

# The Annotated ITAR™ ©

by James Ellwood Bartlett III

## International Traffic in Arms Regulations

### 22 C.F.R. Chapter I, Subchapter M, Parts 120-130

As amended through 74 Fed. Reg. 39212-39213 (August 6, 2009)

(Last editorial revisions Jan. 4, 2010)

“The Annotated ITAR” is a copy of the International Traffic in Arms Regulations with Table of Contents, footnotes, section histories, appendixes, and Index added by the author, with contributions from readers. The word “History” precedes source citations to distinguish from regulatory text. Otherwise, the text is the same as published in the official version, 22 C.F.R. §§ 120-130 (April 1, 2009) and downloaded from the Government Printing Office (GPO) website, with all amendments published in the FEDERAL REGISTER since April 1, 2009. Readers are cautioned, however, that this document is only an unofficial practice aid. The official C.F.R. version, however, does not include revisions published in the Federal Register after April 1, 2009, which *are* included in this version. Some footnotes in this document refer the reader to statutory changes that are effective, even though they have not yet resulted in changes to the official version of the ITAR.

Errors in the official GPO version are repeated here verbatim, followed by “[sic]”, and a footnote explaining the error and the suggested correction. “*Id.*” indicates a repeated footnote. Most typeface, capitalization, hyphenation, and paragraphing errors and inconsistencies are corrected in this version per the U.S. *Government Printing Office Style Manual* without indicating the change from the original. Some words (*e.g.*, “end-use”, “end-user”, “reexport”, and “retransfer”) are alternatively hyphenated and printed solid in the official ITAR version, but have been changed here to conform to standard U.S. Code usage.

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*Summary of the ITAR:* The U.S. Arms Export Control Act (22 U.S.C. 2778), implemented by the ITAR (22 CFR 120-130) and administered by the State Department's Directorate of Defense Trade Controls (“DDTC”)(ITAR 122.12), prohibits the export (ITAR 120.17) and temporary import (ITAR 120.18) of defense articles (ITAR 120.6) and technical data (ITAR 120.10), the provision of defense services (ITAR 120.8) to foreign persons (ITAR 120.16), and the brokering of defense articles or services (ITAR 129.1) by all persons in the United States and by U.S. persons (ITAR 120.15) wherever located, unless authorized in advance by a DDTC-issued export license or by qualification for an ITAR exemption (ITAR 123.1). Any person in the USA who manufactures or exports defense articles, furnishes defense services to foreign persons, or brokers defense articles or services must register with DDTC (ITAR 122.1(a); 129.3) and maintain records of regulated activities for 5 years (ITAR 122.5). Violations are punishable by fines, imprisonment, and debarment (ITAR 127.3). See also 18 U.S.C.A. § 554, which prohibits export of any item from the United States contrary to any law or regulation of the United States, punishable by fine and imprisonment of not more than 10 years.

*Amendment to ITAR since the last official GPO printing (Apr. 1, 2009):*

06 Aug 09: 74 FR 39212-39213, § 123.17(f) body armor exemption

03 Aug 09: 74 FR 38342; §§ 123, 124, 126, and 129, re Congressional Certification for South Korea

20 Jul 09: 74 FR 35115; 121.1(c), Cat XII(c) correction

24 Apr 09: 74 FR 18628; § 121.1(c), Cat. XII revision



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## PART 120: PURPOSE AND DEFINITIONS

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*Authority:* Sections 2, 38, and 71, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2794; E.O. 11958, 42 FR 4311, E.O. 13284, 68 FR 4075, 3 CFR, 1977 Comp. p. 79; 22 U.S.C. 2658; Pub. L. 105-261, 112 Stat. 1920.

*Source:* 58 FR 39283, July 22, 1993, unless otherwise noted.

*History:* 49 FR 47684, Dec. 6, 1984; 50 FR 12787, Apr. 1, 1985, as amended at 53 FR 11496, Apr. 7, 1988; 54 FR 42497, Oct. 17, 1989; 58 FR 39283, Jul. 22, 1993; 68 FR 7417, Feb. 14, 2003 (effective Jan. 19, 2003); 68 FR 57352, Oct. 3, 2003 (effective Aug. 11, 2003). 68 FR 51171, Aug. 26, 2003, effective Jan. 29, 2003; 70 FR 34652-34655, Jun. 15, 2005; 70 Fed. Reg. 50966, Aug. 29, 2005; 71 FR 20534, Apr. 21, 2006.

### **§ 120.1 General Authorities and Eligibility<sup>1</sup>**

(a) Section 38 of the Arms Export Control Act (22 U.S.C. 2778) authorizes the President to control the export

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<sup>1</sup> The commercial export of conventional arms is governed principally by the Arms Export Control Act (AECA), which authorizes the President to control the export of arms, ammunition, implements of war and related technical data. The President has delegated that authority to the Secretary of State, and the Secretary has promulgated the International Traffic in Arms Regulations (ITAR), under which a license or other approval is required for exports of defense articles, related technical data and defense services. Pursuant to the AECA and the ITAR it is unlawful for persons (including U.S. companies and governmental entities) to export or temporarily import any defense articles or related technical data or to furnish any defense services without first obtaining the required license or other approval from the State Department's Directorate of Defense Trade Controls, unless an exemption to the ITAR applies.

and import of defense articles and defense services.<sup>2</sup> The statutory authority of the President to promulgate regulations with respect to exports of defense articles and defense services was delegated to the Secretary of State by Executive Order 11958, as amended. This subchapter<sup>3</sup> implements that authority. By virtue of delegations of authority by the Secretary of State, these regulations are primarily administered by the Deputy Assistant Secretary for Defense Trade Controls and Managing Director of Defense Trade Controls, Bureau of Political-Military Affairs.

(b) (1) *Authorized officials.* All authorities conferred upon the Deputy Assistant Secretary for Defense Trade Controls or the Managing Director of Defense Trade Controls by this subchapter may be exercised at any time by the Under Secretary of State for Arms Control and International Security or the Assistant Secretary of State for Political-Military Affairs unless the Legal Adviser or the Assistant Legal Adviser for Political-Military Affairs of the Department of State determines that any specific exercise of this authority under this paragraph may be inappropriate.

(2) In the Bureau of Political-Military Affairs, there is a Deputy Assistant Secretary for Defense Trade Controls (DAS—Defense Trade Controls) and a Managing Director of Defense Trade Controls (MD—Defense Trade Controls). The DAS—Defense Trade Controls and the MD—Defense Trade Controls are responsible for exercising the authorities conferred under this subchapter. The DAS—Defense Trade Controls is responsible for oversight of the defense trade controls function. The MD—Defense Trade Controls is responsible for the Directorate of Defense Trade Controls, which oversees the subordinate offices described in paragraphs (b)(2)(i) through (b)(2)(iv) of this section.

(i) The Office of Defense Trade Controls Management and the Director, Office of Defense Trade Controls Management, which have responsibilities related to management of defense trade controls operations, to include the exercise of general authorities in this part 120, and the design, development, and refinement of processes, activities, and functional tools for the export licensing regime and to effect export compliance/enforcement activities;

(ii) The Office of Defense Trade Controls Licensing and the Director, Office of Defense Trade Controls Licensing, which have responsibilities related to licensing or other authorization of defense trade, including references under parts 120, 123, 124, 125, 126, 129 and 130 of this subchapter;

(iii) The Office of Defense Trade Controls Compliance<sup>4</sup> and the Director, Office of Defense Trade Controls Compliance, which have responsibilities related to violations of law or regulation and compliance therewith, including references contained in parts 122, 126, 127, 128 and 130 of this subchapter, and that portion under part 129 of this subchapter pertaining to registration;

(iv) The Office of Defense Trade Controls Policy and the Director, Office of Defense Trade Controls Policy, which have responsibilities related to the general policies of defense trade, including references under this part 120 and part 126 of this subchapter, and the commodity jurisdiction procedure under this subchapter, including under this part 120.

(c) *Eligibility.* Only U.S. persons (as defined in § 120.15) and foreign governmental entities in the United States may be granted licenses or other approvals (other than retransfer approvals sought pursuant to this subchapter). Foreign persons (as defined in § 120.16) other than governments are not eligible. U.S. persons who have been convicted of violating the criminal statutes enumerated in § 120.27, who have been debarred pursuant to part 127 or 128 of this subchapter, who are the subject of an indictment involving the criminal statutes enumerated in § 120.27, who are ineligible to contract with, or to receive a license or other form of

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<sup>2</sup> 22 U.S.C. § 2778(a)(1) states: “In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services. The President is authorized to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List.”

<sup>3</sup> Practice tip: The word “subchapter” is another way of referring to the entire ITAR in this case. A “subchapter” is not a “part,” “section,” or a “category.” These distinctions are relevant when reading the ITAR. (Contributor: Kevin Wolf, Esq., kwolf@bryancave.com, 202-508-6113).

<sup>4</sup> Practice tip: “Compliance” includes registration, enforcement, and other compliance matters. (Contributor: Kevin Wolf, Esq., kwolf@bryancave.com, 202-508-6113).

authorization to import defense articles or defense services from any agency of the U.S. Government, who are ineligible to receive export licenses (or other forms of authorization to export) from any agency of the U.S. Government, who are subject to Department of State Suspension/Revocation under §§ 126.7(a)(1) through (a)(7) of this subchapter, or who are ineligible under § 127.7(c) of this subchapter are generally ineligible. Applications for licenses or other approvals will be considered only if the applicant has registered with the Directorate of Defense Trade Controls pursuant to part 122 of this subchapter. All applications and requests for approval must be signed by a U.S. person who has been empowered by the registrant to sign such documents.

(d) The exemptions provided in this subchapter do not apply to transactions in which the exporter or any party to the export (as defined in § 126.7 (e) of this subchapter) is generally ineligible as set forth above in paragraph (c) of this section, unless an exception has been granted pursuant to § 126.7(c) of this subchapter.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

## **§ 120.2 Designation of Defense Articles and Defense Services**

The Arms Export Control Act (22 U.S.C. 2778(a)<sup>5</sup> and 2794(7)<sup>6</sup>) provides that the President shall designate the articles and services deemed to be defense articles and defense services for purposes of this subchapter<sup>7</sup>. The items so designated constitute the United States Munitions List and are specified in part 121 of this subchapter. Such designations are made by the Department of State with the concurrence of the Department of Defense. For a determination on whether a particular item is included on the U.S. Munitions List see § 120.4(a).

*History: 49 FR 47684, Dec. 6, 1984; 58 FR 39283, July 22, 1993*

## **§ 120.3 Policy on Designating and Determining Defense Articles and Services**

An article or service may be designated or determined in the future to be a defense article (see § 120.6) or defense service (see § 120.9) if it:

- (a) Is specifically designed, developed, configured, adapted, or modified for a military application, and
  - (i) Does not have predominant<sup>8</sup> civil applications, and
  - (ii) Does not have performance equivalent (defined by form, fit and function) to those of an article or service used for civil applications; or
- (b) Is specifically designed, developed, configured, adapted, or modified for a military application, and has significant military or intelligence applicability such that control under this subchapter is necessary.

The intended use of the article or service after its export (*i.e.*, for a military or civilian purpose) is not relevant in determining whether the article or service is subject to the controls of this subchapter.<sup>9</sup> Any item covered by the U.S. Munitions List must be within the categories of the U.S. Munitions List. The scope of the U.S.

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<sup>5</sup> 22 U.S.C. 2778, CONTROL OF ARMS EXPORTS AND IMPORTS, stating in part:

(a) Presidential control of exports and imports of defense articles and services, guidance of policy, etc.; designation of United States Munitions List; issuance of export licenses; negotiations information

(1) In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services. The President is authorized to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List.

(2) Decisions on issuing export licenses under this section shall take into account whether the export of an article would contribute to an arms race, aid in the development of weapons of mass destruction, support international terrorism, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control or nonproliferation agreements or other arrangements.

(3) In exercising the authorities conferred by this section, the President may require that any defense article or defense service be sold under this chapter as a condition of its eligibility for export, and may require that persons engaged in the negotiation for the export of defense articles and services keep the President fully and currently informed of the progress and future prospects of such negotiations.

<sup>6</sup> 22 U.S.C. § 2794. Definitions . . . (7) "defense articles and defense services" means, with respect to commercial exports subject to the provisions of [section 2778](#) of this title, those items designated by the President pursuant to subsection (a)(1) of such section;

<sup>7</sup> *I.e.*, 22 C.F.R. Chapter I, Subchapter M, which is the entire ITAR.

<sup>8</sup> The word "predominant" is not defined in the ITAR or in published DDTC guidance.

<sup>9</sup> *But see* § 121.1 Cat VIII(e) Note (1)(i) and § 121.1 Cat XIV(n)(4)(ii) where intended end use is relevant for designating USML articles.

Munitions List shall be changed only by amendments made pursuant to section 38 of the Arms Export Control Act (22 U.S.C. 2778).

History: 49 FR 47684, Dec. 6, 1984; 58 FR 39283, July 22, 1993

## § 120.4 Commodity Jurisdiction

(a) The commodity jurisdiction procedure is used with the U.S. Government if doubt<sup>10</sup> exists as to whether an article<sup>11</sup> or service is covered by the U.S. Munitions List. It may also be used for consideration of a redesignation of an article or service currently covered by the U.S. Munitions List.<sup>12</sup> The Department must provide notice to Congress at least 30 days before any item is removed from the U.S. Munitions List. Upon written request, the Directorate of Defense Trade Controls shall provide a determination of whether a particular article or service is covered by the U.S. Munitions List. The determination, consistent with §§ 120.2, 120.3, and 120.4, entails consultation among the Departments of State, Defense, Commerce and other U.S. Government agencies and industry in appropriate cases.

(b) Registration with the Directorate of Defense Trade Controls as defined in part 122 of this subchapter is not required prior to submission of a commodity jurisdiction request. If it is determined that the commodity is a defense article or defense service covered by the U.S. Munitions List, registration is required for exporters, manufacturers, and furnishers of such defense articles and defense services (see part 122 of this subchapter), as well as for brokers who are engaged in brokering activities related to such articles or services.

(c) Requests shall identify the article or service, and include a history of the product's design, development and use. Brochures, specifications and any other documentation related to the article or service shall be submitted in seven collated sets.

(d) (1) A determination that an article or service does not have predominant civil applications shall be made by the Department of State, in accordance with this subchapter, on a case-by-case basis, taking into account:

- (i) The number, variety and predominance of civil applications;
- (ii) The nature, function and capability of the civil applications; and
- (iii) The nature, function and capability of the military applications.

(2) A determination that an article does not have the performance equivalent, defined by form, fit and function, to those used for civil applications shall be made by the Department of State, in accordance with this subchapter, on a case-by-case basis, taking into account:

- (i) The nature, function, and capability of the article;
- (ii) Whether the components used in the defense article are identical to those components originally developed for civil use.

NOTE: The *form* of the item is its defined configuration, including the geometrically measured configuration, density, and weight or other visual parameters which uniquely<sup>13</sup> characterize the item, component or assembly. For software, form denotes language, language level and media. The fit of the item

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<sup>10</sup> Practice tip: Caution: DDTC has maintained that even an unambiguously civilian end-item must be treated as ITAR-controlled while the CJ request is pending. To treat it as EAR controlled in the interim, according to DDTC, runs the risk of an enforcement action for unlicensed exports in the interim if DDTC rules that the item is ITAR-controlled. This policy is a severe impediment to the seeking of CJs on civilian items in order to, e.g., avoid issues with Customs officials who might think the civilian item is ITAR-controlled. (Contributor: Susan Kovarovics, Esq., Susan.Kovarovics@bryancave.com, 202-508-6132).

<sup>11</sup> The term "defense article" includes ITAR-controlled "technical data" and software. § 120.6.

<sup>12</sup> Practice tip: Other reasons to submit a CJ Request: (1) eliminate confusion among different parts of or personnel within the company; (2) make customers more confident in product that they are buying or having incorporated into their end-item; (3) eliminate concerns regarding the flow of military technology to commercial applications; (4) give comfort to management in high risk transactions; (5) gut reaction that enforcement officials might think an item is controlled although it is not; (6) question a competitor's determination; and/or (7) get a sense for how DDTC interprets a particular issue. (Contributor: Susan Kovarovics, Esq., Susan.Kovarovics@bryancave.com, 202-508-6132).

<sup>13</sup> Practice tip: Focus is often whether the item is somehow unique to the military end-item or whether it can be dropped in on a one-for-one replacement basis without modification into a commercial end item. If so, DDTC will usually rule that the interchangeable item is subject to the EAR and will defer to Commerce regarding classification and relevant controls under the EAR. (Contributor: Susan Kovarovics, Esq., Susan.Kovarovics@bryancave.com, 202-508-6132.)

is its ability to physically interface or interconnect with or become an integral part of another item.<sup>14</sup> The function of the item is the action or actions it is designed to perform.

(3) A determination that an article has significant military or intelligence applications such that it is necessary to control its export as a defense article shall be made, in accordance with this subchapter, on a case-by-case basis, taking into account:

(i) The nature, function, and capability of the article;

(ii) The nature of controls imposed by other nations on such items (including Wassenaar Arrangement and other multilateral controls), and

(iii) That items described on the Wassenaar Arrangement List of Dual-Use<sup>15</sup> Goods and Technologies shall not be designated defense articles or defense services unless the failure to control such items on the U.S. Munitions List would jeopardize significant national security or foreign policy interests.

(e) The Directorate of Defense Trade Controls will provide a preliminary response within 10 working days of receipt of a complete request for commodity jurisdiction. If after 45 days the Directorate of Defense Trade Controls has not provided a final commodity jurisdiction determination, the applicant may request in writing to the Director, Office of Defense Trade Controls Policy that this determination be given expedited processing.

(f) State, Defense and Commerce will resolve commodity jurisdiction disputes in accordance with established procedures. State shall notify Defense and Commerce of the initiation and conclusion of each case.

(g) A person may appeal a commodity jurisdiction determination by submitting a written request for reconsideration to the Managing Director of the Directorate of Defense Trade Controls. The Directorate of Defense Trade Controls will provide a written response of the Managing Director's determination within 30 days of receipt of the appeal. If desired, an appeal of the Managing Director's decision can then be made directly through the Deputy Assistant Secretary for Defense Trade Controls to the Assistant Secretary for Political-Military Affairs.

*History: 49 FR 47684, Dec. 6, 1984; 58 FR 39284, July 22, 1993; 71 FR 20534, Apr. 21, 2006.*

## **§ 120.5 Relation to Regulations of Other Agencies**

If an article or service is covered by the U.S. Munitions List, its export is regulated by the Department of State, except as indicated otherwise in this subchapter. For the relationship of this subchapter to regulations of the Department of Energy and the Nuclear Regulatory Commission, see § 123.20 of this subchapter. The Attorney General controls permanent imports of articles and services covered by the U.S. Munitions Import List from foreign countries by persons subject to U.S. jurisdiction (27 CFR part 447).<sup>16</sup> In carrying out such functions, the Attorney General shall be guided by the views of the Secretary of State on matters affecting world peace, and the external security and foreign policy of the United States. The Department of Commerce regulates the export of items on the Commerce Control List (CCL) under the Export Administration Regulations (15 CFR parts 730 through 799).

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<sup>14</sup> Practice tip: Thus, if you can find a civilian end-item into which the part will fit and function perfectly without modification then an EAR determination in response to a CJ request is more likely. (Contributor: Susan Kovarovics, Esq., Susan.Kovarovics@bryancave.com, 202-508-6132.)

<sup>15</sup> See footnote at § 120.6.

<sup>16</sup> The U.S. Munitions Import List relates to the portion of Section 38, Arms Export Control Act of 1976, which is concerned with the importation of arms, ammunition and implements of war, and includes procedural and administrative requirements and provisions relating to registration of importers, permits, articles in transit, import certification, delivery verification, import restrictions applicable to certain countries, exemptions, U.S. military firearms or ammunition, penalties, seizures, and forfeitures. All designations and changes in designation of articles subject to import control under Section 414 of the Mutual Security Act of 1954, have the concurrence of the Secretary of State and the Secretary of Defense. 27 CFR 447.2 states, in part, "(a) All of those items on the U.S. Munitions Import List (see §447.21) which are "firearms" or "ammunition" as defined in 18 U.S.C. 921(a) are subject to the interstate and foreign commerce controls contained in Chapter 44 of Title 18 U.S.C. and 27 CFR Part 478 and if they are "firearms" within the definition set out in 26 U.S.C. 5845(a) are also subject to the provisions of 27 CFR Part 479. Any person engaged in the business of importing firearms or ammunition as defined in 18 U.S.C. 921(a) must obtain a license under the provisions of 27 CFR Part 478, and if he imports firearms which fall within the definition of 26 U.S.C. 5845(a) must also register and pay special tax pursuant to the provisions of 27 CFR Part 479. Such licensing, registration and special tax requirements are in addition to registration under subpart D of this part."

### § 120.6 Defense Article<sup>17</sup>

*Defense article* means any item or technical data designated in § 121.1 of this subchapter. The policy described in § 120.3 is applicable to designations of additional items. This term includes technical data recorded or stored in any physical form, models, mock-ups or other items that reveal technical data directly relating to items designated in § 121.1 of this subchapter. It does not include basic marketing information on function or purpose or general system descriptions.<sup>18</sup>

History: 49 FR 47684, Dec. 6, 1984; 58 FR 39284, July 22, 1993

### § 120.7 Significant Military Equipment

(a) *Significant military equipment* means articles for which special export controls are warranted because of their capacity for substantial military utility or capability.

(b) Significant military equipment includes:

- (1) Items in § 121.1 of this subchapter which are preceded by an asterisk; and
- (2) All classified articles enumerated in § 121.1 of this subchapter.

History: 49 FR 47684, Dec. 6, 1984; 58 FR 39284, July 22, 1993; as amended at 62 FR 67274, 67275, Dec. 24, 1997

### § 120.8 Major Defense Equipment

Pursuant to section 47(6) of the Arms Export Control Act (22 U.S.C. 2794(6))<sup>19</sup> note [sic]<sup>20</sup>, *major defense equipment* means any item of significant military equipment (as defined in § 120.7) on the U.S. Munitions List having a nonrecurring research and development cost of more than \$50,000,000 or a total production cost of more than \$200,000,000.

History: 49 FR 47684, Dec. 6, 1984; 58 FR 39284, July 22, 1993

### § 120.9 Defense Service<sup>21</sup>

(a) *Defense service* means:

- (1) The 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;<sup>22</sup>

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<sup>17</sup> Practice tip: Note on ITAR and EAR jurisdictional/classification terminology: The effort to determine whether an item is subject to the ITAR, i.e., on the USML, is known as a "jurisdictional" analysis. One is asking which agency has jurisdiction – DDTC or BIS. If DDTC, one then asks how the item is classified on the USML, i.e., which Roman numeral "Category" describes the item. The effort to determine where an item is on the CCL as a dual-use item is known as a "classification" analysis. One is asking where an item is classified on the CCL and which ECCN is applicable. However, one gets to the classification analysis only after a jurisdictional determination has been made. Caution: The term "dual-use" is misleading. Some think that if an item is used for both commercial and military applications it is a "dual-use" item and, thus, subject to the EAR, not the ITAR. While this might be a common sense use of the term, the export control meaning of the term approaches the definition from the other direction – if something is controlled under the EAR, THEN it is a "dual-use" item. (15 C.F.R. § 730.3). The term applies to commercial items that also have military applications, not military (i.e., ITAR-controlled) items that also have commercial applications. For example, aircraft engine components specifically designed for a military aircraft engine but also used in civilian aircraft engines are not "dual use" items because they are subject to the jurisdiction of the ITAR. Whereas, aircraft parts for civil aircraft are dual-use because they could be used on military aircraft or for other military applications. (Contributor: Kevin Wolf, Esq., kwolf@bryancave.com, 202-508-6113).

<sup>18</sup> See also § 121.1 Cat. XXI(a), which includes in § 121.1 "any article . . . which has substantial military application and which has been specifically designed or modified for military purposes."

<sup>19</sup> 22 U.S.C. 2794. ("Definitions . . . (6) "major defense equipment" means any item of significant military equipment on the United States Munitions List having a nonrecurring research and development cost of more than \$50,000,000 or a total production cost of more than \$200,000,000; . . .").

<sup>20</sup> So in original, but this section is not a note.

<sup>21</sup> Obtain DDTC approval before providing a defense service. See part 124.

<sup>22</sup> The assistance does need not to involve technical data, U.S. or foreign origin, to be classified as defense services. See U.S. State Dept. Consent Agreement, IN THE MATTER OF ANALYTICAL METHODS, INC. 5 (Jan. 23, 2009), available at [http://www.pmdtc.state.gov/compliance/consent\\_agreements/pdf/AnalyticalMethods\\_ConsentAgreement.pdf](http://www.pmdtc.state.gov/compliance/consent_agreements/pdf/AnalyticalMethods_ConsentAgreement.pdf), stating in part:

(2) The furnishing to foreign persons of any technical data controlled under this subchapter (see § 120.10), whether in the United States or abroad; or

(3) Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice. (See also § 124.1[sic]<sup>23</sup>.)

(b) [Reserved]

History: 49 FR 47684, Dec. 6, 1984; 58 FR 39285, July 22, 1993; 62 FR 67274, 67275, Dec. 24, 1997

## § 120.10 Technical Data<sup>24</sup>

(a) *Technical data* means, for purposes of this subchapter:<sup>25</sup>

(1) Information, other than software as defined in § 120.10(a)(4) which 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 and documentation.

(2) Classified information relating to defense articles and defense services;

(3) Information covered by an invention secrecy order;<sup>26</sup>

(4) Software as defined in § 121.8(f) of this subchapter directly related to defense articles;

(5) This definition does not include information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or information in the public domain as defined in § 120.11. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.<sup>27</sup>

(b) [Reserved]

History: 49 FR 47684, Dec. 6, 1984; 58 FR 39285, July 22, 1993; 61 FR 48830, 48831, Sept. 17, 1996; 71 FR 20534, Apr. 21, 2006.

## § 120.11 Public Domain

(a) *Public domain* means information which is published and which is generally accessible or available to the public:

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(6) The Respondent acknowledges and accepts that . . .

. . . .

(b) the furnishing of defense services to foreign persons – regardless of whether the underlying defense article(s) is of U.S. or foreign origin – is appropriately subject to the Department’s control under the ITAR, even when no technical data is involved (e.g., all the information relied upon in furnishing defense services to a foreign government or foreign person is in the public domain); . . .

(7) Respondent further acknowledges . . . .

. . . .

(e) that software designated as dual-use can be used to provide an ITAR regulated defense service and can become an ITAR regulated defense article when adapted or modified for a military application; . . . .

See generally Alan G. Kashdan & Andres A. Castrillon, *The Broad Scope Of ITAR-Controlled 'Defense Services'-Lessons Learned From The Analytical Methods Case*, 6 Int'l Gov't Contractor 53, July 2009. (examining the unauthorized export of defense services in the DDTC settlement with Analytical Methods, Inc., and when TAAs may be required for providing defense services to foreign persons using dual-use products and technologies—even if no export of U.S.-origin, ITAR-controlled products or technology is involved; and the “creation” of defense articles when non-defense items are modified for a military purpose).

<sup>23</sup> So in original. Probably intended to be § 124.2, Exemptions for Training and Military Service.

<sup>24</sup> Practice tip: When a non-U.S. company orders an ITAR-controlled part from a U.S. supplier, the non-U.S. company’s specifications will frequently list various acceptance test data (e.g., Certificate of Compliance with specifications, thermal analysis, stress analysis, etc.) as deliverables. Such information qualifies as technical data as defined in ITAR § 120.10. The deliverable data should therefore be specifically itemized in the non-U.S. company’s purchase order, assigned a value, and covered in the U.S. suppliers’ DSP-5 export license application. (Contributor: Gary Stanley, Esq., 202-686-4854, gstanley@glstrade.com)

<sup>25</sup> See § 125.4(c) for other examples of technical data.

<sup>26</sup> If a secrecy order has been placed on a U.S. patent application, the application (including any technical data contained therein) may not be exported from the United States or filed in a foreign country unless authorized under the secrecy order. 37 CFR 5.11(d), 5.5.

<sup>27</sup> Practice tip: Caution: What begins as marketing discussions or general system descriptions can easily slip into discussions of information required for the use of a defense article. (Contributor: Susan Kovarovics, Esq., Susan.Kovarovics@bryancave.com, 202-508-6132.)

- (1) Through sales at newsstands and bookstores;
- (2) Through subscriptions which are available without restriction to any individual who desires to obtain or purchase the published information;
- (3) Through second class mailing privileges granted by the U.S. Government;
- (4) At libraries open to the public or from which the public can obtain documents;
- (5) Through patents<sup>28</sup> available at any patent office;
- (6) Through unlimited distribution at a conference, meeting, seminar, trade show or exhibition, generally accessible to the public, in the United States;
- (7) Through public release (*i.e.*, unlimited distribution) in any form (*e.g.*, not necessarily in published form) after approval by the cognizant U.S. Government department or agency<sup>29</sup> (see also § 125.4(b)(13) of this subchapter);
- (8) Through fundamental research<sup>30</sup> in science and engineering at accredited institutions of higher learning in the U.S. where the resulting information is ordinarily published and shared broadly in the scientific community. *Fundamental research* is defined to mean basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community, as distinguished from research the results of which are restricted for proprietary reasons or specific U.S. Government access and dissemination controls. University research will not be considered fundamental research if:
  - (i) The University or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity, or
  - (ii) The research is funded by the U.S. Government and specific access and dissemination controls protecting information resulting from the research are applicable.

(b) [Reserved]

History: 49 FR 47684, Dec. 6, 1984; 58 FR 39285, July 22, 1993

## § 120.12 Directorate of Defense Trade Controls

Directorate of Defense Trade Controls, Bureau of Political-Military Affairs, Department of State, Washington, D.C. 20522-0112.<sup>31</sup>

<sup>28</sup> *But see* § 125.2(b) regarding data “exceeds that which is used to support a domestic filing of a patent application.”

<sup>29</sup> See 32 CFR Part 250 and DOD’s Office of Security Review website at <http://www.dtic.mil/whs/esd/osr/index.htm>.

<sup>30</sup> Practice tip: National Security Decision Directive 189 is the source of this definition. There is an open debate about whether the exemption includes only the “results” of fundamental research or also includes the information required to conduct such research. See Sense of the Senate provision in S.2198, sec. 401, “It is the sense of the Senate that the use of technology by an institution of higher education in the United States should not be treated as an export of such technology for purposes of section 5 of the Export Administration Act of 1979 (50 U.S.C. App. 2404) and any regulations prescribed thereunder, as currently in effect pursuant to the provisions of the International Emergency Economic Powers Act (50 USC 1701 et seq.), or any other provision of law, if such technology is so used by such institution for fundamental research.” Compare to the opposite position stated by DoD in 71 FR 46434, 46436 (14 Aug. 2006). (Contributor: Susan Kovarovics, Esq., [Susan.Kovarovics@bryancave.com](mailto:Susan.Kovarovics@bryancave.com), 202-508-6132.)

<sup>31</sup> DDTC website, [http://www.pmdtcc.state.gov/about/contact\\_information.html](http://www.pmdtcc.state.gov/about/contact_information.html) (Dec. 5, 2008), lists the following addresses:

Postal Mailing Address:

PM/DDTC, SA-1, 12th Floor Directorate of Defense Trade Controls  
Bureau of Political Military Affairs  
U.S. Department of State  
Washington, D.C. 20522-0112

Express Mail and Courier Delivery Service:

(Except for Registration, see below)  
U.S. Department of State  
PM/DDTC, SA-1, 12th Floor  
2401 E Street, NW  
Washington, D.C. 20037

Postal Mailing Address:

U.S. Department of State  
Directorate of Defense Trade Controls



### **§ 120.13 United States**

*United States*, when used in the geographical sense, includes the several states, the Commonwealth of Puerto Rico, the insular possessions of the United States, the District of Columbia, the Commonwealth of the Northern Mariana Islands, any territory or possession of the United States, and any territory or possession over which the United States exercises any powers of administration, legislation, and jurisdiction.

History: 49 FR 47684, Dec. 6, 1984; 58 FR 39285, July 22, 1993

### **§ 120.14 Person**

*Person* means a natural person as well as a corporation, business association, partnership, society, trust, or any other entity, organization or group, including governmental entities. If a provision in this subchapter does not refer exclusively to a foreign person (§ 120.16) or U.S. person (§120.15), then it refers to both.

History: 49 FR 47684, Dec. 6, 1984; 58 FR 39285, July 22, 1993

### **§ 120.15 U.S. Person**

*U.S. person* means a person (as defined in § 120.14 of this part) who is lawful permanent resident as defined by 8 U.S.C. 1101(a)(20)<sup>32</sup> or who is a protected individual as defined by 8 U.S.C. 1324b(a)(3)<sup>33</sup>. It also means any corporation, business association, partnership, society, trust, or any other entity, organization or group that is incorporated to do business in the United States. It also includes any governmental (federal, state or local) entity. It does not include any foreign person as defined in § 120.16 of this part.

History: 49 FR 47684, Dec. 6, 1984; 58 FR 39285, July 22, 1993; 59 FR 25811, May 18, 1994; amended at 71 FR 20534, Apr. 21, 2006.

### **§ 120.16 Foreign Person**

*Foreign person* means any natural person who is not a lawful permanent resident as defined by 8 U.S.C. 1101(a)(20) or who is not a protected individual as defined by 8 U.S.C. 1324b(a)(3). It also means any foreign corporation, business association, partnership, trust, society or any other entity or group that is not incorporated or organized to do business in the United States, as well as international organizations, foreign governments and any agency or subdivision of foreign governments (*e.g.* diplomatic missions).

History: 59 FR 25811, May 18, 1994; 71 FR 20534, Apr. 21, 2006.

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Compliance & Registration Division  
2401 E Street NW, SA-1, Room H1200  
Washington, DC 20522-0112

Physical Location:

2401 E. Street, N.W.  
Washington, D.C. 20037  
Offices on the 12<sup>th</sup> and 13<sup>th</sup> Floors  
Commonly referred to as "Columbia Plaza Location"  
Nearest Metro station is "Foggy Bottom-GWU"

<sup>32</sup> 8 U.S.C. 1101(a)(20) states: "The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." [Commonly referred to as "green card" holders.]

<sup>33</sup> 8 U.S.C. 1324b(a)(3) states:

Protected individual" defined. As used in paragraph (1), the term "protected individual" means an individual who—  
(A) is a citizen or national of the United States [Practice tip: Thus, even if one is a dual citizen of the US and another country, one is still a "US Person" and not a "Foreign Person." ITAR-controlled data can be released to such US Persons without a license.], or  
(B) is an alien who is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under section 1160 (a) or 1255a (a)(1) of this title, is admitted as a refugee under section 1157 of this title, or is granted asylum under section 1158 of this title; but does not include

(i) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, within six months after November 6, 1986, and

(ii) an alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of the application, unless the alien can establish that the alien is actively pursuing naturalization, except that time consumed in the Service's processing the application shall not be counted toward the 2-year period.

## **§ 120.17 Export**

(a) *Export* means:

- (1) Sending or taking a defense article out of the United States in any manner, except by mere travel outside of the United States by a person whose personal knowledge includes technical data; or
- (2) Transferring registration, control or ownership to a foreign person of any aircraft, vessel, or satellite covered by the U.S. Munitions List, whether in the United States or abroad; or
- (3) Disclosing (including oral or visual disclosure) or transferring in the United States any defense article to an embassy, any agency or subdivision of a foreign government (*e.g.*, diplomatic missions); or
- (4) Disclosing (including oral or visual disclosure) or transferring technical data to a foreign person, whether in the United States or abroad;<sup>34</sup> or
- (5) Performing a defense service on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad.
- (6) A launch vehicle or payload shall not, by reason of the launching of such vehicle, be considered an export for purposes of this subchapter. However, for certain limited purposes (see § 126.1 of this subchapter), the controls of this subchapter may apply to any sale, transfer or proposal to sell or transfer defense articles or defense services.

(b) [Reserved]

## **§ 120.18 Temporary Import<sup>35</sup>**

*Temporary import* means bringing into the United States from a foreign country any defense article<sup>36</sup> that is to be returned to the country from which it was shipped or taken, or any defense article that is in transit to another foreign destination. Temporary import includes withdrawal of a defense article from a customs bonded warehouse or foreign trade zone for the purpose of returning it to the country of origin or country from which it was shipped or for shipment to another foreign destination. Permanent imports are regulated by the Attorney General under the direction of the Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives (see 27 CFR parts 447, 478, 479, and 555).

*History:* 71 FR 20573, Apr. 21, 2006.

## **§ 120.19 Reexport or Retransfer**

*Reexport or retransfer* means the transfer of defense articles or defense services to an end-use, end-user or destination not previously authorized.

## **§ 120.20 License**

*License* means a document bearing the word “license” issued by the Directorate of Defense Trade Controls or its authorized designee which permits the export or temporary import of a specific defense article or defense service controlled by this subchapter.

*History:* 71 FR 20573, Apr. 21, 2006.

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<sup>34</sup> This section is roughly equivalent to the definitions of “deemed export” and “deemed reexport” in the Export Administrations Regulations, 15 CFR § 734.2(b)(2)(ii) and § 734.2(b)(5), which state the release of controlled technology to a foreign national “is deemed to be an export to the home country or countries of the foreign national,” and “any release of technology or source code to a foreign nationals of another country is a deemed reexport to the home country or countries of the foreign national.” See also ITAR § 125.2(c) requiring licenses for disclosures of technical data to foreign persons.

<sup>35</sup> Temporary imports use the DSP-61 license or § 123.4 exemption.

<sup>36</sup> Practice tip: Nowhere in the USML is there a reference to the country of origin of defense articles. Thus, wholly foreign-made articles are still “defense articles” if they were, *e.g.*, specifically designed or modified for a military end-item (or are information directly related to such end-items). Whether the defense articles require a license from DDTC for a particular transaction is a different question. (Contributor: Susan Kovarovics, Esq., Susan.Kovarovics@bryancave.com, 202-508-6132.)

### **§ 120.21 Manufacturing License Agreement**

An agreement (*e.g.*, contract) whereby a U.S. person grants a foreign person an authorization to manufacture defense articles abroad and which involves or contemplates:

- (a) The export of technical data (as defined in § 120.10) or defense articles or the performance of a defense service; or
- (b) The use by the foreign person of technical data or defense articles previously exported by the U.S. person. (See part 124 of this subchapter).

### **§ 120.22 Technical Assistance Agreement**

An agreement (*e.g.*, contract) for the performance of a defense service(s) or the disclosure of technical data, as opposed to an agreement granting a right or license to manufacture defense articles. Assembly of defense articles is included under this section, provided production rights or manufacturing know-how are not conveyed. Should such rights be transferred, § 120.21 is applicable. (See part 124 of this subchapter).

### **§ 120.23 Distribution Agreement**

An agreement (*e.g.*, a contract) to establish a warehouse or distribution point abroad for defense articles exported from the United States for subsequent distribution to entities in an approved sales territory (see part 124 of this subchapter).

### **§ 120.24 Port Directors**

*Port Directors of U.S. Customs and Border Protection* means the U.S. Customs and Border Protection Port Directors at the U.S. Customs and Border Protection Ports of Entry (other than the port of New York, New York, where their title is the *Area Directors*).

*History: 70 FR 50958, Aug. 29, 2005*

### **§ 120.25 Empowered Official**

(a) *Empowered Official* means a U.S. person who:

- (1) Is directly employed by the applicant or a subsidiary in a position having authority for policy or management within the applicant organization; and
- (2) Is legally empowered in writing by the applicant to sign license applications or other requests for approval on behalf of the applicant; and
- (3) Understands the provisions and requirements of the various export control statutes and regulations, and the criminal liability, civil liability and administrative penalties for violating the Arms Export Control Act and the International Traffic in Arms Regulations; and
- (4) Has the independent authority to:
  - (i) Enquire [*sic*] into any aspect of a proposed export or temporary import by the applicant, and
  - (ii) Verify the legality of the transaction and the accuracy of the information to be submitted; and
  - (iii) Refuse to sign any license application or other request for approval without prejudice or other adverse recourse.

(b) [Reserved]

### **§ 120.26 Presiding Official**

*Presiding Official* means a person authorized by the U.S. Government to conduct hearings in administrative proceedings.

## **§ 120.27 U.S. Criminal Statutes**

(a) For purposes of this subchapter, the phrase *U.S. criminal statutes* means:

- (1) Section 38 of the Arms Export Control Act (22 U.S.C. 2778);
- (2) Section 11 of the Export Administration Act of 1979 (50 U.S.C. App. 2410);
- (3) Sections 793, 794, or 798 of title 18, United States Code (relating to espionage involving defense or classified information) or § 2339A of such title (relating to providing material support to terrorists)<sup>37</sup>;
- (4) Section 16 of the Trading with the Enemy Act (50 U.S.C. App. 16);
- (5) Section 206 of the International Emergency Economic Powers Act (relating to foreign assets controls; 50 U.S.C. 1705);
- (6) Section 30A of the Securities Exchange Act of 1934 (15 U.S.C. 78dd-1) or section 104 of the Foreign Corrupt Practices Act (15 U.S.C. 78dd-2);
- (7) Chapter 105 of title 18, United States Code (relating to sabotage);
- (8) Section 4(b) of the Internal Security Act of 1950 (relating to communication of classified information; 50 U.S.C. 783(b) [sic]<sup>38</sup>);
- (9) Sections 57, 92, 101, 104, 222, 224, 225, or 226 of the Atomic Energy Act of 1954 (42 U.S.C. 2077, 2122, 2131, 2134, 2272, 2274, 2275, and 2276);
- (10) Section 601 of the National Security Act of 1947 (relating to intelligence identities protection; 50 U.S.C. 421);
- (11) Section 603(b) or (c) of the Comprehensive Anti-Apartheid Act of 1986 (22 U.S.C. 5113(b) and (c))<sup>39</sup>; and
- (12) Section 371 of title 18, United States Code (when it involves conspiracy to violate any of the above statutes).
- (13) Sections 3, 4, 5, and 6 of the Prevention of Terrorist Access to Destructive Weapons Act of 2004, relating to missile systems designed to destroy aircraft (18 U.S.C. 2332g), prohibitions governing atomic weapons (42 U.S.C. 2122), radiological dispersal services (18 U.S.C. 2332h), and variola virus (18 U.S.C. 175b);

(b) [Reserved]

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

## **§ 120.28 Listing of Forms Referred to in this Subchapter**

The forms referred to in this subchapter are available from the following government agencies:

(a) Department of State, Bureau of Political-Military Affairs, Directorate of Defense Trade Controls, Washington, DC 20522-0112.

- (1) Application/License for permanent export of unclassified defense articles and related technical data (Form DSP-5).
- (2) Application for registration (Form DSP-9 [sic]<sup>40</sup>).
- (3) Application/License for temporary import of unclassified defense articles (Form DSP-61).

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<sup>37</sup> Referring to 18 U.S.C. § 2339A, held to be unconstitutional in *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007).

<sup>38</sup> So in original; should be 50 U.S.C. § 783(a).

<sup>39</sup> Repealed in 1994. See, e.g., *South African Democratic Transition Support Act of 1993*, Pub. L. No. 103-149 § 4(a)(2), set forth as a note to 22 USCA § 5001.

<sup>40</sup> So in original. Should be "DS-2032". See DDTTC, STATEMENT OF REGISTRATION INSTRUCTIONS; <http://www.pmdtct.state.gov/registration/documents/DS2032.pdf> (last viewed Dec. 20, 2009).

- (4) Application/License for temporary export of unclassified defense articles (Form DSP-73).
- (5) Non-transfer and use certificate (Form DSP-83).
- (6) Application/License for permanent/temporary export or temporary import of classified defense articles and related classified technical data (Form DSP-85).
- (7) Authority to Export Defense Articles and Defense Services sold under the Foreign Military Sales program (Form DSP-94).

(b) Department of Commerce, Bureau of Industry and Security:

- (1) International Import Certificate (Form BIS-645P/ATF-4522/DSP-53).
- (2) Shipper's Export Declaration (Form No. 7525-V)<sup>41</sup>.
- (3) Department of Defense, Defense Security Cooperation Agency: Letter of Offer and Acceptance (DD Form 1513).

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 120.29 Missile Technology Control Regime**

(a) For purposes of this subchapter, *Missile Technology Control Regime (MTCR)* means the policy statement between the United States, the United Kingdom, the Federal Republic of Germany, France, Italy, Canada, and Japan, announced on April 16, 1987, to restrict sensitive missile-relevant transfers based on the MTCR Annex, and any amendments thereto;<sup>42</sup>

(b) The term *MTCR Annex* means the Guidelines and Equipment and Technology Annex of the MTCR, and any amendments thereto;

(c) *List of all items on the MTCR Annex.* Section 71(a) of the Arms Export Control Act (22 U.S.C. § 2797) refers to the establishment as part of the U.S. Munitions List of a list of all items on the MTCR Annex, the export of which is not controlled under section 6(l) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(l)), as amended. In accordance with this provision, the list of MTCR Annex items shall constitute all items on the U.S. Munitions List in § 121.16 of this subchapter.

### **§ 120.30 The Automated Export System (AES)**

The Automated Export System (AES) is the Department of Commerce, Bureau of Census, electronic filing of export information.<sup>43</sup> The AES shall serve as the primary system for collection of export data for the Department of State. In accordance with this subchapter U.S. exporters are required to report export information using AES for all hardware exports. Exports of technical data and defense services shall be reported directly to the Directorate of Defense Trade Controls (DDTC). Also, requests for special reporting may be made by DDTC on a case-by-case basis, (e.g., compliance, enforcement, congressional mandates).

*History: 68 FR 61098, Oct. 27, 2003*

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<sup>41</sup> On July 2, 2008, the Shipper's Export Declaration (SED) was replaced by the Electronic Export Information (EEI) by the Foreign Trade Regulations, 15 CFR 30.2, 73 FR 31548, Jun 2, 2008 ("For purposes of the regulations in this part, the SED information shall be referred to as EEI.")

<sup>42</sup> As a subscriber to the Missile Technology Control Regime (MTCR), the United States acts in accordance with the Guidelines for Sensitive Missile Transfers. These guidelines are meant to limit the risks of proliferation of weapons of mass destruction by controlling transfers that could contribute to their delivery systems. The Guidelines form the basis for controlling transfers to any destination beyond the government's jurisdiction, all delivery systems (other than manned aircraft) capable of delivering weapons of mass destruction, and equipment and technology relevant to missiles whose performance in terms of payload and range exceed certain parameters. The MTCR is an informal and voluntary association of countries which share the goals of non-proliferation of unmanned delivery systems capable of delivering weapons of mass destruction, and which seek to coordinate national export licensing efforts aimed at preventing their proliferation. The MTCR was originally established in 1987 by Canada, France, Germany, Italy, Japan, the United Kingdom and the United States. Since that time, the number of MTCR partners has increased to a total of 34 countries, all of which have equal standing within the Regime. The MTCR was initiated partly in response to the increasing proliferation of weapons of mass destruction (WMD), i.e., nuclear, chemical and biological weapons. See generally <http://www.mtcr.info/english/index.html> (last viewed Dec. 20, 2009).

<sup>43</sup> See generally <http://www.aesdirect.gov/> (last viewed Dec. 20, 2009).

### **§ 120.31 North Atlantic Treaty Organization**

North Atlantic Treaty Organization (NATO) is comprised of the following member countries:<sup>44</sup> Belgium, Bulgaria, Canada, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, The Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom and the United States.

*History: 70 FR 50958, Aug. 29, 2005*

### **§ 120.32 Major Non-NATO Ally**

*Major non-NATO ally* means a country that is designated in accordance with § 517 of the Foreign Assistance Act of 1961 (22 U.S.C. 2321k) as a major non-NATO ally for purposes of the Foreign Assistance Act of 1961 and the Arms Export Control Act (22 U.S.C. 2751 et seq.) (22 U.S.C. 2403(q)). The following countries have been designated as major non-NATO allies: Argentina, Australia, Bahrain, Egypt, Israel, Japan, Jordan, Kuwait, Morocco, New Zealand, Pakistan, the Philippines, Thailand, and Republic of Korea<sup>45</sup>. Taiwan shall be treated as though it were designated a major non-NATO ally (as defined in section 644(q) of the Foreign Assistance Act of 1961 (22 U.S.C. 2403(q)) .

*History: 70 FR 50958, Aug. 29, 2005*

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<sup>44</sup> NATO is an Alliance that consists of 28 independent member countries. See [http://www.nato.int/cps/en/natolive/nato\\_countries.htm](http://www.nato.int/cps/en/natolive/nato_countries.htm) (last viewed Dec. 20, 2009). Albania and Croatia joined NATO on April 1, 2009, but the ITAR has not been amended to add them.

<sup>45</sup> South Korea.

# PART 121: THE UNITED STATES MUNITIONS LIST

## Enumeration of Articles

### Section

- 121.1 General. The United States Munitions List
- 121.2 Interpretations of the United States Munitions List and the Missile Technology Control Regime Annex
- 121.3 Aircraft and Related Articles
- 121.4 Amphibious Vehicles
- 121.5 Apparatus and Devices under Category IV(c)
- 121.6 Cartridge and Shell Casings
- 121.7 [Removed & Reserved]
- 121.8 End-Items, Components, Accessories, Attachments, Parts, Firmware, Software, and Systems
- 121.9 [Removed & Reserved]
- 121.10 Forgings, Castings, and Machined Bodies
- 121.11 Military Demolition Blocks and Blasting Caps
- 121.12 [Removed & Reserved]
- 121.13 [Removed & Reserved]
- 121.14 [Reserved]
- 121.15 Vessels of War and Special Naval Equipment
- 121.16 Missile Technology Control Regime Annex

*Authority:* Secs. 2, 38, and 71, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp. p. 79; 22 U.S.C. 2651a; Pub. L. 105-261, 112 Stat. 1920. *History:* 58 FR 39287, July 22, 1993; latest change 71FR 20534-20555, Apr. 21, 2006

### § 121.1 General. The United States Munitions List

(a) The following articles, services and related technical data are designated as defense articles and defense services pursuant to 38 and 47(7) of the Arms Export Control Act (22 U.S.C. 2778 and 2794(7)).<sup>46</sup> Changes in designations will be published in the Federal Register. Information and clarifications on whether specific items are defense articles and services under this subchapter may appear periodically through the Internet Web site of the Directorate of Defense Trade Controls.

