mail/Shipped (air/ocean)
 - Face-to-face
 - Website
 - Visual inspection that reveals technical data
 - Conference – AT&T conference/meeting
 - Hand-carried items – laptops, memory devices, mobile devices



“U.S. Persons”

- U.S. citizens and permanent resident aliens (green card holders)
- Corporate entities organized under U.S. law
- Branch offices of U.S. corporations
- Any governmental (local, state or federal) entity

“Foreign Persons”

- Any natural person who is neither a lawful permanent resident (8 U.S.C. 1101(a)(2)) nor a protected individual (8 U.S.C. 1324b(a)(3))
- Any foreign corporation, business association, partnership, trust, society or any other entity or group not incorporated or organized to do business in the U.S.



What is the Deemed Export Rule?

- Transfer of technology to non-U.S. persons/nationals who are physically located in the U.S.
 - Employees of a U.S. company
 - Visitors
 - Non-U.S. partners or affiliates
- Any release in the United States of technical data to a foreign person is deemed to be an export to all countries in which the foreign person has held or holds citizenship or holds permanent residency.
- Must determine whether the technology is subject to the ITAR and whether a license is required to “export” to the foreign national
 - ◆ Presents challenges with employees, guests, customers, vendors, subcontractors
- Companies must certify in H1-B visa process that they are in compliance with U.S. export regulations for non-U.S. persons



ITAR: Required Submissions to DDTC

- Registration requirements
- Export licenses
- Manufacturing License Agreements
- Technical Assistance Agreements
- Disclosures (Voluntary and/or Directed)



ITAR: Registration Requirements

Who must register?

- All manufacturers, exporters, and brokers of defense articles, related technical data and defense services as defined on the USML (Part 121 of the ITAR)
- Primarily a means to provide the U.S. Government with necessary information on who is involved in certain manufacturing, exporting and brokering activities, and is a precondition for the issuance of any license or other approval for export

How long is registration valid?

- Twelve months from the date of issuance (applies to new/renewal registrations)

Where can I find out more information about DDTC registration requirements?

- <http://www.pmdtdc.state.gov/registration/index.html>



ITAR: Types of Licenses for Export or Temporary Import

DSP-5: Permanent export of unclassified defense articles or technology

- Country of ultimate destination; end use; end user; description of item exported

DSP-73: Temporary export of unclassified defense articles or technology

- Country of destination; Reason for temporary export; Description of item temporarily exported

DSP-85: Permanent or temporary export of classified defense articles or technology

- Foreign end user; Specific purpose of item; Description of item to be exported

DSP-61: Temporary import of unclassified defense articles or technology

- Foreign owner; Foreign end user; Purpose of import (i.e., modifications, overhaul, etc.); Description of technology temporarily imported

DDTC Licensing Source: <http://www.pmdtc.state.gov/licensing/index.html>



ITAR: Common License Exemptions

Exemptions

- Approval to export hardware, technical data and defense services without a license or agreement provided that a set of defined criteria is met prior to export
- Several exemptions listed in the ITAR
 - ◆ Examples: UK, Australia, Canada, NATO (Part 126)
- Recordkeeping and reporting requirement can be significant



ITAR: Voluntary Disclosures

DDTC strongly encourages the disclosure of information by persons that believe they may have violated a provision of the AECA, ITAR, license, etc.

- ITAR Section 127.12
- A voluntary disclosure often helps mitigate penalties

A voluntary disclosure should include a description of the violation and:

- Whether the transaction would have been authorized had a proper license request been made;
- Why the violation occurred;
- The degree of cooperation with the ensuing investigation;
- Whether the person has instituted or improved an internal compliance program to reduce the likelihood of future violation;
- Whether the person making the disclosure did so with the full knowledge and authorization of the person's senior management.



ITAR: Penalties

Statutory authority

- Arms Export Control Act, 22 U.S.C. §§ 2778 and 2779 (“AECA”)

Administrative penalties

- Denial, revocation, suspension, or amendment of licenses
- Debarment

Civil violations

- Fines: Up to \$500,000 per violation

Criminal violations

- Imprisonment for up to 10 years
- Fines: Up to \$1,000,000 for each violation



Jurisdiction, Classification & CJs

Depending on the design authority of a defense article, you may be responsible for determining the export jurisdiction and classification.

- Jurisdiction:
 - ◆ Is it subject to the ITAR, the Export Administration Regulations (EAR) (commercial/dual-use exports) or neither (public domain, etc.)?
- Classification
 - ◆ Under what USML category does the article fit?
 - Submersible Vessels → USML Cat. XX
 - Military Electronics → USML Cat. XI
 - Armored Ground Vehicles → USML Cat. VII
 - Torpedoes → USML Cat. IV
- Can't decide?
 - ◆ The Commodity Jurisdiction Request (CJ) process allows the State Department to review the article and decide for you.



DDTC Guidance: Essentials for Developing an Effective ITAR Compliance Program

- Organization Structure
- Corporate Commitment and Policy
- Identification, Receipt, and Tracking of ITAR-Controlled Items/Technical Data
- Re-exports/Retransfers
- Restricted/Prohibited Exports and Transfers
- Recordkeeping
- Internal Monitoring
- Training
- Violations and Penalties

Source: http://www.pmdrtc.state.gov/compliance/documents/compliance_programs.pdf

Questions?



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