\*(b) *Significant Military Equipment:* An asterisk precedes certain defense articles in the following list. The asterisk means that the article is deemed to be "Significant Military Equipment" to the extent specified in § 120.7 of this subchapter. The asterisk is placed as a convenience to help identify such articles. Note that technical data directly related to the manufacture or production of any defense articles enumerated in any category that are designated as Significant Military Equipment (SME) shall itself be designated [sic]<sup>47</sup> SME.

(c) *Missile Technology Control Regime Annex (MTCR).* Certain defense articles and services are identified in

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<sup>46</sup> Defendants charged with the illegal export of defense articles have generally been unsuccessful in challenging the placement of items or categories of items in the USML. See, e.g., *United States v. Moller-Butcher*, 560 F. Supp. 550 (D. Mass., 1983) (Defendants were challenging whether certain items should have been placed on the list at all because they did not "make a significant contribution to the military potential of any other country," a requirement for placement on the USML.; *United States v. Martinez*, 904 F. 2d 601, 602 (11 Cir., 1990) ("The question whether a particular item should have been placed on the Munitions List possesses nearly every trait that the Supreme Court has enumerated traditionally renders a question political." (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Defendants were also unsuccessful in asserting a right to discover materials which bear on the question of whether what they were alleged to have exported illegally fell within a USML category. Memorandum and Order on Motion to Compel Production of Documents (#87), *United States v. Zhen Zhou Wu, Etc., et al.*, Doc. 109, Case No. 1:08-cr-10386-PBS (D. Mass. Filed Nov. 20, 2009) (denying motion to compel Government to produce documents which formed basis for assertion that certain objects were on USML). But see *U.S. v. Pulungan*, 569 F.3d 326, 328, C.A.7 (Wis., 2009), *reh'g denied* (2009) ("The Directorate's claim of authority to classify any item as a "defense article," without revealing the basis of the decision and without allowing any inquiry by the jury, would create serious constitutional problems. It would allow the sort of secret law that *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935), condemned. ... A regulation is published for all to see. People can adjust their conduct to avoid liability. A designation by an unnamed official, using unspecified criteria, that is put in a desk drawer, taken out only for use at a criminal trial, and immune from any evaluation by the judiciary, is the sort of tactic usually associated with totalitarian régimes. Government must operate through public laws and regulations. See *United States v. Farinella*, 558 F.3d 695 (7th Cir.2009). Thus the United States must prove, and not just assert, that the Leupold Mark 4 CQ/T rifle scope is "manufactured to military specifications."")

<sup>47</sup> So in original; should be "designated".

§ 121.16 as being on the list of MTCR Annex items on the United States Munitions List. These are articles as specified in § 120.29 of this subchapter and appear on the list at § 121.16.

### **Category I — Firearms, Close Assault Weapons and Combat Shotguns<sup>48</sup>**

- \*(a) Non-automatic and semi-automatic firearms to caliber .50 inclusive (12.7 mm).
- \*(b) Fully automatic firearms to .50 caliber inclusive (12.7 mm).
- \*(c) Firearms or other weapons (*e.g.* insurgency-counterinsurgency, close assault weapons systems) having a special military application regardless of caliber.
- \*(d) Combat shotguns. This includes any shotgun with a barrel length less than 18 inches.
- \*(e) Silencers, mufflers, sound and flash suppressors for the articles in (a) through (d) of this category and their specifically designed, modified or adapted components and parts.
- (f) Riflescopes manufactured to military specifications (See category XII(c) for controls on night sighting devices.)<sup>49</sup>
- \*(g) Barrels, cylinders, receivers (frames) or complete breech mechanisms for the articles in paragraphs (a) through (d) of this category.
- (h) Components, parts, accessories and attachments for the articles in paragraphs (a) through (g) of this category.
- (i) Technical data (as defined in § 120.10 of this subchapter) and defense services (as defined in § 120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (h) of this category. Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.
- (j) The following interpretations explain and amplify the terms used in this category and throughout this subchapter:

- (1) A firearm is a weapon not over .50 caliber (12.7 mm) which is designed to expel a projectile by the action of an explosive or which may be readily converted to do so.
- (2) A rifle is a shoulder firearm which can discharge a bullet through a rifled barrel 16 inches or longer.
- (3) A carbine is a lightweight shoulder firearm with a barrel under 16 inches in length.
- (4) A pistol is a hand-operated firearm having a chamber integral with or permanently aligned with the bore.
- (5) A revolver is a hand-operated firearm with a revolving cylinder containing chambers for individual cartridges.
- (6) A submachine gun, “machine pistol” or “machine gun” is a firearm originally designed to fire, or capable of being fired, fully automatically by a single pull of the trigger.

NOTE: This coverage by the U.S. Munitions List in paragraphs (a) through (i) of this category excludes any

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<sup>48</sup> See DDTC, GUIDELINES FOR THE PERMANENT EXPORT, TEMPORARY EXPORT, AND TEMPORARY IMPORT OF FIREARMS AND AMMUNITION; U.S. MUNITIONS LIST CATEGORIES I AND III (Mar. 2008), [http://www.pmdtc.state.gov/licensing/documents/Guidelines\\_Firearms.pdf](http://www.pmdtc.state.gov/licensing/documents/Guidelines_Firearms.pdf).

<sup>49</sup> In *U.S. v. Pulungan*, 569 F.3d 326, C.A.7 (Wis., 2009), Doli Pulungan tried in 2007 to export 100 Leupold Mark 4® CQ/T® riflescopes (made in Oregon by Leupold & Stevens, Inc.). He planned to transship through Saudi Arabia to Indonesia in order to conceal the destination, because his clients told him that the United States had an embargo on military exports to Indonesia. There had been such an embargo between 1999 and 2005, but there was none when Pulungan tried to acquire and export the 'scopes. He was charged with violation of § 2778(c), however, on the theory that the Leupold Mark 4 CQ/T riflescope is “manufactured to military specifications,” a jury found him guilty of attempting to export defense articles without a license, and the judge sentenced him to 48 months' imprisonment. The Court of Appeals reversed, holding that even if riflescopes in question were manufactured to military specifications, as would make them defense articles, evidence did not establish that defendant knew that the riflescopes he attempted to export were defense articles or that license was required to export them, as required to support his conviction for attempting to export defense articles without a license; website consulted by defendant did not state why riflescopes in question could not be shipped outside of the United States, and defendant's belief that what he was doing was illegal because of an embargo, which had been lifted two years earlier, was unrelated to unlicensed exports. International Security Assistance and Arms Export Control Act of 1976, § 212(a)(1), [22 U.S.C.A. § 2778\(c\)](#).



non-combat shotgun with a barrel length of 18 inches or longer, BB, pellet, and muzzle loading (black powder) firearms. This category does not cover riflescopes and sighting devices that are not manufactured to military specifications. It also excludes accessories and attachments (*e.g.*, belts, slings, after market rubber grips, cleaning kits) for firearms that do not enhance the usefulness, effectiveness, or capabilities of the firearm, components and parts. The Department of Commerce regulates the export of such items. See the Export Administration Regulations (15 CFR parts 730-799). In addition, license exemptions for the items in this category are available in various parts of this subchapter (*e.g.* §§ 123.17, 123.18 and 125.4).

*History: 67 FR 20894, April 5, 2002.*

## **Category II — Guns and Armament**

\*(a) Guns over caliber .50 (12.7 mm, whether towed, airborne, self-propelled, or fixed, including but not limited to, howitzers, mortars, cannons and recoilless rifles.

(b) Flame throwers specifically designed or modified for military application.

(c) Apparatus and devices for launching or delivering ordnance, other than those articles controlled in Category IV.

\*(d) Kinetic energy weapon systems specifically designed or modified for destruction or rendering mission-abort of a target.

(e) Signature control materials (*e.g.*, parasitic, structural, coatings, screening) techniques, and equipment specifically designed, developed, configured, adapted or modified to alter or reduce the signature (*e.g.*, muzzle flash suppression, radar, infrared, visual, laser/electro-optical, acoustic) of defense articles controlled by this category.

\*(f) Engines specifically designed or modified for the self-propelled guns and howitzers in paragraph (a) of this category.

(g) Tooling and equipment specifically designed or modified for the production of defense articles controlled by this category.

(h) Test and evaluation equipment and test models specifically designed or modified for the articles controlled by this category. This includes but is not limited to diagnostic instrumentation and physical test models.

(i) Autoloading systems for electronic programming of projectile function for the defense articles controlled in this Category.

(j) All other components, parts, accessories, attachments and associated equipment specifically designed or modified for the articles in paragraphs (a) through (i) of this category. This includes but is not limited to mounts and carriages for the articles controlled in this category.

(k) Technical data (as defined in § 120.10 of this subchapter) and defense services (as defined in § 120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (j) of this category. Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

(l) The following interpretations explain and amplify the terms used in this category and elsewhere in this subchapter:

(1) The kinetic energy weapons systems in paragraph (d) of this category include but are not limited to:

(i) Launch systems and subsystems capable of accelerating masses larger than 0.1g to velocities in excess of 1.6 km/s, in single or rapid fire modes, using methods such as: electromagnetic, electrothermal, plasma, light gas, or chemical;

(ii) Prime power generation, electric armor, energy storage, thermal management; conditioning, switching or fuel-handling equipment; and the electrical interfaces between power supply gun and other turret electric drive function;

(iii) Target acquisition, tracking fire control or damage assessment systems; and

(iv) Homing seeker, guidance or divert propulsion (lateral acceleration) systems for projectiles.

(2) The articles in this category include any end item, component, accessory, attachment part, firmware, software or system that has been designed or manufactured using technical data and defense services controlled by this category.

(3) The articles specifically designed or modified for military application controlled in this category include any article specifically developed, configured, or adapted for military application.

### **Category III — Ammunition/Ordnance<sup>50</sup>**

\*(a) Ammunition/ordnance for the articles in Categories I and II of this section.

(b) Ammunition/ordnance handling equipment specifically designed or modified for the articles controlled in this category, such as, belting, linking, and de-linking equipment.

(c) Equipment and tooling specifically designed or modified for the production of defense articles controlled by this category.

(d) Components, parts, accessories, attachments and associated equipment specifically designed or modified for the articles in this category:

\* (1) Guidance and control components for the articles in paragraph (a) of this category;

\* (2) Safing, arming and fuzing components (including target detection and localization devices) for the articles in paragraph (a) of this category; and

(3) All other components, parts, accessories, attachments and associated equipment for the articles in paragraphs (a) through (c) of this category.

(e) Technical data (as defined in § 120.10 of this subchapter) and defense services (as defined in § 120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (d) of this category. Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

(f) The following explains and amplifies the terms used in this category and elsewhere in this subchapter:

(1) The components, parts, accessories and attachments controlled in this category include, but are not limited to cartridge cases, powder bags (or other propellant charges), bullets, jackets, cores, shells (excluding shotgun shells), projectiles (including canister rounds and submunitions therefor), boosters, firing components therefor, primers, and other detonating devices for the defense articles controlled in this category.

(2) This category does not control cartridge and shell casings that, prior to export, have been rendered useless beyond the possibility of restoration for use as a cartridge or shell casing by means of heating, flame treatment, mangling, crushing, cutting or popping.

(3) Equipment and tooling in paragraph (c) of this category does not include equipment for hand-loading ammunition.

(4) The articles in this category include any end item, component, accessory, attachment, part, firmware, software, or system that has been designed or manufactured using technical data and defense services controlled by this category.

(5) The articles specifically designed or modified for military application controlled in this category include any article specifically developed, configured, or adapted for military application.

### **Category IV — Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs and Mines**

\*(a) Rockets (including but not limited to meteorological and other sounding rockets), bombs, grenades,

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<sup>50</sup> DDTTC, Guidelines for The Permanent Export, Temporary Export, and Temporary Import of Firearms and Ammunition; U.S. Munitions List Categories I & III (Mar. 24, 2008), are available at <http://pmdt.state.gov/docs/oas.pdf>.

torpedoes, depth charges, land and naval mines, as well as launchers for such defense articles, and demolition blocks and blasting caps. (See § 121.11.)

\*(b) Launch vehicles and missile and anti-missile systems including but not limited to guided, tactical and strategic missiles, launchers, and systems.

(c) Apparatus, devices, and materials for the handling, control, activation, monitoring, detection, protection, discharge, or detonation of the articles in paragraphs (a) and (b) of this category. (See § 121.5.)

\*(d) Missile and space launch vehicle power plants.

\*(e) Military explosive excavating devices.

\*(f) Ablative materials fabricated or semi-fabricated from advanced composites (*e.g.*, silica, graphite, carbon, carbon/carbon, and boron filaments) for the articles in this category that are derived directly from or specifically developed or modified for defense articles.

\*(g) Non-nuclear warheads for rockets and guided missiles.

(h) All specifically designed or modified components, parts, accessories, attachments, and associated equipment for the articles in this category.

(i) Technical data (as defined in § 120.10 of this subchapter) and defense services (as defined in § 120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (h) of this category. (See § 125.4 of this subchapter for exemptions.) Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

#### **Category V—Explosives and Energetic Materials, Propellants, Incendiary Agents and Their Constituents**

\*(a) Explosives, and mixtures thereof:

(1) ADNBF (aminodinitrobenzofuroxan or 7-Amino 4,6-dinitrobenzofurazane-1-oxide) (CAS 97096-78-1);

(2) BNCP (cis-bis (5-nitrotetrazolato) tetra amine-cobalt (III) perchlorate) (CAS 117412-28-9);

(3) CL-14 (diamino dinitrobenzofuroxan or 5,7-diamino-4,6-dinitrobenzofurazane-1-oxide) (CAS 117907-74-1);

(4) CL-20 (HNIW or Hexanitrohexaazaisowurtzitane); (CAS 135285-90-4); chlathrates of CL-20 (see paragraphs (g)(3) and (4) of this category);

(5) CP (2-(5-cyanotetrazolato) penta aminocobalt (III) perchlorate); (CAS 70247-32-4);

(6) DADE (1,1-diamino-2,2-dinitroethylene, FOX7);

(7) DDFP (1,4-dinitrodifurazanopiperazine);

(8) DDPO (2,6-diamino-3,5-dinitropyrazine-1-oxide, PZO); (CAS 194486-77-6);

(9) DIPAM (3,3'-Diamino-2,2',4,4',6,6'-hexanitrobiphenyl or dipicramide) (CAS 17215-44-0);

(10) DNGU (DINGU or dinitroglycoluril) (CAS 55510-04-8);

(11) Furazans, as follows:

(i) DAAOF (diaminoazoxyfurazan);

(ii) DAAzF (diaminoazofurazan) (CAS 78644-90-3);

(12) HMX and derivatives (see paragraph (g)(5) of this category):

(i) HMX (Cyclotetramethylenetetranitramine; octahydro-1,3,5,7-tetranitro-1,3,5,7- tetrazine; 1,3,5,7-tetranitro-1,3,5,7-tetraza-cyclooctane; octogen, octogene) (CAS 2691-41-0);

(ii) Difluoroaminated analogs of HMX;

- (iii) K-55 (2,4,6,8-tetranitro-2,4,6,8-tetraazabicyclo [3,3,0]-octanone-3, tetranitrosemiglycouril, or keto-bicyclic HMX) (CAS 130256-72-3);
- (13) HNAD (hexanitroadamantane) (CAS 143850-71-9);
- (14) HNS (hexanitrostilbene) (CAS 20062-22-0);
- (15) Imidazoles, as follows:
- (i) BNNII (Octahydro-2,5-bis(nitroimino) imidazo [4,5-d]Imidazole);
  - (ii) DNI (2,4-dinitroimidazole) (CAS 5213-49-0);
  - (iii) FDIA (1-fluoro-2,4-dinitroimidazole);
  - (iv) NTDNIA (N-(2-nitrotriazolo)-2,4-dinitro-imidazole);
  - (v) PTIA (1-picryl-2,4,5-trinitroimidazole);
- (16) NTNMH (1-(2-nitrotriazolo)-2-dinitromethylene hydrazine);
- (17) NTO (ONTA or 3-nitro-1,2,4-triazol-5-one) (CAS 932-64-9);
- (18) Polynitrocubanes with more than four nitro groups;
- (19) PYX (2,6-Bis(picrylamino)-3,5-dinitropyridine) (CAS 38082-89-2);
- (20) RDX and derivatives:
- (i) RDX (cyclotrimethylenetrinitramine), cyclonite, T4, hexahydro-1,3,5-trinitro-1,3,5-triazine, 1,3,5-trinitro-1,3,5-triaza-cyclohexane, hexogen, or hexogene) (CAS 121-82-4);
  - (ii) Keto-RDX (K-6 or 2,4,6-trinitro-2,4,6-triazacyclohexanone (CAS 115029-35-1);
- (21) TAGN (Triaminoguanidinenitrate) (CAS 4000-16-2);
- (22) TATB (Triaminotrinitrobenzene) (CAS 3058-38-6) (see paragraph (g)(7) of this category);
- (23) TEDDZ (3,3,7,7-tetrakis(difluoroamine) octahydro-1,5-dinitro-1,5-diazocine);
- (24) Tetrazoles, as follows:
- (i) NTAT (nitrotriazol aminotetrazole);
  - (ii) NTNT (1-N-(2-nitrotriazolo)-4-nitrotetrazole);
- (25) Tetryl (trinitrophenylmethylnitramine) (CAS 479-45-8);
- (26) TNAD (1,4,5,8-tetranitro-1,4,5,8-tetraazadecalin) (CAS 135877-16-6)(see paragraph (g)(6) of this category);
- (27) TNAZ (1,1,3-trinitroazetidine) (CAS 97645-24-4) (see paragraph (g)(2) of this category);
- (28) TNGU (SORGUYL or tetranitroglycoluril) (CAS 55510-03-7);
- (29) TNP (1,4,5,8-tetranitro-pyridazino [4,5-d] pyridazine) (CAS 229176-04-9);
- (30) Triazines, as follows:
- (i) DNAM (2-oxy-4,6-dinitroamino-s-triazine) (CAS 19899-80-0);
  - (ii) NNHT (2-nitroimino-5-nitro-hexahydro-1,3,5 triazine) (CAS 130400-13-4);
- (31) Triazoles, as follows:
- (i) 5-azido-2-nitrotriazole;
  - (ii) ADHTDN (4-amino-3,5-dihydrazino-1,2,4-triazole dinitramide)(CAS 1614-08-0);
  - (iii) ADNT (1-amino-3,5-dinitro-1,2,4-triazole);
  - (iv) BDNTA ([Bis-dinitrotriazole]amine);

- (v) DBT (3,3'-dinitro-5,5-bi-1,2,4-triazole) (CAS 30003-46-4);
- (vi) DNBT (dinitrobistriazole) (CAS 70890-46-9);
- (vii) NTDNA (2-nitrotriazole 5-dinitramide) (CAS 75393-84-9);
- (viii) NTDNT (1-N-(2-nitrotriazolo) 3,5-dinitro-triazole);
- (ix) PDNT (1-picryl-3,5-dinitrotriazole);
- (x) TACOT (tetranitrobenzotriazolobenzotriazole) (CAS 25243-36-1);

(32) Any explosive not listed elsewhere in paragraph (a) of this category with a detonation velocity exceeding 8,700m/s at maximum density or a detonation pressure exceeding 34 Gpa (340 kbar).

(33) Other organic explosives not listed elsewhere in paragraph (a) of this category yielding detonation pressures of 25 Gpa (250 kbar) or more that will remain stable at temperatures of 523K (250 degrees C) or higher for periods of 5 minutes or longer;

(34) Diaminotrinitrobenzene (DATB) (CAS 1630-08-6);

(35) Any other explosive not elsewhere identified in this category specifically designed, modified, adapted, or configured (*e.g.* formulated) for military application.

\* (b) Propellants:

(1) Any United Nations (UN) Class 1.1 solid propellant with a theoretical specific impulse (under standard conditions) of more than 250 seconds for non-metallized, or 270 seconds for metallized compositions;

(2) Any UN Class 1.3 solid propellant with a theoretical specific impulse (under standard conditions) of more than 230 seconds for non-halogenized, or 250 seconds for non-metallized compositions;

(3) Propellants having a force constant of more than 1,200 kJ/Kg;

(4) Propellants that can sustain a steady-state burning rate more than 38mm/s under standard conditions (as measured in the form of an inhibited single strand) of 6.89 Mpa (68.9 bar) pressure and 294K (21[deg] C);

(5) Elastomer modified cast double based propellants with extensibility at maximum stress greater than 5% at 233 K (-40C);

(6) Any propellant containing substances listed in Category V;

(7) Any other propellant not elsewhere identified in this category specifically designed, modified, adapted, or configured (*e.g.*, formulated) for military application.

(c) Pyrotechnics, fuels and related substances, and mixtures thereof:

(1) Alane (aluminum hydride)(CAS 7784-21-6);

(2) Carboranes; decaborane (CAS 17702-41-9); pentaborane and derivatives thereof;

(3) Hydrazine and derivatives:

(i) Hydrazine (CAS 302-01-2) in concentrations of 70% or more (not hydrazine mixtures specially formulated for corrosion control);

(ii) Monomethyl hydrazine (CAS 60-34-4);

(iii) Symmetrical dimethyl hydrazine (CAS 540-73-8);

(iv) Unsymmetrical dimethyl hydrazine (CAS 57-14-7);

(4) Liquid fuels specifically formulated for use by articles covered by Categories IV, VI, and VIII;

(5) Spherical aluminum powder (CAS 7429-90-5) in particle sizes of 60 micrometers or less manufactured from material with an aluminum content of 99% or more;

(6) Metal fuels in particle form whether spherical, atomized, spheroidal, flaked or ground, manufactured from material consisting of 99% or more of any of the following:

(i) Metals and mixtures thereof:

(A) Beryllium (CAS 7440-41-7) in particle sizes of less than 60 micrometers;

(B) Iron powder (CAS 7439-89-6) with particle size of 3 micrometers or less produced by reduction of iron oxide with hydrogen;

(ii) Mixtures, which contain any of the following:

(A) Boron (CAS 7440-42-8) or boron carbide (CAS 12069-32-8) fuels of 85% purity or higher and particle sizes of less than 60 micrometers;

(B) Zirconium (CAS 7440-67-7), magnesium (CAS 7439-95-4) or alloys of these in particle sizes of less than 60 micrometers;

(iii) Explosives and fuels containing the metals or alloys listed in paragraphs (c)(6)(i) and (c)(6)(ii) of this category whether or not the metals or alloys are encapsulated in aluminum, magnesium, zirconium, or beryllium;

(7) Pyrotechnics and pyrophoric materials specifically formulated for military purposes to enhance or control the production of radiated energy in any part of the IR spectrum.

(8) Titanium subhydride (TiH<sub>n</sub>) of stoichiometry equivalent to  $n = 0.65-1.68$ ;

(9) Military materials containing thickeners for hydrocarbon fuels specially formulated for use in flame throwers or incendiary munitions; metal stearates or palmates (also known as octol); and M1, M2 and M3 thickeners;

(10) Any other pyrotechnic, fuel and related substance and mixture thereof not elsewhere identified in this category specifically designed, modified, adapted, or configured (*e.g.*, formulated) for military application.

(d) Oxidizers, to include:

(1) ADN (ammonium dinitramide or SR-12) (CAS 140456-78-6);

(2) AP (ammonium perchlorate) (CAS 7790-98-9);

(3) BDNPN (bis,2,2-dinitropropyl nitrate) (CAS 28464-24-6);

(4) DNAD (1,3-dinitro-1,3-diazetidene) (CAS 78246-06-7);

(5) HAN (Hydroxylammonium nitrate) (CAS 13465-08-2);

(6) HAP (hydroxylammonium perchlorate) (CAS 15588-62-2);

(7) HNF (Hydrazinium nitroformate) (CAS 20773-28-8);

(8) Hydrazine nitrate (CAS 37836-27-4);

(9) Hydrazine perchlorate (CAS 27978-54-7);

(10) Liquid oxidizers comprised of or containing inhibited red fuming nitric acid (IRFNA) (CAS 8007-58-7) or oxygen difluoride;

(11) Perchlorates, chlorates, and chromates composited with powdered metal or other high energy fuel components controlled by this category;

(12) Any other oxidizer not elsewhere identified in this category specifically designed, modified, adapted, or configured (*e.g.*, formulated) for military application.

\*(e) Binders, and mixtures thereof:

(1) AMMO (azidomethylmethyloxetane and its polymers) (CAS 90683-29-7) (see paragraph (g)(1) of this category);

(2) BAMO (bisazidomethylmethyloxetane and its polymers) (CAS 17607-20-4) (see paragraph (g)(1) of this category);

- (3) BTTN (butanetrioltrinitrate) (CAS 6659-60-5) (see paragraph (g)(8) of this category);
- (4) FAMA0 (3-difluoroaminomethyl-3-azidomethyl oxetane) and its polymers;
- (5) FEFO (bis-(2-fluoro-2,2-dinitroethyl)formal) (CAS 17003-79-1);
- (6) GAP (glycidylazide polymer) (CAS 143178-24-9) and its derivatives;
- (7) HTPB (hydroxyl terminated polybutadiene) with a hydroxyl functionality equal to or greater than 2.2 and less than or equal to 2.4, a hydroxyl value of less than 0.77 meq/g, and a viscosity at 30[degrees] C of less than 47 poise (CAS 69102-90-5);
- (8) NENAS (nitrateethylnitramine compounds) (CAS 17096-47-8, 85068-73-1 and 82486-82-6);
- (9) Poly-NIMMO (poly nitratomethylmethyloxetane, poly-NMMO, (poly[3-nitratomethyl-3-methyl oxetane]) (CAS 84051-81-0);
- (10) Energetic monomers, plasticizers and polymers containing nitro, azido nitrate, nitraza or difluoromaino groups specially formulated for military use;
- (11) TVOPA 1,2,3-Tris [1,2-bis(difluoroamino) ethoxy]propane; tris vinoxyl propane adduct; (CAS 53159-39-0);
- (12) Polynitrorthocarbonates;
- (13) FPF-1 (poly-2,2,3,3,4,4-hexafluoro pentane-1,5-diolformal) (CAS 376-90-9);
- (14) FPF-3 (poly-2,4,4,5,5,6,6-heptafluoro-2-trifluoromethyl-3-oxaheptane-1,7-diolformal);
- (15) PGN (Polyglycidylnitrate or poly(nitratomethyl oxirane); poly-GLYN); (CAS 27814-48-8);
- (16) N-methyl-p-nitroaniline;
- (17) Low (less than 10,000) molecular weight, alcohol-functionalized, poly(epichlorohydrin); poly(epichlorohydrindiol); and triol;
- (18) Bis(2,2-dinitropropyl) formal and acetal;
- (19) Any other binder and mixture thereof not elsewhere identified in this category specifically designed, modified, adapted, or configured (*e.g.* formulated) for military application.

(f) Additives:

- (1) Basic copper salicylate (CAS 62320-94-9);
- (2) BHEGA (Bis-(2-hydroxyethyl)glycolamide) (CAS 17409-41-5);
- (3) Ferrocene Derivatives:
  - (i) Butacene (CAS 125856-62-4);
  - (ii) Catocene (2,2-Bis-ethylferrocenyl propane) (CAS 37206-42-1);
  - (iii) Ferrocene carboxylic acids;
  - (iv) n-butyl-ferrocene (CAS 31904-29-7);
- (4) Lead beta-resorcylate (CAS 20936-32-7);
- (5) Lead citrate (CAS 14450-60-3);
- (6) Lead-copper chelates of beta-resorcylate or salicylates (CAS 68411-07-4);
- (7) Lead maleate (CAS 19136-34-6);
- (8) Lead salicylate (CAS 15748-73-9);
- (9) Lead stannate (CAS 12036-31-6);
- (10) MAPO (tris-1-(2-methyl)aziridinyl phosphine oxide) (CAS 57-39-6); BOBBA-8 (bis(2-methyl aziridinyl) 2-(2-hydroxypropanoxy) propylamino phosphine oxide); and other MAPO derivatives;

- (11) Methyl BAPO (Bis(2-methyl aziridinyl) methylamino phosphine oxide) (CAS 85068-72-0);
- (12) 3-Nitroaza-1,5 pentane diisocyanate (CAS 7406-61-9);
- (13) Organo-metallic coupling agents, specifically:
  - (i) Neopentyl[diallyl]oxy, tri [dioctyl] phosphatotitanate (CAS 103850-22-2); also known as titanium IV, 2,2[bis 2-propenolato-methyl, butanolato, tris (dioctyl) phosphato] (CAS 110438-25-0), or LICA 12 (CAS 103850-22-2);
  - (ii) Titanium IV, [(2-propenolato-1) methyl, n-propanolatomethyl] butanolato-1, tris(dioctyl)pyrophosphate, or KR3538;
  - (iii) Titanium IV, [2-propenolato-1)methyl, propanolatomethyl] butanolato-1, tris(dioctyl) phosphate;
- (14) Polyfunctional aziridine amides with isophthalic, trimesic (BITA or butylene imine trimesamide), isocyanuric, or trimethyladipic backbone structures and 2-methyl or 2-ethyl substitutions on the aziridine ring and its polymers;
- (15) Superfine iron oxide (Fe<sub>2</sub>O<sub>3</sub> hematite) with a specific surface area more than 250 m<sup>2</sup>/g and an average particle size of 0.003 [micro]m or less (CAS 1309-37-1);
- (16) TEPAN (tetraethylenepentaamineacrylonitrile) (CAS 68412-45-3); cyanoethylated polyamines and their salts;
- (17) TEPANOL (Tetraethylenepentaamineacrylo- nitrileglycidol) (CAS 110445-33-5); cyanoethylated polyamines adducted with glycidol and their salts;
- (18) TPB (triphenyl bismuth) (CAS 603-33-8);
- (19) PCDE (Poly[chyph]cyano di fluoro aminoethyl ene oxide);
- (20) BNO (Butadienenitrileoxide);
- (21) Any other additive not elsewhere identified in this category specifically designed, modified, adapted, or configured (*e.g.*, formulated) for military application.

(g) Precursors, as follows:

- (1) BCMO (bischloromethyloxetane) (CAS 142173-26-0) (see paragraphs (e)(1) and (2) of this category);
- (2) Dinitroazetidine-t-butyl salt (CAS 125735-38-8) (see paragraph (a)(27) of this category);
- (3) HBIW (hexabenzylhexaazaisowurtzitane) (CAS 124782-15-6) (see paragraph (a)(4) of this category);
- (4) TAIW (tetraacetyldibenzylhexa-azaisowurtzitane) (see paragraph (a)(4) of this category);
- (5) TAT (1, 3, 5, 7-tetraacetyl-1, 3, 5, 7-tetraaza-cyclooctane) (CAS 41378-98-7) (see paragraph (a)(12) of this category);
- (6) Tetraazadecalin (CAS 5409-42-7) (see paragraph (a)(26) of this category);
- (7) 1,3,5-trichlorobenzene (CAS 108-70-3) (see paragraph (a)(22) of this category);      (8) 1,2,4-trihydroxybutane (1,2,4-butanetriol) (CAS 3068-00-6) (see paragraph (e)(3) of this category);

(h) Technical data (as defined in § 120.10 of this subchapter) and defense services (as defined in § 120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (g) of this category. (See § 125.4 of this subchapter for exemptions.) Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

(i) The following interpretations explain and amplify the terms used in this category and elsewhere in this subchapter.

- (1) Category V contains explosives, energetic materials, propellants and pyrotechnics and specially formulated fuels for aircraft, missile and naval applications. Explosives are solid, liquid or gaseous substances or mixtures of substances, which, in their primary, booster or main charges in warheads,



demolition or other military applications, are required to detonate.

(2) Paragraph (c)(6)(ii)(A) of this category does not control boron and boron carbide enriched with boron-10 (20% or more of total boron-10 content).

(3) The resulting product of the combination of any controlled or non-controlled substance compounded or mixed with any item controlled by this subchapter is also subject to the controls of this category.

NOTE 1: To assist the exporter, an item has been categorized by the most common use. Also, a reference has been provided to the related controlled precursors (*e.g.*, see paragraph (a)(12) of this category). Regardless of where the item has been placed in the category, all exports are subject to the controls of this subchapter.

NOTE 2: Chemical Abstract Service (CAS) registry numbers do not cover all the substances and mixtures controlled by this category. The numbers are provided as examples to assist the government agencies in the license review process and the exporter when completing their license application and export documentation.

*History: 67 FR 70839, Nov. 27, 2002; 68 FR 25088, May 9, 2003; amended at 71 FR 20534, Apr. 21, 2006.*

### **Category VI — Vessels of War and Special Naval Equipment**

\*(a) Warships, amphibious warfare vessels, landing craft, mine warfare vessels, patrol vessels and any vessels specifically designed or modified for military purposes. (See § 121.15.)

(b) Patrol craft without armor, armament or mounting surfaces for weapon systems more significant than .50 caliber machine guns or equivalent and auxiliary vessels. (See § 121.15.)

\*(c) Turrets and gun mounts, arresting gear, special weapons systems, protective systems, submarine storage batteries, catapults, mine sweeping equipment (including mine countermeasures equipment deployed by aircraft) and other significant naval systems specifically designed or modified for combatant vessels.

(d) Harbor entrance detection devices (magnetic, pressure, and acoustic) and controls therefor.

\*(e) Naval nuclear propulsion plants, their land prototypes, and special facilities for their construction, support, and maintenance. This includes any machinery, device, component, or equipment specifically developed, designed or modified for use in such plants or facilities. (See § 123.20)<sup>51</sup>

(f) All specifically designed or modified components, parts, accessories, attachments, and associated equipment for the articles in paragraphs (a) through (e) of this category.

(g) Technical data (as defined in § 120.10) and defense services (as defined in § 120.9) directly related to the defense articles enumerated in paragraphs (a) through (f) of this category. (See § 125.4 for exemptions.)<sup>52</sup> Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

### **Category VII — Tanks and Military Vehicles**

\*(a) Military type armed or armored vehicles, military railway trains, and vehicles specifically designed or modified to accommodate mountings for arms or other specialized military equipment or fitted with such items.

\*(b) Military tanks, combat engineer vehicles, bridge launching vehicles, half-tracks and gun carriers.

(c) Military trucks, trailers, hoists, and skids specifically designed, modified, or equipped to mount or carry weapons of Categories I, II and IV of this section or for carrying and handling the articles in paragraph (a) of Categories III and IV of this section.

\*(d) Military recovery vehicles.

\*(e) Amphibious vehicles.

\*(f) Engines specifically designed or modified for the vehicles in paragraphs (a), (b), and (e) of this category.

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<sup>51</sup> See also § 125.(e)

<sup>52</sup> See also § 125.(e)

(g) All specifically designed or modified components, parts, accessories, attachments, and associated equipment for the articles in this category, including but not limited to military bridges and deep water fording kits.

(h) Technical data (as defined in § 120.10 of this subchapter) and defense services (as defined in § 120.9 of this subchapter) directly related to the defense articles numerated in paragraphs (a) through (g) of this category. (See § 125.4 of this subchapter for exemptions.) Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

(i) The following explains and amplifies the terms used in this category and elsewhere in this subchapter:

(1) An *amphibious vehicle* in paragraph (e) of this category is an automotive vehicle or chassis which embodies all-wheel drive, is equipped to meet special military requirements, and which has sealed electrical system or adaptation features for deep water fording.

(2) The articles in this category include any end item, component, accessory, attachment part, firmware, software or system that has been designed or manufactured using technical data and defense service controlled by this category.

### **Category VIII — Aircraft and Associated Equipment**

\*(a) Aircraft, including but not limited to helicopters, non-expansive balloons, drones, and lighter-than-air aircraft, which are specifically designed, modified, or equipped for military purposes. This includes but is not limited to the following military purposes: Gunnery, bombing, rocket or missile launching, electronic and other surveillance, reconnaissance, refueling, aerial mapping, military liaison, cargo carrying or dropping, personnel dropping, airborne warning and control, and military training. (See § 121.3.)

\*(b) Military aircraft engines, except reciprocating engines, specifically designed or modified for the aircraft in paragraph (a) of this category, and all specifically designed military hot section components (i.e., combustion chambers and liners; high pressure turbine blades, vanes, disks and related cooled structure; cooled low pressure turbine blades, vanes, disks and related cooled structure; cooled augmenters; and cooled nozzles) and digital engine controls (e.g., Full Authority Digital Engine Controls (FADEC) and Digital Electronic Engine Controls (DEEC)). However, if such military hot section components and digital engine controls are manufactured to engineering drawings dated on or before January 1, 1970, with no subsequent changes or revisions to such drawings, they are controlled under Category VIII(h).

\*(c) Cartridge-actuated devices utilized in emergency escape of personnel and airborne equipment (including but not limited to airborne refueling equipment) specifically designed or modified for use with the aircraft and engines of the types in paragraphs (a) and (b) of this category.

(d) Launching and recovery equipment for the articles in paragraph (a) of this category, if the equipment is specifically designed or modified for military use. Fixed land-based arresting gear is not included in this category.

\*(e) Inertial navigation systems, aided or hybrid inertial navigation systems, Inertial Measurement Units (IMUs), and Attitude and Heading Reference Systems (AHRS) specifically designed, modified, or configured for military use and all specifically designed components, parts and accessories. For other inertial reference systems and related components refer to Category XII(d).

*Note:*

(1) Category XII(d) or Category VIII(e) does not include quartz rate sensors if such items:

(i) Are integrated into and included as an integral part of a commercial primary or commercial standby instrument system for use on civil aircraft prior to export or exported solely for integration into such a commercial primary or standby instrument system, and

(ii) When the exporter has been informed in writing by the Department of State that a specific quartz rate sensor integrated into a commercial primary or standby instrument system has been determined to be subject to the licensing jurisdiction of the Department of Commerce in accordance with this section.

(2) For controls in these circumstances, see the Commerce Control List. In all other circumstances, quartz rate sensors remain under the licensing jurisdiction of the Department of State under Category XII(d) or Category VIII(e) of the U.S. Munitions List and subject to the controls of the ITAR.

(f) Developmental aircraft, engines, and components thereof specifically designed, modified, or equipped for military uses or purposes, or developed principally with U.S. Department of Defense funding, excluding such aircraft, engines, and components subject to the jurisdiction of the Department of Commerce.

*Note:* Developmental aircraft, engines, and components thereof, having no commercial application at the time of this amendment and which have been specifically designed for military uses or purposes, or developed principally with U.S. Department of Defense funding, will be considered eligible for a CCL license when actually applied to a commercial aircraft or commercial aircraft engine program. Exporters may seek to establish commercial application either on a case-by-case basis through submission of documentation demonstrating application to a commercial program in requesting an export license application from Commerce in respect of a specific export or, in the case of use for broad categories of aircraft, engines, or components, a commodity jurisdiction from State.

\*(g) Ground effect machines (GEMS) specifically designed or modified for military use, including but not limited to surface effect machines and other air cushion vehicles, and all components, parts, and accessories, attachments, and associated equipment specifically designed or modified for use with such machines.

(h) Components, parts, accessories, attachments, and associated equipment (including ground support equipment) specifically designed or modified for the articles in paragraphs (a) through (d) of this category, excluding aircraft tires and propellers used with reciprocating engines.

*Note:* The Export Administration Regulations (EAR) administered by the Department of Commerce control any component, part, accessory, attachment, and associated equipment (including propellers) designed exclusively for civil, non-military aircraft (see Sec. 121.3 of this subchapter for the definition of military aircraft) and control any component, part, accessory, attachment, and associated equipment designed exclusively for civil, non-military aircraft engines. The International Traffic in Arms Regulations administered by the Department of State control any component, part, accessory, attachment, and associated equipment designed, developed, configured, adapted or modified for military aircraft, and control any component, part, accessory, attachment, and associated equipment designed, developed, configured, adapted or modified for military aircraft engines. For components and parts that do not meet the above criteria, including those that may be used on either civil or military aircraft, the following requirements apply. A non-SME component or part (as defined in Sec. Sec. 121.8(b) and (d) of this subchapter) that is not controlled under another category of the USML, that: (a) Is standard equipment; (b) is covered by a civil aircraft type certificate (including amended type certificates and supplemental type certificates) issued by the Federal Aviation Administration for a civil, non-military aircraft (this expressly excludes military aircraft certified as restricted and any type certification of Military Commercial Derivative Aircraft); and (c) is an integral part of such civil aircraft, is subject to the jurisdiction of the EAR. In the case of any part or component designated as SME in this or any other USML category, a determination that such item may be excluded from USML coverage based on the three criteria above always requires a commodity jurisdiction determination by the Department of State under Sec. 120.4 of this subchapter. The only exception to this requirement is where a part or component designated as SME in this category was integral to civil aircraft prior to August 14, 2008. For such part or component, U.S. exporters are not required to seek a commodity jurisdiction determination from State, unless doubt exists as to whether the item meets the three criteria above (See Sec. 120.3 and Sec. 120.4 of this subchapter). Also, U.S. exporters are not required to seek a commodity jurisdiction determination from State regarding any non-SME component or part (as defined in Sec. Sec. 121.8(b) and (d) of this subchapter) that is not controlled under another category of the USML, unless doubt exists as to whether the item meets the three criteria above (See Sec. 120.3 and Sec. 120.4 of this subchapter). These commodity jurisdiction determinations will ensure compliance with this section and the criteria of Section 17(c) of the Export Administration Act of 1979. In determining whether the three criteria above have been met, consider whether the same item is common to both civil and military applications without modification of the item's form, fit, or function. Some examples of parts or components that are not common to both civil and military applications are tail hooks, rotodomes, and low observable rotor blades. "Standard equipment" is defined as a part or component manufactured in compliance with an established and published industry specification or an established and published government specification (e.g.,

AN, MS, NAS, or SAE). Parts and components that are manufactured and tested to established but unpublished civil aviation industry specifications and standards are also "standard equipment," e.g., pumps, actuators, and generators. A part or component is not standard equipment if there are any performance, manufacturing or testing requirements beyond such specifications and standards. Simply testing a part or component to meet a military specification or standard for civil purposes does not in and of itself change the jurisdiction of such part or component. Integral is defined as a part or component that is installed in an aircraft. In determining whether a part or component may be considered as standard equipment and integral to a civil aircraft (e.g., latches, fasteners, grommets, and switches) it is important to carefully review all of the criteria noted above. For example, a part approved solely on a non-interference/provisions basis under a type certificate issued by the Federal Aviation Administration would not qualify. Similarly, unique application parts or components not integral to the aircraft would also not qualify.

(i) Technical data (as defined in § 120.10) and defense services (as defined in § 120.9) directly related to the defense articles enumerated in paragraphs (a) through (h) of this category (see § 125.4 for exemptions), except for hot section technical data associated with commercial aircraft engines. Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

*History: 69 FR 873, Jan. 7, 2004, 72 FR 31452, Jun. 7, 2007; 73 FR 47523, Aug. 14, 2008.*

### **Category IX — Military Training Equipment and Training**

(a) Training equipment specifically designed, modified, configured or adapted for military purposes, including but not limited to weapons system trainers, radar trainers, gunnery training devices, antisubmarine warfare trainers, target equipment, armament training units, pilot-less aircraft trainers, navigation trainers and human-rated centrifuges.

(b) Simulation devices for the items covered by this subchapter.

(c) Tooling and equipment specifically designed or modified for the production of articles controlled by this category.

(d) Components, parts, accessories, attachments, and associated equipment specifically designed, modified, configured, or adapted for the articles in paragraphs (a), (b), and (c) of this category.

(e) Technical data (as defined in § 120.10 of this subchapter) and defense services (as defined in § 120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (d) of this category.

(f) The following interpretations explain and amplify terms used in this category and elsewhere in this subchapter:

(1) The *weapons systems trainers* in paragraph (a) of this category include individual crew stations and system specific trainers;

(2) The articles in this category include any end item, components, accessory, part, firmware, software or system that has been designed or manufactured using technical data and defense services controlled by this category;

(3) The defense services and related technical data in paragraph (f) of this category include software and associated databases that can be used to simulate trainers, battle management, test scenarios/models, and weapons effects. In any instance when the military training transferred to a foreign person does not use articles controlled by the U.S. Munitions List, the training may nevertheless be a defense service that requires authorization in accordance with this subchapter. See e.g., § 120.9 and § 124.1 of this subchapter for additional information on military training.

*History: 69 FR 2922, May 21, 2004*

### **Category X — Protective Personnel Equipment and Shelters**

(a) Protective personnel equipment specifically designed, developed, configured, adapted, modified, or

equipped for military applications. This includes but is not limited to:

- (1) Body armor;<sup>53</sup>
  - (2) Clothing to protect against or reduce detection by radar, infrared (IR) or other sensors at wavelengths greater than 900 nanometers, and the specially treated or formulated dyes, coatings, and fabrics used in its design, manufacture, and production;
  - (3) Anti-Gravity suits (G-suits);
  - (4) Pressure suits capable of operating at altitudes above 55,000 feet sea level;
  - (5) Atmosphere diving suits designed, developed, modified, configured, or adapted for use in rescue operations involving submarines controlled by this subchapter;
  - (6) Helmets specially designed, developed, modified, configured, or adapted to be compatible with military communication hardware or optical sights or slewing devices;
  - (7) Goggles, glasses, or visors designed to protect against lasers or thermal flashes discharged by an article subject to this subchapter.
- (b) Permanent or transportable shelters specifically designed and modified to protect against the effect of articles covered by this subchapter as follows:
- (1) Ballistic shock or impact;
  - (2) Nuclear, biological, or chemical contamination.
- (c) Tooling and equipment specifically designed or modified for the production of articles controlled by this category.
- (d) Components, parts, accessories, attachments, and associated equipment specifically designed, modified, configured, or adapted for use with the articles in paragraphs (a) through (c) of this category.
- (e) Technical data (as defined in § 120.10 of this subchapter) and defense services (as defined in § 120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (d) of this category.
- (f) The following interpretations explain and amplify the terms used in this category and throughout this subchapter:
- (1) The body armor covered by this category does not include Type 1, Type 2, Type 2a, or Type 3a [sic]<sup>54</sup> as defined by the National Institute of Justice classification;
  - (2) The articles in this category include any end item, components, accessory, attachment, part, firmware, software or system that has been designed or manufactured using technical data and defense services controlled by this category;
  - (3) Pressure suits in paragraph (a) (4) of this category include full and partial suits used to simulate normal atmospheric pressure conditions at high altitude.

*History: 69 FR 2922, May 21, 2004*

### **Category XI — Military Electronics**

- (a) Electronic equipment not included in Category XII of the U.S. Munitions List which is specifically designed, modified or configured for military application. This equipment includes but is not limited to:
- \* (1) Underwater sound equipment to include active and passive detection, identification, tracking, and weapons control equipment.
  - \* (2) Underwater acoustic active and passive countermeasures and counter-countermeasures.

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<sup>53</sup> See license exemption at § 123.17(f).

<sup>54</sup> So in original. Should be Type I, Type II, Type II-A, and Type III-A. NIJ Guide—Selection and Application Guide to Personal Body Armor, National Institute of Justice (Nov. 2001).

(3) Radar systems, with capabilities such as:

\*(i) Search,

\*(ii) Acquisition,

\*(iii) Tracking,

\*(iv) Moving target indication,

\*(v) Imaging radar systems,

(vi) Any ground air traffic control radar which is specifically designed or modified for military application.

\*(4) Electronic combat equipment, such as:

(i) Active and passive countermeasures,

(ii) Active and passive counter-countermeasures, and

(iii) Radios (including transceivers) specifically designed or modified to interfere with other communication devices or transmissions.

\*(5) Command, control and communications systems to include radios (transceivers), navigation, and identification equipment.

(6) Computers specifically designed or developed for military application and any computer specifically modified for use with any defense article in any category of the U.S. Munitions List.

(7) Any experimental or developmental electronic equipment specifically designed or modified for military application or specifically designed or modified for use with a military system.

\*(b) Electronic systems or equipment specifically designed, modified, or configured for intelligence, security, or military purposes for use in search, reconnaissance, collection, monitoring, direction-finding, display, analysis and production of information from the electromagnetic spectrum and electronic systems or equipment designed or modified to counteract electronic surveillance or monitoring. A system meeting this definition is controlled under this subchapter even in instances where any individual pieces of equipment constituting the system may be subject to the controls of another U.S. Government agency. Such systems or equipment described above include, but are not limited to, those:

(1) Designed or modified to use cryptographic techniques to generate the spreading code for spread spectrum or hopping code for frequency agility. This does not include fixed code techniques for spread spectrum.

(2) Designed or modified using burst techniques (*e.g.*, time compression techniques) for intelligence, security or military purposes.

(3) Designed or modified for the purpose of information security to suppress the compromising emanations of information-bearing signals. This covers TEMPEST suppression technology and equipment meeting or designed to meet government TEMPEST standards. This definition is not intended to include equipment designed to meet Federal Communications Commission (FCC) commercial electro-magnetic interference standards or equipment designed for health and safety.

(c) Components, parts, accessories, attachments, and associated equipment specifically designed or modified for use with the equipment in paragraphs (a) and (b) of this category, except for such items as are in normal commercial use.

(d) Technical data (as defined in § 120.10) and defense services (as defined in § 120.9) directly related to the defense articles enumerated in paragraphs (a) through (c) of this category. (See § 125.4 for exemptions.) Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated as SME.

**Category XII — Fire Control, Range Finder,  
Optical and Guidance and Control Equipment**

\*(a) Fire control systems; gun and missile tracking and guidance systems; gun range, position, height finders,

spotting instruments and laying equipment; aiming devices (electronic, optic, and acoustic); bomb sights, bombing computers, military television sighting and viewing units, and periscopes for the articles of this section.

\*(b) Lasers specifically designed, modified or configured for military application including those used in military communication devices, target designators and range finders, target detection systems, and directed energy weapons.

\*(c) Infrared focal plane array detectors specifically designed, modified, or configured for military use; image intensification and other night sighting equipment or systems specifically designed, modified or configured for military use; second generation and above military image intensification tubes (defined below) specifically designed, developed, modified, or configured for military use, and infrared, visible and ultraviolet devices specifically designed, developed, modified, or configured for military application. Military second and third generation image intensification tubes and military infrared focal plane arrays identified in this subparagraph are licensed by the Department of Commerce (ECCN 6A002A and 6A003A) [sic]<sup>55</sup> when part of a commercial system (*i.e.*, those systems originally designed for commercial use). This does not include any military system comprised of non-military specification components. Replacement tubes or focal plane arrays identified in this paragraph being exported for commercial systems are subject to the controls of the ITAR.

NOTE: Special Definition. For purposes of this subparagraph, *second and third generation image intensification tubes* are defined as having:

A peak response within the 0.4 to 1.05 micron wavelength range and incorporating a microchannel plate for electron image amplification having a hole pitch (center-to-center spacing) of less than 25 microns and having either:

- (a) An S-20, S-25 or multialkali photo cathode; or
- (b) A GaAs, GaInAs, or other compound semiconductor photo cathode.

\*(d) Inertial platforms and sensors for weapons or weapon systems; guidance, control and stabilization systems except for those systems covered in Category VIII; astrocompasses and star trackers and military accelerometers and gyros. For aircraft inertial reference systems and related components refer to Category VIII.

(e) Components, parts, accessories, attachments and associated equipment specifically designed or modified for the articles in paragraphs (a) through (d) of this category, except for such items as are in normal commercial use.

(f) Technical data (as defined in § 120.10) and defense services (as defined in § 120.9) directly related to the defense articles enumerated in paragraphs (a) through (e) of this category. (See § 125.4 for exemptions.) Technical data directly related to manufacture and production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated as SME.

*History: 69 FR 2922, May 21, 2004; 71 FR 20534, Apr. 21, 2006; 74 FR 18628, Apr. 24, 2009; 74 FR 35115, Jul. 20, 2009.*

### **Category XIII — Auxiliary Military Equipment**

(a) Cameras and specialized processing equipment therefor, photointerpretation, stereoscopic plotting, and photogrammetry equipment which are specifically designed, developed, modified, adapted, or configured for military purposes, and components specifically designed or modified therefor;

(b) Military Information Security Assurance Systems and equipment, cryptographic devices, software, and components specifically designed, developed, modified, adapted, or configured for military applications (including command, control and intelligence applications). This includes:

- (1) Military cryptographic (including key management) systems, equipment assemblies, modules, integrated circuits, components or software with the capability of maintaining secrecy or confidentiality of information or information systems, including equipment and software for tracking, telemetry and control (TT&C)

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<sup>55</sup> So in original. Should be "(ECCN 6A002.c, 6A003.b.3, and 6A003.b.4)".

encryption and decryption;

(2) Military cryptographic (including key management) systems, equipment, assemblies, modules, integrated circuits, components of software which have the capability of generating spreading or hopping codes for spread spectrum systems or equipment;

(3) Military cryptanalytic systems, equipment, assemblies, modules, integrated circuits, components or software;

(4) Military systems, equipment, assemblies, modules, integrated circuits, components or software providing certified or certifiable multi-level security or user isolation exceeding Evaluation Assurance Level (EAL) 5 of the Security Assurance Evaluation Criteria and software to certify such systems, equipment or software;

(5) Ancillary equipment specifically designed, developed, modified, adapted, or configured for the articles in paragraphs (b)(1), (2), (3), and (4) of this category.

(c) Self-contained diving and underwater breathing apparatus as follows:

(1) Closed and semi-closed (rebreathing) apparatus;

(2) Specially designed components and parts for use in the conversion of open-circuit apparatus to military use; and,

(3) Articles exclusively designed for military use with self-contained diving and underwater swimming apparatus.

(d) Carbon/carbon billets and preforms not elsewhere controlled by this subchapter (*e.g.*, Category IV) which are reinforced with continuous unidirectional tows, tapes, or woven cloths in three or more dimensional planes (*e.g.*, 3D, 4D) specifically designed, developed, modified, configured or adapted for defense articles.

(e) Armor (*e.g.*, organic, ceramic, metallic), and reactive armor and components, parts and accessories not elsewhere controlled by this subchapter which have been specifically designed, developed, modified, configured or adapted for a military application.

(f) Structural materials, including carbon/carbon and metal matrix composites, plate, forgings, castings, welding consumables and rolled and extruded shapes that have been specifically designed, developed, configured, modified or adapted for defense articles.

(g) Concealment and deception equipment specifically designed, developed, modified, configured or adapted for military application, including but not limited to special paints, decoys, smoke or obscuration equipment and simulators and components, parts and accessories specifically designed, developed, modified, configured or adapted therefor.

(h) Energy conversion devices for producing electrical energy from nuclear, thermal, or solar energy, or from chemical reaction that are specifically designed, developed, modified, configured or adapted for military application.

(i) Metal embrittling agents.

\* (j) Hardware and equipment, which has been specifically designed or modified for military applications, that is associated with the measurement or modification of system signatures for detection of defense articles. This includes but is not limited to signature measurement equipment; reduction techniques and codes; signature materials and treatments; and signature control design methodology.

(k) Tooling and equipment specifically designed or modified for the production of articles controlled by this category.

(l) Technical data (as defined in § 120.10 of this subchapter), and defense services (as defined in § 120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (k) of this category. (See also, § 123.20 of this subchapter.) Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designed SME.

(m) The following interpretations explain and amplify terms used in this category and elsewhere in this



subchapter:

(1) Paragraph (d) of this category does not control carbon/carbon billets and preforms where reinforcement in the third dimension is limited to interlocking of adjacent layers only, and carbon/carbon 3D, 4D, etc. end items that have not been specifically designed or modified for military applications (e.g., brakes for commercial aircraft or high speed trains);

(2) *Metal embrittlement agents* in paragraph (i) of this category are non-lethal weapon substances that alter the crystal structure of metals within a short time span. Metal embrittling agents severely weaken metals by chemically changing their molecular structure. These agents are compounded in various substances to include adhesives, liquids, aerosols, foams and lubricants.

History: 69 FR 2922, May 21, 2004

#### **Category XIV — Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment**

\*(a) Chemical agents, to include:

(1) Nerve agents:

(i) O-Alkyl (equal to or less than C[10], including cycloalkyl) alkyl (Methyl, Ethyl, n-Propyl or Isopropyl)phosphonofluoridates, such as: Sarin (GB): O-Isopropyl methylphosphonofluoridate (CAS 107-44-8) (CWC Schedule 1A); and Soman (GD): O-Pinacolyl methylphosphonofluoridate (CAS 96-64-0) (CWC Schedule 1A);

(ii) O-Alkyl (equal to or less than C[10], including cycloalkyl) N,N-dialkyl (Methyl, Ethyl, n-Propyl or Isopropyl)phosphoramidocyanidates, such as: Tabun (GA): O-Ethyl N, N-dimethylphosphoramidocyanidate (CAS 77-81-6) (CWC Schedule 1A);

(iii) O-Alkyl (H or equal to or less than C[10], including cycloalkyl) S-2-dialkyl (Methyl, Ethyl, n-Propyl or Isopropyl) aminoethyl alkyl (Methyl, Ethyl, n-Propyl or Isopropyl)phosphonothiolates and corresponding alkylated and protonated salts, such as: VX: O-Ethyl S-2-diisopropylaminoethyl methyl phosphonothiolate (CAS 50782-69-9) (CWC Schedule 1A);

(2) Amiton: O,O-Diethyl S-[2(diethylamino)ethyl] phosphorothiolate and corresponding alkylated or protonated salts (CAS 78-53-5) (CWC Schedule 2A);

(3) Vesicant agents:

(i) Sulfur mustards, such as: 2-Chloroethylchloromethylsulfide (CAS 2625-76-5) (CWC Schedule 1A); Bis(2-chloroethyl)sulfide (CAS 505-60-2) (CWC Schedule 1A); Bis(2-chloroethylthio)methane (CAS 63839-13-6) (CWC Schedule 1A); 1,2-bis (2-chloroethylthio)ethane (CAS 3563-36-8) (CWC Schedule 1A); 1,3-bis (2-chloroethylthio)-n-propane (CAS 63905-10-2) (CWC Schedule 1A); 1,4-bis (2-chloroethylthio)-n-butane (CWC Schedule 1A); 1,5-bis (2-chloroethylthio)-n-pentane (CWC Schedule 1A); Bis (2-chloroethylthiomethyl)ether (CWC Schedule 1A); Bis (2-chloroethylthioethyl)ether (CAS 63918-89-8) (CWC Schedule 1A);

(ii) Lewisites, such as: 2-chlorovinylchloroarsine (CAS 541-25-3) (CWC Schedule 1A); Tris (2-chlorovinyl) arsine (CAS 40334-70-1) (CWC Schedule 1A); Bis (2-chlorovinyl) chloroarsine (CAS 40334-69-8) (CWC Schedule 1A);

(iii) Nitrogen mustards, such as: HN1: bis (2-chloroethyl) ethylamine (CAS 538-07-8) (CWC Schedule 1A); HN2: bis (2-chloroethyl) methylamine (CAS 51-75-2) (CWC Schedule 1A); HN3: tris (2-chloroethyl)amine (CAS 555-77-1) (CWC Schedule 1A);

(iv) Ethyldichloroarsine (ED);

(v) Methylchloroarsine (MD);

(4) Incapacitating agents, such as:

(i) 3-Quinuclidinyl benzilate (BZ) (CAS 6581-06-2) (CWC Schedule 2A);

(ii) Diphenylchloroarsine (DA) (CAS 712-48-1);

(iii) Diphenylcyanoarsine (DC);

\*(b) Biological agents and biologically derived substances specifically developed, configured, adapted, or modified for the purpose of increasing their capability to produce casualties in humans or livestock, degrade equipment or damage crops.

\*(c) Chemical agent binary precursors and key precursors, as follows:

(1) Alkyl (Methyl, Ethyl, n-Propyl or Isopropyl) phosphonyl difluorides, such as: DF: Methyl Phosphonyldifluoride (CAS 676-99-3) (CWC Schedule 1B); Methylphosphinyldifluoride;

(2) O-Alkyl (H or equal to or less than C[10], including cycloalkyl) O-2-dialkyl (methyl, ethyl, n-Propyl or isopropyl)aminoethyl alkyl (methyl, ethyl, N-propyl or isopropyl)phosphonite and corresponding alkylated and protonated salts, such as: QL: O-Ethyl-2-di-isopropylaminoethyl methylphosphonite (CAS 57856-11-8) (CWC Schedule 1B);

(3) Chlorosarin: O-Isopropyl methylphosphonochloridate (CAS 1445-76-7) (CWC Schedule 1B);

(4) Chlorosoman: O-Pinakolyl methylphosphonochloridate (CAS 7040-57-5) (CWC Schedule 1B);

(5) DC: Methylphosphonyl dichloride (CAS 676-97-1) (CWC Schedule 2B); Methylphosphinyldichloride;

(d) Tear gases and riot control agents including:

(1) Adamsite (Diphenylamine chloroarsine or DM) (CAS 578-94-9);

(2) CA (Bromobenzyl cyanide) (CAS 5798-79-8);

(3) CN (Phenylacetyl chloride or w-Chloroacetophenone) (CAS 532-27-4);

(4) CR (Dibenz-(b,f)-1,4-oxazepine) (CAS 257-07-8);

(5) CS (o-Chlorobenzylidenemalononitrile or o-Chlorobenzalmalononitrile) (CAS 2698-41-1);

(6) Dibromodimethyl ether (CAS 4497-29-4);

(7) Dichlorodimethyl ether (ClCi) (CAS 542-88-1);

(8) Ethyldibromoarsine (CAS 683-43-2);

(9) Bromo acetone;

(10) Bromo methylethylketone;

(11) Iodo acetone;

(12) Phenylcarbylamine chloride;

(13) Ethyl iodoacetate;

(e) Defoliants, as follows:

(1) Agent Orange (2,4,5-Trichlorophenoxyacetic acid mixed with 2,4-dichlorophenoxyacetic acid);

(2) LNF (Butyl 2-chloro-4-fluorophenoxyacetate)

\*(f) Equipment and its components, parts, accessories, and attachments specifically designed or modified for military operations and compatibility with military equipment as follows:

(1) The dissemination, dispersion or testing of the chemical agents, biological agents, tear gases and riot control agents, and defoliants listed in paragraphs (a), (b), (d), and (e), respectively, of this category;

(2) The detection, identification, warning or monitoring of the chemical agents and biological agents listed in paragraph (a) and (b) of this category;

(3) Sample collection and processing of the chemical agents and biological agents listed in paragraph (a) and (b) of this category;

(4) Individual protection against the chemical agents and biological agents listed in paragraphs (a) and (b) of

this category. This includes military protective clothing and masks, but not those items designed for domestic preparedness (e.g., civil defense);

(5) Collective protection against the chemical agents and biological agents listed in paragraph (a) and (b) of this category.

(6) Decontamination or remediation of the chemical agents and biological agents listed in paragraph (a) and (b) of this category.

(g) Antibodies, polynucleoides, biopolymers or biocatalysts specifically designed or modified for use with articles controlled in paragraph (f) of this category.

(h) Medical countermeasures, to include pre- and post-treatments, vaccines, antidotes and medical diagnostics, specifically designed or modified for use with the chemical agents listed in paragraph (a) of this category and vaccines with the sole purpose of protecting against biological agents identified in paragraph (b) of this category. Examples include: barrier creams specifically designed to be applied to skin and personal equipment to protect against vesicant agents controlled in paragraph (a) of this category; atropine auto injectors specifically designed to counter nerve agent poisoning.

(i) Modeling or simulation tools specifically designed or modified for chemical or biological weapons design, development or employment. The concept of modeling and simulation includes software covered by paragraph (m) of this category specifically designed to reveal susceptibility or vulnerability to biological agents or materials listed in paragraph (b) of this category.

(j) Test facilities specifically designed or modified for the certification and qualification of articles controlled in paragraph (f) of this category.

(k) Equipment, components, parts, accessories, and attachments, exclusive of incinerators (including those which have specially designed waste supply systems and special handling facilities), specifically designed or modified for destruction of the chemical agents in paragraph (a) or the biological agents in paragraph (b) of this category. This destruction equipment includes facilities specifically designed or modified for destruction operations.

(l) Tooling and equipment specifically designed or modified for the production of articles controlled by paragraph (f) of this category.

(m) Technical data (as defined in § 120.10 of this subchapter) and defense services (as defined in § 120.9 of this subchapter) related to the defense articles enumerated in paragraphs (a) through (l) of this category. (See § 125.4 of this subchapter for exemptions.) Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this Category that are designated as Significant Military Equipment (SME) shall itself be designated as SME.

(n) The following interpretations explain and amplify the terms used in this category and elsewhere in this subchapter:

(1) A *chemical agent in category XIV(a)* is a substance having military application, which by its ordinary and direct chemical action, produces a powerful physiological effect.

(2) The *biological agents or biologically derived substances in paragraph (b) of this category* are those agents and substances capable of producing casualties in humans or livestock, degrading equipment or damaging crops and which have been modified for the specific purpose of increasing such effects. Examples of such modifications include increasing resistance to UV radiation or improving dissemination characteristics. This does not include modifications made only for civil applications (e.g. medical or environmental use).

(3) The *destruction equipment* controlled by this category related to biological agents in paragraph (b) is that equipment specifically designed to destroy only the agents identified in paragraph (b) of this category.

(4)(i) The *individual protection against the chemical and biological agents* controlled by this category includes military protective clothing and masks, but not those items designed for domestic preparedness (e.g., civil defense). Domestic preparedness devices for individual protection that integrate components and parts identified in this subparagraph are licensed by the Department of Commerce when such components

are:

- (A) Integral to the device;
- (B) inseparable from the device; and,
- (C) incapable of replacement without compromising the effectiveness of the device.

(ii) Components and parts identified in this subparagraph exported for integration into domestic preparedness devices for individual protection are subject to the controls of the ITAR;

(5) Technical data and defense services in paragraph (1) include libraries, databases and algorithms specifically designed or modified for use with articles controlled in paragraph (f) of this category.

(6) The tooling and equipment covered by paragraph (1) of this category includes molds used to produce protective masks, over-boots, and gloves controlled by paragraph (f) and leak detection equipment specifically designed to test filters controlled by paragraph (f) of this category.

(7) The resulting product of the combination of any controlled or non-controlled substance compounded or mixed with any item controlled by this subchapter is also subject to the controls of this category.

NOTE 1: This Category does not control formulations containing 1% or less CN or CS or individually packaged tear gases or riot control agents for personal self-defense purposes.

NOTE 2: Categories XIV(a) and (d) do not include the following:

- (1) Cyanogen chloride;
- (2) Hydrocyanic acid;
- (3) Chlorine;
- (4) Carbonyl chloride (Phosgene);
- (5) Ethyl bromoacetate;
- (6) Xylyl bromide;
- (7) Benzyl bromide;
- (8) Benzyl iodide;
- (9) Chloro acetone;
- (10) Chloropicrin (trichloronitromethane);
- (11) Fluorine;
- (12) Liquid pepper.

NOTE 3: Chemical Abstract Service (CAS) registry numbers do not cover all the substances and mixtures controlled by this category. The numbers are provided as examples to assist the government agencies in the license review process and the exporter when completing their license application and export documentation.

NOTE 4: With respect to U.S. obligations under the Chemical Weapons Convention (CWC), refer to Chemical Weapons Convention Regulations (CWCR) (15 CFR parts 710 through 722). As appropriate, the CWC schedule is provided to assist the exporter.

NOTE 5: Pharmacological formulations containing nitrogen mustards and certain reference standards for these drugs are not considered to be chemical agents and are licensed by the Department of Commerce when:

- (1) The drug is in the form of a final medical product; or
- (2) The reference standard contains salts of HN2 [bis(2-chloroethyl) methylamine], the quantity to be shipped is 150 milligrams or less, and individual shipments do not exceed twelve

per calendar year per end user.

Technical data for the production of HN1 [bis(2-chloroethyl)ethylamine]; HN2 [bis(2-

chloroethyl)methylamine], HN3 [tris(2-chloroethyl)amine]; or salts of these, such as tris (2-chloroethyl)amine hydrochloride, remains controlled under this Category.

*History: 67 FR 70839, Nov. 27, 2002; 68 FR 25088, May 9, 2003; 69 FR 2922, May 21, 2004; 73 FR 54314, Sep. 19, 2008.*

### **Category XV — Spacecraft Systems and Associated Equipment**

\*(a) Spacecraft, including communications satellites, remote sensing satellites, scientific satellites, research satellites, navigation satellites, experimental and multi-mission satellites.

NOTE TO PARAGRAPH (a): Commercial communications satellites, scientific satellites, research satellites and experimental satellites are designated as SME only when the equipment is intended for use by the armed forces of any foreign country.

(b) Ground control stations for telemetry, tracking and control of spacecraft or satellites, or employing any of the cryptographic items controlled under category XIII of this subchapter.

(c) Global Positioning System (GPS) receiving equipment specifically designed, modified or configured for military use; or GPS receiving equipment with any of the following characteristics:

- (1) Designed for encryption or decryption (*e.g.*, Y-Code) of GPS precise positioning service (PPS) signals;
- (2) Designed for producing navigation results above 60,000 feet altitude and at 1,000 knots velocity or greater;
- (3) Specifically designed or modified for use with a null steering antenna or including a null steering antenna designed to reduce or avoid jamming signals;
- (4) Designed or modified for use with unmanned air vehicle systems capable of delivering at least a 500 kg payload to a range of at least 300 km.

(NOTE: GPS receivers designed or modified for use with military unmanned air vehicle systems with less capability are considered to be specifically designed, modified or configured for military use and therefore covered under this paragraph (d)(4).)

Any GPS equipment not meeting this definition is subject to the jurisdiction of the Department of Commerce (DOC). Manufacturers or exporters of equipment under DOC jurisdiction are advised that the U.S. Government does not assure the availability of the GPS P-Code for civil navigation. It is the policy of the Department of Defense (DOD) that GPS receivers using P-Code without clarification as to whether or not those receivers were designed or modified to use Y-Code will be presumed to be Y-Code capable and covered under this paragraph. The DOD policy further requires that a notice be attached to all P-Code receivers presented for export. The notice must state the following: "ADVISORY NOTICE: This receiver uses the GPS P-Code signal, which by U.S. policy, may be switched off without notice."

(d) Radiation-hardened microelectronic circuits that meet or exceed all five of the following characteristics:

- (1) A total dose of  $5 \times 10^5$  Rads (Si);
- (2) A dose rate upset threshold of  $5 \times 10^8$  Rads (Si)/sec;
- (3) A neutron dose of  $1 \times 10^{14}$  n/cm<sup>2</sup> (1 MeV equivalent);
- (4) A single event upset rate of  $1 \times 10^{-10}$  errors/bit-day or less, for the CREME96 geosynchronous orbit, Solar Minimum Environment;
- (5) Single event latch-up free and having a dose rate latch-up threshold of  $5 \times 10^8$  Rads (Si).

*History: Amended at 72 FR 39010, Jul. 17, 2007.*

(e) All specifically designed or modified systems or subsystems, components, parts, accessories, attachments, and associated equipment for the articles in this category, including the articles identified in section 1516 of Public Law 105-261: satellite fuel, ground support equipment, test equipment, payload adapter or interface hardware, replacement parts, and non-embedded solid propellant orbit transfer engines (see also Categories IV

and V in this section).

NOTE: This coverage by the U.S. Munitions List does not include the following unless specifically designed or modified for military application (see § 120.3 of this subchapter): (For controls on these items see the Export Administration Regulations, Commerce Control List (15 CFR parts 730 through 799).)

- (1) Space qualified traveling wave tubes (also known as helix tubes or TWTs), microwave solid state amplifiers, microwave assemblies, and traveling wave tube amplifiers operating at frequencies equal to or less than 31GHz.
- (2) Space qualified photovoltaic arrays having silicon cells or having single, dual, triple junction solar cells that have gallium arsenide as one of the junctions.
- (3) Space qualified tape recorders.
- (4) Atomic frequency standards that are not space qualified.
- (5) Space qualified data recorders.
- (6) Space qualified telecommunications systems, equipment and components not designed or modified for satellite uses.
- (7) Technology required for the development or production of telecommunications equipment specifically designed for non-satellite uses.
- (8) Space qualified focal plane arrays having more than 2048 elements per array and having a peak response in the wavelength range exceeding 300nm but not exceeding 900nm.
- (9) Space qualified laser radar or Light Detection and Ranging (LIDAR) equipment.

(f) Technical data (as defined in § 120.10 of this subchapter) and defense services (as defined in § 120.9 of this subchapter) directly related to the articles enumerated in paragraphs (a) through (e) of this category, as well as detailed design, development, manufacturing or production data for all spacecraft and specifically designed or modified components for all spacecraft systems. This paragraph includes all technical data, without exception, for all launch support activities (*e.g.*, technical data provided to the launch provider on form, fit, function, mass, electrical, mechanical, dynamic, environmental, telemetry, safety, facility, launch pad access, and launch parameters, as well as interfaces for mating and parameters for launch.) (See § 124.1 for the requirements for technical assistance agreements before defense services may be furnished even when all the information relied upon by the U.S. person in performing the defense service is in the public domain or is otherwise exempt from the licensing requirements of this subchapter.) Technical data directly related to the manufacture or production of any article enumerated elsewhere in this category that is designated as Significant Military Equipment (SME) shall itself be designated SME. Further, technical data directly related to the manufacture or production of all spacecraft, notwithstanding the nature of the intended end-use (*e.g.*, even where the hardware is not SME), is designated SME.

NOTE TO PARAGRAPH (f): The special export controls contained in § 124.15 of this subchapter are always required before a U.S. person may participate in a launch failure investigation or analysis and before the export of any article or defense service in this category for launch in, or by nationals of, a country that is not a member of the North Atlantic Treaty Organization or a major non-NATO ally of the United States. Such special export controls also may be imposed with respect to any destination as deemed appropriate in furtherance of the security and foreign policy of the United States.

### **Category XVI — Nuclear Weapons, Design and Testing Related Items**

\*(a) Any article, material, equipment, or device which is specifically designed or modified for use in the design, development, or fabrication of nuclear weapons or nuclear explosive devices. (See § 123.20 of this subchapter and Department of Commerce Export Administration Regulations, 15 CFR 742.3 and 744.2).

\*(b) Any article, material, equipment, or device which is specifically designed or modified for use in the devising, carrying out, or evaluating of nuclear weapons tests or any other nuclear explosions (including for modeling or simulating the employment of nuclear weapons or the integrated operational use of nuclear weapons), except such items as are in normal commercial use for other purposes.

\*(c) Nuclear radiation detection and measurement devices specifically designed or modified for military applications.

(d) All specifically designed or modified components and parts, accessories, attachments, and associated equipment for the articles in this category.

(e) Technical data (as defined in § 120.10 of this subchapter), and defense services (as defined in § 120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (d) of this category. (See also, § 123.20 of this subchapter.) Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

#### **Category XVII — Classified Articles, Technical Data and Defense Services Not Otherwise Enumerated**

\*(a) All articles, technical data (as defined in § 120.10 of this subchapter) and defense services (as defined in § 120.9 of this subchapter) relating thereto which are classified in the interests of national security and which are not otherwise enumerated in the U.S. Munitions List.

#### **Category XVIII — Directed Energy Weapons**

\*(a) Directed energy weapon systems specifically designed or modified for military applications (*e.g.*, destruction, degradation or rendering mission-abort of a target). These include, but are not limited to:

- (1) Laser systems, including continuous wave or pulsed laser systems, specifically designed or modified to cause blindness;
- (2) Lasers of sufficient continuous wave or pulsed power to effect destruction similar to the manner of conventional ammunition;
- (3) Particle beam systems;
- (4) Particle accelerators that project a charged or neutral particle beam with destructive power;
- (5) High power radio-frequency (RF) systems;
- (6) High pulsed power or high average power radio frequency beam transmitters that produce fields sufficiently intense to disable electronic circuitry at distant targets;
- (7) Prime power generation, energy storage, switching, power conditioning, thermal management or fuel-handling equipment;
- (8) Target acquisition or tracking systems;
- (9) Systems capable of assessing target damage, destruction or mission-abort;
- (10) Beam-handling, propagation or pointing equipment;
- (11) Equipment with rapid beam slew capability for rapid multiple target operations;
- (12) Negative ion beam funneling equipment; and,
- (13) Equipment for controlling and slewing a high-energy ion beam.

\*(b) Equipment specifically designed or modified for the detection or identification of, or defense against, articles controlled in paragraph (a) of this category.

(c) Tooling and equipment specifically designed or modified for the production of defense articles controlled by this category.

(d) Test and evaluation equipment and test models specifically designed or modified for the defense articles controlled by this category. This includes, but is not limited to, diagnostic instrumentation and physical test models.

(e) Components, parts, accessories, attachments and associated equipment specifically designed or modified for the articles in paragraphs (a) through (d) of this category.

(f) Technical data (as defined in § 120.10 of this subchapter) and defense services (as defined in § 120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (e) of this category. Technical data directly related to the manufacture or production of any defense articles enumerated in this category that are designated as Significant Military Equipment (SME) shall itself be designated SME.

(g) The following interpretations explain and amplify terms used in this category and elsewhere in this subchapter:

(1) The components, parts, accessories, attachments and associated equipment include, but are not limited to adaptive optics and phase conjugators components, space-qualified accelerator components, targets and specifically designed target diagnostics, current injectors for negative hydrogen ion beams, and space-qualified foils for neutralizing negative hydrogen isotope beams.

(2) The particle beam systems in paragraph (a)(3) of this category include devices embodying particle beam and electromagnetic pulse technology and associated components and subassemblies (*e.g.*, ion beam current injectors, particle accelerators for neutral or charged particles, beam handling and projection equipment, beam steering, fire control, and pointing equipment, test and diagnostic instruments, and targets) which are specifically designed or modified for directed energy weapon applications.

(3) The articles controlled in this category include any end item, component, accessory, attachment, part, firmware, software or system that has been designed or manufactured using technical data and defense services controlled by this category.

(4) The articles specifically designed or modified for military application controlled in this category include any articles specifically developed, configured, or adapted for military application.

*History: 69 FR 2922, May 21, 2004*

#### **Category XIX — [Reserved]**

#### **Category XX — Submersible Vessels, Oceanographic and Associated Equipment**

\*(a) Submersible vessels, manned or unmanned, tethered or untethered, designed or modified for military purposes, or powered by nuclear propulsion plants.

\*(b) Swimmer delivery vehicles designed or modified for military purposes.

(c) Equipment, components, parts, accessories, and attachments specifically designed or modified for any of the articles in paragraphs (a) and (b) of this category.

(d) Technical data (as defined in § 120.10 of this subchapter) and defense services (as defined in § 120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (c) of this category. (See § 125.4 of this subchapter for exemptions.) Technical data directly related to the manufacture or production of any defense articles enumerated elsewhere in this category that are designated as Significant Military Equipment (SME) shall itself be designated as SME.



## Category XXI — Miscellaneous Articles<sup>56</sup>

(a) Any article not specifically enumerated in the other categories of the U.S. Munitions List which has substantial military applicability and which has been specifically designed, developed, configured, adapted, or modified for military purposes. The decision on whether any article may be included in this category shall be made by the Director, Office of Defense Trade Controls Policy.

(b) Technical data (as defined in § 120.10 of this subchapter) and defense services (as defined in § 120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) of this category.

*History: 57 FR 15230, Apr. 27, 1992, as amended at 57 FR 32148, July 20, 1992; 57 FR 41078, Sept. 9, 1992; 57 FR 48316, Oct. 23, 1992; 58 FR 39287, July 22, 1993; 58 FR 47638, Sept. 10, 1993; 58 FR 60115, Nov. 15, 1993; 59 FR 46548, 46549, Sept. 9, 1994; 59 FR 47800, Sept. 19, 1994; 61 FR 56894, 56895, Nov. 5, 1996; 61 FR 68633, Dec. 30, 1996; 63 FR 17329, 17330, April 9, 1998; 64 FR 13679, 13680, Mar. 22, 1999; 64 FR 17531, 17533, Apr. 12, 1999; 67 FR 20894, 20895, Apr. 29, 2002; 67 FR 58984, 58985, Sept. 19, 2002; 67 FR 59733, Sept. 23, 2002; 71 FR 20537, Apr. 21, 2006; 73 Fed. Reg. 28863, May 19, 2008.*

### **§ 121.2 Interpretations of the U.S. Munitions List and the Missile Technology Control Regime Annex**

The following interpretations (listed alphabetically) explain and amplify the terms used in § 121.1. These interpretations have the same force as if they were a part of the U.S. Munitions List (USML) category to which they refer. In addition, all the items listed in § 121.16 shall constitute all items on the United States Munitions List which are Missile Technology Control Regime Annex items in accordance with section 71(a) of the Arms Export Control Act.

### **§ 121.3 Aircraft and Related Articles**

In Category VIII, “*aircraft*” means aircraft designed, modified, or equipped for a military purpose, including aircraft described as “demilitarized.” All aircraft bearing an original military designation are included in Category VIII. However, the following aircraft are not included so long as they have not been specifically equipped, re-equipped, or modified for military operations:

- (a) Cargo aircraft bearing “C” designations and numbered C-45 through C-118 inclusive, C-121 through C-125 inclusive, and C-131, using reciprocating engines only.
- (b) Trainer aircraft bearing “T” designations and using reciprocating engines or turboprop engines with less than 600 horsepower (s.h.p.)
- (c) Utility aircraft bearing “U” designations and using reciprocating engines only.
- (d) All liaison aircraft bearing an “L” designation.
- (e) All observation aircraft bearing “O” designations and using reciprocating engines.

### **§ 121.4 Amphibious Vehicles**

An *amphibious vehicle* in Category VII(f) is an automotive vehicle or chassis which embodies all-wheel drive,

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<sup>56</sup> State/DDTC, *Use of USML Category XXI (Sep. 8, 2009)*, [http://pmdtc.state.gov/licensing/documents/WebNotice\\_CatXXI.doc](http://pmdtc.state.gov/licensing/documents/WebNotice_CatXXI.doc):

Effective immediately, all license submissions which identify USML Category XXI – Miscellaneous Articles must include an attached copy of one of the following two documents authorizing use of Cat XXI or the application will be subject to Return Without Action: (1) A copy of a DDTC Commodity Jurisdiction determination letter identifying the commodity as controlled under the USML at Cat XXI; or (2) an official letter from the Director, Office of Defense Trade Controls Policy granting permission to use Cat XXI. This policy is necessary to enforce the requirement of 22 CFR Part 121.1 Category XXI(a). DDTC has observed a recent increase in the use of Cat XXI for items which should be properly categorized under a well defined USML category. The incorrect use of Cat XXI results in the license application being directed to the incorrect licensing team at DDTC and DTSA, which significantly slows down the adjudication of the request. Additionally, if a properly categorized commodity is designated as SME, the incorrect use of Cat XXI also incorrectly identifies the commodity as non-SME. If you are unsure if your commodity is controlled by the USML, you should seek a Commodity Jurisdiction determination (see 22 CFR 120.4). Please follow the guidelines at [http://www.pmdtc.state.gov/commodity\\_jurisdiction/index.html](http://www.pmdtc.state.gov/commodity_jurisdiction/index.html). If you have determined your commodity is USML but are unsure of the correct category, contact the DDTC Response Team at 202-663-1282 or PM-DDTC-Response-Team-DL@state.gov. Any other questions or concerns regarding the use of Category XXI should be directed to the DDTC Response Team at 202-663-1282 or [PM-DDTC-Response-Team-DL@state.gov](mailto:PM-DDTC-Response-Team-DL@state.gov).

is equipped to meet special military requirements, and which has sealed electrical systems or adaptation features for deep water fording.<sup>57</sup>

### **§ 121.5 Apparatus and Devices under Category IV(c)**

Category IV includes but is not limited to the following: Fuses and components specifically designed, modified or configured for items listed in that category, bomb racks and shackles, bomb shackle release units, bomb ejectors, torpedo tubes, torpedo and guided missile boosters, guidance systems equipment and parts, launching racks and projectors, pistols (exploders), ignitors, fuse arming devices, intervalometers, thermal batteries, hardened missile launching facilities, guided missile launchers and specialized handling equipment, including transporters, cranes and lifts designed to handle articles in paragraphs (a) and (b) of this category for preparation and launch from fixed and mobile sites. The equipment in this category includes robots, robot controllers and robot end-effectors specially designed or modified for military applications.

### **§ 121.6 Cartridge and Shell Casings**

Cartridge and shell casings are included in Category III unless, prior to export, they have been rendered useless beyond the possibility of restoration for use as a cartridge or shell casing by means of heating, flame treatment, mangling, crushing, cutting, or popping.<sup>58</sup>

### **§ 121.7 (Removed & Reserved)**

*History: 67 FR 70839, Nov. 27, 2002*

### **§ 121.8 End-Items, Components, Accessories, Attachments, Parts, Firmware, Software, and Systems**

(a) An *end-item* is an assembled article ready for its intended use. Only ammunition, fuel or another energy source is required to place it in an operating state.

(b) A *component* is an item which is useful only when used in conjunction with an end-item. A *major component* includes any assembled element which forms a portion of an end-item without which the end-item is inoperable. (Example: Airframes, tail sections, transmissions, tank treads, hulls, etc.) A *minor component* includes any assembled element of a major component.

(c) *Accessories* and *attachments* are associated equipment for any component, end-item or system, and which are not necessary for their operation, but which enhance their usefulness or effectiveness. (Examples: Military riflescopes, special paints, etc.)

(d) A *part* is any single unassembled element of a major or a minor component, accessory, or attachment which is not normally subject to disassembly without the destruction or the impairment of design use. (Examples: Rivets, wire, bolts, etc.)

(e) *Firmware* and any related unique support tools (such as computers, linkers, editors, test case generators, diagnostic checkers, library of functions and system test diagnostics) specifically designed for equipment or systems covered under any category of the U.S. Munitions List are considered as part of the end-item or component. Firmware includes but is not limited to circuits into which software has been programmed.

(f) *Software* includes but is not limited to the system functional design, logic flow, algorithms, application programs, operating systems and support software for design, implementation, test, operation, diagnosis and repair. A person who intends to export software only should, unless it is specifically enumerated in § 121.1 (e.g., XIII(b)), apply for a technical data license pursuant to part 125 of this subchapter.

(g) A *system* is a combination of end-items, components, parts, accessories, attachments, firmware or software, specifically designed, modified or adapted to operate together to perform a specialized military function.

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<sup>57</sup> This paragraph repeats the definition in § 121.1 Cat VII(i)(2).

<sup>58</sup> This paragraph repeats the definition in § 121.1 Cat III(f)(2).

## **§ 121.9 (Removed and Reserved)**

*History: 67 FR 20894, April 5, 2002*

## **§ 121.10 Forgings, Castings, and Machined Bodies**

Articles on the U.S. Munitions List include articles in a partially completed state (such as forgings, castings, extrusions and machined bodies) which have reached a stage in manufacture where they are clearly identifiable as defense articles. If the end-item is an article on the U.S. Munitions List (including components, accessories, attachments and parts as defined in § 121.8), then the particular forging, casting, extrusion, machined body, etc., is considered a defense article subject to the controls of this subchapter, except for such items as are in normal commercial use.

## **§ 121.11 Military Demolition Blocks and Blasting Caps**

Military demolition blocks and blasting caps referred to in Category IV(a) do not include the following articles:

- (a) Electric squibs.
- (b) No. 6 and No. 8 blasting caps, including electric ones.
- (c) Delay electric blasting caps (including No. 6 and No. 8 millisecond ones).
- (d) Seismograph electric blasting caps (including SSS, Static-Master, Vibrocap SR, and SEISMO SR).
- (e) Oil well perforating devices.

## **§ 121.12 (Removed & Reserved)**

*History: 67 FR 70839, Nov. 27, 2002*

## **§ 121.13 (Removed & Reserved)**

*History: 67 FR 70839, Nov. 27, 2002*

## **§ 121.14 (Reserved)**

## **§ 121.15 Vessels of War and Special Naval Equipment**

*Vessels of war* means vessels, waterborne or submersible, designed, modified or equipped for military purposes, including vessels described as developmental, “demilitarized” or decommissioned. Vessels of war in Category VI, whether developmental, “demilitarized” and/or decommissioned or not, include, but are not limited to, the following:

- (a) Combatant vessels:
  - (1) Warships (including nuclear-powered versions):
    - (i) Aircraft carriers.
    - (ii) Battleships.
    - (iii) Cruisers.
    - (iv) Destroyers.
    - (v) Frigates.
    - (vi) Submarines.
  - (2) Other Combatants:
    - (i) Patrol Combatants (*e.g.*, including but not limited to PHM).
    - (ii) Amphibious Aircraft/Landing Craft Carriers.
    - (iii) Amphibious Materiel/Landing Craft Carriers.

- (iv) Amphibious Command Ships.
- (v) Mine Warfare Ships.
- (vi) Coast Guard Cutters (*e.g.*, including but not limited to: WHEC, WMEC).

(b) Combatant Craft:

- (1) Patrol Craft (patrol craft described in § 121.1, Category VI, paragraph (b) are considered noncombatant):
  - (i) Coastal Patrol Combatants.
  - (ii) River, Roadstead Craft (including swimmer delivery craft).
  - (iii) Coast Guard Patrol Craft (*e.g.*, including but not limited to WPB).
- (2) Amphibious Warfare Craft:
  - (i) Landing Craft (*e.g.*, including but not limited to LCAC).
  - (ii) Special Warfare Craft (*e.g.*, including but not limited to: LSSC, MSSC, SDV, SWCL, SWCM).
- (3) Mine Warfare Craft and Mine Countermeasures Craft (*e.g.*, including but not limited to: MCT, MSB).

(c) Non-Combatant Auxiliary Vessels and Support Ships:

- (1) Combat Logistics Support:
  - (i) Underway Replenishment Ships.
  - (ii) Surface Vessel and Submarine Tender/Repair Ships.
- (2) Support Ships:
  - (i) Submarine Rescue Ships.
  - (ii) Other Auxiliaries (*e.g.*, including but not limited to: AGDS, AGF, AGM, AGOR, AGOS, AH, AP, ARL, AVB, AVM, AVT).

(d) Non-Combatant Support, Service and Miscellaneous Vessels (*e.g.*, including but not limited to: DSRV, DSV, NR, YRR).

### **§ 121.16 Missile Technology Control Regime Annex<sup>59</sup>**

Some of the items on the Missile Technology Control Regime Annex are controlled by both the Department of Commerce on the Commodity Control List and by the Department of State on the United States Munitions List. To the extent an article is on the United States Munitions List, a reference appears in parentheses listing the U.S. Munitions List category in which it appears. The following items constitute all items on the Missile Technology Control Regime Annex which are covered by the U.S. Munitions List:

#### **Item 1—Category I**

Complete rocket systems (including ballistic missile systems, space launch vehicles, and sounding rockets (see § 121.1, Cat. IV(a) and (b))) [sic]<sup>60</sup> and unmanned air vehicle systems (including cruise missile systems, see § 121.1, Cat. VIII (a)), target drones and reconnaissance drones (see § 121.1, Cat. VIII (a))) [sic]<sup>61</sup> capable of delivering at least a 500 kg payload to a range of at least 300 km.

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<sup>59</sup> ITAR §§ 123.16, 124.2(c)(5)(i), and 126.5(b)(2) discuss MTCR restrictions on ITAR license exemptions. See §§ 120.29 and § 121.2 for an explanation of the MTCR and the effect of the MTCR interpretations from § 121.3 through § 121.15. Practice Tip: The MTCR portion of the ITAR is many years out of date. Some of the items on the MTCR Annex are controlled wholly or partially by the Department of Commerce on the Commodity Control List and some are controlled wholly or partially by the Department of State on the United States Munitions List (USML). For items wholly or partially on the USML, a reference appears in parentheses listing the USML category which is relevant. The list in § 121.16 identifies all items on the MTCR Annex covered, wholly or partially, by the USML, but none of the MTCR items is identical in the USML, which uses different terminology. (Contributor: William A. Root, 301-987-6418, waroot@aol.com)

<sup>60</sup> So in original; should be “))”.

<sup>61</sup> So in original; should be “))”.

## Item 2—Category I

Complete subsystems usable in the systems in Item 1 as follows:

- (a) Individual rocket stages (see § 121.1, Cat. IV(h));
- (b) Reentry vehicles (see § 121.1, Cat. IV(g)), and equipment designed or modified therefor, as follows, except as provided in Note (1) below for those designed for non-weapon payloads;
  - (1) Heat shields and components thereof fabricated of ceramic or ablative materials (see § 121.1, Cat. IV(f));
  - (2) Heat sinks and components thereof fabricated of lightweight, high heat capacity materials;
  - (3) Electronic equipment specially designed for reentry vehicles (see § 121.1, Cat. XI(a)(7));
- (c) Solid or liquid propellant rocket engines, having a total impulse capacity of 1.1 x 10 N-sec (2.5 x 10 lb-sec) or greater (see § 121.1, Cat. IV, (h)).
- (d) “Guidance sets” capable of achieving system accuracy of 3.33 percent or less of the range (*e.g.*, a CEP of 1 j., or less at a range of 300 km), except as provided in Note (1) below for those designed for missiles with a range under 300 km or manned aircraft (see § 121.1, Cat. XII(d));
- (e) Thrust vector control subsystems, except as provided in Note (1) below for those designed for rocket systems that do not exceed the range/payload capability of Item 1 (see § 121.1, Cat. IV);
- (f) Warhead safing, arming, fusing, and firing mechanisms, except as provided in Note (1) below for those designed for systems other than those in Item 1 (see § 121.1, Cat. IV(h)).

### Note to Item 2:

- (1) The exceptions in (b), (d), (e), and (f) above may be treated as Category II if the subsystem is exported subject to end-use statements and quantity limits appropriate for the excepted end-use stated above.
- (2) *CEP (circle of equal probability)* is a measure of accuracy, and defined as the radius of the circle centered at the target, at a specific range, in which 50 percent of the payloads impact.
- (3) A “*guidance set*” integrates the process of measuring and computing a vehicle’s position and velocity (*i.e.*, navigation) with that of computing and sending commands to the vehicle’s flight control systems to correct the trajectory.
- (4) Examples of methods of achieving thrust vector control which are covered by (e) include:
  - (i) Flexible nozzle;
  - (ii) Fluid or secondary gas injection;
  - (iii) Movable engine or nozzle;
  - (iv) Deflection of exhaust gas stream (jet vanes or probes); or
  - (v) Use of thrust tabs.

## Item 3—Category II

Propulsion components and equipment usable in the systems in Item 1, as follows:

- (a) Lightweight turbojet and turbofan engines (including turbocompound engines) that are small and fuel efficient (see § 121.1, both Cat. IV(h) and VIII(b));
- (b) Ramjet/Scramjet/pulse jet/combined cycle engines, including devices to regulate combustion, and specially designed components therefor (see § 121.1, both Cat. IV(h) and Cat. VIII(b));
- (c) Rocket motor cases, “interior lining”, “insulation” and nozzles therefor (see § 121.1, Cat. IV(h) and Cat. V(c));
- (d) Staging mechanisms, separation mechanisms, and interstages therefor (see § 121.1, Cat. IV(c) and (h));

(e) Liquid and slurry propellant (including oxidizers) control systems, and specially designed components therefor, designed or modified to operate in vibration environments of more than 100 g RMS between 20 Hz and 2,000 Hz (see § 121.1, Cat. IV(c) and (h));

(f) Hybrid rocket motors and specially designed components therefor (see § 121.1, Cat. IV(h)).

**Note to Item 3:**

(1) Item 3(a) engines may be exported as part of a manned aircraft or in quantities appropriate for replacement parts for manned aircraft.

(2) In Item 3(C), “interior lining” suited for the bond interface between the solid propellant and the case or insulating liner is usually a liquid polymer based dispersion of refractory or insulating materials, *e.g.*, carbon filled HTPB or other polymer with added curing agents to be sprayed or screened over a case interior (see § 121.1, Cat. V(c)).

(3) In Item 3(c), “insulation” intended to be applied to the components of a rocket motor, *i.e.*, the case, nozzle inlets, case closures, includes cured or semi-cured compounded rubber sheet stock containing an insulating or refractory material. It may also be incorporated as stress relief boots or flaps.

(4) The only servo valves and pumps covered in (e) above, are the following:

(i) Servo valves designed for flow rates of 24 liters per minute or greater, at an absolute pressure of 7,000 kPa (1,000 psi) or greater, that have an actuator response time of less than 100 msec;

(ii) Pumps, for liquid propellants, with shaft speeds equal to or greater than 8,000 RPM or with discharge pressures equal to or greater than 7,000 kPa (1,000 psi).

(5) Item 3(e) systems and components may be exported as part of a satellite.

**Item 4—Category II**

Propellants and constituent chemicals for propellants as follows:

(a) Propulsive substances:

(1) Hydrazine with a concentration of more than 70 percent and its derivatives including monomethylhydrazine (MMH);

(2) Unsymmetric dimethylhydrazine (UDHM);

(3) Ammonium perchlorate;

(4) Spherical aluminum powder with particle of uniform diameter of less than  $500 \times 10^{-6} \text{M}$  (500 microns) and an aluminum content of 97 percent or greater;

(5) Metal fuels in particle sizes less than  $500 \times 10^{-6} \text{M}$  (500 microns), whether spherical, atomized, spheroidal, flaked or ground, consisting of 97 percent or more of any of the following: zirconium, beryllium, boron, magnesium, zinc, and alloys of these;

(6) Nitroamines (cyclotetramethylenetetranitramene (HMX), cyclotrimethylenetrinitramine (RDX));

(7) Perchlorates, chlorates or chromates mixed with powdered metals or other high energy fuel components;

(8) Carboranes, decaboranes, pentaboranes and derivatives thereof;

(9) Liquid oxidizers, as follows:

(i) Nitrogen dioxide/dinitrogen tetroxide;

(ii) Inhibited Red Fuming Nitric Acid (IRFNA);

(iii) Compounds composed of fluorine and one or more of other halogens, oxygen or nitrogen.

(b) Polymeric substances:

(1) Hydroxyterminated polybutadiene (HTPB);

(2) Glycidylazide polymer (GAP).

(c) Other high energy density propellants such as, Boron Slurry, having an energy density of  $40 \times 10$  joules/kg or greater.

(d) Other propellant additives and agents:

(1) Bonding agents as follows:

(i) tris(1(2methyl)aziridinyl phosphine oxide (MAPO);

(ii) trimesol(2ethyl)aziridine (HX868, BITA);

(iii) "Tepanol" (HX878), reaction product of tetraethylenepentamine, acrylonitrile and glycidol;

(iv) "Tepan" (HX879), Reaction product of tet enepentamine and acrylonitrile;

(v) Polyfunctional aziridene amides with isophthalic, trimesic, isocyanuric, or trimethyladipic backbone also having a 2methyl or 2ethyl aziridine group (HX752, HX872 and HX877).

(2) Curing agents and catalysts as follows:

(i) Triphenyl bismuth (TPB);

(3) Burning rate modifiers as follows:

(i) Catocene;

(ii) Nbutylferrocene;

(iii) Other ferrocene derivatives.

(4) Nitrate esters and nitrate plasticizers as follows:

(i) 1,2,4butanetriol trinitrate (BTTN);

(5) Stabilizers as follows:

(i) Nmethylpnitroaniline.

*History: Amended at 71 FR 20534, Apr. 21, 2006*

## **Item 8—Category II**

Structural materials usable in the systems in Item 1, as follows:

(a) Composite structures, laminates, and manufactures thereof, including resin impregnated fibre preregs and metal coated fibre preforms therefor, specially designed for use in the systems in Item 1 and the subsystems in Item 2 made either with organix matrix or metal matrix utilizing fibrous or filamentary reinforcements having a specific tensile strength greater than  $7.62 \times 10^4$  m ( $3 \times 10^6$  inches) and a specific modules greater than  $3.18 \times 10^6$  m ( $1.25 \times 10^8$  inches), (see § 121.1, Category IV (f), and Category XIII (d));

(b) Resaturated pyrolyzed (*i.e.*, carboncarbon) materials designed for rocket systems, (see § 121.1 Category IV (f));

(c) Fine grain recrystallized bulk graphites (with a bulk density of at least 1.72 g/cc measured at 15 degrees C), pyrolytic, or fibrous reinforced graphites useable for rocket nozzles and reentry vehicle nose tips (see § 121.1, Category IV (f) and Category XIII);

(d) Ceramic composites materials (dielectric constant less than 6 at frequencies from 100 Hz to 10,000 MHz) for use in missile radomes, and bulk machinable siliconcarbide reinforced unfired ceramic useable for nose tips (see § 121.1, Category IV (f));

## **Item 9—Category II**

Instrumentation, navigation and direction finding equipment and systems, and associated production and test equipment as follows; and specially designed components and software therefor:

(a) Integrated flight instrument systems, which include gyrostabilizers or automatic pilots and integration

software therefor; designed or modified for use in the systems in Item 1 (See § 121.1, Category XII(d));

(b) Gyro-astro compasses and other devices which derive position or orientation by means of automatically tracking celestial bodies or satellites (see § 121.1, Category XV(d));

(c) Accelerometers with a threshold of 0.05 g or less, or a linearity error within 0.25 percent of full scale output, or both, which are designed for use in inertial navigation systems or in guidance systems of all types (see § 121.1, Category VIII(e) and Category XII (d));

(d) All types of gyros usable in the systems in Item 1, with a rated drift rate stability of less than 0.5 degree (1 sigma or rms) per hour in a 1 q [sic]<sup>62</sup> environment (see § 121.1, Category VIII(e) and Category XII(d));

(e) Continuous output accelerometers or gyros of any type, specified to function at acceleration levels greater than 100 g (see § 121.1, Category XII(d));

(f) Inertial or other equipment using accelerometers described by subitems (c) and (e) above, and systems incorporating such equipment, and specially designed integration software therefor (see § 121.1, Category VIII (e) and Category XII(d));

**Notes to Item 9:**

(1) Items (a) through (f) may be exported as part of a manned aircraft or satellite or in quantities appropriate for replacement parts for manned aircraft.

(2) In subitem (d):

(i) *Drift rate* is defined as the time rate of output deviation from the desired output. It consists of random and systematic components and is expressed as an equivalent angular displacement per unit time with respect to inertial space.

(ii) *Stability* is defined as standard deviation (1 sigma) of the variation of a particular parameter from its calibrated value measured under stable temperature conditions. This can be expressed as a function of time.

*History: Amended at 71 FR 20534, Apr. 21, 2006*

**Item 10—Category II**

Flight control systems and “technology” as follows; designed or modified for the systems in Item 1.

(a) Hydraulic, mechanical, electro-optical, or electromechanical flight control systems (including fly-by-wire systems), (see § 121.1, Category IV (h));

(b) Attitude control equipment, (see § 121.1, Category IV, (c) and (h));

(c) Design technology for integration of air vehicle fuselage, propulsion system and lifting control surfaces to optimize aerodynamic performance throughout the flight regime of an unmanned air vehicle, (see § 121.1, Category VIII (k) [sic]<sup>63</sup>);

(d) Design technology for integration of the flight control, guidance, and propulsion data into a flight management system for optimization of rocket system trajectory, (see § 121.1, Category IV (i)).

**Note to Item 10:**

Items (a) and (b) may be exported as part of a manned aircraft or satellite or in quantities appropriate for replacement parts for manned aircraft.

**Item 11—Category II**

Avionics equipment, “technology” and components as follows; designed or modified for use in the systems in Item 1, and specially designed software therefor:

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<sup>62</sup> So in original. Should be “g” (for gravity).

<sup>63</sup> So in original. There is no Category VIII (k).



- (a) Radar and laser radar systems, including altimeters (see § 121.1, Category XI(a)(3));
- (b) Passive sensors for determining bearings to specific electromagnetic sources (direction finding equipment) or terrain characteristics (see § 121.1, Category XI(b) and (d));
- (c) Global Positioning System (GPS) or similar satellite receivers;
  - (1) Capable of providing navigation information under the following operational conditions:
    - (i) At speeds in excess of 515 m/sec (1,000 nautical miles/hours); and
    - (ii) At altitudes in excess of 18 km (60,000 feet), (see § 121.1, Category XV(d)(2)); or
  - (2) Designed or modified for use with unmanned air vehicles covered by Item 1 (see § 121.1, Category XV(d)(4)).
- (d) Electronic assemblies and components specifically designed for military use and operation at temperatures in excess of 125 degrees C, (see § 121.1, Category XI(a)(7)).
- (e) Design technology for protection of avionics and electrical subsystems against electromagnetic pulse (EMP) and electromagnetic interference (EMI) hazards from external sources, as follows, (see § 121.1, Category XI (b)).
  - (1) Design technology for shielding systems;
  - (2) Design technology for the configuration of hardened electrical circuits and subsystems;
  - (3) Determination of hardening criteria for the above.

**Notes to Item 11:**

- (1) Item 11 equipment may be exported as part of a manned aircraft or satellite or in quantities appropriate for replacement parts for manned aircraft.
- (2) Examples of equipment included in this Item:
  - (i) Terrain contour mapping equipment;
  - (ii) Scene mapping and correlation (both digital and analog) equipment;
  - (iii) Doppler navigation radar equipment;
  - (iv) Passive interferometer equipment;
  - (v) Imaging sensor equipment (both active and passive);
- (3) In subitem (a), laser radar systems embody specialized transmission, scanning, receiving and signal processing techniques for utilization of lasers for echo ranging, direction finding and discrimination of targets by location, radial speed and body reflection characteristics.

**Item 12—Category II**

Launch support equipment, facilities and software for the systems in Item 1, as follows:

- (a) Apparatus and devices designed or modified for the handling, control, activation and launching of the systems in Item 1, (see § 121.1, Category IV(c));
- (b) (Vehicles designed or modified for the transport, handling, control, activation and launching of the systems in Item 1, (see § 121.1, Category VII(d));
- (c) Telemetry and telecontrol equipment usable for unmanned air vehicles or rocket systems, (see § 121.1, Category XI(a));
- (d) Precision tracking systems:
  - (1) Tracking systems which use a transponder installed on the rocket system or unmanned air vehicle in conjunction with either surface or airborne references or navigation satellite systems to provide real-time measurements of in-flight position and velocity, (see § 121.1, Category XI(a));

(2) Range instrumentation radars including associated optical/infrared trackers and the specially designed software therefor with all of the following capabilities (see § 121.1, Category XI(a)(3)):

- (i) angular resolution better than 3 milli-radians (0.5 mils);
- (ii) range of 30 km or greater with a range resolution better than 10 meters RMS;
- (iii) velocity resolution better than 3 meters per second.

(3) Software which processes post-flight, recorded data, enabling determination of vehicle position throughout its flight path (see § 121.1, Category IV(i)).

*History: Amended at 71 FR 20534, Apr. 21, 2006*

### **Item 13—Category II**

Analog computers, digital computers, or digital differential analyzers designed or modified for use in the systems in Item 1 (see § 121.1, Category XI (a)(6)), having either of the following characteristics:

- (a) Rated for continuous operation at temperature from below minus 45 degrees C to above plus 55 degrees C; or
- (b) Designed as ruggedized or “radiation hardened”.

#### **Note to Item 13:**

Item 13 equipment may be exported as part of a manned aircraft or satellite or in quantities appropriate for replacement parts for manned aircraft.

### **Item 14—Category II**

Analog-to-digital converters, usable in the system in Item 1, having either of the following characteristics:

- (a) Designed to meet military specifications for ruggedized equipment (see § 121.1, Category XI(d)); or,
- (b) Designed or modified for military use (see § 121.1, Category XI(d)); and being one of the following types:
  - (1) Analog-to-digital converter “microcircuits,” which are “radiation hardened” or have all of the following characteristics:
    - (i) Having a resolution of 8 bits or more;
    - (ii) Rated for operation in the temperature range from below minus 54 degrees C to above plus 125 degrees C; and
    - (iii) Hermetically sealed.
  - (2) Electrical input type analog-to-digital converter printed circuit boards or modules, with all of the following characteristics:
    - (i) Having a resolution of 8 bits or more;
    - (ii) Rated for operation in the temperature range from below minus 45 degrees C to above plus 55 degrees C; and
    - (iii) Incorporated “microcircuits” listed in (1), above.

### **Item 15—Category II<sup>64</sup>**

### **Item 16—Category II**

Specially designed software, or specially designed software with related specially designed hybrid (combined analog/digital) computers, for modeling, simulation, or design integration of the systems in Item 1 and Item 2

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<sup>64</sup> "Item 15-Category II" was excluded when the MTCR Annex was added to the ITAR in 1993 because the items in that category are subject to the EAR. See 58 FR 39280 (July 22, 1993). The items in that category are currently classified in ECCNs 2B116, 2D101, 9B105, 9D101, and in related technology ECCNs. See further discussion about the MTCR at the footnote to § 121.16.

(see § 121.1, Category IV(i) and Category XI(a)(6)).

**Note to Item 16:**

The modeling includes in particular the aerodynamic and thermodynamic analysis of the system.

**Item 17—Category II**

Materials, devices, and specially designed software for reduced observables such as radar reflectivity, ultraviolet/infrared signatures on acoustic signatures (*i.e.*, stealth technology), for applications usable for the systems in Item 1 or Item 2 (see § 121.1, Category XIII (e) and (k)), for example:

- (a) Structural material and coatings specially designed for reduced radar reflectivity;
- (b) Coatings, including paints, specially designed for reduced or tailored reflectivity or emissivity in the microwave, infrared or ultraviolet spectra, except when specially used for thermal control of satellites.
- (c) Specially designed software or databases for analysis of signature reduction.
- (d) Specially designed radar cross section measurement systems (see § 121.1, Category XI(a)(3)).

**Item 18—Category II**

Devices for use in protecting rocket systems and unmanned air vehicles against nuclear effects (*e.g.* Electromagnetic Pulse (EMP), Xrays, combined blast and thermal effects), and usable for the systems in Item 1, as follows (see § 121.1, Category IV (c) and (h)):

- (a) “Radiation Hardened” “microcircuits” and detectors (see § 121.1, Category XI(c)(3) [sic]<sup>65</sup>. Note: This commodity has been formally proposed for movement to category XV(e)(2) in the near future).
- (b) Radomes designed to withstand a combined thermal shock greater than 1000 cal/sq cm accompanied by a peak over pressure of greater than 50 kPa (7 pounds per square inch) (see § 121.1, Category IV(h)).

**Note to Item 18(a):**

A *detector* is defined as a mechanical, electrical, optical or chemical device that automatically identifies and records, or registers a stimulus such as an environmental change in pressure or temperature, an electrical or electromagnetic signal or radiation from a radioactive material. The following pages were removed from the final ITAR for replacement by DDTC's updated version § 6(l) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(l)), as amended. In accordance with this provision, the list of MTCR Annex items shall constitute all items on the U.S. Munitions List in § 121. 16.

*History: 58 FR 39287, July 22, 1993; 71 FR 20534, Apr. 21, 2006; 73 Fed. Reg. 28863, May 19, 2008; 73 FR 47523, Aug. 14, 2008; 73 FR 54314, Sep. 19, 2008.*

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<sup>65</sup> So in original. There is no Category XI(c)(3).



## PART 122: REGISTRATION OF MANUFACTURERS AND EXPORTERS

### Section

- 122.1 Registration Requirements
- 122.2 Submission of Registration Statement
- 122.3 Registration Fees
- 122.4 Notification of Changes in Information Furnished by Registrants
- 122.5 Maintenance of Records by Registrants

*Authority: §§ 2 and 38, Public Law 90-629, 90 Stat. 744 (22 U.S.C. 2752, 2778); E.O. 11958, 42 FR 4311; 1977 Comp. p. 79, 22 U.S.C. 2651a. Source: 58 FR 39298, July 22, 1993, 71 FR 3762-3763, Jan. 24, 2006, unless otherwise noted.*

### **§ 122.1 Registration Requirements<sup>66</sup>**

(a) Any person who engages in the United States in the business of either manufacturing or exporting defense articles or furnishing defense services is required to register with the Directorate of Defense Trade Controls. For the purpose of this subchapter, engaging in the business of manufacturing or exporting defense articles or furnishing defense services requires only one occasion of manufacturing or exporting a defense article or furnishing a defense service. Manufacturers who do not engage in exporting must nevertheless register.<sup>67</sup>

(b) *Exemptions.* Registration is not required for:

- (1) Officers and employees of the United States Government acting in an official capacity.
- (2) Persons whose pertinent business activity is confined to the production of unclassified technical data only.
- (3) Persons all of whose manufacturing and export activities are licensed under the Atomic Energy Act of 1954, as amended.
- (4) Persons who engage only in the fabrication of articles for experimental or scientific purpose, including research and development.

(c) *Purpose.* Registration is primarily a means to provide the U.S. Government with necessary information on who is involved in certain manufacturing and exporting activities. Registration does not confer any export rights or privileges. It is generally a precondition to the issuance of any license or other approval under this subchapter.

*History: Amended at 71 FR 20534, Apr. 21, 2006*

### **§ 122.2 Submission of Registration Statement<sup>68</sup>**

(a) *General.* The Department of State Form DS-2032 (Statement of Registration)<sup>69</sup> and the transmittal letter required by paragraph (b) of this section must be submitted by an intended registrant with a payment by check drawn against the registrant's account, payable to the Department of State of the fee prescribed in § 122.3(a) of this subchapter. Checks must be in U.S. currency, and must be payable through a U.S. financial institution. In addition, the Statement of Registration and transmittal letter must be signed by a senior officer (e.g., Chief Executive Officer, President, Secretary, Partner, Member, Treasurer, General Counsel) who has been empowered by the intended registrant to sign such documents. The intended registrant also shall submit

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<sup>66</sup> DDTTC registration guidelines and forms are available at <http://www.pmdtcc.state.gov/registration/index.html> (Dec. 15, 2009).

<sup>67</sup> Practice tip: DDTTC also construes this to cover companies that own, control, or otherwise are related to companies that engage in the manufacture or export of defense articles or furnish defense services, but which themselves do not engage in such activities. DDTTC is, in many cases, requiring companies that are not the parent company to consolidate the registrations of affiliated companies or all companies with common ultimate ownership, even if the common owner is foreign. (Contributor: Susan Kovarovics, Esq., Susan.Kovarovics@bryancave.com, 202-508-6132.)

<sup>68</sup> DDTTC has published guidance, "Preparing a Registration Package," at <http://www.pmdtcc.state.gov/registration/package.html> (Dec. 15, 2009) on submitting registration packages and material changes to registration. A complete package consists of a DS-2032, Transmittal Letter, Legal Documentation and other attachments as needed.

<sup>69</sup> A copy of the DS-2032 may be downloaded at <http://www.pmdtcc.state.gov/registration/documents/DS2032.pdf> (last viewed Dec. 20, 2009).

documentation that demonstrates that it is incorporated or otherwise authorized to do business in the United States. The Directorate of Defense Trade Controls will notify the registrant if the Statement of Registration is incomplete either by notifying the registrant of what information is required or through the return of the entire registration package. Registrants may not establish new entities for the purpose of reducing registration fees.

(b) *Transmittal letter.* A letter of transmittal, signed by an authorized senior officer of the intended registrant, shall accompany each Statement of Registration.

(1) The letter shall state whether the intended registrant, chief executive officer, president, vice presidents, other senior officers or officials (*e.g.* comptroller, treasurer, general counsel) or any member of the board of directors:

(i) Has ever been indicted for or convicted of violating any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter; or

(ii) Is ineligible to contract with, or to receive a license<sup>70</sup> or other approval to import defense articles or defense services from, or to receive an export license or other approval from, any agency of the U.S. Government.

(2) The letter shall also declare whether the intended registrant is owned or controlled by foreign persons (as defined in § 120.16 of this subchapter). If the intended registrant is owned or controlled by foreign persons, the letter shall also state whether the intended registrant is incorporated or otherwise authorized to engage in business in the United States.

(c) *Definition.* For purpose of this section, *ownership* means that more than 50 percent of the outstanding voting securities of the firm are owned by one or more foreign persons. *Control* means that one or more foreign persons have the authority or ability to establish or direct the general policies or day-to-day operations of the firm. Control is presumed to exist where foreign persons own 25 percent or more of the outstanding voting securities if no U.S. persons control an equal or larger percentage.

*History: 69 FR 70888-70889 of Dec. 8, 2004; 71 FR 20534, Apr. 21, 2006; 73 FR 55439, Sep. 25, 2008.*

### **§ 122.3 Registration Fees**

(a) A person who is required to register must do so on an annual basis upon submission of a completed Form DS-2032, transmittal letter, and payment of a fee as follows:

(1) Tier 1: A set fee of \$2,250 per year is required for new registrants or registrants for whom the Directorate of Defense Trade Controls has not reviewed, adjudicated or issued a response to any applications during a 12-month period ending 90 days prior to expiration of the current registration.

(2) Tier 2: A set fee of \$2,750 per year is required for registrants for whom the Directorate of Defense Trade Controls has reviewed, adjudicated or issued a response to between one and ten applications during a 12-month period ending 90 days prior to expiration of the current registration.

(3) Tier 3: The third tier is for registrants for whom the Directorate of Defense Trade Controls has reviewed, adjudicated or issued a response to more than ten applications during a 12-month period ending 90 days prior to expiration of the current registration. For this tier, registrants will pay a fee of \$2,750 plus an additional fee based on the number of applications for which the Directorate of Defense Trade Controls has reviewed, adjudicated or issued a response. The additional fee will be determined by multiplying \$250 times the number of applications over ten for whom the Directorate of Defense Trade Controls has reviewed, adjudicated or issued a response during a 12-month period ending 90 days prior to expiration of the current registration.

(4) For registrants, including universities, exempt from income taxation pursuant to 26 U.S.C. 501(c)(3), their fee may be reduced to the Tier 1 registration fee provided a copy of their certification letter

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<sup>70</sup> Practice tip: DDTC has advised that this is not intended to cover officers and directors who are ineligible to obtain an export license or other approval solely because they are foreign persons. (Contributor: Susan Kovarovics, Esq., Susan.Kovarovics@bryancave.com, 202-508-6132.)

from the Internal Revenue Service is submitted with their registration package. To be eligible, the registrant and all of its subsidiaries/affiliates must be exempt from income taxation pursuant to 26 U.S.C. 501(c)(3).

(5) The fee for registrants whose total registration fee is greater than 3% of the total value of applications for whom the Directorate of Defense Trade Controls has reviewed, adjudicated or issued a response during the 12-month period ending 90 days prior to expiration of the current registration will be reduced to 3% of such total application value or \$2,750, which ever is greater.

(6) For those renewing a registration, notice of the fee due for the next year's registration will be sent to the registrant of record at least 60 days prior to its expiration date.<sup>71</sup>

(7) For purposes of this subsection, "applications" refers to the actions enumerated within parts 123 through 126 of this subchapter that require the Directorate of Defense Trade Controls to review, adjudicate and issue responses.<sup>72</sup> Only those applications that the Department has taken final action on and provided response to will be counted in determining the annual registration fee. Those applications that are "returned without action" or "denied" will not be counted.<sup>73</sup>

(b) *Expiration of registration.* A registrant must submit its request for registration renewal at least 30 days but no earlier than 60 days prior to the expiration date.

(c) *Lapse in registration.* A registrant who fails to renew a registration and, after an intervening period, seeks to register again must pay registration fees for any part of such intervening period during which the registrant engaged in the business of manufacturing or exporting defense articles or defense services.

*History: 58 FR 39298, July 22, 1993, 69 FR 70889, Dec. 8, 2004, 70 FR 50958, Aug. 29, 2005; 73 Fed. Reg. 41258, July 18, 2008; 73 FR 55439, Sep. 25, 2008.*

## **§ 122.4 Notification of Changes in Information Furnished by Registrants**

(a) A registrant must, within five days of the event, notify the Directorate of Defense Trade Controls by registered mail if:

(1) Any of the persons referred to § 122.2(b) are indicted for or convicted of violating any of the U.S. criminal statutes enumerated in §120.27 of this subchapter, or become ineligible<sup>74</sup> to contract with, or to receive a license or other approval to export or temporarily import defense articles or defense services from any agency of the U.S. government; or

(2) There is a material change in the information contained in the Statement of Registration, including a change in the senior officers; the establishment, acquisition or divestment of a subsidiary or foreign affiliate; a merger; a change of location; or the dealing in an additional category of defense articles or defense services.

(b) A registrant must notify the Directorate of Defense Trade Controls by registered mail at least 60 days in advance of any intended sale or transfer to a foreign person of ownership or control of the registrant or any entity thereof. Such notice does not relieve the registrant from obtaining the approval required under this subchapter for the export of defense articles or defense services to a foreign person, including the approval required prior to disclosing technical data. Such notice provides the Directorate of Defense Trade Controls with the information necessary to determine whether the authority of § 38(g)(6) of the Arms Export Control Act regarding licenses or other approvals for certain sales or transfers of defense articles or data on the U.S. Munitions List should be invoked (see §§ 120.10 and 126.1(e) of this subchapter).

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<sup>71</sup> Practice tip: The notice from DDTC is a courtesy only. This amount is due regardless of whether the registrant actually receives the notice. (Contributor: Susan Kovarovics, Esq., [Susan.Kovarovics@bryancave.com](mailto:Susan.Kovarovics@bryancave.com), 202-508-6132.)

<sup>72</sup> E.g., a license (DSP-5, DSP-61, DSP-73, DSP-85); a license amendment (DSP-119); TAA, MLA, DA, or agreement amendment. (Contributor: Susan Kovarovics, Esq., [Susan.Kovarovics@bryancave.com](mailto:Susan.Kovarovics@bryancave.com), 202-508-6132.)

<sup>73</sup> Practice tip: This does not include voluntary disclosures, commodity jurisdiction requests, advisory opinion requests, general correspondence or export authorization requests that are returned without action. (Contributor: Susan Kovarovics, Esq., [Susan.Kovarovics@bryancave.com](mailto:Susan.Kovarovics@bryancave.com), 202-508-6132.)

<sup>74</sup> Practice tip: This statement has not been interpreted to include non U.S. person officers and directors who are ineligible solely based on their status as foreign persons. (Contributor: Susan Kovarovics, Esq., [Susan.Kovarovics@bryancave.com](mailto:Susan.Kovarovics@bryancave.com), 202-508-6132.)

(c) The new entity formed when a registrant merges with another company or acquires, or is acquired by, another company or a subsidiary or division of another company shall advise the Directorate of Defense Trade Controls of the following:

- (1) The new firm name and all previous firm names being disclosed;
- (2) The registration number that will survive and those that are to be discontinued (if any);
- (3) The license numbers of all approvals on which unshipped balances will be shipped under the surviving registration number, since any license not the subject of notification will be considered invalid; and
- (4) Amendments to agreements approved by the Directorate of Defense Trade Controls to change the name of a party to those agreements. The registrant must, within 60 days of this notification, provide to the Directorate of Defense Trade Controls a signed copy of an amendment to each agreement signed by the new U.S. entity, the former U.S. licensor and the foreign licensee. Any agreements not so amended will be considered invalid.

(d) Prior approval by the Directorate of Defense Trade Controls is required for any amendment making a substantive change.

*History: Amended at 71 FR 20534, Apr. 21, 2006*

### **§ 122.5 Maintenance of Records by Registrants**

(a) A person who is required to register must maintain records concerning the manufacture, acquisition and disposition<sup>75</sup> (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. Records in an electronic format must be maintained using a process or system capable of reproducing all records on paper. Such records when displayed on a viewer, monitor, or reproduced on paper, must exhibit a high degree of legibility and readability. (For the purpose of this section, “*legible*” and “*legibility*” mean the quality of a letter or numeral that enables the observer to identify it positively and quickly to the exclusion of all other letters or numerals. “*Readable*” and “*readability*” means the quality of a group of letters or numerals being recognized as complete words or numbers.) This information must be stored in such a manner that none of it may be altered once it is initially recorded without recording all changes, who made them, and when they were made.<sup>76</sup> For processes or systems based on the storage of digital images, the process or system must afford accessibility to all digital images in the records being maintained. All records subject to this section must be maintained for a period of five years from the expiration of the license or other approval, to include exports using an exemption (§ 123.26 of this subchapter); or, from the date of the transaction (*e.g.* expired licenses or other approvals relevant to the export transaction using an exemption). The Managing Director, Directorate of Defense Trade Controls, and the Director of the Office of Defense Trade Controls Licensing, may prescribe a longer or shorter period in individual cases.

(b) Records maintained under this section shall be available at all times for inspection and copying by the Directorate of Defense Trade Controls or a person designated by the Directorate of Defense Trade Controls (*e.g.* the Diplomatic Security Service) or U.S. Immigration and Customs Enforcement, or U.S. Customs and Border Protection. Upon such request, the person maintaining the records must furnish the records, the equipment, and if necessary, knowledgeable personnel for locating, reading, and reproducing any record that is required to be maintained in accordance with this section.

*History: 70 FR 50958, Aug. 29, 2005.*

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<sup>75</sup> Practice tip: Presumably this is limited to acquisition and disposition in which an export occurred, not all acquisitions and dispositions where no export occurred. (Contributor: Susan Kovarovics, Esq., [Susan.Kovarovics@bryancave.com](mailto:Susan.Kovarovics@bryancave.com), 202-508-6132.)

<sup>76</sup> Practice tip: If you rely on an order processing database or other system, ensure your information system supports these requirements. (Contributor: Susan Kovarovics, Esq., [Susan.Kovarovics@bryancave.com](mailto:Susan.Kovarovics@bryancave.com), 202-508-6132.)



## PART 123: LICENSES FOR THE EXPORT OF DEFENSE ARTICLES

### Section

- 123.1 Requirement for Export or Temporary Import Licenses
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*AUTHORITY: §§ 2, 38, and 71, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2753; E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp. p. 79; 22 U.S.C. 2651a; 22 U.S.C. 2776; Pub. L. 105-261, 112 Stat. 1920; Sec 1205(a), Pub. L. 107-228. History: 58 FR 39299, July 22, 1993, unless otherwise noted*

### **§ 123.1 Requirement for Export or Temporary Import Licenses<sup>77</sup>**

(a) Any person who intends to export or to import temporarily a defense article must obtain the approval of the Directorate of Defense Trade Controls prior to the export or temporary import, unless the export or temporary import qualifies for an exemption under the provisions of this subchapter. Applications for export or temporary import must be made as follows:

- (1) Applications for licenses for permanent export must be made on Form DSP-5 (unclassified);
- (2) Applications for licenses for temporary export must be made on Form DSP-73 (unclassified);
- (3) Applications for licenses for temporary import must be made on Form DSP-61 (unclassified); and
- (4) Applications for the export or temporary import of classified defense articles or classified technical data<sup>78</sup> must be made on Form DSP-85.

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<sup>77</sup> DDTC guidance on electronic license applications is available at <http://www.pmdtcc.state.gov/DTRADE/index.html> (Dec. 24, 2009).

<sup>78</sup> The title on the DSP-85 is "Application/License for Permanent/Temporary Export or Temporary Import of Classified Defense Articles and Related Classified Technical Data." § 120.28(a)(6).

(b) Applications for Department of State export licenses must be confined to proposed exports of defense articles including technical data.

(c) As a condition to the issuance of a license or other approval, the Directorate of Defense Trade Controls may require all pertinent documentary information regarding the proposed transaction and proper completion of the application form as follows:

(1) Form DSP-5, DSP-61, DSP-73, and DSP-85 applications must have an entry in each block where space is provided for an entry. All requested information must be provided.

(2) Attachments and supporting technical data or brochures should be submitted in seven collated copies. Two copies of any freight forwarder lists must be submitted. If the request is limited to renewal of a previous license or for the export of spare parts, only two sets of any attachment (including freight forwarder lists) and one copy of the previous license should be submitted. In the case of fully electronic submissions, unless otherwise expressly required by the Directorate of Defense Trade Controls, applicants need not provide multiple copies of supporting documentation and attachments, supporting technical data or brochures, and freight forwarder lists.

(3) A certification letter signed by an empowered official must accompany all application submissions (see § 126.13 of this subchapter).

(4) An application for a license under this part for the permanent export of defense articles sold commercially must be accompanied by a copy of a purchase order, letter of intent, or other appropriate documentation. In cases involving the U.S. Foreign Military Sales program, three copies of the relevant Department of Defense Form 1513 [sic]<sup>79</sup> are required, unless the procedures of § 126.4(c) or § 126.6 of this subchapter are followed.<sup>80</sup>

(5) Form DSP-83, duly executed, must accompany all license applications for the permanent export of significant military equipment, including classified hardware or classified technical data (see §§ 123.10 and 125.3 of this subchapter).<sup>81</sup>

(6) A statement concerning the payment of political contributions, fees and commissions must accompany a permanent export application if the export involves defense articles or defense services valued in an amount of \$500,000 or more and is being sold commercially to or for the use of the armed forces of a foreign country or international organization (see part 130 of this subchapter).

(d) Provisions for furnishing the type of defense services described in § 120.9(a) of this subchapter are contained in part 124 of this subchapter. Provisions for the export or temporary import of technical data and classified defense articles are contained in part 125 of this subchapter.

(e) A request for a license for the export of unclassified technical data (DSP-5) related to a classified defense article should specify any classified technical data or material that subsequently will be required for export in the event of a sale.

*History: 70 FR 50958, Aug. 29, 2005; 71 FR 20534, Apr. 21, 2006.*

## **§ 123.2 Import Jurisdiction**

The Department of State regulates the temporary import of defense articles. Permanent imports of defense articles into the United States are regulated by the Department of the Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives under the direction of the Attorney General (see 27 CFR parts 447, 478, 479, and 555).

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

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<sup>79</sup> So in original. "Department of Defense Form 1513" should be "Letter of Offer and Acceptance," as DD Form 1513 is obsolete. DFARS Case 98-D015, Aug. 17, 1998.

<sup>80</sup> This section is referred to in § 123.27 re exemption for commercial communications satellites.

<sup>81</sup> See exemption for commercial communications satellites at § 123.27.

### § 123.3 Temporary Import Licenses

(a) A license (DSP-61) issued by the Directorate of Defense Trade Controls is required for the temporary import and subsequent export of unclassified defense articles, unless exempted from this requirement pursuant to § 123.4. This requirement applies to:

- (1) Temporary imports of unclassified defense articles that are to be returned directly to the country from which they were shipped to the United States;
- (2) Temporary imports of unclassified defense articles in transit to a third country;

(b) A bond may be required as appropriate (see part 125 of this subchapter for license requirements for technical data and classified defense articles.)

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### § 123.4 Temporary Import License Exemptions

(a)<sup>82</sup> Port Directors of U.S. Customs and Border Protection shall permit the temporary import (and subsequent export) without a license, for a period of up to 4 years, of unclassified<sup>83</sup> U.S.-origin defense items<sup>84</sup> (including any items manufactured abroad pursuant to U.S. Government approval) if the item temporarily imported:

- (1)<sup>85</sup> Is serviced (*e.g.*, inspection, testing, calibration or repair, including overhaul, reconditioning and one-to-one replacement of any defective items, parts or components, but excluding any modifications, enhancement, upgrade or other form of alteration or improvement that changes the basic performance of the item), and is subsequently returned to the country from which it was imported. Shipment may be made by the U.S. importer or a foreign government representative of the country from which the goods were imported; or
- (2) Is to be enhanced, upgraded or incorporated into another item which has already been authorized by the Directorate of Defense Trade Controls for permanent export; or
- (3) Is imported for the purpose of exhibition, demonstration or marketing in the United States and is subsequently returned to the country from which it was imported; or
- (4) Has been rejected for permanent import by the Department of the Treasury and is being returned to the

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<sup>82</sup> Practical summary of § 123.4(a): Temporary import of a defense article is permitted without license, PROVIDED it is:

- unclassified, **and**
- for repair & return to sender within 4 years, **and**
- U.S.-made (or foreign with USG approval), **and**:
- will be serviced but not improved; **or**
- will be improved or incorporated into another item which has already been authorized for permanent return; **or**
- will be imported only for exhibition or demonstration in USA; **or**
- was rejected for permanent import and is being returned to sender; **or**
- was approved for import under FMS LOA.

<sup>83</sup> See § 123.1(a)(4) and § 123.3(b) re classified articles.

<sup>84</sup> So in original. "Defense articles" is the term defined at 120.6 and used throughout the ITAR, although "defense items" is defined in the Arms Export Control Act at 22 U.S.C. 2778(j)(4)(A) as "defense articles, defense services, and related technical data."

<sup>85</sup> DDTTC has posted guidance for obtaining permission to return "surprise" temporary imports sent to U.S. repair facilities without the required use of a DSP-61 or 123.4(a) exemption. State Dept., DDTTC, TEMPORARY IMPORT VIOLATIONS (Nov. 25, 2009), *available at*: [http://www.pmdtcc.state.gov/licensing/documents/WebNotice\\_TemporaryImportViolations.doc](http://www.pmdtcc.state.gov/licensing/documents/WebNotice_TemporaryImportViolations.doc), stating:

Temporary imports of defense articles require the recipient to obtain a DSP-61 (Temporary Import License) or to claim the exemption under 22 CFR 123.4. In order for the temporary import exemption to be claimed at the time of re-export, the article being returned must have been declared at the time of import on the appropriate U.S. Customs and Border Protection document. The Directorate of Defense Trade Controls (DDTTC) has seen an increase in the number of instances where a foreign person temporarily returns a defense article for repair or replacement without authorization to a U.S. person without the U.S. person's prior knowledge. In this situation, the U.S. person is unable to coordinate the return and obtain the requisite DSP-61 license or claim the regulatory exemptions under §123.4(a)(1) of the International Traffic in Arms Regulations (ITAR) (22 C.F.R. 120-130). DDTTC has established new guidance regarding these unauthorized temporary imports and the subsequent exports to return the items. When this situation occurs, the U.S. person should investigate the nature and cause of the violation and determine if the U.S. person had any responsibility for the violation. If the U.S. person determines they did not have any responsibility for the violation, then in lieu of submitting a separate Voluntary Disclosure in accordance with ITAR §127.12, the U.S. person can submit a DSP-5 license application to return the defense article to the foreign person. A transmittal letter, signed by the Empowered Official, must be submitted with the application, explaining the reasons why the applicant does not believe they have any responsibility for the violation and the steps taken to make this determination; the identities and addresses of all persons known or suspected to be involved in the activities giving rise to the unauthorized temporary import; and any measures taken to prevent a reoccurrence.

country from which it was shipped; or

(5) Is approved for such import under the U.S. Foreign Military Sales (FMS) program pursuant to an executed U.S. Department of Defense Letter of Offer and Acceptance (LOA).

Note: These exceptions do not apply to shipments that transit the U.S. to or from Canada (see § 123.19 and 126.5 of this subchapter for exceptions).

(b)<sup>86</sup> Port Directors of U.S. Customs and Border Protection shall permit the temporary import (but not the subsequent export) without a license of unclassified defense articles that are to be incorporated into another article, or modified, enhanced, upgraded, altered, improved or serviced in any other manner that changes the basic performance or productivity of the article prior to being returned to the country from which they were shipped or prior to being shipped to a third country. A DSP-5 is required for the reexport of such unclassified defense articles after incorporation into another article, modification, enhancement, upgrading, alteration or improvement.

(c) *Requirements.* To use an exemption under § 123.4 (a) or (b), the following criteria must be met:

(1) The importer must meet the eligibility requirements set forth in § 120.1(b) [sic]<sup>87</sup> of this subchapter;

(2) At the time of export, the ultimate consignee named on the (SED)<sup>88</sup> must be the same as the foreign consignee or end-user of record named at the time of import; and

(3) As stated in § 126.1 of this subchapter, the temporary import must not be from or on behalf of a proscribed country listed in that section unless an exception has been granted in accordance with § 126.3 of this subchapter.

(d)<sup>89</sup> *Procedures.* To the satisfaction of the Port Director of U.S. Customs and Border Protection, the importer and export [sic]<sup>90</sup> must comply with the following procedures:

(1) At the time of temporary import—

(i) File and annotate the applicable U.S. Customs and Border Protection document (*e.g.*, Form CF 3461, 7512, 7501, 7523 or 3311)<sup>91</sup> to read: “*This shipment is being imported in accordance with and under the authority of 22 CFR 123.4(a)* (identify subsection),” and

(ii) Include, on the invoice or other appropriate documentation, a complete list and description of the defense article(s) being imported, including quantity and U.S. dollar value; and

(2) At the time of export, in accordance with the U.S. Customs and Border Protection procedures, the Directorate of Defense Trade Controls (DDTC) registered and eligible exporter, or an agent acting on the filer’s behalf, must electronically file the export information using the Automated Export System (AES), and identify 22 CFR 123.4 as the authority for the export and provide, as requested by U.S. Customs and Border Protection, the entry document number or a copy of the U.S. Customs and Border Protection document under which the article was imported.

*History: 58 FR 39299, July 22, 1993, as amended at 64 FR 17533, Apr. 12, 1999; 68 FR 61101, Oct. 27, 2003, 70 FR 50958, Aug. 29, 2005.*

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<sup>86</sup> Practical summary of § 123.4(b): Temporary imports of an unclassified item is permitted without license, PROVIDED it will be exported under DSP-5 within 4 years.

▪ Okay for temp import to be foreign-made and to be shipped to different party or country than origin.

<sup>87</sup> So in original. Should be “§ 120.1(c)”.

<sup>88</sup> So in original. Should be Electronic Export Information (EEI).

<sup>89</sup> Practical summary of § 123.4(d) procedures:

(1) On import—

(i) Get CBP annotation on CF 3461, 7512, 7501, 7523, 3311, carnet, or other doc which must contain statement: “*This shipment is being imported in accordance with and under the authority of 22 CFR 123.4(a)* (identify subsection),” and

(ii) Include on invoice or other docs a description of item including quantity and value; and

(2) On export, file AES report, identifying 22 CFR 123.4 as authority for export, and provide entry document number or copy of the CBP form under which the article was imported.

<sup>90</sup> So in original. Probably should be “exporter”.

<sup>91</sup> Although not stated in the ITAR, DDTC has opined that CBP documents include carnets, which must also contain this statement when the imported item is being imported under these exemptions.

### **§ 123.5 Temporary Export Licenses**

(a) The Directorate of Defense Trade Controls may issue a license for the temporary export of unclassified defense articles (DSP-73). Such licenses are valid only if the article will be exported for a period of less than 4 years and will be returned to the United States and transfer of title will not occur during the period of temporary export. Accordingly, articles exported pursuant to a temporary export license may not be sold or otherwise permanently transferred to a foreign person while they are overseas under a temporary export license. A renewal of the license or other written approval must be obtained from the Directorate of Defense Trade Controls if the article is to remain outside the United States beyond the period for which the license is valid.

(b) *Requirements.* Defense articles authorized for temporary export under this section may be shipped only from a port in the United States where a Port Director of U.S. Customs and Border Protection is available, or from a U.S. Post Office (see 39 CFR part 20), as appropriate. The license for temporary export must be presented to the Port Director of U.S. Customs and Border Protection who, upon verification, will endorse the exit column on the reverse side of the license. In some instances of the temporary export of technical data (*e.g.* postal shipments), self-endorsement will be necessary (see § 123.22(b)<sup>92</sup>). The endorsed license for temporary export is to be retained by the licensee. In the case of a military aircraft or vessel exported under its own power, the endorsed license must be carried on board such vessel or aircraft as evidence that it has been duly authorized by the Department of State to leave the United States temporarily.

(c) Any temporary export license for hardware that is used, regardless of whether the hardware was exported directly to the foreign destination or returned directly from the foreign destination, must be endorsed<sup>93</sup> by the U.S. Customs and Border Protection in accordance with the procedures in § 123.22 of this subchapter.

*History:* 58 FR 39299, July 22, 1993, as amended at 64 FR 17533, Apr. 12, 1999; 68 FR 61101, Oct. 27, 2003, 70 FR 50958, Aug. 29, 2005.

### **§ 123.6 Foreign Trade Zones and U.S. Customs and Border Protection Bonded Warehouses**

Foreign trade zones in the United States and U.S. Customs and Border Protection bonded warehouses are considered integral parts of the United States for the purpose of this subchapter. An export license is therefore not required for shipment between the United States and a foreign trade zone or a U.S. Customs and Border Protection bonded warehouse. In the case of classified defense articles, the provisions of the Department of Defense National Industrial Security Program Operating Manual will apply. An export license is required for all shipments of articles on the U.S. Munitions List from foreign trade zones and U.S. Customs and Border Protection bonded warehouses to foreign countries, regardless of how the articles reached the zone or warehouse.

*History:* 70 FR 50958, Aug. 29, 2005; 71 FR 20534, Apr. 21, 2006.

### **§ 123.7 Exports to Warehouses or Distribution Points Outside the United States**

Unless the exemption under § 123.16(b)(1) is used, a license is required to export defense articles to a warehouse or distribution point outside the United States for subsequent resale and will normally be granted only if an agreement has been approved pursuant to § 124.14 of this subchapter.

### **§ 123.8 Special Controls on Vessels, Aircraft, and Satellites Covered by the U.S. Munitions List**

(a) Transferring registration or control to a foreign person of any aircraft, vessel, or satellite on the U.S. Munitions List is an export for purposes of this subchapter and requires a license or written approval from the Directorate of Defense Trade Controls. This requirement applies whether the aircraft, vessel, or satellite is physically located in the United States or abroad.

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<sup>92</sup> For electronic reports to DDTC of exports of technical data via the U.S. Postal Service, see § 123.24(b).

<sup>93</sup> Referred to in § 123.22(a) as “decrement” rather than “endorse”.

(b) The registration in a foreign country of any aircraft, vessel or satellite covered by the U.S. Munitions List which is not registered in the United States but which is located in the United States constitutes an export. A license or written approval from the Directorate of Defense Trade Controls is therefore required. Such transactions may also require the prior approval of the Maritime Administration, the Federal Aviation Administration or other agencies of the U.S. Government.

*History: Amended at 71 FR 20534, Apr. 21, 2006*

### **§ 123.9 Country of Ultimate Destination and Approval of Reexports or Retransfers**

(a) The country designated as the country of ultimate destination on an application for an export license, or on a Shipper's Export Declaration where an exemption is claimed under this subchapter, must be the country of ultimate end-use. The written approval of the Directorate of Defense Trade Controls must be obtained before reselling, transferring, transshipping, or disposing of a defense article to any end user, end use or destination other than as stated on the export license, or on the Shipper's Export Declaration in cases where an exemption is claimed under this subchapter. Exporters must ascertain the specific end-user and end-use prior to submitting an application to the Directorate of Defense Trade Controls or claiming an exemption under this subchapter.

(b) The exporter shall incorporate the following statement as an integral part of the bill of lading, and the invoice whenever defense articles on the U.S. Munitions List are to be exported:

*“These commodities are authorized by the U.S. Government for export only to [country of ultimate destination] for use by [end-user]. They may not be transferred, transshipped on a non-continuous voyage, or otherwise be disposed of in any other country, either in their original form or after being incorporated into other end items, without the prior written approval of the U.S. Department of State.”*

(c) A U.S. person or a foreign person requesting approval for the reexport or retransfer, or change in end-use, of a defense article shall submit a written request which shall be subject to all the documentation required for a permanent export license (see § 123.1) and shall contain the following:

- (1) The license number under which the defense article was previously authorized for export from the United States;
- (2) A precise description, quantity and value of the defense article;
- (3) A description of the new end-use; and
- (4) Identification of the new end-user.

(d) The written approval of the Directorate of Defense Trade Controls must be obtained before reselling, transferring, transshipping on a non-continuous voyage, or disposing of a defense article in any country other than the country of ultimate destination, or anyone other than the authorized end-user, as stated on the Shipper's Export Declaration in cases where an exemption is claimed under this subchapter.

(e) Reexports or retransfers of U.S.-origin components incorporated into a foreign defense article to NATO, NATO agencies, a government of a NATO country, or the governments of Australia, Japan, New Zealand, or South Korea, are authorized without the prior written approval of the Directorate of Defense Trade Controls, provided:

- (1) The U.S. origin components were previously authorized for export from the United States, either by a license or an exemption;
- (2) The U.S.-origin components are not significant military equipment, the items are not major defense equipment sold under contract in the amount of \$25,000,000 (\$25 million) or more; the articles are not defense articles or defense services sold under a contract in the amount of \$100,000,000 (\$100 million) or more; and are not identified in part 121 of this subchapter as Missile Technology Control Regime (MTCR) items; and
- (3) The person reexporting the defense article must provide written notification to the Directorate of Defense Trade Controls of the retransfer not later than 30 days following the reexport. The notification must state the articles being reexported and the recipient government.

(4) In certain cases, the Managing Director, Directorate of Defense Trade Controls or the Director, Office of Defense Trade Controls Licensing, may place retransfer restrictions on a license prohibiting use of this exemption.

*History: Amended at 71 FR 20534, Apr. 21, 2006; 73 FR 15885, Mar. 26, 2008; 74 FR 38342, Aug 3, 2009.*

### **§ 123.10 Nontransfer and Use Assurances**

(a) A *nontransfer and use certificate* (Form DSP-83) is required for the export of significant military equipment and classified articles, including classified technical data. A license will not be issued until a completed Form DSP-83 has been received by the Directorate of Defense Trade Controls. This form is to be executed by the foreign consignee, foreign end-user, and the applicant. The certificate stipulates that, except as specifically authorized by prior written approval of the Department of State, the foreign consignee and foreign end-user will not reexport, resell or otherwise dispose of the significant military equipment enumerated in the application outside the country named as the location of the foreign end-use or to any other person.

(b) The Directorate of Defense Trade Controls may also require a DSP-83 for the export of any other defense articles, including technical data, or defense services.

(c) When a DSP-83 is required for an export of any defense article or defense service to a non-governmental foreign end-user, the Directorate of Defense Trade Controls may require as a condition of issuing the license that the appropriate authority of the government of the country of ultimate destination also execute the certificate.

*History: Amended at 71 FR 20534, Apr. 21, 2006*

### **§ 123.11 Movements of Vessels and Aircraft Covered by the U.S. Munitions List Outside the United States**

(a) A license issued by the Directorate of Defense Trade Controls is required whenever a privately owned aircraft or vessel on the U.S. Munitions List makes a voyage outside the United States.

(b) *Exemption.* An export license is not required when a vessel or aircraft referred to in paragraph (a) of this section departs from the United States and does not enter the territorial waters or airspace of a foreign country if no defense articles are carried as cargo. Such a vessel or aircraft may not enter the territorial waters or airspace of a foreign country before returning to the United States, or carry as cargo any defense article, without a temporary export license (Form DSP-73) from the Department of State. (See § 123.5.)

*History: Amended at 71 FR 20534, Apr. 21, 2006*

### **§ 123.12 Shipments Between U.S. Possessions**

An export license is NOT required for the shipment of defense articles between the United States, the Commonwealth of Puerto Rico, and U.S. possessions. A license is required, however, for the export of defense articles from these areas to foreign countries.

### **§ 123.13 Domestic Aircraft Shipments via a Foreign Country**

A license is not required for the shipment by air of a defense article from one location in the United States to another location in the United States via a foreign country. The pilot of the aircraft must, however, file a written statement with the Port Director of U.S. Customs and Border Protection at the port of exit in the United States. The original statement must be filed at the time of exit with the Port Director of U.S. Customs and Border Protection. A duplicate must be filed at the port of reentry with the Port Director of U.S. Customs and Border Protection, who will duly endorse it and transmit it to the Port Director of U.S. Customs and Border Protection at the port of exit. The statement will be as follows:

#### ***Domestic Shipment Via a Foreign Country of Articles on the U.S. Munitions List***

*Under penalty according to Federal law, the undersigned certifies and warrants that all the information in this document is true and correct, and that the equipment listed below is being shipped from (U.S. port of exit) via (foreign country) to (U.S. port of entry), which is the final destination in the United States.*

**Description of Equipment**

Quantity: \_\_\_\_\_

Equipment \_\_\_\_\_

Value \_\_\_\_\_

Signed \_\_\_\_\_

**Endorsement: U.S. Customs and Border Protection Inspector**

Port of Exit \_\_\_\_\_

Date: \_\_\_\_\_

Signed: \_\_\_\_\_

**Endorsement: U.S. Customs and Border Protection Inspector**

Port of Entry \_\_\_\_\_

Date \_\_\_\_\_

History: 70 FR 50958, Aug. 29, 2005

**§ 123.14 Import Certificate/Delivery Verification Procedure**

(a) The Import Certificate/Delivery Verification Procedure is designed to assure that a commodity imported into the territory of those countries participating in IC/DV procedures will not be diverted, transhipped, or reexported to another destination except in accordance with export control regulations of the importing country.

(b) *Exports.* The Directorate of Defense Trade Controls may require the IC/DV procedure on proposed exports of defense articles to non-government entities in those countries participating in IC/DV procedures. In such cases, U.S. exporters must submit both an export license application (the completed Form DSP-5) and the original Import Certificate, which must be provided and authenticated by the government of the importing country. This document verifies that the foreign importer complied with the import regulations of the government of the importing country and that the importer declared the intention not to divert, transship or reexport the material described therein without the prior approval of that government. After delivery of the commodities to the foreign consignee, the Directorate of Defense Trade Controls may also require U.S. exporters to furnish Delivery Verification documentation from the government of the importing country. This documentation verifies that the delivery was in accordance with the terms of the approved export license. Both the Import Certificate and the Delivery Verification must be furnished to the U.S. exporter by the foreign importer.

(c) *Triangular transactions.* When a transaction involves three or more countries that have adopted the IC/DV procedure, the governments of these countries may stamp a triangular symbol on the Import Certificate. This symbol is usually placed on the Import Certificate when the applicant for the Import Certificate (the importer) states either (1) that there is uncertainty whether the items covered by the Import Certificate will be imported into the country issuing the Import Certificate; (2) that he or she knows that the items will not be imported into the country issuing the Import Certificate; or (3) that, if the items are to be imported into the country issuing the Import Certificate, they will subsequently be reexported to another destination. All parties, including the ultimate consignee in the country of ultimate destination, must be shown on the completed Import Certificate.

History: Amended at 71 FR 20534, Apr. 21, 2006

**§ 123.15 Congressional Certification Pursuant to § 36 (c) of the Arms Export Control Act**

(a) The Arms Export Control Act requires that a certification be provided to the Congress prior to the granting of any license or other approval for transactions, in the amounts described below, involving exports of any



defense articles and defense services and for exports of major defense equipment, as defined in § 120.8 of this subchapter.<sup>94</sup> Approvals may not be granted when the Congress has enacted a joint resolution prohibiting the export. Certification is required for any transaction involving:

(1) A license for the export of major defense equipment sold under a contract in the amount of \$14,000,000 or more, or for defense articles and defense services sold under a contract in the amount of \$50,000,000 or more to any country that is not a member country of the North Atlantic Treaty Organization (NATO), or Australia, Japan, New Zealand, or South Korea that does not authorize a new sales territory; or

(2) A license for export to a country that is a member country of the North Atlantic Treaty Organization (NATO), or Australia, Japan, New Zealand, or South Korea of major defense equipment sold under a contract in the amount in the amount of \$25,000,000 or more, or for defense articles and defense services sold under a contract in the amount of \$100,000,000 or more and provided the transfer does not include any other countries; or

(3) A license for export of a firearm controlled under Category I of the United States Munitions List, of this subchapter, in an amount of \$1,000,000 or more.<sup>95</sup>

(b) Unless an emergency exists which requires the proposed export in the national security interests of the United States, approval may not be granted for any transaction until at least 15 calendar days have elapsed after receipt by the Congress of the certification required by 22 U.S.C. 2776(c)(1) involving the North Atlantic Treaty Organization, any member country of the Organization, or Australia, Japan, New Zealand, or South Korea or at least 30 calendar days have elapsed for any other country; in the case of a license for an export of a commercial communications satellite for launch from, and by nationals of, the Russian Federation, Ukraine, or Kazakhstan, until at least 15 calendar days after the Congress receives such certification.

(c) Persons who intend to export defense articles and defense services pursuant to any exemption in this subchapter under the circumstances described in this section must provide written notification to the Directorate of Defense Trade Controls and include a signed contract and a DSP-83 signed by the applicant, the foreign consignee and the end-user.

*History: 49 FR 47691, Dec. 6, 1984; 58 FR 39302, July 22, 1993; 62 FR 67274, 67275, Dec. 24, 1997; 64 FR 17531, 17533, Apr. 12, 1999; 70 FR 34652-34655, Jun. 15, 2005; 74 FR 38342, Aug 3, 2009.*

### **§ 123.16 Exemptions of General Applicability**

(a) The following exemptions apply to exports of unclassified defense articles for which no approval is needed from the Directorate of Defense Trade Controls. These exemptions do not apply to: Proscribed destinations under § 126.1 of this subchapter; exports for which Congressional notification is required (see § 123.15 of this subchapter); MTCR articles; Significant Military Equipment (SME); and may not be used by persons who are generally ineligible as described in § 120.1(c) of this subchapter. All shipments of defense articles, including those to and from Canada, require a Shipper's Export Declaration (SED)<sup>96</sup> or notification letter. If the export of a defense article is exempt from licensing, the SED must cite the exemption. Refer to § 123.22 for Shipper's

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<sup>94</sup> 22 USCS § 2776, Reports and Certifications to Congress on Military Exports.

<sup>95</sup> See Dept. of State, DDTC, GUIDELINES FOR THE PERMANENT EXPORT, TEMPORARY EXPORT, AND TEMPORARY IMPORT OF FIREARMS AND AMMUNITION, U.S. MUNITIONS LIST CATEGORIES I AND III, 4 (March 2008), para. I.G, *available at* [http://www.pmdtcc.state.gov/licensing/documents/Guidelines\\_Firearms.pdf](http://www.pmdtcc.state.gov/licensing/documents/Guidelines_Firearms.pdf), stating in part

Per § 123.15(a)(3) of the ITAR, a license application for the export of firearms with a total value of \$1 million or higher will require Congressional notification. To assist in expediting the certification process, and to respond to commonly asked questions from Congressional staffers, additional information is required to be submitted with your application for firearms exports totaling \$1 million or higher:

If the end-user is a defense ministry or a law enforcement agency:

-- What will happen to the weapons in their inventory? (E.g., current inventory will be sold, reassigned to another service branch, destroyed)

-- Provide information on the ultimate end-user (i.e., branch of military, unit designation) and location (if known).

If the end-user is a firearms dealer importing the firearms for commercial resale:

-- Provide as much information as you have regarding the ultimate end-user/end-user."

<sup>96</sup> So in original. Should be Electronic Export Information (EEI).

Export Declaration and letter notification requirements.

(b) The following exports are exempt from the licensing requirements of this subchapter.

(1) Port Directors of U.S. Customs and Border Protection shall permit the export without a license of defense hardware being exported in furtherance of a manufacturing license agreement, technical assistance agreement, distribution agreement or an arrangement for distribution of items identified in Category XIII(b)(1), approved in accordance with part 124, provided that:

- (i) The defense hardware to be exported supports the activity and is identified by item, quantity and value in the agreement or arrangement; and
- (ii) Any provisos or limitations placed on the authorized agreement or arrangement are adhered to; and
- (iii) The exporter certifies on the Shipper's Export Declaration<sup>97</sup> that the export is exempt from the licensing requirements of this subchapter. This is done by writing, "22 CFR 123.16(b)(1) and the agreement or arrangement (identify/state number) applicable"; and
- (iv) The total value of all shipments does not exceed the value authorized in the agreement or arrangement.
- (v) In the case of a distribution agreement, export must be made directly to the approved foreign distributor.

(2) Port Directors of U.S. Customs and Border Protection shall permit the export of components or spare parts (for exemptions for firearms and ammunition see § 123.17) without a license when the total value does not exceed \$500 in a single transaction and:

- (i) The components or spare parts are being exported to support a defense article previously authorized for export; and
- (ii) The spare parts or components are not going to a distributor, but to a previously approved end-user of the defense articles; and
- (iii) The spare parts or components are not to be used to enhance the capability of the defense article;
- (iv) exporters shall not split orders so as not to exceed the dollar value of this exemption;
- (v) the exporter may not make more than 24 shipments per calendar year to the previously authorized end user;
- (vi) The exporter must certify on the Shipper's Export Declaration<sup>98</sup> that the export is exempt from the licensing requirements of this subchapter. This is done by writing "22 CFR 123.16(b)(2) applicable".

(3) Port Directors of U.S. Customs and Border Protection shall permit the export without a license, of packing cases specially designed to carry defense articles.

(4) Port Directors of U.S. Customs and Border Protection shall permit the export without a license, of unclassified models or mock-ups of defense articles, provided that such models or mock-ups are nonoperable and do not reveal any technical data in excess of that which is exempted from the licensing requirements of § 125.4(b) of this subchapter<sup>99</sup> and do not contain components covered by the U.S. Munitions List (see § 121.8(b) of this subchapter). Some models or mockups built to scale or constructed of original materials can reveal technical data. U.S. persons who avail themselves of this exemption must provide a written certification to the Port Director of U.S. Customs and Border Protection that these conditions are met. This exemption does not imply that the Directorate of Defense Trade Controls will approve the export of any defense articles for which models or mock-ups have been exported pursuant to this exemption.

(5) Port Directors of U.S. Customs and Border Protection shall permit the temporary export without a license

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<sup>97</sup> So in original. Should be Electronic Export Information (EEI).

<sup>98</sup> So in original. Should be Electronic Export Information (EEI).

<sup>99</sup> Practice tip: If the model reveals no technical data as defined by 120.10, and is not otherwise defined as a defense article under 120.6, it would not be subject to the AECA and ITAR license requirements.

of unclassified defense articles to **any public exhibition, trade show, air show** or related event if that article has previously been licensed for a public exhibition, trade show, air show or related event and the license is still valid. U.S. persons who avail themselves of this exemption must provide a written certification to the Port Director of U.S. Customs and Border Protection that these conditions are met.

(6) For exemptions for **firearms and ammunition for personal use** refer to § 123.17.

(7) For exemptions for **firearms for personal use of members of the U.S. Armed Forces and civilian employees** see § 123.18.

(8) For **exports to Canada** refer to § 126.5 of this subchapter.

(9) Port Directors of U.S. Customs and Border Protection shall permit the temporary export without a license by a U.S. person of any **unclassified component, part, tool or test equipment to a subsidiary, affiliate or facility owned or controlled by the U.S. person** (see § 122.2(c) of this subchapter) if the component, part, tool or test equipment is to be used for manufacture, assembly, testing, production, or modification provided:

(i) The U.S. person is registered with the Directorate of Defense Trade Controls and complies with all requirements set forth in part 122 of this subchapter;

(ii) No defense article exported under this exemption may be sold or transferred without the appropriate license or other approval from the Directorate of Defense Trade Controls.

(10) Port Directors of U.S. Customs and Border Protection shall permit, without a license, the permanent export, and temporary export and return to the United States, **by accredited U.S. institutions of higher learning of articles fabricated only for fundamental research** purposes otherwise controlled by Category XV (a) or (e) in § 121.1 of this subchapter when all of the following conditions are met:

(i) The export is to an accredited institution of higher learning, a governmental research center or an established government funded private research center located within countries of the North Atlantic Treaty Organization (NATO) or countries which have been designated in accordance with section 517 of the Foreign Assistance Act of 1961 as a major non-NATO ally<sup>100</sup> (and as defined further in section 644(q) of that Act) for purposes of that Act and the Arms Export Control Act, or countries that are members of the European Space Agency<sup>101</sup> or the European Union<sup>102</sup> and involves exclusively nationals of such countries;

(ii) All of the information about the article(s), including its design, and all of the resulting information obtained through fundamental research involving the article will be published and shared broadly within the scientific community, and is not restricted for proprietary reasons or specific U.S. Government access and dissemination controls or other restrictions accepted by the institution or its researchers on publication of scientific and technical information resulting from the project or activity (See § 120.11<sup>103</sup> of this subchapter); and

(iii) If the article(s) is for permanent export, the platform or system in which the article(s) may be incorporated must be a satellite covered by § 125.4(d)(1)(iii) of this subchapter and be exclusively concerned with fundamental research and only be launched into space from countries and by nationals of countries identified in this section.

*History: 49 FR 47691, Dec. 6, 1984, amended at 56 FR 55458, Oct. 28, 1991; 58 FR 39299, July 22, 1993, 59 FR 29951, June 10, 1994; 59 FR 45622, Sept. 2, 1994; 67 FR 15100, Mar. 29, 2002; 70 FR 50958, Aug. 29, 2005; 71 FR 20534, Apr. 21, 2006.*

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<sup>100</sup> See list of major non-NATO allies at § 120.32.

<sup>101</sup> ESA is an international organization with 18 Member States. Members are Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the United Kingdom. Canada takes part in some projects under a Cooperation agreement. Hungary, Romania and Poland are 'European Cooperating States'. Estonia and Slovenia have recently signed cooperation agreements with ESA.  
[http://www.esa.int/SPECIALS/About\\_ESA/SEM16ARR1F\\_0.html](http://www.esa.int/SPECIALS/About_ESA/SEM16ARR1F_0.html).

<sup>102</sup> The 27 members of European Union are Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and United Kingdom. Current candidates are Croatia, Former Yugoslav Republic of Macedonia, and Turkey.  
[http://europa.eu/abc/european\\_countries/index\\_en.htm](http://europa.eu/abc/european_countries/index_en.htm).

<sup>103</sup> See § 120.11(a)(8).

### **§ 123.17 Exports of Firearms and Ammunition**

(a) Except as provided in § 126.1 of this subchapter, Port Directors of U.S. Customs and Border Protection shall permit the export without a license of components and parts for Category I(a) firearms, except barrels, cylinders, receivers (frames) or complete breech mechanisms when the total value does not exceed \$100 wholesale in any transaction.

(b) Port Directors of U.S. Customs and Border Protection shall permit the export without a license of nonautomatic firearms covered by Category I(a) of § 121.1 of this subchapter if they were manufactured in or before 1898, or are replicas of such firearms.

(c) Port Directors of U.S. Customs and Border Protection shall permit U.S. persons to export temporarily from the United States without a license not more than three nonautomatic firearms in Category I(a) of § 121.1 of this subchapter and not more than 1,000 cartridges therefor, provided that:

(1) A declaration by the U.S. person and an inspection by a customs officer is made;

(2) The firearms and accompanying ammunition must be with the U.S. person's baggage or effects, whether accompanied or unaccompanied (but not mailed); and

(3) They must be for that person's exclusive use and not for reexport or other transfer of ownership. The foregoing exemption is not applicable to a crewmember of a vessel or aircraft unless the crewmember declares the firearms to a Customs officer upon each departure from the United States, and declares that it is his or her intention to return the article(s) on each return to the United States. It is also not applicable to the personnel referred to in § 123.18.

(d) Port Directors of U.S. Customs and Border Protection shall permit a foreign person to export without a license such firearms in Category I(a) of § 121.1 of this subchapter and ammunition therefor as the foreign person brought into the United States under the provisions of 27 CFR 478.115(d). (The latter provision specifically excludes from the definition of importation the bringing into the United States of firearms and ammunition by certain foreign persons for specified purposes.)

(e) Port Directors of U.S. Customs and Border Protection shall permit U.S. persons to export without a license ammunition for nonautomatic firearms referred to in paragraph (a) of this section if the quantity does not exceed 1,000 cartridges (or rounds) in any shipment. The ammunition must also be for personal use and not for resale or other transfer of ownership. The foregoing exemption is also not applicable to the personnel referred to in § 123.18.

(f) Except as provided in §126.1 of this subchapter, Port Directors of U.S. Customs and Border Protection shall permit U.S. persons to export temporarily from the United States without a license one set of body armor covered by Category X(a)(1) of this subchapter provided that:

(1) A declaration by the U.S. person and an inspection by a customs officer is made;

(2) The body armor is with the U.S. person's baggage or effects, whether accompanied or unaccompanied (but not mailed);

(3) The body armor is for that person's exclusive use and not for re-export or other transfer of ownership; and

(4) If the body armor is lost or otherwise not returned to the United States, a detailed report must be submitted to the Office of Defense Trade Controls Compliance in § 127.12(c)(2) of this subchapter entitled "Voluntary disclosures."

(g) The license exemption set forth in paragraph (f) of this section is also available for the temporary export of body armor for personal use to Afghanistan and to Iraq provided that:

(1) The conditions in paragraphs (f)(1)-(f)(3) of this section are met;

(2) For temporary exports to Iraq the U.S. person utilizing the license exemption is either a person affiliated with the U.S. Government traveling on official business or is a person not affiliated with the U.S. Government but traveling to Iraq under a direct authorization by the Government of Iraq and engaging in humanitarian activities for, on behalf of, or at the request of the Government of Iraq.

### **§ 123.18 Firearms for Personal Use of Members of the U.S. Armed Forces and Civilian Employees of the U.S. Government**

The following exemptions apply to members of the U.S. Armed Forces and civilian employees of the U.S. Government who are U.S. persons (both referred to herein as personnel). The exemptions apply only to such personnel if they are assigned abroad for extended duty. These exemptions do not apply to dependents.

(a) *Firearms.* Port Directors of U.S. Customs and Border Protection shall permit nonautomatic firearms in Category I(a) of § 121.1 of this subchapter and parts therefor to be exported, except by mail, from the United States without a license if:

- (1) They are consigned to servicemen's clubs abroad for uniformed members of the U.S. Armed Forces; or,
- (2) In the case of a uniformed member of the U.S. Armed Forces or a civilian employee of the Department of Defense, they are for personal use and not for resale or other transfer of ownership, and if the firearms are accompanied by a written authorization from the commanding officer concerned; or
- (3) In the case of other U.S. Government employees, they are for personal use and not for resale or other transfer of ownership, and the Chief of the U.S. Diplomatic Mission or his designee in the country of destination has approved in writing to Department of State the import of the specific types and quantities of firearms into that country. The exporter shall provide a copy of this written statement to the Port Director of U.S. Customs and Border Protection.

(b) *Ammunition.* Port Directors of U.S. Customs and Border Protection shall permit not more than 1,000 cartridges (or rounds) of ammunition for the firearms referred to in paragraph (a) of this section to be exported (but not mailed) from the United States without a license when the firearms are on the person of the owner or with his baggage or effects, whether accompanied or unaccompanied (but not mailed).

History: 70 FR 50958, Aug. 29, 2005

### **§ 123.19 Canadian and Mexican Border Shipments**

A shipment originating in Canada or Mexico which incidentally transits the United States en route to a delivery point in the same country that originated the shipment is exempt from the requirement for an in transit license.

### **§ 123.20 Nuclear Materials**

(a) The provisions of this subchapter do not apply to equipment in Category VI(e) and Category XVI of § 121.1 of this subchapter to the extent such equipment is under the export control of the Department of Energy or the Nuclear Regulatory Commission pursuant to the Atomic Energy Act of 1954, as amended, and the Nuclear Non-Proliferation Act of 1978.

(b) A license for the export of any machinery, device, component, equipment, or technical data relating to equipment referred to in Category VI(e) will not be granted unless the proposed export comes within the scope of an existing Agreement for Cooperation for Mutual Defense Purposes concluded pursuant to the Atomic Energy Act of 1954, as amended, with the government of the country to which the article is to be exported. Licenses may be granted in the absence of such an agreement only (1) if the proposed export involves an article which is identical to that in use in an unclassified civilian nuclear power plant, (2) if the proposed export has no relationship to naval nuclear propulsion, and (3) if it is not for use in a naval propulsion plant.

(c) A license for the export of any machinery, device, component, equipment, or technical data relating to equipment referred to in Category VI(e) of §121.1 of this subchapter will not be granted unless the proposed equipment comes within the scope of an existing Agreement for Cooperation for Mutual Defense Purposes concluded pursuant to the Atomic Energy Act of 1954, as amended, with the government of the country to which the Article is to be exported. Licenses may be granted in the absence of such an agreement only:

- (1) If the proposed export involves an article which is identical to that in use in an unclassified civilian nuclear power plant,

- (2) If the proposed export has no relationship to naval nuclear propulsion, and
- (3) If it is not for use in a naval propulsion plant.

History: 67 FR 58988, Sept. 19, 2002

### **§ 123.21 Duration, Renewal, and Disposition of Licenses**

(a) A license is valid for four years. The license expires when the total value or quantity authorized has been shipped or when the date of expiration has been reached, whichever occurs first. Defense articles to be shipped thereafter require a new application and license. The new application should refer to the expired license. It should not include references to any defense articles other than those of the unshipped balance of the expired license.

(b) Unused, expired, expended, suspended, or revoked licenses must be returned immediately to the Department of State.

### **§ 123.22 Filing, Retention, and Return of Export Licenses and Filing of Export Information**

(a) Any export, as defined in this subchapter, of a defense article controlled by this subchapter, to include defense articles transiting the United States, requires the electronic reporting of export information. The reporting of the export information shall be to the U.S. Customs and Border Protection using the Automated Export System (AES) or directly to the Directorate of Defense Trade Controls (DDTC).<sup>104</sup> Any license or other approval authorizing the permanent export of hardware must be filed at a U.S. Port before any export. Licenses or other approvals for the permanent export of technical data and defense services shall be retained by the applicant who will send the export information directly to DDTC. Temporary export or temporary import licenses for such items need not be filed with the U.S. Customs and Border Protection, but must be presented to the U.S. Customs and Border Protection for decrementing of the shipment prior to departure and at the time of entry. The U.S. Customs and Border Protection will only decrement a shipment after the export information has been filed correctly using the AES. Before the export of any hardware using an exemption in this subchapter, the DDTC registered applicant/exporter, or an agent acting on the filer's behalf, must electronically provide export information using the AES (see paragraph (b) of this section). In addition to electronically providing the export information to the U.S. Customs and Border Protection before export, all the mandatory documentation must be presented to the port authorities (e.g., attachments, certifications, proof of AES filing; such as the External Transaction Number (XTN) or Internal Transaction Number (ITN)). Export authorizations shall be filed, retained, decremented or returned to DDTC as follows:

(1) *Filing of licenses and documentation for the permanent export of hardware.* For any permanent export of hardware using a license (e.g., DSP-5, DSP-94) or an exemption in this subchapter, the exporter must, prior to an AES filing, deposit the license and provide any required documentation for the license or the exemption with the U.S. Customs and Border Protection, unless otherwise directed in this subchapter (e.g., § 125.9). If necessary, an export may be made through a port other than the one designated on the license if the exporter complies with the procedures established by the U.S. Customs and Border Protection.

(2) *Presentation and retention by the applicant of temporary licenses and related documentation for the export of unclassified defense articles.* Licenses for the temporary export or temporary import of unclassified defense articles need not be filed with the U.S. Customs and Border Protection, but must be retained by the

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<sup>104</sup> See 70 FR 1278 (Jan. 6, 2005) ("The electronic reporting procedure will use DS-4071, "Export Declaration of Defense Technical Data or Services," once the system is implemented."); *but see* State Dept., DDTC notice, *available at* [http://www.pmdtc.state.gov/licensing/documents/WebNotice\\_DS4071.doc](http://www.pmdtc.state.gov/licensing/documents/WebNotice_DS4071.doc) (Mar. 6, 2009) ("Pursuant to 22 CFR 123.22(b)(3), the exporter of record (e.g., license applicant or agreement holder) must notify the Directorate of Defense Trade Controls (DDTC) of the initial export of technical data and/or defense services. Currently, the International Traffic in Arms Regulations (ITAR) requires this notification to be provided to DDTC electronically. The electronic mechanism to meet this requirement, the DS-4071 ["Notification of Initial Exports of Technical Data and/or Defense Services" per 22 CFR 123.22(b)(3)], is not available at this time. The required notification must be provided to DDTC via paper submission. DDTC is continuing to work on the implementation of the DS-4071 and will provide status updates via web notice. The final implementation of the DS-4071, and instructions, will be provided via Federal Register notice.")

applicant and presented to the U.S. Customs and Border Protection at the time of temporary import and temporary export. When a defense article is temporarily exported from the United States and moved from one destination authorized on a license to another destination authorized on the same or another temporary license, the applicant, or an agent acting on the applicant's behalf, must ensure that the U.S. Customs and Border Protection decrements both temporary licenses to show the exit and entry of the hardware.

(b) *Filing and Reporting of Export Information*

(1) *Filing of Export Information with the U.S. Customs and Border Protection.* Before exporting any hardware controlled by this subchapter, using a license or exemption, the DDTC registered applicant/exporter, or an agent acting on the filer's behalf, must electronically file the export information with the U.S. Customs and Border Protection using the Automated Export System (AES) in accordance with the following timelines:

(i) *Air or Truck Shipments.* The export information must be electronically filed at least 8 hours prior to departure.

(ii) *Sea or Rail Shipments.* The export information must be electronically filed at least 24 hours prior to departure.

(2) *Emergency shipments of hardware that cannot meet the pre-departure filing requirements.* U.S. Customs and Border Protection may permit an emergency export of hardware by truck (e.g., departures to Mexico or Canada) or air, by a U.S. registered person, when the exporter is unable to comply with the SED<sup>105</sup> filing timeline in paragraph (b)(1)(i) of this section. The applicant, or an agent acting on the applicant's behalf, in addition to providing the export information electronically using the AES, must provide documentation required by the U.S. Customs and Border Protection and this subchapter. The documentation provided to the U.S. Customs and Border Protection at the port of exit must include the External Transaction Number (XTN) or Internal Transaction Number (ITN) for the shipment and a copy of a notification to DDTC stating that the shipment is urgent and why. The original of the notification must be immediately provided to DDTC. The AES filing of the export information when the export is by air must be at least two hours prior to any departure from the United States; and, when a truck shipment, at the time when the exporter provides the articles to the carrier or at least one hour prior to departure from the United States, when the permanent export of the hardware has been authorized for export:

(i) In accordance with § 126.4 of this subchapter, or

(ii) On a valid license (i.e., DSP-5, DSP-94) and the ultimate recipient and ultimate end-user identified on the license is a foreign government.

(3) *Reporting of Export Information on Technical Data and Defense Service.* When an export is being made using a DDTC authorization (e.g., technical data license, agreement or a technical data exemption provided in this subchapter), the DDTC registered exporter will retain the license or other approval and provide the export information electronically to DDTC as follows:

(i) *Technical Data License.* Prior to the permanent export of technical data licensed using a Form DSP-5, the applicant shall electronically provide export information using the system for direct electronic reporting to DDTC of export information and self validate the original of the license. When the initial export of all the technical data authorized on the license has been made, the license must be returned to DDTC. Exports of copies of the licensed technical data should be made in accordance with existing exemptions in this subchapter. Should an exemption not apply, the applicant may request a new license.

(ii) *Manufacturing License and Technical Assistance Agreements.* Prior to the initial export of any technical data and defense services authorized in an agreement the U.S. agreement holder must electronically inform DDTC that exports have begun.<sup>106</sup> In accordance with this subchapter, all subsequent exports of technical data and services are not required to be filed electronically with DDTC except when

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<sup>105</sup> So in original. Should be Electronic Export Information (EEI).

<sup>106</sup> So in original, although it would be impossible to inform DDTC that exports have begun "prior to the initial export."

the export is done using a U.S. Port. Records of all subsequent exports of technical data shall be maintained by the exporter in accordance with this subchapter and shall be made immediately available to DDTC upon request. Exports of technical data in furtherance of an agreement using a U.S. Port shall be made in accordance with § 125.4 of this subchapter and made in accordance with the procedures in paragraph (b)(3)(iii) of this section.

(iii) *Technical Data and Defense Service Exemptions.* In any instance when technical data is exported using an exemption in this subchapter (e.g., §§ 125.4(b)(2), 125.4(b)(4), 126.5) from a U.S. port, the exporter is not required to report using AES, but must, effective January 18, 2004, provide the export data electronically to DDTC.<sup>107</sup> A copy of the electronic notification to DDTC must accompany the technical data shipment and be made available to the U.S. Customs and Border Protection upon request.

*NOTE to Paragraph (b)(3)(iii):* Future changes to the electronic reporting procedure will be amended by publication of a rule in the Federal Register. Exporters are reminded to continue maintaining records of all export transactions, including exemption shipments, in accordance with this subchapter.

(c) *Return of Licenses.* All licenses issued by the Directorate of Defense Trade Controls (DDTC) must be returned to the DDTC in accordance with the following:

(1) *License Filed with the U.S. Customs and Border Protection.* The U.S. Customs and Border Protection must return to the DDTC any license when the total value or quantity authorized has been shipped or when the date of expiration is reached, whichever occurs first.

(2) *Licenses Not Filed with the U.S. Customs and Border Protection.* Any license that is not filed with the U.S. Customs and Border Protection (e.g., oral or visual technical data releases or temporary import and export licenses retained in accordance with paragraph (a)(2) of this section), must be returned by the applicant to the DDTC no later than 60 days after the license has been expended (e.g., total value or quantity authorized has been shipped) or the date of expiration, whichever occurs first.

*History: 68 FR 61101, Oct. 27, 2003; 70 FR 50958, Aug. 29, 2005*

### **§ 123.23 Monetary Value of Shipments**

Port Directors of U.S. Customs and Border Protection shall permit the shipment of defense articles identified on any license when the total value of the export does not exceed the aggregate monetary value (not quantity) stated on the license by more than ten percent, provided that the additional monetary value does not make the total value of the license or other approval for the export of any major defense equipment sold under a contract reach \$14,000,000 or more, and provided that the additional monetary value does not make defense articles or defense services sold under a contract reach the amount of \$50,000,000 or more.

### **§ 123.24 Shipments by U.S. Postal Service**

(a) The export of any defense hardware using a license or exemption in this subchapter by the U.S. Postal Service must be filed with the U.S. Customs and Border Protection using the Automated Export System (AES) and the license must be filed with the U.S. Customs and Border Protection before any hardware is actually sent abroad by mail. The exporter must certify the defense hardware being exported in accordance with this subchapter by clearly marking on the package:

*“This export is subject to the controls of the ITAR, 22 CFR (identify section for an exemption) or (state license*

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<sup>107</sup> See State Dept., Directorate of defense Trade Controls [hereinafter “DDTC”] Web Notice, DS-4071: NOTIFICATION OF INITIAL EXPORTS OF TECHNICAL DATA AND/OR DEFENSE SERVICES PER 22 CFR 123.22(b)(3) (March 6, 2009), *available at* [http://www.pmddtc.state.gov/licensing/documents/WebNotice\\_DS4071.doc](http://www.pmddtc.state.gov/licensing/documents/WebNotice_DS4071.doc):

Pursuant to 22 CFR 123.22(b)(3), the exporter of record (e.g., license applicant or agreement holder) must notify the Directorate of Defense Trade Controls (DDTC) of the initial export of technical data and/or defense services. Currently, the International Traffic in Arms Regulations (ITAR) requires this notification to be provided to DDTC electronically. The electronic mechanism to meet this requirement, the DS-4071 [“Notification of Initial Exports of Technical Data and/or Defense Services” per 22 CFR 123.22(b)(3)], is not available at this time. The required notification must be provided to DDTC via paper submission. DDTC is continuing to work on the implementation of the DS-4071 and will provide status updates via web notice. The final implementation of the DS-4071, and instructions, will be provided via Federal Register notice.”



number) and the export has been electronically filed with the U.S. Customs and Border Protection using the Automated Export System (AES).”

(b) The export of any technical data using a license in this subchapter by the U.S. Postal Service must be notified electronically directly to the Directorate of Defense Trade Controls (DDTC). The exporter, using either a license or exemption, must certify, by clearly marking on the package:

“This export is subject to the controls of the ITAR, 22 CFR (identify section for an exemption) or (state license number).”

For those exports using a license, the exporter must also state:

“The export has been electronically notified directly to DDTC.”

The license must be returned to DDTC upon completion of the use of the license (*see* § 123.22(c)).

*History: 68 FR 61098, Oct. 27, 2003; 70 FR 50958, Aug. 29, 2005*

### **§ 123.25 Amendments to Licenses**

(a) The Directorate of Defense Trade Controls may approve an amendment to a license for permanent export, temporary export and temporary import of unclassified defense articles. A suggested format is available from the Directorate of Defense Trade Controls.

(b) The following types of amendments to a license that [sic]<sup>108</sup> will be considered: Addition of U.S. freight forwarder or U.S. consignor; change due to an obvious typographical error; change in source of commodity; and change of foreign intermediate consignee if that party is only transporting the equipment and will not process (*e.g.*, integrate, modify) the equipment. For changes in U.S. dollar value<sup>109</sup> see § 123.23.

(c) The following types of amendments to a license will NOT be approved: Additional quantity, changes in commodity, country of ultimate destination, end-use or end-user, foreign consignee and/or extension of duration. The foreign intermediate consignee may only be amended if that party is acting as freight forwarder and the export does not involve technical data. A new license is required for these changes. Any new license submission must reflect only the unshipped balance of quantity and dollar value.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 123.26 Recordkeeping Requirement for Exemptions**

When an exemption is claimed for the export of unclassified technical data, the exporter must maintain a record of each such export. The business record should include the following information: A description of the unclassified technical data, the name of the recipient end-user, the date and time of the export, and the method of transmission.

### **§ 123.27 Special Licensing Regime for Export to U.S. Allies of Commercial Communications Satellite Components, Systems, Parts, Accessories, Attachments, and Associated Technical Data**

(a) U.S. persons engaged in the business of exporting specifically designed or modified components, systems, parts, accessories, attachments, associated equipment and certain associated technical data for commercial

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<sup>108</sup> So in original. The word “that” is unnecessary.

<sup>109</sup> See DDTC web notice, DSP AMENDMENTS FOR VALUE OR QUANTITY CHANGES (Sept. 30, 2009), available at [http://www.pmdt.state.gov/licensing/documents/WebNotice\\_AmendmentValueChange.pdf](http://www.pmdt.state.gov/licensing/documents/WebNotice_AmendmentValueChange.pdf):

Pursuant to 22 CFR 123.25(b), changes can be approved under a DSP amendment for obvious typographical errors. While an erroneously entered unit price or quantity may be an obvious typographical error when supported by the provided purchase documentation, the approved amendments are not provided to Customs nor the information updated in AES. Thus the original value or quantity of the DSP license remains unchanged in AES. As such, amendments for DSP licenses (DSP-6, 62, 74 and 119) must be limited to administrative changes only that do not impact AES filings. Effective immediately, DDTC will no longer process DSP amendments for value or quantity changes. These changes must be the subject of a replacement license. The applicant must explicitly state in block 20 that the replacement license is to correct erroneously entered value or quantity and cite the original license number.

communications satellites, and who are so registered with the Directorate of Defense Trade Controls pursuant to part 122 of this subchapter, may submit license applications for multiple permanent and temporary exports and temporary imports of such articles for expeditious consideration without meeting the documentary requirements of § 123.1(c)(4) and (5) concerning purchase orders, letters of intent, contracts and non-transfer and end use certificates, or the documentary requirements of § 123.9, concerning approval of re-exports or re-transfers, when all of the following requirements are met:

- (1) The proposed exports or reexports concern exclusively one or more countries of the North Atlantic Treaty Organization (see § 120.31 of this subchapter) and/or one or more countries which have been designated in accordance with section 517 of the Foreign Assistance Act of 1961 and with section 1206 of the Foreign Relations Authorization Act, Fiscal Year 2003 as a major non-NATO ally (see § 120.32 of this subchapter).
  - (2) The proposed exports concern exclusively one or more foreign persons (*e.g.*, companies or governments) located within the territories of the countries identified in paragraph (a)(1) of this section, and one or more commercial communications satellite programs included within a list of such persons and programs approved by the U.S. Government for purposes of this section, as signified in a list of such persons and programs that will be publicly available through the Internet Web site of the Directorate of Defense Trade Controls and by other means.
  - (3) The articles are not major defense equipment sold under a contract in the amount of \$14,000,000 or more or defense articles or defense services sold under a contract in the amount of \$50,000,000 or more (for which purpose, as is customary, exporters may not split contracts or purchase orders). Items meeting these statutory thresholds must be submitted on a separate license application to permit the required notification to Congress pursuant to section 36(c) of the Arms Export Control Act.<sup>110</sup>
  - (4) The articles are not detailed design, development, manufacturing or production data and do not involve the manufacture abroad of significant military equipment.
  - (5) The U.S. exporter provides complete shipment information to the Directorate of Defense Trade Controls within 15 days of shipment by submitting a report containing a description of the item and the quantity, value, port of exit, and end-user and country of destination of the item, and at that time meets the documentary requirements of § 123.1(c)(4) and (5), the documentary requirements of § 123.9 in the case of re-exports or re-transfers, and, other documentary requirements that may be imposed as a condition of a license (*e.g.*, parts control plans for MTCR-controlled items). The shipment information reported must include a description of the item and quantity, value, port of exit and end user and country of destination of the item.
  - (6) At any time in which an item exported pursuant to this section is proposed for retransfer outside of the approved territory, programs or persons (*e.g.*, such as in the case of an item included in a satellite for launch beyond the approved territory), the detailed requirements of § 123.9 apply with regard to obtaining the prior written consent of the Directorate of Defense Trade Controls.
- (b) The reexport or retransfer of the articles authorized for export (including to specified reexport destinations) in accordance with this section do not require the separate prior written approval of the Directorate of Defense Trade Controls provided all of the requirements in paragraph (a) of this section are met.
- (c) The Directorate of Defense Trade Controls will consider, on a case-by-case basis, requests to include additional foreign companies and satellite programs within the geographic coverage of a license application submitted pursuant to this section from countries not otherwise covered, who are members of the European Space Agency<sup>111</sup> or the European Union.<sup>112</sup> In no case, however, can the provisions of this section apply or be

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<sup>110</sup> See § 123.15(a)(2) re increases in thresholds for NATO countries, Australia, Japan, and New Zealand.

<sup>111</sup> ESA is an international organization with 18 Member States. Members are Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the United Kingdom. Canada takes part in some projects under a Cooperation agreement. Hungary, Romania and Poland are 'European Cooperating States'. Estonia and Slovenia have recently signed cooperation agreements with ESA.  
[http://www.esa.int/SPECIALS/About\\_ESA/SEM16ARR1F\\_0.html](http://www.esa.int/SPECIALS/About_ESA/SEM16ARR1F_0.html).

<sup>112</sup> The 27 members of European Union are Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia,

relied upon by U.S. exporters in the case of countries who are subject to the mandatory requirements of Section 1514 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (Pub. L. 105-261), concerning national security controls on satellite export licensing.

(d) Registered U.S. exporters may request at the time of a license application submitted pursuant to this section that additional foreign persons or communications satellite programs be added to the lists referred to in paragraph (a)(2) of this section, which additions, if approved, will be included within the publicly available lists of authorized recipients and programs.

*History: 65 FR 34091, May 26, 2000, as amended at 67 FR 58988, Sept. 19, 2002; 69 FR 29226, May 21, 2004; 69 FR 40314, July 2, 2004; 70 FR 50958, Aug. 29, 2005; 71 FR 20534, Apr. 21, 2006.*



## PART 124: AGREEMENTS, OFFSHORE PROCUREMENT, AND OTHER DEFENSE SERVICES

### Section

- 124.1 Manufacturing License Agreements and Technical Assistance Agreements
- 124.2 Exemptions for Training and Military Service
- 124.3 Exports of Technical Data in Furtherance of an Agreement
- 124.4 Deposit of Signed Agreements with the Directorate of Defense Trade Controls
- 124.5 Proposed Agreements That are Not Concluded
- 124.6 Termination of Manufacturing License Agreements and Technical Assistance Agreements
- 124.7 Information Required in All Manufacturing License Agreements and Technical Assistance Agreements
- 124.8 Clauses Required Both in Manufacturing License Agreements and Technical Assistance Agreements
- 124.9 Additional Clauses Required Only in Manufacturing License Agreements
- 124.10 Nontransfer and Use Assurances
- 124.11 Congressional Certification Pursuant to Section 36(d) of the Arms Export Control Act
- 124.12 Required Information in Letters of Transmittal
- 124.13 Procurement by United States Persons in Foreign Countries (Offshore Procurement)
- 124.14 Exports to Warehouses or Distribution Points Outside the United States
- 124.15 Special Export Controls for Defense Articles and Defense Services Controlled under Category XV: Space Systems and Space Launches
- 124.16 Special Retransfer Authorizations for Unclassified Technical Data and Defense Services to Member States of NATO and the European Union, Australia, Japan, New Zealand, and Switzerland

*Authority: Sec. 2, 38, and 71, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); E.O. 11958, 42 FR 4311, 3 CFR 1977 Comp. p. 79; 22 U.S.C. 2651a; 22 U.S.C. 2776; Pub L. 105-261. Source: 70 FR 34652, June 15, 2005, unless otherwise noted.*

### **§ 124.1 Manufacturing License Agreements and Technical Assistance Agreements**

(a) *Approval.* The approval of the Directorate of Defense Trade Controls must be obtained before the defense services described in § 120.9(a) of this subchapter may be furnished. In order to obtain such approval, the U.S. person must submit a proposed agreement to the Directorate of Defense Trade Controls. Such agreements are generally characterized as manufacturing license agreements, technical assistance agreements, distribution agreements, or off-shore procurement agreements, and may not enter into force<sup>113</sup> without the prior written

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<sup>113</sup> See Dept. of State, DDTC, Web Notice, REQUIREMENT FOR FULL EXECUTION OF AGREEMENTS/AMENDMENTS PRIOR TO EXPORT OR TEMPORARY IMPORT (Mar. 20, 2009), available at [http://pmdtdtc.state.gov/licensing/documents/WebNotice\\_ApprovalLetterNotice.doc](http://pmdtdtc.state.gov/licensing/documents/WebNotice_ApprovalLetterNotice.doc):

This notice is to inform applicants that the format for Agreement and Amendment Approval Letters issued by DTCL [DDTC Office of Defense Trade Controls Licensing] has been modified to specifically address the requirement that "No U.S. signatories may export or temporarily import defense articles, technical data, or defense services against an agreement until all parties have executed the agreement." This modification has been made to the preamble of the approval letter for agreements and amendments issued to the applicant from this office and reads as follows:

"Dear Applicant:

The Department of State approves the request as identified subject to the limitations, provisos, and requirements stated below as well as the requirements contained in the International Traffic in Arms Regulation. This agreement may not enter into force until these requirements have been satisfied. No U.S. signatories may export or temporarily import defense articles, technical data, or defense services against this agreement until all parties have executed the agreement.

Purpose of Modification:

On December 12, 2008, Agreement and Amendment Approval Letters issued by DTCL were revised to eliminate redundancy and enhance clarity by minimizing informative and acknowledgement provisos. As part of that revision, a proviso specifying that exports or temporarily imports against the agreement were not authorized until all parties have executed the agreement was removed, being deemed an informative proviso.

Since this revision, DTCL has received numerous queries as to whether a fully executed agreement was still required prior to export or temporary import, noting the requirement is not clearly described within the International Traffic In Arms Regulation (ITAR).

This modification is necessary to ensure applicants are properly informed of the requirement to fully execute agreements and amendments prior to export or temporary import of defense articles, technical data or defense services in furtherance of the agreement or amendment."

#### **Implementation**

Effective March 18, 2009, this revision will be included in all agreement and amendment approval letter issued by DTCL.

approval of the Directorate of Defense Trade Controls. Once approved, the defense services described in the agreements may generally be provided without further licensing in accordance with §§ 124.3 and 125.4(b)(2) of this subchapter. The requirements of this section apply whether or not technical data is to be disclosed or used in the performance of the defense services described in § 120.9(a) of this subchapter (e.g., all the information relied upon by the U.S. person in performing the defense service is in the public domain or is otherwise exempt from the licensing requirements of this subchapter pursuant to § 125.4 of this subchapter). This requirement also applies to the training of any foreign military forces, regular and irregular, in the use of defense articles. Technical assistance agreements must be submitted in such cases. In exceptional cases, the Directorate of Defense Trade Controls, upon written request, will consider approving the provision of defense services described in § 120.9(a) of this subchapter by granting a license under part 125 of this subchapter.<sup>114</sup>

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Specific revisions to individual approval letters issued between December 12, 2008 and March 18, 2009 will not be published. A copy of this notice should be included with approval letters in cases where a specific revision is desired.

<sup>114</sup> *But see* DDTC, LICENSING OF FOREIGN PERSONS EMPLOYED BY A U.S. PERSON – UPDATED (Sept. 30, 2009), *available at* [http://www.pmdtc.state.gov/licensing/documents/WebNotice\\_LicensingForeign.doc](http://www.pmdtc.state.gov/licensing/documents/WebNotice_LicensingForeign.doc) (7-page notice, stating in part):

The Directorate of Defense Trade Controls (DDTC) has a long-standing policy to authorize the employment of a foreign person by a U.S. person on a DSP-5 through an exception to the requirement for a technical assistance agreement (TAA) in accordance with 22 CFR 124.1(a). In certain instances, DDTC required a TAA in addition to the DSP-5 to authorize the U.S. person to transfer certain levels of technical data and defense services. After close review, DDTC has determined this “double” licensing to be redundant. Therefore, all requests for the licensing of a foreign person employed by a U.S. person must be made through the use of a DSP-5 to cover all levels of requested technical data and defense services.

The DSP-5 authorizes the U.S. person to transfer technical data and perform defense services to the employee(s) on their products. The DSP-5 authorizes the foreign person to perform defense services on behalf of the employing U.S. person. The foreign person employed by a U.S. person does not have to reside in the U.S. to be considered an employee but may reside and perform the job responsibilities outside the U.S. If the foreign person is a regular employee (i.e., paid, insured, hired/fired and/or promoted exclusively by the U.S. person) and not seconded, the foreign person is considered to be “employed” by the U.S. person. The employing U.S. person is liable to ensure the employee’s compliance with U.S. export laws regardless of where the employee currently resides. DDTC recommends that only one DSP-5 be obtained for each foreign person employee to cover all activities.

A foreign person employment authorization must be obtained for all foreign persons who require access to ITAR-controlled defense articles and/or technical data in the performance of their job responsibilities. If a foreign person employee does not require access to ITAR-controlled defense articles and/or technical data, the employing company must ensure internal controls are in place to prevent unauthorized access. If a foreign person has access to ITAR-controlled defense articles and/or technical data without DDTC authorization, that is a violation and must be reported in accordance with 22 CFR 127.12.

Use of the DSP-5 permits DDTC to identify all requests for employment, determine technical areas in which the individual is employed, standardize application documentation, and, to the extent possible, standardize conditions of approval. In addition, standardization should assist industry in monitoring its foreign person employees.

For situations involving the transfer of classified technical data, a DSP-85 must be obtained in lieu of the DSP-5 and requires the same documentation. As required for the transfer of classified, a DSP-83 must be executed by the applicant and the foreign person employee. DDTC may require the foreign government to execute the DSP-83 on a case-by-case basis. The executed DSP-83 does not have to accompany the license application. For foreign person employment authorizations, the Managing Director is exercising the authority under 22 CFR 126.3 to waive the requirement for the executed DSP-83 to be submitted prior to license issuance (22 CFR 123.10). Once executed, the applicant must provide DDTC with the original DSP-83 and maintain a copy for their files per 22 CFR 122.5.

The foreign person employee must execute a Non-Disclosure Agreement (NDA) in the attached format. The DDTC case number must be entered on the NDA prior to execution. The executed NDA must be maintained by the applicant pursuant to 22 CFR 122.5 and is not required for submission with the foreign person employment application.

The applicant must have in place internal company procedures to control the release of technical data to foreign persons and mechanisms in accordance with the conditions of approval and to prevent unauthorized access to defense articles and/or technical data. This document must be maintained by the applicant pursuant to 22 CFR 122.5 and is not required for submission with the foreign person employment application.

Requests for a foreign person employee involving the transfer of manufacturing know-how related to a Significant Military Equipment (SME) defense article will require the execution of a DSP-83 by the foreign person and the U.S. applicant. The executed DSP-83 does not have to accompany the license application. The applicant must maintain the executed DSP-83 per 22 CFR 122.5. The executed NDA is not an acceptable substitute for a DSP-83 when required. For foreign person employment authorizations, the Managing Director is exercising the authority under 22 CFR 126.3 to waive the requirement for the executed DSP-83 to be submitted prior to license issuance (22 CFR 123.10).

The foreign person, once authorized by a DSP-5/DSP-85, no longer requires additional authorization to work in the scope of the approved DSP-5/DSP-85 and as such, the foreign person employee may have contact with other entities, U.S. or foreign, so long as the presence of the foreign person employee is identified to the other party. In all situations, it is the responsibility of the employing company to notify the other entities of the foreign person’s participation.

(1) If the foreign person employee will have direct interaction with and receive technical data from another U.S. person, the responsibility for obtaining all required authorizations may be taken by either the employing party or another U.S. person, as follows.

(a) The employing party may take responsibility for obtaining all required permissions from the other U.S. party for the transfer of the other U.S. party’s technical data to, and have direct interaction with, the foreign employee. The employing company must certify that the technical data received is within the scope of the employing authorization regardless of source.

(b) The other U.S. party may accept responsibility for obtaining all required authorizations in order to transfer their technical data to, and have direct interaction with the foreign person employee.

(2) When the employing company and the other U.S. person are both signatories to the same ITAR 124 agreement no further

Also, see § 126.8 of this subchapter for the requirements for prior approval of proposals relating to significant military equipment.

(b) *Classified Articles.* Copies of approved agreements involving the release of classified defense articles will be forwarded by the Directorate of Defense Trade Controls to the Defense Security Service of the Department of Defense.

(c) *Amendments.* Changes to the scope of approved agreements, including modifications, upgrades, or extensions must be submitted for approval. The amendments may not enter into force until approved by the Directorate of Defense Trade Controls.

(d) *Minor Amendments.* Amendments which only alter delivery or performance schedules, or other minor administrative amendments which do not affect in any manner the duration of the agreement or the clauses or information which must be included in such agreements because of the requirements of this part, do not have to be submitted for approval. One copy of all such minor amendments must be submitted to the Directorate of Defense Trade Controls within thirty days after they are concluded.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

## **§ 124.2 Exemptions for Training and Military Service**

(a) Technical assistance agreements are not required for the provision of training in the basic operation and maintenance of defense articles lawfully exported or authorized for export to the same recipient. This does not include training in intermediate and depot level maintenance.

(b) Services performed as a member of the regular military forces of a foreign nation by U.S. persons who have been drafted into such forces are not deemed to be defense services for purposes of § 120.9 of this subchapter.

(c) NATO countries,<sup>115</sup> Australia, Japan, and Sweden, in addition to the basic maintenance training exemption provided in § 124.2(a) and basic maintenance information exemption in § 125.4(b)(5), no technical assistance agreement is required for maintenance training or the performance of maintenance, including the export of supporting technical data, when the following criteria can be met:

(1) Defense services are for unclassified U.S. origin defense articles lawfully exported or authorized for export and owned or operated by and in the inventory of NATO or the Federal Governments of NATO countries, Australia, Japan, or Sweden;

(2) This defense service exemption does not apply to any transaction involving defense services for which congressional notification is required in accordance with § 123.15 and § 124.11 of this subchapter.

(3) Maintenance training or the performance of maintenance must be limited to inspection, testing, calibration or repair, including overhaul, reconditioning and one-tone replacement of any defective items, parts or components; and excluding any modification, enhancement, upgrade or other form of alteration or improvement that enhances the performance or capability of the defense article. This does not preclude maintenance training or the performance of maintenance that would result in enhancements or improvements only in the reliability or maintainability of the defense article, such as an increased mean time between

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authorization is required so long as the foreign person employee's participation is identified in the agreement. The foreign person employee must not be called out as a separate signatory or identified by name.

(3) If the foreign person employee will have direct interaction with another foreign person, the foreign person employee's country/countries of nationality must be identified in the agreement the employing U.S. person has with the foreign party; they do not have to be a signatory to the agreement.

A DSP-5/DSP-85 approved for foreign person employment will be valid only for a period of four years or until expiration of their authorized stay from Department of Homeland Security, U.S. Citizenship and Immigration Services, whichever is shorter. **This license will remain valid if the foreign person's work authorization has been renewed, or has been submitted for renewal, and there is no lapse in authorization.** (Emphasis in original.) If the foreign person employee resides outside the U.S., the license will be valid for the standard validity of a license or upon termination of the foreign person's employment, whichever is shorter.

In instances when the authorized stay is longer than four years, there has been a lapse in authorization, or the employee's employment continues beyond the approved validity, the applicant must apply for a renewal of the license no later than 60 days prior to expiration of this license.

**Instructions for Completing a DSP-5/DSP-85 License Application . . . .**

<sup>115</sup> See list at § 120.31.

failure (MTBF).

(4) Supporting technical data must be unclassified and must not include software documentation on the design or details of the computer software, software source code, design methodology, engineering analysis or manufacturing know-how such as that described in paragraphs (c)(4)(i) through (c)(4)(iii) as follows:

(i) *Design Methodology*, such as: The underlying engineering methods and design philosophy utilized (*i.e.*, the “why” or information that explains the rationale for particular design decision, engineering feature, or performance requirement); engineering experience (*e.g.* lessons learned); and the rationale and associated databases (*e.g.* design allowables, factors of safety, component life predictions, failure analysis criteria) that establish the operational requirements (*e.g.*, performance, mechanical, electrical, electronic, reliability and maintainability) of a defense article.

(ii) *Engineering Analysis*, such as: Analytical methods and tools used to design or evaluate a defense article’s performance against the operational requirements. Analytical methods and tools include the development and/or use of mock-ups, computer models and simulations, and test facilities.

(iii) *Manufacturing Know-how*, such as: Information that provides detailed manufacturing processes and techniques needed to translate a detailed design into a qualified, finished defense article.

(5) This defense service exemption does not apply to maintenance training or the performance of maintenance and service or the transfer of supporting technical data for the following defense articles:

(i) All Missile Technology Control Regime Annex Items;

(ii) Firearms listed in Category I; and ammunition listed in Category III for the firearms in Category I;

(iii) Nuclear weapons strategic delivery systems and all components, parts, accessories and attachments specifically designed for such systems and associated equipment;

(iv) Naval nuclear propulsion equipment listed in Category VI(e);

(v) Gas turbine engine hot sections covered by Categories VI(f) and VIII(b);

(vi) Category VIII(f);

(vii) Category XII(c);

(viii) Chemical agents listed in Category XIV (a), biological agents in Category XIV (b), and equipment listed in Category XIV (c) for dissemination of the chemical agents and biological agents listed in Categories XIV (a) and (b);

(ix) Nuclear radiation measuring devices manufactured to military specifications listed in Category XIV(c);

(x) Category XV;

(xi) Nuclear weapons design and test equipment listed in Category XVI;

(xii) Submersible and oceanographic vessels and related articles listed in Category XX(a) through (d);

(xiii) Miscellaneous articles covered by Category XXI.

(6) *Eligibility Criteria for Foreign Persons*. Foreign persons eligible to receive technical data or maintenance training under this exemption are limited to nationals of the NATO countries, Australia, Japan, or Sweden.

*History: 58 FR 39305 July 22, 1993, as amended at 65 FR 45283, July 21, 2000; 66 FR 35899, July 10, 2001*

### **§ 124.3 Exports of Technical Data in Furtherance of an Agreement**

(a) *Unclassified Technical Data*. The U.S. Customs and Border Protection or U.S. Postal authorities shall permit the export without a license of unclassified technical data if the export is in furtherance of a manufacturing license or technical assistance agreement which has been approved in writing by the Directorate of Defense Trade Controls (DDTC) and the technical data does not exceed the scope or limitations of the relevant agreement. The approval of the DDTC must be obtained for the export of any unclassified technical data that may exceed the terms of the agreement.



(b) *Classified Technical Data.* The export of classified information in furtherance of an approved manufacturing license or technical assistance agreement which provides for the transmittal of classified information does not require further approval from the Directorate of Defense Trade Controls when:

- (1) The United States party certifies to the Department of Defense transmittal authority that the classified information does not exceed the technical or product limitations in the agreement; and
- (2) The U.S. party complies with the requirements of the Department of Defense National Industrial Security Program Operating Manual concerning the transmission of classified information (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed) and any other requirements of cognizant U.S. departments or agencies.

*History: 58 FR 39305, July 22, 1993, as amended at 68 FR 61102, Oct. 27, 2003; 70 FR 50958, Aug. 29, 2005; 71 FR 20534, Apr. 21, 2006.*

#### **§ 124.4 Deposit of Signed Agreements with the Directorate of Defense Trade Controls**

(a) The United States party to a manufacturing license or a technical assistance agreement must file one copy of the concluded agreement with the Directorate of Defense Trade Controls not later than 30 days after it enters into force. If the agreement is not concluded within one year of the date of approval, the Directorate of Defense Trade Controls must be notified in writing and be kept informed of the status of the agreement until the requirements of this paragraph or the requirements of § 124.5 are satisfied.

(b) In the case of concluded agreements involving coproduction or licensed production outside of the United States of defense articles of United States origin, a written statement must accompany filing of the concluded agreement with the Directorate of Defense Trade Controls, which shall include:

- (1) The identity of the foreign countries, international organization, or foreign firms involved;
- (2) A description and the estimated value of the articles authorized to be produced, and an estimate of the quantity of the articles authorized to be produced;
- (3) A description of any restrictions on third-party transfers of the foreign manufactured articles; and
- (4) If any such agreement does not provide for United States access to and verification of quantities of articles produced overseas and their disposition in the foreign country, a description of alternative measures and controls to ensure compliance with restrictions in the agreement on production quantities and third-party transfers.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

#### **§ 124.5 Proposed Agreements That are Not Concluded**

The United States party to any proposed manufacturing license agreement or technical assistance agreement must inform the Directorate of Defense Trade Controls if a decision is made not to conclude the agreement. The information must be provided within 60 days of the date of the decision. These requirements apply only if the approval of the Directorate of Defense Trade Controls was obtained for the agreement to be concluded (with or without any provisos).

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

#### **§ 124.6 Termination of Manufacturing License Agreements and Technical Assistance Agreements**

The U.S. party to a manufacturing license or a technical assistance agreement must inform the Directorate of Defense Trade Controls in writing of the impending termination of the agreement not less than 30 days prior to the expiration date of such agreement.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

## **§ 124.7 Information Required in All Manufacturing License Agreements and Technical Assistance Agreements**

The following information must be included in all proposed manufacturing license agreements and technical assistance agreements. The information should be provided in terms which are as precise as possible. If the applicant believes that a clause or that required information is not relevant or necessary, the applicant may request the omission of the clause or information. The transmittal letter accompanying the agreement must state the reasons for any proposed variation in the clauses or required information.

- (1) The agreement must describe the defense article to be manufactured and all defense articles to be exported, including any test and support equipment or advanced materials. They should be described by military nomenclature, contract number, National Stock Number, nameplate data, or other specific information. Supporting technical data or brochures should be submitted in seven copies. Only defense articles listed in the agreement will be eligible for export under the exemption in § 123.16(b)(1) of this subchapter.
- (2) The agreement must specifically describe the assistance and technical data, including the design and manufacturing know-how involved, to be furnished and any manufacturing rights to be granted;
- (3) The agreement must specify its duration; and
- (4) The agreement must specifically identify the countries or areas in which manufacturing, production, processing, sale or other form of transfer is to be licensed.

## **§ 124.8 Clauses Required Both in Manufacturing License Agreements and Technical Assistance Agreements**

The following statements must be included both in manufacturing license agreements and in technical assistance agreements:

- (1)<sup>116</sup> *“This agreement shall not enter into force, and shall not be amended or extended, without the prior written approval of the Department of State of the U.S. Government.”*
- (2) *“This agreement is subject to all United States laws and regulations relating to exports and to all administrative acts of the U.S. Government pursuant to such laws and regulations.”*
- (3) *“The parties to this agreement agree that the obligations contained in this agreement shall not affect the performance of any obligations created by prior contracts or subcontracts which the parties may have individually or collectively with the U.S. Government.”*
- (4) *“No liability will be incurred by or attributed to the U.S. Government in connection with any possible infringement of privately owned patent or proprietary rights, either domestic or foreign, by reason of the U.S. Government’s approval of this agreement.”*
- (5) *“The technical data or defense service exported from the United States in furtherance of this agreement and any defense article which may be produced or manufactured from such technical data or defense service may not be transferred to a person in a third country or to a national of a third country except as specifically authorized in this agreement unless the prior written approval of the Department of State has been obtained.”<sup>117</sup>*
- (6) *“All provisions in this agreement which refer to the United States Government and the Department of State will remain binding on the parties after the termination of the agreement.”*

## **§ 124.9 Additional Clauses Required Only in Manufacturing License Agreements**

(a) *Clauses for All Manufacturing License Agreements.* The following clauses must be included only in

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<sup>116</sup> Paragraphing should begin with “(a)” rather than “(1)”.

<sup>117</sup> See also § 124.16.

manufacturing license agreements:

(1) *“No export, sale, transfer, or other disposition of the licensed article is authorized to any country outside the territory wherein manufacture or sale is herein licensed without the prior written approval of the U.S. Government unless otherwise exempted by the U.S. Government. Sales or other transfers of the licensed article shall be limited to governments of countries wherein manufacture or sale is hereby licensed and to private entities seeking to procure the licensed article pursuant to a contract with any such government unless the prior written approval of the U.S. Government is obtained.”*

(2) *“It is agreed that sales by licensee or its sublicensees under contracts made through the U.S. Government will not include either charges for patent rights in which the U.S. Government holds a royalty-free license, or charges for data which the U.S. Government has a right to use and disclose to others, which are in the public domain, or which the U.S. Government has acquired or is entitled to acquire without restrictions upon their use and disclosure to others.”*

(3) *“If the U.S. Government is obligated or becomes obligated to pay to the licensor royalties, fees, or other charges for the use of technical data or patents which are involved in the manufacture, use, or sale of any licensed article, any royalties, fees or other charges in connection with purchases of such licensed article from licensee or its sublicensees with funds derived through the U.S. Government may not exceed the total amount the U.S. Government would have been obligated to pay the licensor directly.”*

(4) *“If the U.S. Government has made financial or other contributions to the design and development of any licensed article, any charges for technical assistance or know-how relating to the item in connection with purchases of such articles from licensee or sublicensees with funds derived through the U.S. Government must be proportionately reduced to reflect the U.S. Government contributions, and subject to the provisions of paragraphs (a) (2) and (3) of this section, no other royalties, or fees or other charges may be assessed against U.S. Government funded purchases of such articles. However, charges may be made for reasonable reproduction, handling, mailing, or similar administrative costs incident to the furnishing of such data.”*

(5) *“The parties to this agreement agree that an annual report of sales or other transfers pursuant to this agreement of the licensed articles, by quantity, type, U.S. dollar value, and purchaser or recipient, shall be provided by (applicant or licensee) to the Department of State.”* This clause must specify which party is obligated to provide the annual report. Such reports may be submitted either directly by the licensee or indirectly through the licensor, and may cover calendar or fiscal years. Reports shall be deemed proprietary information by the Department of State and will not be disclosed to unauthorized persons. See § 126.10(b) of this subchapter.

(6) (Licensee) agrees to incorporate the following statement as an integral provision of a contract, invoice or other appropriate document whenever the licensed articles are sold or otherwise transferred:

*“These commodities are authorized for export by the U.S. Government only to (country of ultimate destination or approved sales territory). They may not be resold, diverted, transferred, transshipped, or otherwise be disposed of in any other country, either in their original form or after being incorporated through an intermediate process into other end-items, without the prior written approval of the U.S. Department of State.”*

(b) *Special clause for agreements relating to significant military equipment.* With respect to an agreement for the production of significant military equipment, the following additional provisions must be included in the agreement:

(1) *“A completed nontransfer and use certificate (DSP-83) must be executed by the foreign end-user and submitted to the Department of State of the United States before any transfer may take place.”*

(2) *“The prior written approval of the U.S. Government must be obtained before entering into a commitment for the transfer of the licensed article by sale or otherwise to any person or government outside of the approved sales territory.”*

## **§ 124.10 Nontransfer and Use Assurances**

(a) *Types of Agreements Requiring Assurances.* With respect to any manufacturing license agreement or

technical assistance agreement which relates to significant military equipment or classified defense articles, including classified technical data, a Nontransfer and Use Certificate (Form DSP-83) (see § 123.10 of this subchapter) signed by the applicant and the foreign party must be submitted to the Directorate of Defense Trade Controls. With respect to all agreements involving classified articles, including classified technical data, an authorized representative of the foreign government must sign the DSP-83 (or provide the same assurances in the form of a diplomatic note), unless the Directorate of Defense Trade Controls has granted an exception to this requirement. The Directorate of Defense Trade Controls may require that a DSP-83 be provided in conjunction with an agreement that does not relate to significant military equipment or classified defense articles. The Directorate of Defense Trade Controls may also require with respect to any agreement that an appropriate authority of the foreign party's government also sign the DSP-83 (or provide the same assurances in the form of a diplomatic note).

(b) *Timing of Submission of Assurances.* Submission of a Form DSP-83 and/or diplomatic note must occur as follows:

- (1) Agreements which have been signed by all parties before being submitted to the Directorate of Defense Trade Controls may only be submitted along with any required DSP-83 and/or diplomatic note.
- (2) If an agreement has not been signed by all parties before being submitted, the required DSP-83 and/or diplomatic note must be submitted along with the signed agreement.

Note to paragraph (b): In no case may a transfer occur before a required DSP-83 and/or diplomatic note has been submitted to the Directorate of Defense Trade Controls.

*History: 59 FR 29951, June 10, 1994; 71 FR 20534, Apr. 21, 2006.*

### **§ 124.11 Congressional Certification Pursuant to Section 36(d) of the Arms Export Control Act**

(a) The Arms Export Control Act requires that a certification be provided to the Congress prior to the granting of any approval of a manufacturing license agreement or technical assistance agreement as defined in §§ 120.21 and 120.22 respectively for the manufacturing abroad of any item of significant military equipment (see § 120.7 of this subchapter) that is entered into with any country regardless of dollar value.<sup>118</sup> Additionally, any manufacturing license agreement or technical assistance agreement providing for the export of major defense equipment, as defined in § 120.8 of this subchapter shall also require a certification when meeting the requirements of § 123.15 of this subchapter.<sup>119</sup>

(b) Unless an emergency exists which requires the immediate approval of the agreement in the national security interests of the United States, approval may not be granted until at least 15 calendar days have elapsed after receipt by the Congress of the certification required by 22 U.S.C. 2776(d)(1) involving the North Atlantic Treaty Organization, any member country of that Organization, or Australia, Japan, New Zealand, or South Korea or at least 30 calendar days have elapsed for any other country. Approvals may not be granted when the Congress has enacted a joint resolution prohibiting the export.

(c) Persons who intend to export defense articles and defense services pursuant to any exemption in this subchapter under the circumstances described in this section and § 123.15 must provide written notification to the Directorate of Defense Trade Controls and include a signed contract and a DSP-83 signed by the applicant, the foreign consignee and the end-user.

*History: 62 FR 67276, Dec. 24, 1997; 70 FR 34652-34655, Jun. 15, 2005; 74 FR 38342, Aug 3, 2009.*

### **§ 124.12 Required Information in Letters of Transmittal**

(a) An application for the approval of a manufacturing license or technical assistance agreement with a foreign person must be accompanied by an explanatory letter. The original letter and seven copies of the letter and

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<sup>118</sup> 22 USC 2276(a)(12).

<sup>119</sup> So in original. Should probably read "Additionally, any manufacturing license agreement or technical assistance agreement shall also require a certification when meeting the requirements of § 123.15(a) of this subchapter."

eight copies of the proposed agreement shall be submitted to the Directorate of Defense Trade Controls. The explanatory letter shall contain:

- (1) A statement giving the applicant's Directorate of Defense Trade Controls registration number.
- (2) A statement identifying the licensee and the scope of the agreement.
- (3) A statement identifying the U.S. Government contract under which the equipment or technical data was generated, improved, or developed and supplied to the U.S. Government, and whether the equipment or technical data was derived from any bid or other proposal to the U.S. Government.
- (4) A statement giving the military security classification of the equipment or technical data.
- (5) A statement identifying any patent application which discloses any of the subject matter of the equipment or technical data covered by an invention secrecy order issued by the U.S. Patent and Trademark Office.
- (6) A statement of the actual or estimated value of the agreement, including the estimated value of all defense articles to be exported in furtherance of the agreement or amendments thereto. If the value is \$500,000 or more, an additional statement must be made regarding the payment of political contributions, fees or commissions, pursuant to part 130 of this subchapter.
- (7) A statement indicating whether any foreign military sales credits or loan guarantees are or will be involved in financing the agreement.
- (8) The agreement must describe any classified information involved and identify, from Department of Defense form DD-254, the address and telephone number of the U.S. Government office that classified the information.
- (9) For agreements that may require the export of classified information, the Defense Investigative Service<sup>120</sup> [sic] cognizant security offices that have responsibility for the facilities of the U.S. parties to the agreement shall be identified. The facility security clearance codes of the U.S. parties shall also be provided.
- (10) A statement specifying whether the applicant is requesting retransfer of defense articles and defense services pursuant to § 124.16 of this subchapter.

(b) The following statements must be made in the letter of transmittal:

- (1) *"If the agreement is approved by the Department of State, such approval will not be construed by (the applicant) as passing on the legality of the agreement from the standpoint of antitrust laws or other applicable statutes, nor will (the applicant) construe the Department's approval as constituting either approval or disapproval of any of the business terms or conditions between the parties to the agreement."*
- (2) *"The (applicant) will not permit the proposed agreement to enter into force until it has been approved by the Department of State."*
- (3) *"The (applicant) will furnish the Department of State with one copy of the signed agreement (or amendment) within 30 days from the date that the agreement is concluded and will inform the Department of its termination not less than 30 days prior to expiration and provide information on the continuation of any foreign rights or the flow of technical data to the foreign party. If a decision is made not to conclude the proposed agreement, the applicant will so inform the Department within 60 days."*
- (4) *"If this agreement grants any rights to sublicense, it will be amended to require that all sublicensing arrangements incorporate all the provisions of the basic agreement that refer to the U.S. Government and the Department of State (i.e., 22 CFR 124.9 and 124.10)."<sup>121</sup>*

History: Amended at 71 FR 20534, Apr. 21, 2006; 72 FR 71785, Dec. 19, 2007.

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<sup>120</sup> So in original. Should be Defense Security Service.

<sup>121</sup> So in original. Should refer to 22 CFR 124.8 and 124.9.

### **§ 124.13 Procurement by United States Persons in Foreign Countries (Offshore Procurement)**

Notwithstanding the other provisions in part 124 of this subchapter, the Directorate of Defense Trade Controls may authorize by means of a license (DSP-5) the export of unclassified technical data to foreign persons for offshore procurement of defense articles, provided that:

- (a) The contract or purchase order for offshore procurement limits delivery of the defense articles to be produced only to the person in the United States or to an agency of the U.S. Government; and
- (b) The technical data of U.S. origin to be used in the foreign manufacture of defense articles does not exceed that required for bid purposes on a build-to-print basis (*build-to-print* means producing an end-item (*i.e.*, system, subsystem or component) from technical drawings and specifications (which contain no process or know-how information) without the need for additional technical assistance). Release of supporting documentation (*e.g.*, acceptance criteria, object code software for numerically controlled machines) is permissible. Build-to-print does not include the release of any information which discloses design methodology, engineering analysis, detailed process information or manufacturing know-how); and
- (c) The contract or purchase order between the person in the United States and the foreign person:
  - (1) Limits the use of the technical data to the manufacture of the defense articles required by the contract or purchase order only; and
  - (2) Prohibits the disclosure of the data to any other person except subcontractors within the same country; and
  - (3) Prohibits the acquisition of any rights in the data by any foreign person; and
  - (4) Provides that any subcontracts between foreign persons in the approved country for manufacture of equipment for delivery pursuant to the contract or purchase order contain all the limitations of this paragraph (c); and
  - (5) Requires the foreign person, including subcontractors, to destroy or return to the person in the United States all of the technical data exported pursuant to the contract or purchase order upon fulfillment of their terms; and
  - (6) Requires delivery of the defense articles manufactured abroad only to the person in the United States or to an agency of the U.S. Government; and
- (d) The person in the United States provides the Directorate of Defense Trade Controls with a copy of each contract, purchase order or subcontract for offshore procurement at the time it is accepted. Each such contract, purchase order or subcontract must clearly identify the article to be produced and must identify the license number or exemption under which the technical data was exported; and
- (e) Licenses issued pursuant to this section must be renewed prior to their expiration if offshore procurement is to be extended beyond the period of validity of the original approved license. In all instances a license for offshore procurement must state as the purpose “Offshore procurement in accordance with the conditions established in the ITAR, including § 124.13. No other use will be made of the technical data.” If the technical data involved in an offshore procurement arrangement is otherwise exempt from the licensing requirements of this subchapter (*e.g.*, § 126.4), the DSP-5 referred to in the first sentence of this section is not required. However, the exporter must comply with the other requirements of this section and provide a written certification to the Directorate of Defense Trade Controls annually of the offshore procurement activity and cite the exemption under which the technical data was exported. The exemptions under § 125.4 of this subchapter may not be used to establish offshore procurement arrangements.

*History: 58 FR 39305, July 22, 1993, as amended at 64 FR 17534, Apr. 12, 1999; 71 FR 20534, Apr. 21, 2006.*

### **§ 124.14 Exports to Warehouses or Distribution Points Outside the United States**

(a) *Agreements.* Agreements (*e.g.*, contracts) between U.S. persons and foreign persons for the warehousing and distribution of defense articles must be approved by the Directorate of Defense Trade Controls before they enter into force. Such agreements will be limited to unclassified defense articles and must contain conditions

for special distribution, end-use and reporting. Licenses for exports pursuant to such agreements must be obtained prior to exports of the defense articles unless an exemption under § 123.16(b)(1) of this subchapter is applicable.

(b) *Required Information.* Proposed warehousing and distribution agreements (and amendments thereto) shall be submitted to the Directorate of Defense Trade Controls for approval. The following information must be included in all such agreements:

(1) A description of the defense articles involved including test and support equipment covered by the U.S. Munitions List. This shall include when applicable the military nomenclature, the Federal stock number, nameplate data, and any control numbers under which the defense articles were developed or procured by the U.S. Government. Only those defense articles specifically listed in the agreement will be eligible for export under the exemption in § 123.16(b)(1) of this subchapter.

(2) A detailed statement of the terms and conditions under which the defense articles will be exported and distributed;

(3) The duration of the proposed agreement;

(4) Specific identification of the country or countries that comprise the distribution territory. Distribution must be specifically limited to the governments of such countries or to private entities seeking to procure defense articles pursuant to a contract with a government within the distribution territory or to other eligible entities as specified by the Directorate of Defense Trade Controls. Consequently, any deviation from this condition must be fully explained and justified. A nontransfer and use certificate (DSP-83) will be required to the same extent required in licensing agreements under § 124.9(b).

(c) *Required Statements.* The following statements must be included in all warehousing and distribution agreements:

(1) *“This agreement shall not enter into force, and may not be amended or extended, without the prior written approval of the Department of State of U.S. Government.”*

(2) *“This agreement is subject to all United States laws and regulations related to exports and to all administrative acts of the United States Government pursuant to such laws and regulations.”*

(3) *“The parties to this agreement agree that the obligations contained in this agreement shall not affect the performance of any obligations created by prior contracts or subcontracts which the parties may have individually or collectively with the U.S. Government.”*

(4) *“No liability will be incurred by or attributed to the U.S. Government in connection with any possible infringement of privately owned patent or proprietary rights, either domestic or foreign by reason of the U.S. Government’s approval of this agreement.”*

(5) *“No export, sale, transfer, or other disposition of the defense articles covered by this agreement is authorized to any country outside the distribution territory without the prior written approval of the Directorate of Defense Trade Controls of the U.S. Department of State.”*

(6) *“The parties to this agreement agree that an annual report of sales or other transfers pursuant to this agreement of the licensed articles, by quantity, type, U.S. dollar value, and purchaser or recipient shall be provided by (applicant or licensee) to the Department of State.”* This clause must specify which party is obligated to provide the annual report. Such reports may be submitted either directly by the licensee or indirectly through the licensor, and may cover calendar or fiscal years. Reports shall be deemed proprietary information by the Department of State and will not be disclosed to unauthorized persons. (See § 126.10(b) of this subchapter.)

(7) (Licensee) *agrees to incorporate the following statement as an integral provision of a contract, invoice or other appropriate document whenever the articles covered by this agreement are sold or otherwise transferred: “These commodities are authorized for export by the U.S. Government only to (country of ultimate destination or approved sales territory). They may not be resold, diverted, transferred, transshipped, or otherwise be disposed of in any other country, either in their original form or after being incorporated through an intermediate process into other end-items, without the prior written approval of the U.S.*

*Department of State.*”

(8) *“All provisions in this agreement which refer to the United States Government and the Department of State will remain binding on the parties after the termination of the agreement.”*

(9) *Additional Clause.* Unless the articles covered by the agreement are in fact intended to be distributed to private persons or entities (e.g., sporting firearms for commercial resale, cryptographic devices and software for financial and business applications), the following clause must be included in all warehousing and distribution agreements:

*“Sales or other transfers of the licensed article shall be limited to governments of the countries in the distribution territory and to private entities seeking to procure the licensed article pursuant to a contract with a government within the distribution territory, unless the prior written approval of the U.S. Department of State is obtained.”*

(d) *Special Clauses for Agreements Relating to Significant Military Equipment.* With respect to agreements for the warehousing and distribution of significant military equipment, the following additional provisions must be included in the agreement:

(1) A completed nontransfer and use certificate (DSP-83) must be executed by the foreign end-user and submitted to the U.S. Department of State before any transfer may take place.

(2) The prior written approval of the U.S. Department of State must be obtained before entering into a commitment for the transfer of the licensed article by sale or otherwise to any person or government outside the approved distribution territory.

(e) *Transmittal Letters.* Requests for approval of warehousing and distribution agreements with foreign persons must be made by letter. The original letter and seven copies of the letter and seven copies of the proposed agreement shall be submitted to the Directorate of Defense Trade Controls. The letter shall contain:

(1) A statement giving the applicant’s Directorate of Defense Trade Controls registration number.

(2) A statement identifying the foreign party to the agreement.

(3) A statement identifying the defense articles to be distributed under the agreement.

(4) A statement identifying any U.S. Government contract under which the equipment may have been generated, improved, developed or supplied to the U.S. Government, and whether the equipment was derived from any bid or other proposal to the U.S. Government.

(5) A statement that no classified defense articles or classified technical data are involved.

(6) A statement identifying any patent application which discloses any of the subject matter of the equipment or related technical data covered by an invention secrecy order issued by the U.S. Patent and Trademark Office.

(f) *Required Clauses.* The following statements must be made in the letter of transmittal:

(1) *“If the agreement is approved by the Department of State, such approval will not be construed by (applicant) as passing on the legality of the agreement from the standpoint of antitrust laws or other applicable statutes, nor will (the applicant) construe the Department’s approval as constituting either approval or disapproval of any of the business terms or conditions between the parties to the agreement.”*

(2) *“The (applicant) will not permit the proposed agreement to enter into force until it has been approved by the Department of State.”*

(3) *“(Applicant) will furnish the Department of State with one copy of the signed agreement (or amendment thereto) within 30 days from the date that the agreement is concluded, and will inform the Department of its termination not less than 30 days prior to expiration. If a decision is made not to conclude the proposed agreement, (applicant) will so inform the Department within 60 days.”*



**§ 124.15 Special Export Controls for Defense Articles and Defense Services  
Controlled under Category XV: Space Systems and Space Launches**

(a) The export of any satellite or related item (see § 121.1, Category XV(a) and (e)) or any defense service controlled by this subchapter associated with the launch in, or by nationals of, a country that is not a member of the North Atlantic Treaty Organization or a major non-NATO ally of the United States always requires special exports controls, in addition to other export controls required by this subchapter, as follows:

(1) All licenses and other requests for approval require a technology transfer control plan (TTCP) approved by the Department of Defense and an encryption technology control plan approved by the National Security Agency. Drafts reflecting advance discussions with both agencies must accompany submission of the license application or proposed technical assistance agreement, and the letter of transmittal required in § 124.12 must identify the U.S. Government officials familiar with the preparation of the draft TTCPs. The TTCP must require any U.S. person or entity involved in the export to notify the Department of Defense in advance of all meetings and interactions with any foreign person or entity that is a party to the export and require such U.S. person or entity to certify that it has complied with this notification requirement within 30 days after launch.

(2) The U.S. person must make arrangements with the Department of Defense for monitoring. The costs of such monitoring services must be fully reimbursed to the Department of Defense by the U.S. person receiving such services. The letter of transmittal required under § 124.12 must also state that such reimbursement arrangements have been made with the Department of Defense and identify the specific Department of Defense official with whom these arrangements have been made. As required by Public Law 105261, such monitoring will cover, but not be limited to—

(i) Technical discussions and activities, including the design, development, operation, maintenance, modification, and repair of satellites, satellite components, missiles, other equipment, launch facilities, and launch vehicles;

(ii) Satellite processing and launch activities, including launch preparation, satellite transportation, integration of the satellite with the launch vehicle, testing and checkout prior to launch, satellite launch, and return of equipment to the United States;

(iii) Activities relating to launch failure, delay, or cancellation, including post-launch failure investigations or analyses with regard to either the launcher or the satellite; and

(iv) All other aspects of the launch.

(b) *Mandatory Licenses for Launch Failure (Crash) Investigations or Analyses.* In the event of a failure of a launch from a foreign country (including a post liftoff failure to reach proper orbit)—

(1) The activities of U.S. persons or entities in connection with any subsequent investigation or analysis of the failure continue to be subject to the controls established under § 38 of the Arms Export Control Act, including the requirements under this subchapter for express approval prior to participation in such investigations or analyses, regardless of whether a license was issued under this subchapter for the initial export of the satellite or satellite component;

(2) Officials of the Department of Defense must monitor all activities associated with the investigation or analyses to insure against unauthorized transfer of technical data or services and U.S. persons must follow the procedures set forth in paragraphs (a)(1) and (a)(2) of this Category.

(c) Although Public Law 105261 does not require the application of special export controls for the launch of U.S. origin satellites and components from or by nationals of countries that are members of NATO or major non-NATO allies, such export controls may nonetheless be applied, in addition to any other export controls required under this subchapter, as appropriate in furtherance of the security and foreign policy of the United States. Further, the export of any article or defense service controlled under this subchapter to any destination may also require that the special export controls identified in paragraphs (a)(1) and (a)(2) of this category be applied in furtherance of the security and foreign policy of the United States.

(d) *Mandatory Licenses for Exports to Insurance Providers and Underwriters:* None of the exemptions or sublicensing provisions available in this subchapter may be used for the export of technical data in order to

obtain or satisfy insurance requirements.<sup>122</sup> Such exports are always subject to the prior approval and retransfer requirements of sections 3 and 38 of the Arms Export Control Act, as applied by relevant provisions of this subchapter.

**§ 124.16 Special Retransfer Authorizations for Unclassified Technical Data and Defense Services to Member States of NATO<sup>123</sup> and the European Union,<sup>124</sup> Australia, Japan, New Zealand, and Switzerland.**

The provisions of § 124.8(5)<sup>125</sup> of this subchapter notwithstanding, pursuant to this subsection the Department may approve access to unclassified defense articles exported in furtherance of or produced as a result of a TAA/MLA, and retransfer of technical data and defense services to individuals who are third country/dual national employees of the foreign signatory or its approved sub-licensees provided they are nationals exclusively of countries that are members of NATO [sic]<sup>126</sup> the European Union, Australia, Japan, New Zealand, and Switzerland and their employer is a signatory to the agreement or has executed a Non Disclosure Agreement. The retransfer must take place completely within the physical territories of these countries or the United States. Permanent retransfer of hardware is not authorized.

*History: 64 FR 13681, Mar. 22, 1999; 72 FR 71785, Dec. 19, 2007.*

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<sup>122</sup> This is an apparent exception to technical data exemptions in ITAR sections 124.2, 124.3, 125.4, and part 125, which do not mention this exception.

<sup>123</sup> See members at § 120.31.

<sup>124</sup> The 27 members of European Union are Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and United Kingdom. Current candidates are Croatia, Former Yugoslav Republic of Macedonia, and Turkey. [http://europa.eu/abc/european\\_countries/index\\_en.htm](http://europa.eu/abc/european_countries/index_en.htm).

<sup>125</sup> Required TAA clause.

<sup>126</sup> Missing comma after "NATO". Should read: "of NATO, the European Union . . . ."

## PART 125: LICENSES FOR THE EXPORT OF TECHNICAL DATA AND CLASSIFIED DEFENSE ARTICLES

### Section

- 125.1 Exports Subject to this Part
- 125.2 Exports of Unclassified Technical Data
- 125.3 Exports of Classified Technical Data and Classified Defense Articles
- 125.4 Exemptions of General Applicability
- 125.5 Exemptions for Plant Visits
- 125.6 Certification Requirements for Exemptions
- 125.7 Procedures for the Export of Classified Technical Data and other Classified Defense Articles
- 125.8 [Removed & reserved]
- 125.9 Filing of Licenses and Other Authorizations for Exports of Classified Technical Data and Classified Defense Articles

*AUTHORITY: Sections 2 and 38, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. 2752, 2778); E.O. 11958, 42 FR 4311, 3 CFR, 1977 Comp. p. 79; 22 U.S.C. 2658. History: 58 FR 39310, July 22, 1993, unless otherwise noted.*

### **§ 125.1 Exports Subject to this Part**

(a) The controls of this part apply to the export of technical data and the export of classified defense articles. Information which is in the public domain (see § 120.11 of this subchapter and § 125.4(b)(13)) is not subject to the controls of this subchapter.

(b) A license for the export of technical data and the exemptions in § 125.4 may not be used for foreign production purposes or for technical assistance unless the approval of the Directorate of Defense Trade Controls has been obtained. Such approval is generally provided only pursuant to the procedures specified in part 124 of this subchapter.

(c) Technical data authorized for export may not be reexported, transferred or diverted from the country of ultimate end-use or from the authorized foreign end-user (as designated in the license or approval for export) or disclosed to a national of another country without the prior written approval of the Directorate of Defense Trade Controls.

(d) The controls of this part apply to the exports referred to in paragraph (a) of this section regardless of whether the person who intends to export the technical data produces or manufactures defense articles if the technical data is determined by the Directorate of Defense Trade Controls to be subject to the controls of this subchapter.

(e) The provisions of this subchapter do not apply to technical data related to articles in Category VI(e) and Category XVI. The export of such data is controlled by the Department of Energy and the Nuclear Regulatory Commission pursuant to the Atomic Energy Act of 1954, as amended, and the Nuclear Non-Proliferation Act of 1978.<sup>127</sup>

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 125.2 Exports of Unclassified Technical Data**

(a) *License.* A license (DSP-5) is required for the export of unclassified technical data unless the export is exempt from the licensing requirements of this subchapter. In the case of a plant visit, details of the proposed discussions must be transmitted to the Directorate of Defense Trade Controls for an appraisal of the technical data. Seven copies of the technical data or the details of the discussion must be provided.

(b) *Patents.* A license issued by the Directorate of Defense Trade Controls is required for the export of technical data whenever the data exceeds that which is used to support a domestic filing of a patent application

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<sup>127</sup> See also § 121.1 Cat. VI(e), (g), and § 123.20.

or to support a foreign filing of a patent application whenever no domestic application has been filed. Requests for the filing of patent applications in a foreign country, and requests for the filing of amendments, modifications or supplements to such patents, should follow the regulations of the U.S. Patent and Trademark Office in accordance with 37 CFR part 5. The export of technical data to support the filing and processing of patent applications in foreign countries is subject to regulations issued by the U.S. Patent and Trademark Office pursuant to 35 U.S.C. 184.<sup>128</sup>

(c) *Disclosures.* Unless otherwise expressly exempted in this subchapter, a license is required for the oral, visual or documentary disclosure of technical data by U.S. persons to foreign persons. A license is required regardless of the manner in which the technical data is transmitted (*e.g.*, in person, by telephone, correspondence, electronic means, etc.). A license is required for such disclosures by U.S. persons in connection with visits to foreign diplomatic missions and consular offices.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 125.3 Exports of Classified Technical Data and Classified Defense Articles**

(a) A request for authority to export defense articles, including Technical data, classified by a foreign government or pursuant to Executive Order 12356, successor orders, or other legal authority must be submitted to the Directorate of Defense Trade Controls for approval. The application must contain full details of the proposed transaction. It should also list the facility security clearance code of all U.S. parties on the license and include the Defense Security Service cognizant security office of the party responsible for packaging the commodity for shipment. A nontransfer and use certificate (Form DSP-83) executed by the applicant, foreign consignee, end-user and an authorized representative of the foreign government involved will be required.

(b) Classified technical data which is approved by the Directorate of Defense Trade Controls either for export or reexport after a temporary import will be transferred or disclosed only in accordance with the requirements in the Department of Defense National Industrial Security Program Operating Manual (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed). Any other requirements imposed by cognizant U.S. departments and agencies must also be satisfied.

(c) The approval of the Directorate of Defense Trade Controls must be obtained for the export of technical data by a U.S. person to a foreign person in the U.S. or in a foreign country unless the proposed export is exempt under the provisions of this subchapter.

(d) All communications relating to a patent application covered by an invention secrecy order are to be addressed to the U.S. Patent and Trademark Office (see 37 CFR 5.11).

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 125.4 Exemptions of General Applicability**

(a) The following exemptions apply to exports of technical data for which approval is not needed from the Directorate of Defense Trade Controls. These exemptions, except for paragraph (b)(13) of this section, do not apply to exports to proscribed destinations under § 126.1 of this subchapter or for persons considered generally ineligible under § 120.1(c) of this subchapter. The exemptions are also not applicable for purposes of establishing offshore procurement arrangements or producing defense articles offshore (see § 124.13), except as authorized under § 125.4 (c). If § 126.8 of this subchapter requirements are applicable, they must be met before an exemption under this section may be used. Transmission of classified information must comply with the requirements of the Department of Defense National Industrial Security Program Operating Manual (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls,

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<sup>128</sup> Practice tip: A PTO license will authorize the export of technical data from the U.S. "for purposes relating to the preparation, filing or possible filing and prosecution of a foreign patent application." 37 CFR 5.11(b). For ITAR-controlled technical data, if the PTO has issued a foreign filing license, a DDTC license is not required to export it for these purposes, unless the data being exported exceeds that which is used to support a patent application in a foreign country. See 37 CFR 5.11(b), 5.18(a). (Contributor: Susan Kovarovics, Esq., Susan.Kovarovics@bryancave.com, 202-508-6132).

in which case the latter guidance must be followed) and the exporter must certify to the transmittal authority that the technical data does not exceed the technical limitation of the authorized export.

(b) The following exports are exempt from the licensing requirements of this subchapter.

(1) Technical data, including classified information, to be disclosed pursuant to an official written request or directive from the U.S. Department of Defense;

(2) Technical data, including classified information, in furtherance of a manufacturing license or technical assistance agreement approved by the Department of State under part 124 of this subchapter and which meet the requirements of § 124.3 of this subchapter;

(3) Technical data, including classified information, in furtherance of a contract between the exporter and an agency of the U.S. Government, if the contract provides for the export of the data and such data does not disclose the details of design, development, production, or manufacture of any defense article;

(4) Copies of technical data, including classified information, previously authorized for export to the same recipient. Revised copies of such technical data are also exempt if they pertain to the identical defense article, and if the revisions are solely editorial and do not add to the content of technology previously exported or authorized for export to the same recipient;

(5) Technical data, including classified information, in the form of basic operations, maintenance, and training information relating to a defense article lawfully exported or authorized for export to the same recipient. Intermediate or depot level repair and maintenance information may be exported only under a license or agreement approved specifically for that purpose;

(6) Technical data, including classified information, related to firearms not in excess of caliber .50 and ammunition for such weapons, except detailed design, development, production or manufacturing information;

(7) Technical data, including classified information, being returned to the original source of import;

(8) Technical data directly related to classified information which has been previously exported or authorized for export in accordance with this part to the same recipient, and which does not disclose the details of the design, development, production, or manufacture of any defense article;

(9) Technical data, including classified information, sent by a U.S. corporation to a U.S. person employed by that corporation overseas or to a U.S. Government agency.<sup>129</sup> This exemption is subject to the limitations of § 125.1(b) and may be used only if:

(i) The technical data is to be used overseas solely by U.S. persons;

(ii) If the U.S. person overseas is an employee of the U.S. Government or is directly employed by the U.S. corporation and not by a foreign subsidiary; and

(iii) The classified information is sent overseas in accordance with the requirements of the Department of Defense National Industrial Security Program Operating Manual (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed).

(10) Disclosures of unclassified technical data in the U.S. by U.S. institutions of higher learning to foreign persons who are their bona fide and full time regular employees. This exemption is available only if:

(i) The employee's permanent abode throughout the period of employment is in the United States;

(ii) The employee is not a national of a country to which exports are prohibited pursuant to § 126.1 of this

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<sup>129</sup> DDTTC has proposed to amend this section to clarify that the exemption covers technical data, regardless of media or format, sent or taken by a U.S. person who is an employee of a U.S. corporation or a U.S. Government agency to a U.S. person employed by that U.S. corporation or to a U.S. Government agency outside the United States. 74 FR 61292-61294 (Nov. 24, 2009).

subchapter; and

(iii) The institution informs the individual in writing that the technical data may not be transferred to other foreign persons without the prior written approval of the Directorate of Defense Trade Controls;

(11) Technical data, including classified information, for which the exporter, pursuant to an arrangement with the Department of Defense, Department of Energy or NASA which requires such exports, has been granted an exemption in writing from the licensing provisions of this part by the Directorate of Defense Trade Controls. Such an exemption will normally be granted only if the arrangement directly implements an international agreement to which the United States is a party and if multiple exports are contemplated. The Directorate of Defense Trade Controls, in consultation with the relevant U.S. Government agencies, will determine whether the interests of the United States Government are best served by expediting exports under an arrangement through an exemption (see also paragraph (b)(3) of this section for a related exemption);

(12) Technical data which is specifically exempt under part 126 of this subchapter; or

(13) Technical data approved for public release (*i.e.*, unlimited distribution) by the cognizant U.S. Government department or agency or Office of Freedom of Information and Security Review.<sup>130</sup> This exemption is applicable to information approved by the cognizant U.S. Government department or agency for public release in any form. It does not require that the information be published in order to qualify for the exemption.

(c) Defense services and related unclassified technical data are exempt from the licensing requirements of this subchapter, to nationals of NATO countries, Australia, Japan, and Sweden for the purposes of responding to a written request from the Department of Defense for a quote or bid proposal. Such exports must be pursuant to an official written request or directive from an authorized official of the U.S. Department of Defense. The defense services and technical data are limited to those listed in paragraphs (c)(1), (c)(2), and (c)(3) and must not include those listed in paragraphs (c)(4), (c)(5), and (c)(6) which follow:

(1) *Build-to-Print*. “*Build-to-Print*” means that a foreign consignee can produce a defense article from engineering drawings without any technical assistance from a U.S. exporter. This transaction is based strictly on a “hands-off” approach since the foreign consignee is understood to have the inherent capability to produce the defense article and only lacks the necessary drawings. Supporting documentation such as acceptance criteria, and specifications, may be released on an as-required basis (*i.e.*, “must have”) such that the foreign consignee would not be able to produce an acceptable defense article without this additional supporting documentation. Documentation which is not absolutely necessary to permit manufacture of an acceptable defense article (*i.e.*, “nice to have”) is not considered within the boundaries of a “Build-to-Print” data package;

(2) *Build/Design-to-Specification*. “*Build/Design-to-Specification*” means that a foreign consignee can design and produce a defense article from requirement specifications without any technical assistance from the U.S. exporter. This transaction is based strictly on a “hands-off” approach since the foreign consignee is understood to have the inherent capability to both design and produce the defense article and only lacks the necessary requirement information;

(3) *Basic Research*. “*Basic Research*” means a systemic study directed toward greater knowledge or understanding of the fundamental aspects of phenomena and observable facts without specific applications towards processes or products in mind. It does not include “*Applied Research*” (*i.e.*, a systemic study to gain knowledge or understanding necessary to determine the means by which a recognized and specific need may be met. It is a systematic application of knowledge toward the production of useful materials, devices, and systems or methods, including design, development, and improvement of prototypes and new processes to meet specific requirements.);

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<sup>130</sup> So in original. The office was renamed “Office of Security Review” in 2005. WHS Action Memo of Aug. 16, 2005. Practice tip: Obtain clearance for releasing marketing material containing descriptions and specifications for ITAR-controlled products from DoD Office of Security Review, 1777 N. Kent Street, Suite 12047, Arlington, VA 22209. (Contributor: Gary Stanley, Esq., 202-686-4854, gstanley@glstrade.com)

(4) *Design Methodology*, such as: The underlying engineering methods and design philosophy utilized (*i.e.*, the “why” or information that explains the rationale for particular design decision, engineering feature, or performance requirement); engineering experience (*e.g.* lessons learned); and the rationale and associated databases (*e.g.* design allowables, factors of safety, component life predictions, failure analysis criteria) that establish the operational requirements (*e.g.*, performance, mechanical, electrical, electronic, reliability and maintainability) of a defense article. (Final analytical results and the initial conditions and parameters may be provided.)

(5) *Engineering Analysis*, such as: Analytical methods and tools used to design or evaluate a defense article’s performance against the operational requirements. Analytical methods and tools include the development and/or use of mock-ups, computer models and simulations, and test facilities. (Final analytical results and the initial conditions and parameters may be provided.)

(6) *Manufacturing Know-how*, such as: information that provides detailed manufacturing processes and techniques needed to translate a detailed design into a qualified, finished defense article. (Information may be provided in a build-to-print package that is necessary in order to produce an acceptable defense article.)

(d)(1) Defense services for the items identified in § 123.16(b)(10) of this subchapter exported by accredited U.S. institutions of higher learning are exempt from the licensing requirements of this subchapter when the export is:

(i) To countries identified in § 123.16(b)(10)(i) of this subchapter and exclusively to nationals of such countries when engaged in international fundamental research conducted under the aegis of an accredited U.S. institution of higher learning; and

(ii) In direct support of fundamental research as defined in § 120.11 (8) of this subchapter being conducted either at accredited U.S. institutions of higher learning or an accredited institution of higher learning, a governmental research center or an established government funded private research center located within the countries identified in § 123.16(b)(10)(i) of this subchapter; and

(iii) Limited to discussions on assembly of any article described in § 123.16(b)(10) of this subchapter and or integrating any such article into a scientific, research, or experimental satellite.

(2) The exemption in paragraph (d)(1) of this section, while allowing accredited U.S. institutions of higher learning to participate in technical meetings with foreign nationals [sic]<sup>131</sup> from countries specified in § 123.16(b)(10)(i) of this subchapter for the purpose of conducting space scientific fundamental research either in the United States or in these countries when working with information that meets the requirements of § 120.11 of this subchapter in activities that would generally be controlled as a defense service in accordance with § 124.1(a) of this subchapter, does not cover:

(i) Any level of defense service or information involving launch activities including the integration of the satellite or spacecraft to the launch vehicle;

(ii) Articles and information listed in the Missile Technology Control Regime (MTCR) Annex or classified as significant military equipment; or

(iii) The transfer of or access to technical data, information, or software that is otherwise controlled by this subchapter.

*History: Added by 67 FR 15101, Mar 29, 2002, effective Mar. 11, 2002; amended at 71 FR 20534, Apr. 21, 2006.*

## **§ 125.5 Exemptions for Plant visits**

(a) A license is not required for the oral and visual disclosure of unclassified technical data during the course of a classified plant visit by a foreign person, provided: The classified visit has itself been authorized pursuant to a license issued by the Directorate of Defense Trade Controls; or the classified visit was approved in connection

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<sup>131</sup> So in original. Should be “foreign persons”, as the term “foreign national” is not defined in the ITAR, and could include either U.S. persons or foreign persons.

with an actual or potential government-to-government program or project by a U.S. Government agency having classification jurisdiction over the classified defense article or classified technical data involved under Executive Order 12356 or other applicable Executive Order; and the unclassified information to be released is directly related to the classified defense article or technical data for which approval was obtained and does not disclose the details of the design, development, production or manufacture of any other defense articles. In the case of visits involving classified information, the requirements of the Department of Defense National Industrial Security Program Operating Manual must be met (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed).

(b) The approval of the Directorate of Defense Trade Controls is not required for the disclosure of oral and visual classified information to a foreign person during the course of a plant visit approved by the appropriate U.S. Government agency if: The requirements of the Department of Defense National Industrial Security Program Operating Manual have been met (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed); the classified information is directly related to that which was approved by the U.S. Government agency; it does not exceed that for which approval was obtained; and it does not disclose the details of the design, development, production or manufacture of any defense articles.

(c) A license is not required for the disclosure to a foreign person of unclassified technical data during the course of a plant visit (either classified or unclassified) approved by the Directorate of Defense Trade Controls or a cognizant U.S. Government agency provided the technical data does not contain information in excess of that approved for disclosure. This exemption does not apply to technical data which could be used for design, development, production or manufacture of a defense article.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 125.6 Certification Requirements for Exemptions**

(a) To claim an exemption for the export of technical data under the provisions of this subchapter (e.g., §§ 125.4 and 125.5), the exporter must certify that the proposed export is covered by a relevant section of this subchapter, to include the paragraph and applicable subparagraph. Certifications consist of clearly marking the package or letter containing the technical data “22 CFR [insert ITAR exemption] *applicable.*” This certification must be made in written form and retained in the exporter’s files for a period of 5 years (see § 123.22 of this subchapter).

(b) For exports that are oral, visual, or electronic the exporter must also complete a written certification as indicated in paragraph (a) of this section and retain it for a period of 5 years.

*History: 68 FR 61098, Oct. 27, 2003*

### **§ 125.7 Procedures for the Export of Classified Technical Data and Other Classified Defense Articles**

(a) All applications for the export or temporary import of classified technical data or other classified defense articles must be submitted to the Directorate of Defense Trade Controls on Form DSP-85.

(b) An application for the export of classified technical data or other classified defense articles must be accompanied by seven copies of the data and a completed Form DSP-83 (see § 123.10 of this subchapter). Only one copy of the data or descriptive literature must be provided if a renewal of the license is requested. All classified materials accompanying an application must be transmitted to the Directorate of Defense Trade Controls in accordance with the procedures contained in the Department of Defense National Industrial Security Program Operating Manual (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed).

*History: Amended at 71 FR 20534, Apr. 21, 2006.*



**§ 125.8 (Removed and reserved)**

**§ 125.9 Filing of Licenses and Other Authorizations for Exports of Classified Technical Data and Classified Defense Articles**

Licenses and other authorizations for the export of classified technical data or classified defense articles will be forwarded by the Directorate of Defense Trade Controls to the Defense Security Service of the Department of Defense in accordance with the provisions of the Department of Defense National Industrial Security Program Operating Manual (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed). The Directorate of Defense Trade Controls will forward a copy of the license to the applicant for the applicant's information. The Defense Security Service will return the endorsed license to the Directorate of Defense Trade Controls upon completion of the authorized export or expiration of the license, whichever occurs first.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*



## PART 126: GENERAL POLICIES AND PROVISIONS

### Section

- 126.1 Prohibited Exports and Sales to Certain Countries
- 126.2 Temporary Suspension or Modification of this Subchapter
- 126.3 Exceptions
- 126.4 Shipments by or for United States Government Agencies
- 126.5 Canadian Exemptions
- 126.6 Foreign-Owned Military Aircraft and Naval Vessels, and the Foreign Military Sales Program
- 126.7 Denial, Revocation, Suspension or Amendment of Licenses and other Approvals
- 126.8 Proposals to Foreign Persons Relating to Significant Military Equipment
- 126.9 Advisory Opinions and Related Authorizations
- 126.10 Disclosure of Information
- 126.11 Relations to Other Provisions of Law
- 126.12 Continuation in Force
- 126.13 Required Information
- 126.14 Special Comprehensive Export Authorizations for NATO, Australia, and Japan
- 126.15 Expedited Processing of License Applications for the Export of Defense Articles and Defense Services to Australia or the United Kingdom

Authority: §§ 2, 38, 40, 42, and 71, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2780, 2791, and 2797); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp. p. 79; 22 U.S.C. 2651a; 22 U.S.C. 287c; E.O. 12918, 59 FR 28205, 3 CFR, 1994 Comp. p. 899. Source: 70 FR 34652, June 15, 2005, unless otherwise noted.

### § 126.1 Prohibited Exports and Sales to Certain Countries<sup>132</sup>

(a) *General.* It is the policy of the United States to deny licenses and other approvals for exports and imports of defense articles and defense services, destined for or originating in certain countries. This policy applies to Belarus,<sup>133</sup> Cuba, Eritrea, Iran,<sup>134</sup> North Korea, Syria, and Venezuela. This policy also applies to countries with respect to which the United States maintains an arms embargo (*e.g.*, Burma,<sup>135</sup> China, Liberia, and Sudan<sup>136</sup>) or whenever an export would not otherwise be in furtherance of world peace and the security and foreign policy of the United States.<sup>137</sup> Information regarding certain other embargoes appears elsewhere in this section.

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<sup>132</sup> Should be "Prohibited Exports, Imports, and Sales to or from Certain Countries", as the prohibitions apply to imports as well. This section is also referred to in § 129.5(b).

<sup>133</sup> See also 74 FR 28435-28437 (Jun, 15, 2009): Notice of June 12, 2009--CONTINUATION OF THE NATIONAL EMERGENCY WITH RESPECT TO THE ACTIONS AND POLICIES OF CERTAIN MEMBERS OF THE GOVERNMENT OF BELARUS AND OTHER PERSONS THAT UNDERMINE DEMOCRATIC PROCESSES OR INSTITUTIONS IN BELARUS.

<sup>134</sup> The Iranian Transactions Regulations, 31 CFR part 560, 31 CFR 560.521, authorize the exportation, reexportation, sale, or supply, directly or indirectly, from the United States or by a U.S. person, wherever located, of any goods or technology to a third-country government, or to its contractors or agents, for shipment to Iran via a diplomatic pouch. It also authorizes, to the extent necessary, the shipment by a third-country government to Iran of U.S.-origin goods or technology in a diplomatic pouch. 72 FR 15831-15832 (Apr. 3, 2007).

<sup>135</sup> See also 74 FR 40463-40466: 48 CFR pts. 4, 15, 25, and 52; FEDERAL ACQUISITION REGULATION; PROHIBITION ON RESTRICTED BUSINESS OPERATIONS IN SUDAN AND IMPORTS FROM BURMA.

<sup>136</sup> On April 28, 2008, the Deputy Secretary of State determined "that the provision to the Government of Southern Sudan of non-lethal military assistance, military education and training, and defense services controlled under the International Traffic in Arms Regulations is in the national interest of the United States, and that such assistance may be provided pursuant to section 666(e)." 73 FR 28545 (May 16, 2008). The Sudanese Sanctions Regulations, 31 CFR part 538, at 31 CFR 538.516(b), authorize "the exportation or reexportation, directly or indirectly, from the United States or by a U.S. person, wherever located, of any goods or technology to a third-country government, or to its contractors or agents, for shipment to Sudan via a diplomatic pouch. In addition, Sec. 538.516(b) clarifies that, to the extent necessary, the shipment by a third-country government to Sudan of U.S.-origin goods or technology in a diplomatic pouch is authorized. 72 FR 15831-15832 (Apr. 3, 2007). See also 74 FR 40463-40466: 48 CFR pts. 4, 15, 25, and 52; Federal Acquisition Regulation; Prohibition on Restricted Business Operations in Sudan and Imports from Burma.

<sup>137</sup> In addition to the listed countries, DDTTC has published restrictive guidance regarding the following countries:

- **Cyprus.** 57 FR 60265-01 (Dec. 18, 1992).
- **Fiji.** U.S. Dept. of State, STATE FOREIGN POLICY OBJECTIVES--EAST ASIA AND PACIFIC REGION (Aug 2007), <http://www.state.gov/t/pm/rls/rpt/fmtrpt/2007/92078.htm>, states in part: "The United States also will suspend all deliveries and sales of lethal military equipment to Fiji . . . . These measures will remain in place until the President or Secretary of State determines that a democratically elected government has taken office."

Comprehensive arms embargoes are normally the subject of a State Department notice published in the FEDERAL REGISTER. The exemptions provided in the regulations in this subchapter, except § 123.17 of this subchapter, do not apply with respect to articles originating in or for export to any proscribed countries, areas, or persons in this § 126.1.

(b) *Shipments.* A defense article licensed for export under this subchapter may not be shipped on a vessel, aircraft or other means of conveyance which is owned or operated by, or leased to or from, any of the proscribed countries or areas.

(c) *Exports and Sales Prohibited by United Nations Security Council Embargoes.* Whenever the United Nations Security Council mandates an arms embargo, all transactions that are prohibited by the embargo and that involve U.S. persons anywhere, or any person in the United States, and defense articles or services of a type enumerated on the United States Munitions List (22 CFR part 121), irrespective of origin, are prohibited under the ITAR for the duration of the embargo, unless the Department of State publishes a notice in the FEDERAL REGISTER specifying different measures. This would include, but is not limited to, transactions involving trade by U.S. persons who are located inside or outside of the United States in defense articles or services of U.S. or foreign origin that are located inside or outside of the United States. United Nations Arms Embargoes include, but are not necessarily limited to, the following countries:

- (1) Cote d'Ivoire<sup>138</sup>
- (2) Democratic Republic of Congo (see also paragraph (i) of this section)
- (3) Iraq<sup>139</sup>

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- **Guinea.** DDTC, WEB NOTICE ON EXPORTS TO THE REPUBLIC OF GUINEA (Oct. 29, 2009) *available at* [http://www.pmdtcc.state.gov/licensing/documents/WebNotice\\_Guinea.pdf](http://www.pmdtcc.state.gov/licensing/documents/WebNotice_Guinea.pdf), stating in part:

In response to recent events in the Republic of Guinea (Guinea), DDTC wishes to inform exporters that although there is no current U.S. or UN arms embargo on Guinea, the final decision on license applications for the export of U.S. Munitions List (USML) items to Guinea received from this date or currently in the review process may be delayed as the situation develops. License applications will continue to be reviewed on a case-by-case basis, but approval should not be assumed. We encourage exporters to take the current situation into account and if applying for a new license to export or re-export USML items to Guinea, that the license application provide detailed information on the end-use and end-user of the USML items. If you have any questions about this matter, please contact the DDTC Response Team at [DDTCResponseTeam@state.gov](mailto:DDTCResponseTeam@state.gov). . . .

On October 27, 2009, the European Union adopted Council Common Position 2009/788, imposing restrictive measures against the Republic of Guinea. The Common Position includes a prohibition on the sale, supply, transfer, or export of arms and related materiel of all types to the Republic of Guinea from any EU Member State or by EU nationals overseas. Council Common Position (EC) No. 2009/788/CFSP of 27 Oct 2009, 1.

- **Indonesia.** Notices at 64 FR 55805 (Oct. 14, 1999); 66 FR 7836 (Jan. 25, 2001); 66 FR 16085 (Mar. 22, 2001); 66 FR 65235 (Dec. 18, 2001) expressed varying degrees of restriction on exports of defense articles to Indonesia. The latest notice at 71 FR 15797 (Mar. 29, 2006), relaxed the restrictions, stating that "requests for the export or retransfer of lethal defense articles to Indonesia (and defense services related to such lethal defense articles) pursuant to section 38 of the Arms Export Control Act will be considered on a case-by-case basis."

- **Palestinian Authority/Hamas.** 31 CFR 594.411 ("U.S. persons are prohibited from engaging in transactions with the Palestinian Authority unless authorized.")

- **Yemen.** 57 FR 59852 (Dec. 16, 1992); restricting exports of "lethal articles or items supporting such articles."

- **Zimbabwe.** 67 FR 18978 (Apr. 17, 2002); 67 FR 48242 (July 23, 2002).

<sup>138</sup> A.k.a. Ivory Coast. See also 69 FR 74560 (Dec. 14, 2004), stating in part:

Effective immediately, it is the policy of the U.S. Government to deny all applications for licenses and other approvals to export or otherwise transfer defense articles and defense services to Cote d'Ivoire (formerly known as Ivory Coast). In addition, U.S. manufacturers and exporters and any other affected parties are hereby notified that the Department of State has suspended all previously issued licenses and approvals to export or otherwise transfer defense articles and defense services to Cote d'Ivoire. These actions have been taken in accordance with U.N. Security Council Resolution 1572, unanimously passed on November 15, 2004, which imposes an embargo on the export of arms and related material, as well as defense services, to the West African nation of Cote d'Ivoire. The embargo will remain in effect for a period of 13 months unless otherwise amended.

<sup>139</sup> See also § 126.1(d). See DDTC, GUIDANCE FOR IRAQ AND AFGHANISTAN CASES (July 22, 2008):

It is the policy of the Department of State to expedite all requests for exports directly supporting our coalition efforts in Operation Iraqi Freedom (OIF) in Iraq and Operation Enduring Freedom (OEF) in Afghanistan. To ensure these priority operations are fully supported, the Department will ensure only requests directly related to OEF/OIF operations are afforded this expedited review. Licenses that may undergo OEF/OIF expedited review are limited to those that provide:

Defense articles and services to forces or organizations deployed in Afghanistan and Iraq;

Defense articles and services to forces or organizations within 90 days of a scheduled deployment.

Licenses requesting OEF/OIF expedited handling not meeting these criteria will be returned without action for resubmission by the applicant as a routine license.

**Application Submission:** Cases meeting the OIF/OEF criteria stated above must be clearly marked so as not to delay processing. For D-Trade and DSP-119 cases, the Transaction ID should begin with the letters "OIF" or "OEF," as applicable. These cases will automatically be expeditiously routed to the appropriate licensing division/licensing officer. All requests must note OIF or OEF in the first line of purpose block (Block 20 for the DSP-5; Block 23 for the DSP-73 and DSP-61). Note: Applicants using the OIF/OEF

- (4) Iran<sup>140</sup>
- (5) Lebanon<sup>141</sup>
- (6) Liberia<sup>142</sup>
- (7) North Korea<sup>143</sup>
- (8) Sierra Leone
- (9) Somalia<sup>144</sup>
- (10) Sudan<sup>145</sup>

(d) *Terrorism*. Exports to countries which the Secretary of State has determined to have repeatedly provided support for acts of international terrorism are contrary to the foreign policy of the United States and are thus subject to the policy specified in paragraph (a) of this section and the requirements of section 40 of the Arms Export Control Act (22 U.S.C. 2780) and the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 (22 U.S.C. 4801, note). The countries in this category are: Cuba, Iran, North Korea, Sudan, and Syria.<sup>146</sup>

(e) *Proposed Sales*. No sale or transfer and no proposal to sell or transfer any defense articles, defense services or technical data subject to this subchapter may be made to any country referred to in this section (including the embassies or consulates of such a country), or to any person acting on its behalf, whether in the United States or abroad, without first obtaining a license or written approval of the Directorate of Defense Trade Controls. However, in accordance with paragraph (a) of this section, it is the policy of the Department of State to deny licenses and approvals in such cases. Any person who knows or has reason to know of such a proposed or actual sale, or transfer, of such articles, services or data must immediately inform the Directorate of Defense Trade Controls.

transaction identifier in instances where the case is found not to meet the criteria stated above will have their cases returned without action. The applicant will be notified to resubmit the case without OIF/OEF in the Transaction ID. Hard copy submissions should have a bright color cover sheet indicating that the case is for OIF or OEF and direct the case to the appropriate licensing Division based on the U.S. Munitions List (USML) category, as noted below:

T2C: USML Categories VI, VII, XII, XIII, XVI, XVIII, XX, and XXI

T3D: USML Categories IV, V, IX, XIV, and XV

T4M: USML Category XI

T5Z: USML Category VIII

T6F: USML Categories I, II, III, and X

**Supporting Documentation.** The following documentation must be included in OIF/OEF requests: . . . .

**Re-export Requests Under General Correspondence.** Requests to re-export USML controlled defense articles under ITAR §123.9 to coalition partners in Iraq and/or Afghanistan will be considered for expeditious handling. To qualify for this consideration, the request must clearly demonstrate that the re-export is for equipment to U.S. and/or coalition forces or supporting contractors currently deployed in Iraq or Afghanistan or for forces scheduled to deploy within 90 days.

Supporting documentation must include the following: . . . .

**Export of Fully Automatic Weapons to Private Entities.** DDTC has a longstanding policy of not authorizing fully-automatic weapons to private entities, but has made an exception with regard to the activities of private security companies in Iraq and Afghanistan. The preference is for these weapons to be exported temporarily on DSP-73s, although DSP-5s will be considered only when the security company is, itself, a foreign person as defined in ITAR §121.16. For fully-automatic firearms proposed for export to a non-Iraqi Government (private) end-user in Iraq, DDTC requires: (1) justification for the number of weapons being requested, with particular attention to follow-on licenses requesting additional quantities; (2) end-user assurances using the example provided below; (3) a letter from the government or international organization responsible for the contract, stating it will send an inventory report of the fully-automatic weapons to DDTC within five days of the weapons arrival in Iraq, and account for the ultimate disposition of the weapons upon completion of the mission/termination of the contract. When a DSP-5 is used, the license must be accompanied by a DSP-83 executed by the parent government of the foreign person. Supporting documentation for the export of USML Category I, Firearms, must include those items listed above, and all serial numbers must be listed in Block 20 of the application.

SAMPLE LETTER . . . .

<sup>140</sup> *Id.*

<sup>141</sup> See also 71 FR 75609 (Dec. 15, 2006), stating in part: "all licenses and approvals to export or otherwise transfer defense articles and defense services to Lebanon pursuant to Section 38 of the Arms Export Control Act (AECA) are suspended, except those authorized by the Government of Lebanon or the United Nations Interim Force in Lebanon (UNIFIL). Further, effective immediately, it is the policy of the United States Government to deny all applications for license and other approvals to export or otherwise transfer defense articles and defense services to Lebanon, except those authorized by the Government of Lebanon or UNIFIL."

<sup>142</sup> See also § 126.1(a).

<sup>143</sup> See also § 126.1(a) and (d).

<sup>144</sup> See also § 126.1(m)

<sup>145</sup> See also § 126.1(a) and (d), and 74 FR 40463-40466: 48 CFR pts. 4, 15, 25, and 52; Federal Acquisition Regulation; FAR Case 2008-004, Prohibition on Restricted Business Operations in Sudan and Imports from Burma

<sup>146</sup> In 73 FR 29172 (May 20, 2008), the State Department published a determination and certification to Congress Under Section 40A of the Arms Export Control Act that the following countries are not cooperating with United States antiterrorism efforts: Cuba; Eritrea; Iran; North Korea; Syria; Venezuela.

(f) **Iraq**. It is the policy of the United States to deny licenses, other approvals, exports and imports of defense articles, destined for or originating in Iraq except, if determined to be in the national interest of the United States and subject to the notification requirements of section 1504 of Public Law 108-11, exports may be authorized of nonlethal military equipment and, in the case of lethal military equipment, only that which is designated by the Secretary of State (or designee) for use by a reconstituted (or interim) Iraqi military or police force, and of small arms designated by the Secretary of State (or designee) for use for private security purposes.

(g) **Afghanistan**.<sup>147</sup> It is the policy of the United States to deny licenses, other approvals, exports and imports of defense articles and defense services, destined for or originating in Afghanistan except for the Government of Afghanistan (currently the Afghan Interim Authority) and the International Security Assistance Force, which will be reviewed on a case-by-case basis. In addition, lists of persons subject to a broad prohibition, including an arms embargo, due to their affiliation with the Taliban, Usama bin Laden, Al-Qaida or those associated with them will continue to be published from time to time.

(h) [Reserved.]

(i) **Democratic Republic of the Congo**. It is the policy of the United States to deny licenses, other approvals, exports or imports of defense articles and defense services destined for or originating in the Democratic Republic of the Congo except for non-lethal equipment and training (lethal and non-lethal) to the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), the transitional National Unity Government of the Democratic Republic of the Congo and the integrated Congolese national army and police forces, such units operating under the command of the etat-major integre of the Congolese Armed Forces or National Police, and such units in the process of being integrated outside the provinces of North and South Kivu and the Ituri district; and non-lethal equipment for humanitarian or protective use, and related assistance and training, as notified in advance to the UN. An arms embargo exists with respect to any recipient in the Democratic Republic of the Congo.

(j) **Haiti**. It is the policy of the United States to deny licenses, other approvals, exports or imports of defense articles and defense services, destined for or originating in Haiti. A denial policy will remain for exports or imports of defense articles and defense services destined for or originating in Haiti except, on a case-by-case basis, for supplies of arms and related materials or technical training and assistance intended solely for the support of or use by security units that operate under the command of the Government of Haiti, supplies of arms and related materials for technical training and assistance intended solely for the support of or use by the United Nations or a United Nations-authorized mission, and personal protective clothing, including flak jackets and helmets, for use by personnel from the United Nations and other international organizations, representatives of the media, and development workers and associated personnel. All shipments of arms and related materials consistent with such exemptions shall only be made to Haitian security units as designated by the Government of Haiti, in coordination with the U.S. Government.

(k) **Libya**. It is the policy of the United Sates [sic]<sup>148</sup> to deny licenses, other approvals, exports or imports of defense articles and defense services destined for or originating in Libya except, on a case-by-case basis, for:

(1) Non-lethal defense articles and defense services,

(2) Non-lethal safety-of-use defense articles (*e.g.*, cartridge actuated devices, propellant actuated devices and technical manuals for military aircraft for purposes of enhancing the safety of the aircrew) as spare parts for lethal end-items.

For non-lethal defense end-items, no distinction will be made between Libya's existing and new inventory.

(l) **Vietnam**. It is the policy of the United Sates to deny licenses, other approvals, exports or imports of defense articles and defense services destined for or originating in Vietnam except, on a case-by-case basis, for:

(1) Non-lethal defense articles and defense services, and

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<sup>147</sup> See DDTC, GUIDANCE FOR IRAQ AND AFGHANISTAN CASES (July 22, 2008), [http://www.pmdtc.state.gov/licensing/documents/OEFandOIF\\_Guidelines2008.doc](http://www.pmdtc.state.gov/licensing/documents/OEFandOIF_Guidelines2008.doc), reprinted *supra* at § 126.1(c)(3).

<sup>148</sup> So in original.

(2) Non-lethal, safety-of-use defense articles (e.g., cartridge actuated devices, propellant actuated devices and technical manuals for military aircraft for purposes of enhancing the safety of the aircraft crew) for lethal end-items.

For non-lethal defense end-items, no distinction will be made between Vietnam's existing and new inventory.

(m) **Somalia**. It is the policy of the United States to deny licenses, or other approvals, for exports or imports of defense articles and defense services destined for or originating in Somalia. A denial policy will remain for exports or imports of defense articles and defense services destined for or originating in Somalia except, on a case-by-case basis, for defense articles and defense services intended solely for:

(1) Support for the African Union Mission to Somalia (AMISOM), and

(2) Support for the purpose of helping develop security sector institutions in Somalia that further the objectives of peace, stability and reconciliation in Somalia, after advance notification of the proposed export by the United States Government to the UN Somalia Sanctions Committee and the absence of a negative decision by that committee.

Exemptions from the licensing requirement may not be used with respect to any export to Somalia unless specifically authorized in writing by the Directorate of Defense Trade Controls.

(n) **Sri Lanka**. It is the policy of the United States to deny licenses and other approvals to export or otherwise transfer defense articles and services to Sri Lanka except, on a case-by-case basis, for technical data or equipment made available for the limited purposes of maritime and air surveillance and communications.

*History: 58 FR 39312, July 22, 1993, as amended at 59 FR 15625, Apr. 4, 1994; 59 FR 42158, Aug. 17, 1994; 61 FR 6113, Feb. 16, 1996; 61 FR 41499, Aug. 9, 1996; 62 FR 37133, July 11, 1997; 67 FR 44352, July 2, 2002; 68 FR 44614, July 30, 2003; 68 FR 65634, Nov. 21, 2003; 69 FR 7350, Feb. 17, 2004; 69 FR 18811, Apr. 9, 2004; 70 FR 50967, Aug. 29, 2005; 71 FR 20546, Apr. 21, 2006; 71 FR 58497, Oct. 4, 2006; 72 FR 5615, Feb. 7, 2007; 72 FR 15831, Apr. 3, 2007; 72 FR 28603, May 22, 2007; 72 FR 71575, Dec. 18, 2007; 73 FR 15409-15410, Mar. 24, 2008; 73 FR 55439, 55441, Sep. 25, 2008; 73 FR 58041, Oct. 6, 2008.*

## **§ 126.2 Temporary suspension or modification of this subchapter**

The Deputy Assistant Secretary for Defense Trade Controls or the Managing Director, Directorate of Defense Trade Controls, may order the temporary suspension or modification of any or all of the regulations of this subchapter in the interest of the security and foreign policy of the United States.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

## **§ 126.3 Exceptions**

In a case of exceptional or undue hardship, or when it is otherwise in the interest of the United States Government, the Director, Office [sic]<sup>149</sup> of Defense Trade Controls may make an exception to the provisions of this subchapter.<sup>150</sup>

*History: 49 FR 47702, Dec. 6, 1984, as amended at 53 FR 11499, Apr. 7, 1988; 58 FR 39313, July 22, 1993*

## **§ 126.4 Shipments By or For United States Government Agencies**

(a) A license is not required for the temporary import, or temporary export, of any defense article, including technical data or the performance of a defense service,<sup>151</sup> by or for any agency of the U.S. Government for official use by such an agency, or for carrying out any foreign assistance, cooperative project or sales program authorized by law and subject to control by the President by other means. This exemption applies only when all

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<sup>149</sup> So in original. Should be "Directorate".

<sup>150</sup> Practice tip: There is no specified form for a request under this section. Requests are submitted as "general correspondence" requests on company letterhead.

<sup>151</sup> An interpretation of § 126.4(a) in the Society of International Affairs, Exemptions Under the International Traffic in Arms Regulations (5<sup>th</sup> Ed., Apr. 2004) ("SIA ITAR Exemptions Handbook"), states that § 126.4(a) "may not be used 'for technical assistance' without prior DTC approval." SIA ITAR Exemptions Handbook, at 112. That interpretation conflicts with a literal reading of the exemption, which contains no such requirement.

aspects of a transaction (export, carriage, and delivery abroad) are affected<sup>152</sup> by a United States Government agency or when the export is covered by a United States Government Bill of Lading. This exemption, however, does not apply when a U.S. Government agency acts as a transmittal agent on behalf of a private individual or firm, either as a convenience or in satisfaction of security requirements. The approval of the Directorate of Defense Trade Controls must be obtained before defense articles previously exported pursuant to this exemption are permanently transferred (e.g., property disposal of surplus defense articles overseas) unless the transfer is pursuant to a grant, sale, lease, loan or cooperative project under the Arms Export Control Act or a sale, lease or loan under the Foreign Assistance Act of 1961, as amended, or the defense articles have been rendered useless for military purposes beyond the possibility of restoration.

*NOTE: Special Definition.* For purposes of this section, defense articles exported abroad for incorporation into a foreign launch vehicle or for use on a foreign launch vehicle or satellite that is to be launched from a foreign country shall be considered a permanent export.

(b) This section does not authorize any department or agency of the U.S. Government to make any export which is otherwise prohibited by virtue of other administrative provisions or by any statute.

(c) A license is not required for the temporary import, or temporary or permanent export, of any classified or unclassified defense articles, including technical data or the performance of a defense service, for end-use by a U.S. Government Agency in a foreign country under the following circumstances:

(1) The export or temporary import is pursuant to a contract with, or written direction by, an agency of the U.S. Government; and

(2) The end-user in the foreign country is a U.S. Government agency or facility, and the defense articles or technical data will not be transferred to any foreign person; and

(3) The urgency of the U.S. Government requirement is such that the appropriate export license or U.S. Government Bill of Lading could not have been obtained in a timely manner.

(d) A Shipper's Export Declaration (SED)<sup>153</sup>, required under § 123.22 of this subchapter, and a written statement by the exporter certifying that these requirements have been met must be presented at the time of export to the appropriate Port Director of U.S. Customs and Border Protection or Department of Defense transmittal authority. A copy of the SED and the written certification statement shall be provided to the Directorate of Defense Trade Controls immediately following the export.

*History: 70 FR 50958, Aug. 29, 2005*

### **§ 126.5 Canadian Exemptions<sup>154</sup>**

(a) *Temporary Import of Defense Articles.* Port Director [sic]<sup>155</sup> of U.S. Customs and Border Protection and postmasters shall permit the temporary import and return to Canada without a license of any unclassified defense articles (see § 120.6 of this subchapter) that originate in Canada for temporary use in the United States and return to Canada. All other temporary imports shall be in accordance with §§ 123.3 and 123.4 of this subchapter.

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<sup>152</sup> So in original. Probably intended to be "effected".

<sup>153</sup> So in original. Should be Electronic Export Information (EEI).

<sup>154</sup> See generally DDTC, EXPORTS TO CANADA--GUIDANCE ON ITAR EXEMPTION EFFECTIVE MAY 30, 2001 (6-page Q&A discussion), available at [http://www.pmdtcc.state.gov/licensing/documents/exports\\_canada.pdf](http://www.pmdtcc.state.gov/licensing/documents/exports_canada.pdf), stating in part:

Introduction: On February 16, 2001, the Department of State published a rule in the Federal Register (66FR10575) amending the International Traffic in Arms Regulations (ITAR) at 22 C.F.R. § 126.5 concerning exports to Canada. The new rule takes effect May 30, 2001. The Office of Defense Trade Controls and representatives of the Defense Trade Advisory Committee (the State Department's federal advisory committee in this field) have prepared the following questions and answers, reflecting the most common queries or requests for clarification drawn from various sectors of the U.S. defense industry, including by participants in the April 2001 Spring Conference of the Society for International Affairs (SIA).<sup>1</sup> They are intended as an informal aid to U.S. manufacturers and exporters, and may be modified from time-to-time in light of experience gained in use of the new exemption. U.S. persons requiring authoritative guidance on specific exports, however, should continue to rely on the written advisory opinion process set forth in the ITAR. . . .

<sup>155</sup> So in original. Should be "Directors".



(b) *Permanent and Temporary Export of Defense Articles.*<sup>156</sup> Except as provided below, the Port Director [sic]<sup>157</sup> of U.S. Customs and Border Protection and postmasters shall permit, when for end-use in Canada<sup>158</sup> by Canadian Federal or Provincial governmental authorities acting in an official capacity or by a Canadian-registered person or return to the United States, the permanent and temporary export to Canada without a license of defense articles and related technical data identified in 22 CFR 121.1. The above exemption is subject to the following limitations: Defense articles and related technical data, and defense services identified in paragraphs (b)(1) through (b)(21) of this section and exports that transit third countries. Such limitations also are subject to meeting the requirements of this subchapter, (to include 22 CFR 120.1(c) and (d), parts 122 and 123 (except insofar as exemption from licensing requirements is herein authorized) and § 126.1, and the requirement to obtain non-transfer and use assurances for all significant military equipment. For purposes of this section, “*Canadian-registered person*” is any Canadian national (including Canadian business entities organized under the laws of Canada), dual citizen of Canada and a third country<sup>159</sup> (subject to § 126.1), and permanent resident registered in Canada in accordance with the Canadian Defense Production Act, and such other Canadian Crown Corporations identified by the Department of State in a list of such persons publicly available through the Internet Web site of the Directorate of Defense Trade Controls<sup>160</sup> and by other means. The defense articles, related technical data, and defense services identified in 22 CFR 121.1 **continuing to require a license** are:

- (1) All classified articles, technical data and defense services covered by § 121.1 of this subchapter.
- (2) All Missile Technology Control Regime (MTCR) Annex Items.
- (3) Defense services covered by part 124 of this subchapter, except for those in paragraph (c) of this section.
- (4) Any transaction involving the export of defense articles and defense services for which congressional notification is required in accordance with § 123.15 and § 124.11 of this subchapter.
- (5) All technical data and defense services for gas turbine engine hot sections covered by Categories VI(f)

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<sup>156</sup> Practice Tip: U.S. companies exporting specifications and build-to-print drawings to Canadian suppliers under the authority of § 126.5 to procure parts must also comply with, among other things, § 124.13. Section 124.13(e) provides that if the technical data involved in an offshore procurement is otherwise exempt from the licensing requirements of the ITAR, the DSP-5 license referred to in the first sentence of § 124.13 is not required. However, the exporter must comply with the other requirements of this section (e.g., § 124.13) and provide a written certification to DDTC annually of the offshore procurement activity and cite the exemption under which the technical data was exported. The requirements in § 124.13 include special terms and conditions for contracts and purchase orders relating to offshore procurement, and the U.S. exporter providing DDTC with a copy of each contract, purchase order, or subcontract for offshore procurement at the time it is accepted. (Contributor: Gary Stanley, Esq., 202-686-4854, gstanley@glstrade.com)

<sup>157</sup> So in original. Should be “Directors”.

<sup>158</sup> Practice tip: Q&A — May the ITAR § 126.5(b) Canadian exemption be used to provide access to controlled U.S. defense technology to non-green card holding Canadian citizens employed by U.S. companies in the United States? — Answer: No. This exemption only applies to Canadian Controlled Goods Program-registered persons and business entities, with respect to specified items exempted from licensing requirements, for end use in Canada. Even if the other criteria just mentioned to qualify for the exemption were met, defense services (except to the limited extent specified in § 126.5(c)) are generally not included within the exemption for Canada. Therefore, DDTC requires a DSP-5 license for employment of a foreign national and, in most instances, a technical assistance agreement or other written authorization. (Contributor: Gary Stanley, Esq., 202-686-4854, gstanley@glstrade.com).

<sup>159</sup> DDTC, STATE DEPARTMENT’S ARRANGEMENT WITH THE CANADIAN DEPARTMENT OF NATIONAL DEFENCE ON DUAL NATIONALS (Jan. 21, 2009), *available at* [http://www.pmdtcc.state.gov/licensing/agreement\\_canada.html](http://www.pmdtcc.state.gov/licensing/agreement_canada.html), stating in part:

The State Department has concluded an arrangement with the Canadian Department of National Defense (DND), effective May 17, 2007, with respect to access to ITAR items by Canadian citizens who are dual nationals. The DND has agreed to restrict access to ITAR controlled items to its employees who are issued a minimum SECRET-level security clearance by the Canadian Government. Among the reasons for which SECRET-level security clearances are not granted, the DND intends to ensure SECRET-level security clearances are not granted to personnel with ties to known terrorist groups or who maintain significant ties to foreign countries, including those countries to which exports and sales of ITAR controlled defense articles and services are prohibited. In exchange, the State Department will revise its export authorizations, which have incorporated limitations/provisos that require specific identification of individuals and countries of dual nationals and execution of Non Disclosure Agreements, to permit Canadian citizen/dual-national DND employees access as needed to ITAR defense articles and services if they possess a SECRET-level security clearance. This applies only to the DND and is not extended to any other government agency or to private companies in Canada. (Emphasis in original.) The State Department’s Directorate of Defense Trade Controls Licensing office will re-issue export authorizations to companies for export of defense articles or services to the DND where the restrictive limitations/provisos have been imposed. The reissued export authorizations will contain proviso language reflecting the May 17 State Department-DND arrangement mitigating the requirement for specific identification of dual nationals and execution of Non Disclosure Agreements. The Department has been provided a list of authorizations from the DND which require revision so it will not be necessary for companies to apply for an amendment to existing affected authorizations.

<sup>160</sup> DDTC, CANADIAN CROWN CORPORATIONS (Jan 21, 2009), *available at* [http://www.pmdtcc.state.gov/licensing/canadian\\_corp\\_list.html](http://www.pmdtcc.state.gov/licensing/canadian_corp_list.html) (listing one entity: Canadian Commercial Corporation (CCC)).

and VIII(b). (This does not include hardware).

(6) Firearms, close assault weapons and combat shotguns listed in Category I.

(7) Ammunition listed in Category III for the firearms in Category I.

(8) Nuclear weapons strategic delivery systems and all components, parts, accessories and attachments specifically designed for such systems and associated equipment.

(9) Naval nuclear propulsion equipment listed in Category VI(e).

(10) All Category VIII(a) items, and developmental aircraft, engines and components identified in Category VIII(f).

(11) All Category XII(c), except any 1st- and 2nd-generation image intensification tube and 1st- and 2nd-generation image intensification night sighting equipment. End items (see § 121.8 of this subchapter) in Category XII(c) and related technical data limited to basic operations, maintenance and training information as authorized under the exemption in § 125.4(b)(5) of this subchapter may be exported directly to a Canadian Government entity (*i.e.*, federal, provincial, territorial, or municipal) without a license.

(12) Chemical agents listed in Category XIV (a), (d), and (e), biological agents and biologically derived substances in Category XIV (b), and equipment listed in Category XIV (f) for dissemination of the chemical agents and biological agents listed in Category XIV (a), (b), (d), and (e).

(13) Nuclear radiation measuring devices manufactured to military specifications listed in Category XVI(c).

(14) All spacecraft in Category XV(a), except commercial communications satellites.

(15) Category XV(c), except end items (see § 121.8 of this subchapter) for end-use by the Federal Government of Canada exported directly or indirectly through a Canadian-registered person.

(16) Category XV(d).

(17) The following systems, components and parts included within the coverage of Category XV(e):

(i) Anti-jam systems with the ability to respond to incoming interference by adaptively reducing antenna gain (nulling) in the direction of the interference.

(ii) Antennas:

(A) With aperture (overall dimension of the radiating portions of the antenna) greater than 30 feet; or

(B) With all sidelobes less than or equal to -35dB, relative to the peak of the main beam; or

(C) Designed, modified, or configured to provide coverage area on the surface of the earth less than 200 nautical miles in diameter, where “*coverage area*” is defined as that area on the surface of the earth that is illuminated by the main beam width of the antenna (which is the angular distance between half power points of the beam).

(iii) Optical intersatellite data links (cross links) and optical ground satellite terminals.

(iv) Spaceborne regenerative baseband processing (direct up and down conversion to and from baseband) equipment.

(v) Propulsion systems which permit acceleration of the satellite on-orbit (*i.e.*, after mission orbit injection) at rates greater than 0.1g.

(vi) Attitude control and determination systems designed to provide spacecraft pointing determination and control or payload pointing system control better than 0.02 degrees per axis.

(vii) All specifically designed or modified systems, components, parts, accessories, attachments, and associated equipment for all Category XV(a) items, except when specifically designed or modified for use in commercial communications satellites.

(18) Nuclear weapons, design and testing equipment listed in Category XVI.

(19) Submersible and oceanographic vessels and related articles listed in Category XX(a) through (d).

(20) Miscellaneous articles covered by Category XXI.

(21) Man-portable air defense systems, and their parts and components, and technical data for such systems covered by Category IV.

(c) *Defense Service Exemption.* A defense service is exempt from the licensing requirements of part 124 of this subchapter, when the following criteria can be met.<sup>161</sup>

(1) The item, technical data, defense service and transaction is not identified in paragraphs (b)(1) through (21) of this section; and

(2) The transfer of technical data and provision of defense service is limited to the following activities:

(i) Canadian-registered person or a registered and eligible U.S. company (in accordance with part 122 of this subchapter) preparing a quote or bid proposal in response to a written request from a Department or Agency of the United States Federal Government or from a Canadian Federal, Provincial, or Territorial Government; or

(ii) Produce, design, assemble, maintain or service a defense article (*i.e.*, hardware, technical data) for use by a registered U.S. company; or, a U.S. Federal Government Program; or for end-use in a Canadian Federal, Provincial, or Territorial Government Program; and

(iii) The defense services and technical data are limited to that defined in paragraph (c)(6) of this section; and

(3) The Canadian contractor and subcontractor certify, in writing, to the U.S. exporter that the technical data and defense service being exported will be used only for an activity identified in paragraph (c)(2) of this section; and

(4) A written arrangement between the U.S. exporter and the Canadian recipient (such as a consummated Non-Disclosure or other multi-party agreement, Technology Transfer Control Plan, contract, or purchase order) must:

(i) Limit delivery of the defense articles being produced directly to an identified manufacturer in the United States registered in accordance with part 122 of this subchapter; a Department or Agency of the United States Federal Government; a Canadian-registered person authorized in writing to manufacture defense articles by and for the Government of Canada; a Canadian Federal, Provincial, or Territorial Government; and

(ii) Prohibit the disclosure of the technical data to any other contractor or subcontractor who is not a Canadian-registered person; and

(iii) Provide that any subcontract contain all the limitations of this section; and

(iv) Require that the Canadian contractor, including subcontractors, destroy or return to the U.S. exporter in the United States all of the technical data exported pursuant to the contract or purchase order upon fulfillment of the contract, unless for use by a Canadian or United States Government entity that requires in writing the technical data be maintained. The U.S. exporter must be provided written certification that the technical data is being retained or destroyed; and

(v) Include a clause requiring that all documentation created from U.S. technical data contain the statement, *“This document contains technical data, the use of which is restricted by the U.S. Arms Export Control Act. This data has been provided in accordance with, and is subject to, the limitations specified in*

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<sup>161</sup> Practice Tip: Most companies that use the ITAR § 126.5(c) defense service exemption to export build-to-print or build/design-to-specification technical data for offshore procurement of defense articles in Canada are aware of the semi-annual reporting requirement set forth in ITAR § 126.5(c)(5). Many, however, overlook that ITAR § 124.13(e) arguably imposes a similar annual reporting requirement on the same offshore procurement activity. That section says that if the technical data involved in an offshore procurement arrangement is otherwise exempt from ITAR licensing requirements, the DSP-5 license to which ITAR § 124.13 refers is not required. ITAR § 124.13(e) goes on to require, though, that “the exporter must comply with the other requirements of the section and provide a written certification to State/DDTC annually of the offshore procurement activity and cite the exemption under which the technical data was exported.” (Contributor: Gary Stanley, Esq., 202-686-4854, gstanley@glstrade.com)

§ 126.5 of the International Traffic In Arms Regulations (ITAR). By accepting this data, the consignee agrees to honor the requirements of the ITAR”; and

(5) The U.S. exporter must provide the Directorate of Defense Trade Controls a semi-annual report of all their on-going activities authorized under this section. The report shall include the article(s) being produced; the end-user(s) (*i.e.*, name of U.S. or Canadian company); the end item into which the product is to be incorporated; the intended end-use of the product (*e.g.*, United States or Canadian Defense contract number and identification of program); the name and address of all the Canadian contractors and subcontractors; and

(6) The defense services and technical data are limited to those in paragraphs (c)(6)(i), (ii), (iii) and (iv), and do not include paragraphs (c)(6)(v), (vi) and (vii) of this section:

**(i) Build-to-Print.** Build-to-Print means that a foreign consignee can produce a defense article from engineering drawings without any technical assistance from a U.S. exporter. This transaction is based strictly on a “hand-off” approach because the foreign consignee is understood to have the inherent capability to produce the defense article and only lacks the necessary drawings. Supporting documentation such as acceptance criteria, and specifications, may be released on an as-required basis (*i.e.*, “must have”) such that the foreign consignee would not be able to produce an acceptable defense article without this additional supporting documentation. Documentation which is not absolutely necessary to permit manufacture of an acceptable defense article (*i.e.*, “nice to have”) is not considered within the boundaries of a “Build-to Print” data package; and/or

**(ii) Build/Design-to-Specification.** “Build/Design-to-Specification” means that a foreign consignee can design and produce a defense article from requirement specifications without any technical assistance from the U.S. exporter. This transaction is based strictly on a “hands-off” approach since the foreign consignee is understood to have the inherent capability to both design and produce the defense article and only lacks the necessary requirement information; and/or

**(iii) Basic Research.** “Basic Research” means a systemic study directed toward greater knowledge or understanding of the fundamental aspects of phenomena and observable facts without specific applications towards processes or products in mind. It does not include “Applied Research” (*i.e.*, a systemic study to gain knowledge or understanding necessary to determine the means by which a recognized and specific need may be met. It is a systematic application of knowledge toward the production of useful materials, devices, and systems or methods, including design, development, and improvement of prototypes and new processes to meet specific requirements.); and

**(iv) Maintenance** (*i.e.*, inspection, testing, calibration or repair, including overhaul, reconditioning and one-to-one replacement of any defective items, parts or components, but excluding any modification, enhancement, upgrade or other form of alteration or improvement that changes the basic performance of the item); and does not include

**(v) Design Methodology**, such as: The underlying engineering methods and design philosophy utilized (*i.e.*, the “why” or information that explains the rationale for particular design decision, engineering feature, or performance requirement); engineering experience (*e.g.* lessons learned); and the rationale and associated databases (*e.g.* design allowables, factors of safety, component life predictions, failure analysis criteria) that establish the operational requirements (*e.g.*, performance, mechanical, electrical, electronic, reliability and maintainability) of a defense article. (Final analytical results and the initial conditions and parameters may be provided.)

**(vi) Engineering Analysis**, such as: Analytical methods and tools used to design or evaluate a defense article’s performance against the operational requirements. Analytical methods and tools include the development and/or use of mockups, computer models and simulations, and test facilities. (Final analytical results and the initial conditions and parameters may be provided.)

**(vii) Manufacturing Know-How**, such as: Information that provides detailed manufacturing processes and techniques needed to translate a detailed design into a qualified, finished defense article. (Information may be provided in a build-to-print package identified in paragraph (c)(6)(i) of this section that is necessary in order to produce an acceptable defense article.)

(d) *Reexports/Retransfer.* Reexport/retransfer in Canada to another end-user or end-use or from Canada to

another destination, except the United States, must in all instances have the prior approval of the Directorate of Defense Trade Controls. Unless otherwise exempt in this subchapter, the original exporter is responsible, upon request from a Canadian-registered person, for obtaining or providing reexport/retransfer approval. In any instance when the U.S. exporter is no longer available to the Canadian end-user the request for reexport/retransfer may be made directly to Department of State, Directorate of Defense Trade Controls. All requests must include the information in § 123.9(c) of this subchapter. Reexport/retransfer approval is acquired by:

(1) If the reexport/retransfer being requested could be made pursuant to this section (*i.e.*, a retransfer within Canada to another eligible Canadian recipient under this section) if exported directly from the U.S., upon receipt by the U.S. company of a request by a Canadian end-user, the original U.S. exporter is authorized to grant on behalf of the U.S. Government by confirming in writing to the Canadian requester that the reexport/retransfer is authorized subject to the conditions of this section; or

(2) If the reexport/retransfer is to an end-use or end-user that, if directly exported from the U.S. requires a license, retransfer must be handled in accordance with § 123.9 of this subchapter.

#### NOTES TO § 126.5:

1. In any instance when the exporter has knowledge that the defense article exempt from licensing is being exported for use other than by a qualified Canadian-registered person or for export to another foreign destination, other than the United States, in its original form or incorporated into another item, an export license must be obtained prior to the transfer to Canada.

2. Additional exemptions exist in other sections of this subchapter that are applicable to Canada, for example §§ 123.9, 125.4 and 124.2, which allows for the performance of defense services related to training in basic operations and maintenance, without a license, for defense articles lawfully exported, including those identified in paragraphs (b)(1) through (21) of this section.

*History: 49 FR 47702 Dec. 6, 1984; 50 FR 12787, Apr. 1, 1985; 58 FR 39313, July 22, 1993; 59 FR 29951, June 10, 1994; 64 FR 17531, 17534, Apr. 12, 1999; 66 FR 10575, 10576, Feb. 16, 2001, as corrected at 66 FR 36834, July 13, 2001; 67 FR 78685 Dec. 26, 2002; 70 FR 34652-34655, Jun. 15, 2005; 70 FR 39919, Jul. 12, 2005; 70 FR 50958, Aug. 29, 2005; 71 FR 20534, Apr. 21, 2006.*

### **§ 126.6 Foreign-Owned Military Aircraft and Naval Vessels, and the Foreign Military Sales Program<sup>162</sup>**

(a) A license from the Directorate of Defense Trade Controls is not required if:

(1) The article or technical data to be exported was sold, leased, or loaned by the Department of Defense to a foreign country or international organization pursuant to the Arms Export Control Act or the Foreign Assistance Act of 1961, as amended, and

(2) The article or technical data is delivered to representatives of such a country or organization in the United States; and

(3) The article or technical data is to be exported from the United States on a military aircraft or naval vessel of that government or organization or via the Defense Transportation Service (DTS).

(b) *Foreign Military Aircraft and Naval Vessels.* A license is not required for the entry into the United States of military aircraft or naval vessels of any foreign state if no overhaul, repair, or modification of the aircraft or naval vessel is to be performed. However, Department of State approval for overflight (pursuant to the 49 U.S.C. 40103) and naval visits must be obtained from the Bureau of Political-Military Affairs, Office of International Security Operations.

(c) *Foreign Military Sales Program.* A license from the Directorate of Defense Trade Controls is not required if the defense article or technical data or a defense service to be transferred was sold, leased or loaned by the Department of Defense to a foreign country or international organization under the Foreign Military Sales

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<sup>162</sup> DDTTC has proposed to amend this section to clarify when an export license is not required. See 74 Fed. Reg. 61586 (Nov. 25, 2009).

(FMS) Program of the Arms Export Control Act pursuant to an Letter of Offer and Acceptance (LOA) authorizing such transfer which meets the criteria stated below:

(1) Transfers of the defense articles, technical data or defense services using this exemption may take place only during the period which the FMS Letter of Offer and Acceptance (LOA) and implementing USG FMS contracts and subcontracts are in effect and serve as authorization for the transfers hereunder in lieu of a license. After the USG FMS contracts and subcontracts have expired and the LOA no longer serves as such authorization, any further provision of defense articles, technical data or defense services shall not be covered by this section and shall instead be subject to other authorization requirements of this subchapter; and

(2) The defense article, technical data or defense service to be transferred are specifically identified in an executed LOA, in furtherance of the Foreign Military Sales Program signed by an authorized Department of Defense Representative and an authorized representative of the foreign government, and

(3) The transfer of the defense article and related technical data is effected during the duration of the relevant Letter of Offer and Acceptance (LOA), similarly a defense service is to be provided only during the duration of the USG FMS contract or subcontract and not to exceed the specified duration of the LOA, and

(4) The transfer is not to a country identified in § 126.1 of this subchapter, and

(5) The U.S. person responsible for the transfer maintains records of all transfers in accordance with part 122 of this subchapter, and

(6) For transfers of defense articles and technical data,

(i) The transfer is made by the relevant foreign diplomatic mission of the purchasing country or its authorized freight forwarder, provided that the freight forwarder is registered with the Directorate of Defense Trade Controls pursuant to part 122 of this subchapter, and

(ii) At the time of shipment, the Port Director of U.S. Customs and Border Protection is provided an original and properly executed DSP-94 accompanied by a copy of the LOA and any other documents required by U.S. Customs and Border Protection in carrying out its responsibilities. The Shippers Export Declaration or, if authorized, the outbound manifest, must be annotated: *“This shipment is being exported under the authority of Department of State Form DSP-94. It covers FMS Case [insert case identification], expiration [insert date], 22 CFR 126.6 applicable. The U.S. Government point of contact is \_\_\_\_\_, telephone number \_\_\_\_\_.”* and

(iii) If, classified hardware and related technical data are involved the transfer must have the requisite USG security clearance and transportation plan and be shipped in accordance with the Department of Defense National Industrial Security Program Operating Manual or

(7) For Transfers of Defense Services:

(i) A contract or subcontract between the U.S. person(s) responsible for providing the defense service and the USG exists that:

(A) Specifically defines the scope of the defense service to be transferred;

(B) Identifies the FMS case identifier,

(C) Identifies the foreign recipients of the defense service

(D) Identifies any other U.S. or foreign parties that may be involved and their roles/responsibilities, to the extent known when the contract is executed,

(E) Provides a specified period of duration in which the defense service may be performed, and

(ii) The U.S. person(s) identified in the contract maintain a registration with the Directorate of Defense Trade Controls for the entire time that the defense service is being provided. In any instance when the U.S. registered person(s) [sic] identified in the contract employs a subcontractor, the subcontractor may only use this exemption when registered with DDTC, and when such subcontract meets the above stated requirements, and

(iii) In instances when the defense service involves the transfer of classified technical data, the U.S. person transferring the defense service must have the appropriate USG security clearance and a transportation plan, if appropriate, in compliance with the Department of Defense National Industrial Security Program Operating Manual, and

(iv) The U.S. person responsible for the transfer reports the initial transfer, citing this section of the ITAR, the FMS case identifier, contract and subcontract number, the foreign country, and the duration of the service being provided to the Directorate of Defense Trade Controls using DDTC's Direct Shipment Verification Program.

*History: 70 FR 50958, Aug. 29, 2005; amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 126.7 Denial, Revocation, Suspension, or Amendment of Licenses and Other Approvals**

(a) *Policy.* Licenses or approvals shall be denied or revoked whenever required by any statute of the United States (see §§ 127.7 and 127.11 of this subchapter). Any application for an export license or other approval under this subchapter may be disapproved, and any license or other approval or exemption granted under this subchapter may be revoked, suspended, or amended without prior notice whenever:

(1) The Department of State deems such action to be in furtherance of world peace, the national security or the foreign policy of the United States, or is otherwise advisable; or

(2) The Department of State believes that 22 U.S.C. 2778, any regulation contained in this subchapter, or the terms of any U.S. Government export authorization (including the terms of a manufacturing license or technical assistance agreement, or export authorization granted pursuant to the Export Administration Act, as amended) has been violated by any party to the export or other person having significant interest in the transaction; or

(3) An applicant is the subject of an indictment for a violation of any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter; or

(4) An applicant or any party to the export or the agreement has been convicted of violating any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter; or

(5) An applicant is ineligible to contract with, or to receive a license or other authorization to import defense articles or defense services from, any agency of the U.S. Government; or

(6) An applicant, any party to the export or agreement, any source or manufacturer of the defense article or defense service or any person who has a significant interest in the transaction has been debarred, suspended, or otherwise is ineligible to receive an export license or other authorization from any agency of the U.S. government (e.g., pursuant to debarment by the Department of Commerce under 15 CFR part 760 or by the Department of State under part 127 or 128 of this subchapter); or

(7) An applicant has failed to include any of the information or documentation expressly required to support a license application or other request for approval under this subchapter or as required in the instructions in the applicable Department of State form; or

(8) An applicant is subject to sanctions under other relevant U.S. laws (e.g., the Missile Technology Controls title of the National Defense Authorization Act for FY 1991 (Pub. L. 10-1510); the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (Pub. L. 10-2182); or the Iran-Iraq Arms Non-Proliferation Act of 1992 (Pub. L. 10-2484)).

(b) *Notification.* The Directorate of Defense Trade Controls will notify applicants or licensees or other appropriate United States persons of actions taken pursuant to paragraph (a) of this section. The reasons for the action will be stated as specifically as security and foreign policy considerations permit.

(c) *Reconsideration.* If a written request for reconsideration of an adverse decision is made within 30 days after a person has been informed of the decision, the U.S. person will be accorded an opportunity to present additional information. The case will then be reviewed by the Directorate of Defense Trade Controls.

(d) *Reconsideration of Certain Applications.* Applications for licenses or other requests for approval denied for

repeated failure to provide information or documentation expressly required will normally not be reconsidered during the 30-day period following denial. They will be reconsidered after this period only after a final decision is made on whether the applicant will be subject to an administrative penalty imposed pursuant to this subchapter. Any request for reconsideration shall be accompanied by a letter explaining the steps that have been taken to correct the failure and to ensure compliance with the requirements of this subchapter.

(e) *Special Definition.* For purposes of this section, the term *party to the export* means:

- (1) The chief executive officer, president, vice-presidents, other senior officers and officials (*e.g.*, comptroller, treasurer, general counsel) and any member of the board of directors of the applicant;
- (2) The freight forwarders or designated exporting agent of the applicant; and
- (3) Any consignee or end-user of any item to be exported.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 126.8 Proposals to Foreign Persons Relating to Significant Military Equipment**

(a) Certain proposals to foreign persons for the sale or manufacture abroad of significant military equipment require either the prior approval of, or prior notification to, the Directorate of Defense Trade Controls.

(1) *Sale of Significant Military Equipment:* The prior approval of the Directorate of Defense Trade Controls is required before a U.S. person may make a proposal or presentation designed to constitute a basis for a decision on the part of any foreign person to purchase significant military equipment on the U.S. Munitions List whenever all the following conditions are met:

- (i) The value of the significant military equipment to be sold is \$14,000,000 or more; and
- (ii) The equipment is intended for use by the armed forces of any foreign country other than a member of the North Atlantic Treaty Organization, Australia, Japan, New Zealand, or South Korea; and
- (iii) The sale would involve the export from the United States of any defense article or the furnishing abroad of any defense service including technical data; and
- (iv) The identical significant military equipment has not been previously licensed for permanent export or approved for sale under the Foreign Military Sales Program of the Department of Defense, to any foreign country.

(2) *Sale of Significant Military Equipment:* The Directorate of Defense Trade Controls must be notified in writing at least thirty days in advance of any proposal or presentation concerning the sale of significant military equipment whenever the conditions specified in paragraphs (a)(1)(i) through (iii) of this section are met and the identical equipment has been previously licensed for permanent export or approved for sale under the FMS Program to any foreign country.

(3) *Manufacture Abroad of Significant Military Equipment:* The prior approval of the Directorate of Defense Trade Controls is required before a U.S. person may make a proposal or presentation designed to constitute a basis for a decision on the part of any foreign person to enter into any manufacturing license agreement or technical assistance agreement for the production or assembly of significant military equipment, *regardless of dollar value*, in any foreign country, whenever:

- (i) The equipment is intended for use by the armed forces of any foreign country; and
- (ii) The agreement would involve the export from the United States of any defense article or the furnishing abroad of any defense service including technical data.

(b) *Definition of Proposal or Presentation.* The terms *proposal* or *presentation* (designed to constitute a basis for a decision to purchase and to enter into any agreement) mean the communication of information in sufficient detail that the person communicating that information knows or should know that it would permit an intended purchaser to decide either to acquire the particular equipment in question or to enter into the manufacturing license agreement or technical assistance agreement. For example, a presentation which describes the equipment's performance characteristics, price, and probable availability for delivery would require prior notification or approval, as appropriate, where the conditions specified in paragraph (a) of this



section are met. By contrast, the following would not require prior notification or approval: Advertising or other reporting in a publication of general circulation; preliminary discussions to ascertain market potential; or merely calling attention to the fact that a company manufactures a particular item of significant military equipment.

(c) *Satisfaction of Requirements*

(1) The requirement of this section for prior approval is met by any of the following:

(i) A written statement from the Directorate of Defense Trade Controls approving the proposed sale or agreement or approving the making of a proposal or presentation.

(ii) A license issued under § 125.2 or § 125.3 of this subchapter for the export of technical data relating to the proposed sale or agreement to the country concerned.

(iii) A temporary export license issued under § 123.5 of this subchapter relating to the proposed sale or agreement for a demonstration to the armed forces of the country of export.

(iv) With respect to manufacturing license agreements or technical assistance agreements, the application for export licenses pursuant to the two preceding subparagraphs must state that they are related to possible agreements of this kind.

(2) The requirement of this section for prior notification is met by informing the Directorate of Defense Trade Controls by letter at least 30 days before making the proposal or presentation. The letter must comply with the procedures set forth in paragraph (d) of this section and must identify the relevant license, approval, or FMS case by which the identical equipment had previously been authorized for permanent export or sale. The Directorate of Defense Trade Controls will provide written acknowledgement of such prior notification to confirm compliance with this requirement and the commencement of the 30-day notification period.

(d) *Procedures.* Unless a license has been obtained pursuant to § 126.8(c)(1)(ii) or (iii), a request for prior approval to make a proposal or presentation with respect to significant military equipment, or a 30-day prior notification regarding the sale of such equipment, must be made by letter to the Directorate of Defense Trade Controls. The letter must outline in detail the intended transaction, including usage of the equipment involved and the country (or countries) involved. Seven copies of the letter should be provided as well as seven copies of suitable descriptive information concerning the equipment.

(e) *Statement to Accompany Licensing Requests*

(1) Every application for an export license or other approval to implement a sale or agreement which meets the criteria specified in paragraph (a) of this section must be accompanied by a statement from the applicant which either:

(i) Refers to a specific notification made or approval previously granted with respect to the transaction; or

(ii) Certifies that no proposal or presentation requiring prior notification or approval has been made.

(2) The Department of State may require a similar statement from the Foreign Military Sales contractor concerned in any case where the United States Government receives a request for a letter of offer for a sale which meets the criteria specified in paragraph (a) of this section.

(f) *Penalties.* In addition to other remedies and penalties prescribed by law or this subchapter, a failure to satisfy the prior approval or prior notification requirements of this section may be considered to be a reason for disapproval of a license, agreement or sale under the FMS program.

(g) *License for Technical Data.* Nothing in this section constitutes or is to be construed as an exemption from the licensing requirement for the export of technical data that is embodied in any proposal or presentation made to any foreign persons.

*History: 58 FR 39312, July 22, 1993; as amended at 71 FR 20534, Apr. 21, 2006; and 74 FR 38342, Aug 3, 2009.*

## **§ 126.9 Advisory Opinions and Related Authorizations**

(a) *Advisory Opinion.* Any person desiring information as to whether the Directorate of Defense Trade Controls

would be likely to grant a license or other approval for the export or approval of a particular defense article or defense service to a particular country may request an advisory opinion from the Directorate of Defense Trade Controls. Advisory opinions are issued on a case-by-case basis and apply only to the particular matters presented to the Directorate of Defense Trade Controls. These opinions are not binding on the Department of State, and may not be used in future matters before the Department. A request for an advisory opinion must be made in writing and must outline in detail the equipment, its usage, the security classification (if any) of the articles or related technical data, and the country or countries involved. An original and seven copies of the letter must be provided along with seven copies of suitable descriptive information concerning the defense article or defense service.

(b) *Related Authorizations.* The Directorate of Defense Trade Controls may, as appropriate, in accordance with the procedures set forth in paragraph (a) of this section, provide export authorization, subject to all other relevant requirements of this subchapter, both for transactions that have been the subject of advisory opinions requested by prospective U.S. exporters, or for the Directorate's own initiatives. Such initiatives may cover pilot programs, or specifically anticipated circumstances for which the Directorate considers special authorizations appropriate.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 126.10 Disclosure of Information**

(a) *Freedom of Information.* Subchapter R of this title<sup>163</sup> contains regulations on the availability to the public of information and records of the Department of State. The provisions of subchapter R apply to such disclosures by the Directorate of Defense Trade Controls.

(b) *Determinations Required by Law.* Section 38(e) of the Arms Export Control Act (22 U.S.C. 2778) provides by reference to certain procedures of the Export Administration Act that certain information required by the Department of State in connection with the licensing process may generally not be disclosed to the public unless certain determinations relating to the national interest are made in accordance with the procedures specified in that provision, except that the names of the countries and types and quantities of defense articles for which licenses are issued under this section shall not be withheld from public disclosure unless the President determines that release of such information would be contrary to the national interest. Registration with the Directorate of Defense Trade Controls is required of certain persons, in accordance with section 38 of the Arms Export Control Act. The requirements and guidance are provided in the ITAR pursuant to parts 122 and 129. Registration is generally a precondition to the issuance of any license or other approvals under this subchapter, to include the use of any exemption. Therefore, information provided to the Department of State to effect registration, as well as that regarding actions taken by the Department of State related to registration, may not generally be disclosed to the public. Determinations required by section 38(e) shall be made by the Assistant Secretary for Political-Military Affairs.

(c) *Information Required Under Part 130.* Part 130 of this subchapter contains specific provisions on the disclosure of information described in that part.

(d) *National Interest Determinations.* In accordance with section 38(e) of the Arms Export Control Act (22 U.S.C. 2778(e)), the Secretary of State has determined that the following disclosures are in the national interest of the United States:

- (1) Furnishing information to foreign governments for law enforcement or regulatory purposes; and
- (2) Furnishing information to foreign governments and other agencies of the U.S. Government in the context of multilateral or bilateral export regimes (e.g., the Missile Technology Control Regime, the Australia Group, and Wassenaar Arrangement).

*History: 70 FR 50958, Aug. 29, 2005; amended at 71 FR 20534, Apr. 21, 2006.*

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<sup>163</sup> 22 C.F.R. pts. 171, 172.

### **§ 126.11 Relations to Other Provisions of Law**

The provisions in this subchapter are in addition to, and are not in lieu of, any other provisions of law or regulations. The sale of firearms in the United States, for example, remains subject to the provisions of the Gun Control Act of 1968 and regulations administered by the Department of Justice. The performance of defense services on behalf of foreign governments by retired military personnel continues to require consent pursuant to Part 3a of this title. Persons who intend to export defense articles or furnish defense services should not assume that satisfying the requirements of this subchapter relieves one of other requirements of law.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 126.12 Continuation in Force**

All determinations, authorizations, licenses, approvals of contracts and agreements and other action issued, authorized, undertaken, or entered into by the Department of State pursuant to section 414 of the Mutual Security Act of 1954, as amended, or under the previous provisions of this subchapter, continue in full force and effect until or unless modified, revoked or superseded by the Department of State.

### **§ 126.13 Required Information**

(a) All applications for licenses (DSP-5, DSP-61, DSP-73, and DSP-85), all requests for approval of agreements and amendments thereto under part 124 of this subchapter, all requests for other written authorizations, and all 30-day prior notifications of sales of significant military equipment under § 126.8(c) must include a letter signed by a responsible official empowered by the applicant and addressed to the Directorate of Defense Trade Controls, stating whether:

- (1) The applicant or the chief executive officer, president, vice-presidents, other senior officers or officials (*e.g.*, comptroller, treasurer, general counsel) or any member of the board of directors is the subject of an indictment for or has been convicted of violating any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter since the effective date of the Arms Export Control Act, Public Law 94-329, 90 Stat. 729 (June 30, 1976);
- (2) The applicant or the chief executive officer, president, vice-presidents, other senior officers or officials (*e.g.*, comptroller, treasurer, general counsel) or any member of the board of directors is ineligible to contract with, or to receive a license or other approval to import defense articles or defense services from, or to receive an export license or other approval from, any agency of the U.S. Government;
- (3) To the best of the applicant's knowledge, any party to the export as defined in § 126.7(e) has been convicted of violating any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter since the effective date of the Arms Export Control Act, Public Law 94-329, 90 Stat. 729 (June 30, 1976), or is ineligible to contract with, or to receive a license or other approval to import defense articles or defense services from, or to receive an export license or other approval from any agency of the U.S. Government; and
- (4) The natural person signing the application, notification or other request for approval (including the statement required by this subsection) is a citizen or national of the United States, has been lawfully admitted to the United States for permanent residence (and maintains such a residence) under the Immigration and Nationality Act, as amended (8 U.S.C. 1101(a), section 101(a)20, 60 Stat. 163), or is an official of a foreign government entity in the United States.

(b) In addition, all applications for licenses must include, on the application or an addendum sheet, the complete names and addresses of all U.S. consignors and freight forwarders, and all foreign consignees and foreign intermediate consignees involved in the transaction. If there are multiple consignors, consignees or freight forwarders, and all the required information cannot be included on the application form, an addendum sheet and seven copies containing this information must be provided. The addendum sheet must be marked at the top as follows: "*Attachment to Department of State License Form (insert DSP-5, 61, 73, or 85, as appropriate) for Export of (insert commodity) valued at (insert U.S. dollar amount) to (insert country of ultimate destination).*" The Directorate of Defense Trade Controls will impress one copy of the addendum sheet with the Department of State seal and return it to the applicant with each license. The sealed addendum sheet must remain attached to the license as an integral part thereof. Port Directors of U.S. Customs and Border

Protection and Department of Defense transmittal authorities will permit only those U.S. consignors or freight forwarders listed on the license or sealed addendum sheet to make shipments under the license, and only to those foreign consignees named on the documents. Applicants should list all freight forwarders who may be involved with shipments under the license to ensure that the list is complete and to avoid the need for amendments to the list after the license has been approved. If there are unusual or extraordinary circumstances that preclude the specific identification of all the U.S. consignors and freight forwarders and all foreign consignees, the applicant must provide a letter of explanation with each application.

(c) In cases when foreign nationals<sup>164</sup> are employed at or assigned to security-cleared facilities, provision by the applicant of a Technology Control Plan (available from the Defense Security Service) will facilitate processing.

*History: 70 FR 50958, Aug. 29, 2005; amended at 71 FR 20534, Apr. 21, 2006.*

## **§ 126.14 Special Comprehensive Export Authorizations for NATO, Australia, and Japan<sup>165</sup>**

(a) *Comprehensive Authorizations.* With respect to NATO members, Australia, Japan, and Sweden, the Directorate of Defense Trade Controls may provide the comprehensive authorizations described in paragraphs (a) and (b) of this section for circumstances where the full parameters of a commercial export endeavor including the needed defense exports can be well anticipated and described in advance, thereby making use of such comprehensive authorizations appropriate.

(1) *Major Project Authorization.* With respect to NATO members, Australia, Japan, and Sweden, the Directorate of Defense Trade Controls may provide comprehensive authorizations for well circumscribed commercially developed “major projects”, where a principal registered U.S. exporter/prime contractor identifies in advance the broad parameters of a commercial project including defense exports needed, other participants (*e.g.*, exporters with whom they have “teamed up,” or subcontractors), and foreign government end users. Projects eligible for such authorization may include a commercial export of a major weapons system for a foreign government involving, for example, multiple U.S. suppliers under a commercial teaming agreement to design, develop and manufacture defense articles to meet a foreign government's requirements. U.S. exporters seeking such authorization must provide detailed information concerning the scope of the project, including other exporters, U.S. subcontractors, and planned exports (including re-exports) of defense articles, defense services, and technical data, and meet the other requirements set forth in paragraph (b) of this section.

(2) *Major Program Authorization.* With respect to NATO members, Australia, Japan, and Sweden, the Directorate of Defense Trade Controls may provide comprehensive authorizations for well circumscribed commercially developed “major program”. This variant would be available where a single registered U.S. exporter defines in advance the parameters of a broad commercial program for which the registrant will be providing all phases of the necessary support (including the needed hardware, technical data, defense services, development, manufacturing, and logistic support). U.S. exporters seeking such authorization must provide detailed information concerning the scope of the program, including planned exports (including re-exports) of defense articles, defense services, and technical data, and meet the other requirements set forth in paragraph (b) of this section.

(3)(i) *Global Project Authorization.* With respect to NATO members, Australia, Japan, and Sweden, the Directorate of Defense Trade Controls may provide a comprehensive “Global Project Authorization” to registered U.S. exporters for exports of defense articles, technical data or defense services in support of government to government cooperative projects (covering research and development or production) with one of these countries undertaken pursuant to an agreement between the U.S. Government and the government of such country, or a memorandum of understanding/agreement between the Department of Defense and the country's Ministry of Defense.

(ii) A set of standard terms and conditions derived from and corresponding to the breadth of the activities

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<sup>164</sup> The term “foreign national” is not defined in the ITAR, and could include either U.S. persons or foreign persons.

<sup>165</sup> So in original; should be “for NATO, Australia, Japan, and Sweden”.

and phases covered in such a cooperative MOU will provide the basis for this comprehensive authorization for all U.S. exporters (and foreign end-users) identified by DOD as participating in such cooperative project. Such authorizations may cover a broad range of defined activities in support of such programs including multiple shipments of defense articles and technical data and performance of defense services for extended periods, and reexports to approved end-users.

(iii) Eligible end-users will be limited to ministries of defense of MOU signatory countries and foreign companies serving as contractors of such countries.

(iv) Any requirement for non-transfer and use assurances from a foreign government may be deemed satisfied by the signature by such government of a cooperative agreement or by its ministry of defense of a cooperative MOU/MOA where the agreement or MOU contains assurances that are comparable to that required by a DSP-83 with respect to foreign governments and that clarifies that the government is undertaking responsibility for all its participating companies. The authorized non-government participants or end users (*e.g.*, the participating government's contractors) will still be required to execute DSP-83s.

(4) *Technical Data Supporting an Acquisition, Teaming Arrangement, Merger, Joint Venture Authorization.* With respect to NATO member countries, Australia, Japan, and Sweden, the Directorate of Defense Trade Controls may provide a registered U.S. defense company a comprehensive authorization to export technical data in support of the U.S. exporter's consideration of entering into a teaming arrangement, joint venture, merger, acquisition, or similar arrangement with prospective foreign partners. Specifically, the authorization is designed to permit the export of a broadly defined set of technical data to qualifying well established foreign defense firms in NATO countries, Australia, Japan, or Sweden in order to better facilitate a sufficiently in depth assessment of the benefits, opportunities and other relevant considerations presented by such prospective arrangements. U.S. exporters seeking such authorization must provide detailed information concerning the arrangement, joint venture, merger or acquisition, including any planned exports of defense articles, defense services, and technical data, and meet the other requirements set forth in paragraph (b) of this section.

(b) *Provisions and Requirements for Comprehensive Authorizations.* Requests for the special comprehensive authorizations set forth in paragraph (a) of this section should be by letter addressed to the Directorate of Defense Trade Controls. With regard to a commercial major program or project authorization, or technical data supporting a teaming arrangement, merger, joint venture or acquisition, registered U.S. exporters may consult the Director of the Directorate of Defense Trade Controls about eligibility for and obtaining available comprehensive authorizations set forth in paragraph (a) of this section or pursuant to § 126.9(b).

(1) Requests for consideration of all such authorizations should be formulated to correspond to one of the authorizations set out in paragraph (a) of this section, and should include:

(i) A description of the proposed program or project, including where appropriate a comprehensive description of all phases or stages; and

(ii) Its value; and

(iii) Types of exports needed in support of the program or project; and

(iv) Projected duration of same, within permissible limits; and

(v) Description of the exporter's plan for recordkeeping and auditing of all phases of the program or project; and

(vi) In the case of authorizations for exports in support of government to government cooperative projects, identification of the cooperative project.

(2) Amendments to the requested authorization may be requested in writing as appropriate, and should include a detailed description of the aspects of the activities being proposed for amendment.

(3) The comprehensive authorizations set forth in paragraph (a) of this section may be made valid for the duration of the major commercial program or project, or cooperative project, not to exceed 10 years.

(4) Included among the criteria required for such authorizations are those set out in part 124, *e.g.*, §§ 124.7, 124.8 and 124.9, as well as §§ 125.4 (technical data exported in furtherance of an agreement) and 123.16

(hardware being included in an agreement). Provisions required will also take into account the congressional notification requirements in §§ 123.15 and 124.11 of the ITAR. Specifically, comprehensive congressional notifications corresponding to the comprehensive parameters for the major program or project or cooperative project should be possible, with additional notifications such as those required by law for changes in value or other significant modifications.

(5) All authorizations will be consistent with all other applicable requirements of the ITAR, including requirements for non-transfer and use assurances (see §§ 123.10 and 124.10), congressional notifications (*e.g.*, §§ 123.15 and 124.11), and other documentation (*e.g.*, §§ 123.9 and 126.13).

(6) Special auditing and reporting requirements will also be required for these authorizations. Exporters using special authorizations are required to establish an electronic system for keeping records of all defense articles, defense services and technical data exported and comply with all applicable requirements for submitting shipping or export information within the allotted time.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

**§ 126.15 Expedited processing of license applications for the export of defense articles and defense services to Australia or the United Kingdom**

(a) Any application submitted for authorization of the export of defense articles or services to Australia or the United Kingdom will be expeditiously processed by the Department of State, in consultation with the Department of Defense. Such license applications will not be referred to any other Federal department or agency, except when the defense articles or defense services are classified or exceptional circumstances apply. (See section 1225, Pub. L. 108-375).

(b) To be eligible for the expedited processing in paragraph (a) of this section, the destination of the prospective export must be limited to Australia or the United Kingdom. No other country may be included as intermediary or ultimate end-user.

*History: 65 FR 45282, 45285, July 21, 2000; 66 FR 35899, 35900, July 10, 2001; 70 FR 39919, July 12, 2005*

## PART 127: VIOLATIONS AND PENALTIES

### Section

- 127.1 Violations
- 127.2 Misrepresentation and Omission of Facts
- 127.3 Penalties for Violations
- 127.4 Authority of U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection Officers
- 127.5 Authority of the Defense Security Service
- 126.6 Seizure and forfeiture in attempts at illegal exports
- 127.7 Debarment
- 127.8 Interim suspension
- 127.9 Applicability of orders
- 127.10 Civil penalty
- 127.11 Past violations
- 127.12 Voluntary disclosures

*Authority: §§ 2, 38, and 42, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2791); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Com. p. 79; 22 U.S.C. 401; 22 U.S.C. 2651a; 22 U.S.C. 2779a; 22 U.S.C. 2780. History: 58 FR 39316, July 22, 1993, 70 FR 50958, Aug. 29, 2005, 70 FR 34652, June 15, 2005.*

### § 127.1 Violations<sup>166</sup>

(a) It is unlawful:

- (1) To export or attempt to export from the United States, or to reexport or retransfer or attempt to reexport or retransfer from one foreign destination to another foreign destination by a U.S. person of any defense article or technical data or by anyone of any U.S. origin defense article or technical data or to furnish any defense service for which a license or written approval is required by this subchapter without first obtaining the required license or written approval from the Directorate of Defense Trade Controls;
- (2) To import or attempt to import any defense article whenever a license is required by this subchapter

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<sup>166</sup> The equivalent in the Export Administration Regulations to this section is 15 CFR 764.2. The following is a practical summary of § 127.1: It is unlawful, without prior USG approval when required by law:

- for a U.S. person:
  - to export any defense article or technical data from the United States;
  - to reexport or retransfer any defense article or technical data from one foreign destination to another;
  - to furnish any defense service for which written approval is required.
- for anyone:
  - to export any U.S. origin defense article or technical data from the United States;
  - to reexport or retransfer any U.S. origin defense article or technical data from one foreign destination to another;
  - to import [into the U.S.] any defense article;
  - to fail to comply with any of the terms or conditions of licenses or approvals;
  - to manufacture or export defense articles or furnish defense services without DDTC registration ;
  - to engage in brokering defense articles or services;
  - to cause, aid, abet, counsel, demand, induce, procure or permit the commission of any act prohibited by, or the omission of any act required by the ITAR.
- for anyone subject to U.S. jurisdiction who obtains temporary custody of a defense article exported from the U.S. or produced abroad under an MLA:
  - to export or reexport it;
  - to participate in any transaction involving a defense article or service where an ineligible person may obtain any benefit or have any direct or indirect interest;
  - to apply for, obtain for, or use an export document for an ineligible person;
  - to order from, buy from, or receive a defense article from an ineligible person;
  - to sell to, deliver to, or store a defense article for an ineligible person;
  - to use, dispose of, forward, transport, finance, or otherwise service any defense article or service from, to, or for an ineligible person.

See also 18 U.S.C.A. § 554(a), stating in part: "Whoever fraudulently or knowingly exports or sends from the United States, or attempts to export or send from the United States, any merchandise, article, or object contrary to any law or regulation of the United States, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise, article or object, prior to exportation, knowing the same to be intended for exportation contrary to any law or regulation of the United States, shall be fined under this title, imprisoned not more than 10 years, or both."

without first obtaining the required license or written approval from the Directorate of Defense Trade Controls;

(3) To conspire to export, import, reexport or cause to be exported, imported or reexported, any defense article or to furnish any defense service for which a license or written approval is required by this subchapter without first obtaining the required license or written approval from the Directorate of Defense Trade Controls;

(4) To violate any of the terms or conditions of licenses or approvals granted pursuant to this subchapter;

(5) To engage in the United States in the business of either manufacturing or exporting defense article [sic]<sup>167</sup> or furnishing defense services without complying with the registration requirements. For the purposes of this subchapter, engaging in the business of manufacturing or exporting defense articles or furnishing defense services requires only one occasion of manufacturing or exporting a defense article or furnishing a defense service; or

(6) To engage in the business of brokering activities for which registration, a license or written approval is required by this subchapter without first registering or obtaining the required license or written approval from the Directorate of Defense Trade Controls. For the purposes of this subchapter, engaging in the business of brokering activities requires only one occasion of engaging in an activity as reflected in § 129.2(b).

(b) Any person who is granted a license or other approval under this subchapter is responsible for the acts of employees, agents, and all authorized persons to whom possession of the licensed defense article or technical data has been entrusted regarding the operation, use, possession, transportation, and handling of such defense article or technical data abroad. All persons abroad subject to U.S. jurisdiction who obtain temporary custody of a defense article exported from the United States or produced under an agreement described in part 124 of this subchapter, and irrespective of the number of intermediate transfers, are bound by the regulations of this subchapter in the same manner and to the same extent as the original owner or transferor.

(c) A person with knowledge that another person is then ineligible pursuant to §§ 120.1(c) or 126.7 of this subchapter or subject to an order of debarment or interim suspension, may not, directly or indirectly, in any manner or capacity, without prior disclosure of the facts to, and written authorization from, the Directorate of Defense Trade Controls:

(1) Apply for, obtain, or use any export control document as defined in § 127.2(b) for such debarred, suspended, or ineligible person; or

(2) Order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance, or otherwise service or participate in any transaction which may involve any defense article or the furnishing of any defense service for which a license or approval is required by this subchapter for export, where such debarred, suspended, or ineligible person may obtain any benefit therefrom or have any direct or indirect interest therein.

(d) No person may knowingly or willfully cause, or aid, abet, counsel, demand, induce, procure or permit the commission of any act prohibited by, or the omission of any act required by 22 U.S.C. 2778, 22 U.S.C. 2779, or any regulation, license, approval, or order issued thereunder.

*History: 58 FR 39316, July 22, 1993, as amended at 71 FR 20548, Apr. 21, 2006*

## **§ 127.2 Misrepresentation and Omission of Facts**

(a) It is unlawful to use any export or temporary import control document containing a false statement or misrepresenting or omitting a material fact for the purpose of exporting any defense article or technical data or the furnishing of any defense service for which a license or approval is required by this subchapter. Any false statement, misrepresentation, or omission of material fact in an export or temporary import control document will be considered as made in a matter within the jurisdiction of a department or agency of the United States for

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<sup>167</sup> So in original; probably should be "articles".



the purposes of 18 U.S.C. 1001, 22 U.S.C. 2778 and 22 U.S.C. 2779.

(b) For the purpose of this section, *export or temporary import control documents* include the following:

- (1) An application for a permanent export or a temporary import license and supporting documents.
- (2) Shipper's Export Declaration.<sup>168</sup>
- (3) Invoice.
- (4) Declaration of destination.
- (5) Delivery verification.
- (6) Application for temporary export.
- (7) Application for registration.
- (8) Purchase order.
- (9) Foreign import certificate.
- (10) Bill-of-lading.
- (11) Airway bill.
- (12) Nontransfer and use certificate.
- (13) Any other document used in the regulation or control of a defense article, defense service or technical data for which a license or approval is required by this subchapter.

### **§ 127.3 Penalties for Violations**

Any person who willfully:

- (a) Violates any provision of section 38 or section 39 of the Arms Export Control Act (22 U.S.C. 2778 and 2779), or any undertaking specifically required by part 124 of this subchapter; or
- (b) In a registration, license application or report required by § 38 or § 39 of the Arms Export Control Act (22 U.S.C. 2778 and 2779) or by any rule or regulation issued under either section, makes any untrue statement of a material fact or omits a material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be subject to a fine or imprisonment, or both, as prescribed by 22 U.S.C. 2778(c).

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 127.4 Authority of U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection officers**

- (a) U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection officers may take appropriate action to ensure observance of this subchapter as to the export or the attempted export of any defense article or technical data, including the inspection of loading or unloading of any vessel, vehicle, or aircraft. This applies whether the export is authorized by license or by written approval issued under this subchapter.
- (b) U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection officers have the authority to investigate, detain or seize any export or attempted export of defense articles or technical data contrary to this subchapter.
- (c) Upon the presentation to a U.S. Customs and Border Protection Officer of a license or written approval authorizing the export of any defense article, the customs officer may require the production of other relevant documents and information relating to the proposed export. This includes an invoice, order, packing list,

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<sup>168</sup> So in original. Should be Electronic Export Information (EEI).

shipping document, correspondence, instructions, and the documents otherwise required by the U.S. Customs and Border Protection or U.S. Immigration and Customs Enforcement.

*History: 70 FR 50958, Aug. 29, 2005*

### **§ 127.5 Authority of the Defense Security Service**

In the case of exports involving classified technical data or defense articles, the Defense Security Service may take appropriate action to ensure compliance with the Department of Defense National Industrial Security Program Operating Manual (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed). Upon a request to the Defense Security Service regarding the export of any classified defense article or technical data, the Defense Security Service official or a designated government transmittal authority may require the production of other relevant documents and information relating to the proposed export.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 127.6 Seizure and Forfeiture in Attempts at Illegal Exports**

(a) An attempt to export from the United States any defense articles in violation of the provisions of this subchapter constitutes an offense punishable under section 401 of title 22 of the United States Code. Whenever it is known or there is probable cause to believe that any defense article is intended to be or is being or has been exported or removed from the United States in violation of law, such article and any vessel, vehicle or aircraft involved in such attempt is subject to seizure, forfeiture and disposition as provided in section 401 of title 22 of the United States Code.

(b) Similarly, an attempt to violate any of the conditions under which a temporary export or temporary import license was issued pursuant to this subchapter or to violate the requirements of § 123.2 of this subchapter also constitutes an offense punishable under section 401 of title 22 of the United States Code, and such article, together with any vessel, vehicle or aircraft involved in any such attempt is subject to seizure, forfeiture, and disposition as provided in section 401 of title 22 of the United States Code.

### **§ 127.7 Debarment**

(a) Debarment. In implementing § 38 of the Arms Export Control Act, the Assistant Secretary of State for Political-Military Affairs may prohibit any person from participating directly or indirectly in the export of defense articles, including technical data, or in the furnishing of defense services for which a license or approval is required by this subchapter for any of the reasons listed below. Any such prohibition is referred to as a debarment for purposes of this subchapter. The Assistant Secretary of State for Political-Military Affairs shall determine the appropriate period of time for debarment, which shall generally be for a period of three years. However, reinstatement is not automatic and in all cases the debarred person must submit a request for reinstatement and be approved for reinstatement before engaging in any export or brokering activities subject to the Arms Export Control Act or this subchapter.

#### **(b) Grounds**

(1) The basis for a statutory debarment, as described in paragraph (c) of this section, is any conviction for violating the Arms Export Control Act (see § 127.3 of this subchapter) or any conspiracy to violate the Arms Export Control Act.

(2) The basis for administrative debarment, described in part 128 of this subchapter, is any violation of 22 U.S.C. 2778 or any rule or regulation issued thereunder when such a violation is of such a character as to provide a reasonable basis for the Directorate of Defense Trade Controls to believe that the violator cannot be relied upon to comply with the statute or these rules or regulations in the future, and when such violation is established in accordance with part 128 of this subchapter.

(c) *Statutory Debarment.* Section 38(g)(4) of the Arms Export Control Act prohibits the issuance of licenses to persons who have been convicted of violating the U.S. criminal statutes enumerated in § 120.27 of this subchapter. Discretionary authority to issue licenses is provided, but only if certain statutory requirements are met. It is the policy of the Department of State not to consider applications for licenses or requests for

approvals involving any person who has been convicted of violating the Arms Export Control Act or convicted of conspiracy to violate that Act for a three year period following conviction. Such individuals shall be notified in writing that they are debarred pursuant to this policy. A list of persons who have been convicted of such offenses and debarred for this reason shall be published periodically in the FEDERAL REGISTER. Debarment in such cases is based solely upon the outcome of a criminal proceeding, conducted by a court of the United States, that established guilt beyond a reasonable doubt in accordance with due process. The procedures of part 128 of this subchapter are not applicable in such cases.

(d) *Appeals.* Any person who is ineligible pursuant to paragraph (c) of this section may appeal to the Under Secretary of State for Arms Control and International Security for reconsideration of the ineligibility determination. The procedures specified in § 128.13 of this subchapter will be used in submitting a reconsideration appeal.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 127.8 Interim Suspension**

(a) The Managing Director of the Directorate of Defense Trade Controls or the Director of the Office of Defense Trade Controls Compliance is authorized to order the interim suspension of any person when the Managing Director or Director of Compliance believes that grounds for debarment (as defined in § 127.7 of this part) exist and where and to the extent the Managing Director or Director of Compliance, as applicable, finds that interim suspension is reasonably necessary to protect world peace or the security or foreign policy of the United States. The interim suspension orders prohibit that person from participating directly or indirectly in the export of any defense article or defense service for which a license or approval is required by this subchapter. The suspended person shall be notified in writing as provided in § 127.7(c) of this part (statutory debarment) or § 128.3 of this subchapter (administrative debarment), whichever is appropriate. In both cases, a copy of the interim suspension order will be served upon that person in the same manner as provided in § 128.3 of this subchapter. The interim suspension order may be made immediately effective, without prior notice. The order will state the relevant facts, the grounds for issuance of the order, and describe the nature and duration of the interim suspension. No person may be suspended for a period exceeding 60 days, absent extraordinary circumstances, (*e.g.*, unless proceedings under § 127.7(c) of this part or under part 128 of this subchapter, or criminal proceedings, are initiated).

(b) A motion or petition to vacate or modify an interim suspension order may be filed at any time with the Under Secretary of State for Arms Control and International Security. After a final decision is reached, the Managing Director of the Directorate of Defense Trade Controls will issue an appropriate order disposing of the motion or petition and will promptly inform the respondent accordingly.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 127.9 Applicability of Orders**

For the purpose of preventing evasion, orders of the Assistant Secretary of State for Political-Military Affairs debarring a person under § 127.7, and orders of the Managing Director, Directorate of Defense Trade Controls or Director of the Office of Defense Trade Controls Compliance suspending a person under § 127.8, may be made applicable to any other person who may then or thereafter (during the term of the order) be related to the debarred person by affiliation, ownership, control, position of responsibility, or other commercial connection. Appropriate notice and opportunity to respond to the basis for the suspension will be given.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 127.10 Civil Penalty**

(a) The Assistant Secretary of State for Political-Military Affairs is authorized to impose a civil penalty in an amount not to exceed that authorized by 22 U.S.C. 2778, 2779a and 2780 for each violation of 22 U.S.C. 2778, 2779a and 2780, or any regulation, order, license or approval issued thereunder. This civil penalty may be either in addition to, or in lieu of, any other liability or penalty which may be imposed.

(b) The Directorate of Defense Trade Controls may make:

- (1) The payment of a civil penalty under this section or
- (2) The completion of any administrative action pursuant to this part 127 or 128 of this subchapter a prior condition for the issuance, restoration, or continuing validity of any export license or other approval.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 127.11 Past Violations**

(a) *Presumption of Denial.* Pursuant to section 38 of the Arms Export Control Act, licenses or other approvals may not be granted to persons who have been convicted of violating any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter or who are ineligible to receive any export licenses from any agency of the U.S. Government, subject to a narrowly defined statutory exception. This provision establishes a presumption of denial for licenses or other approvals involving such persons. This presumption is applied by the Directorate of Defense Trade Controls to all persons convicted or deemed ineligible in this manner since the effective date of the Arms Export Control Act (Public Law 94-329; 90 Stat. 729) (June 30, 1976).

(b) *Policy.* An exception to the policy of the Department of State to deny applications for licenses or other approvals that involve persons described in paragraph (a) of this section shall not be considered unless there are extraordinary circumstances surrounding the conviction or ineligibility to export, and only if the applicant demonstrates, to the satisfaction of the Assistant Secretary of State for Political-Military Affairs, that the applicant has taken appropriate steps to mitigate any law enforcement and other legitimate concerns, and to deal with the causes that resulted in the conviction, ineligibility, or debarment. Any person described in paragraph (a) of this section who wishes to request consideration of any application must explain, in a letter to the Managing Director, Directorate of Defense Trade Controls, the reasons why the application should be considered. If the Assistant Secretary of State for Political-Military Affairs concludes that the application and written explanation have sufficient merit, the Assistant Secretary shall consult with the Office of the Legal Adviser and the Department of the Treasury regarding law enforcement concerns, and may also request the views of other departments, including the Department of Justice. If the Directorate of Defense Trade Controls does grant the license or other approval, subsequent applications from the same person need not repeat the information previously provided but should instead refer to the favorable decision.

(c) *Debarred persons.* Persons debarred pursuant to § 127.7(c) (statutory debarment) may not utilize the procedures provided by this section while the debarment is in force. Such persons may utilize only the procedures provided by § 127.7(d) of this part.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 127.12 Voluntary Disclosures**

(a) *General policy.* The Department strongly encourages the disclosure of information to the Directorate of Defense Trade Controls by persons (see Sec. 120.14 of this subchapter) that believe they may have violated any export control provision of the Arms Export Control Act, or any regulation,<sup>169</sup> order, license, or other authorization issued under the authority of the Arms Export Control Act. The Department may consider a voluntary disclosure as a mitigating factor in determining the administrative penalties, if any, that should be imposed. Failure to report a violation may result in circumstances detrimental to U.S. national security and foreign policy interests, and will be an adverse factor in determining the appropriate disposition of such violations.

(b) *Limitations.*

- (1) The provisions of this section apply only when information is provided to the Directorate of Defense Trade Controls for its review in determining whether to take administrative action under part 128 of this

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<sup>169</sup> Regarding disclosures of violations of licensing of temporary imports of hardware that would have been eligible for a DSP-61 or use of a § 123.4(a) exemption, DDTC has posted guidance for obtaining permission to return "surprise" temporary imports sent to U.S. repair facilities without the required use of a DSP-61 or § 123.4(a) exemption. State Dept., DDTC, TEMPORARY IMPORT VIOLATIONS (Nov. 25, 2009), available at: [http://www.pmddtc.state.gov/licensing/documents/WebNotice\\_TemporaryImportViolations.doc](http://www.pmddtc.state.gov/licensing/documents/WebNotice_TemporaryImportViolations.doc). See notice at footnote for § 123.4(a), *supra*.

subchapter concerning a violation of the export control provisions of the Arms Export Control Act and these regulations.

(2) The provisions of this section apply only when information is received by the Directorate of Defense Trade Controls for review prior to such time that either the Department of State or any other agency, bureau, or department of the United States Government obtains knowledge of either the same or substantially similar information from another source and commences an investigation or inquiry that involves that information, and that is intended to determine whether the Arms Export Control Act or these regulations, or any other license, order, or other authorization issued under the Arms Export Control Act has been violated.

(3) The violation(s) in question, despite the voluntary nature of the disclosure, may merit penalties, administrative actions, sanctions, or referrals to the Department of Justice to consider criminal prosecution. In the latter case, the Directorate of Defense Trade Controls will notify the Department of Justice of the voluntary nature of the disclosure, although the Department of Justice is not required to give that fact any weight. The Directorate of Defense Trade Controls has the sole discretion to consider whether "voluntary disclosure," in context with other relevant information in a particular case, should be a mitigating factor in determining what, if any, administrative action will be imposed. Some of the mitigating factors the Directorate of Defense Trade Controls may consider are:

- (i) Whether the transaction would have been authorized, and under what conditions, had a proper license request been made;
- (ii) Why the violation occurred;
- (iii) The degree of cooperation with the ensuing investigation;
- (iv) Whether the person has instituted or improved an internal compliance program to reduce the likelihood of future violation;
- (v) Whether the person making the disclosure did so with the full knowledge and authorization of the person's senior management. (If not, then the Directorate will not deem the disclosure voluntary as covered in this section.)

(4) The provisions of this section do not, nor should they be relied on to, create, confer, or grant any rights, benefits, privileges, or protection enforceable at law or in equity by any person in any civil, criminal, administrative, or other matter.

(c) Notification.

(1) Any person wanting to disclose information that constitutes a voluntary disclosure should, in the manner outlined below, initially notify the Directorate of Defense Trade Controls immediately after a violation is discovered and then conduct a thorough review of all defense trade transactions where a violation is suspected.

- (i) If the notification does not contain all the information required by 127.12(c)(2) of this section, a full disclosure must be submitted within 60 calendar days of the notification, or the Directorate of Defense Trade Controls will not deem the notification to qualify as a voluntary disclosure.
- (ii) If the person is unable to provide a full disclosure within the 60 calendar day deadline, an empowered official (see Sec. 120.25 of this subchapter) or a senior officer may request an extension of time in writing. A request for an extension must specify what information required by Sec. 127.12(c)(2) of this section could not be immediately provided and the reasons why.
- (iii) Before approving an extension of time to provide the full disclosure, the Directorate of Defense Trade Controls may require the requester to certify in writing that they will provide the full disclosure within a specific time period.
- (iv) Failure to provide a full disclosure within a reasonable time may result in a decision by the Directorate of Defense Trade Controls not to consider the notification as a mitigating factor in determining the appropriate disposition of the violation. In addition, the Directorate of Defense Trade Controls may direct the requester to furnish all relevant information surrounding the violation.

(2) Notification of a violation must be in writing and should include the following information:

- (i) A precise description of the nature and extent of the violation (e.g., an unauthorized shipment, doing business with a party denied U.S. export privileges, etc.);
- (ii) The exact circumstances surrounding the violation (a thorough explanation of why, when, where, and how the violation occurred);
- (iii) The complete identities and addresses of all persons known or suspected to be involved in the activities giving rise to the violation (including mailing, shipping, and e-mail addresses; telephone and fax/facsimile numbers; and any other known identifying information);
- (iv) Department of State license numbers, exemption citation, or description of any other authorization, if applicable;
- (v) U.S. Munitions List category and subcategory, product description, quantity, and characteristics or technological capability of the hardware, technical data or defense service involved;
- (vi) A description of corrective actions already undertaken that clearly identifies the new compliance initiatives implemented to address the causes of the violations set forth in the voluntary disclosure and any internal disciplinary action taken; and how these corrective actions are designed to deter those particular violations from occurring again;
- (vii) The name and address of the person making the disclosure and a point of contact, if different, should further information be needed.

(3) Factors to be addressed in the voluntary disclosure include, for example, whether the violation was intentional or inadvertent; the degree to which the person responsible for the violation was familiar with the laws and regulations, and whether the person was the subject of prior administrative or criminal action under the AECA; whether the violations are systemic; and the details of compliance measures, processes and programs, including training, that were in place to prevent such violations, if any. In addition to immediately providing written notification, persons are strongly urged to conduct a thorough review of all export-related transactions where a possible violation is suspected.

(d) Documentation.

(1)<sup>170</sup> The written disclosure should be accompanied by copies of substantiating documents. Where appropriate, the documentation should include, but not be limited to:

- (i) Licensing documents (e.g., license applications, export licenses and end-user statements), exemption citation, or other authorization description, if any;
- (ii) Shipping documents (e.g., shipper's export declarations,<sup>171</sup> airway bills and bills of lading);
- (iii) Any other relevant documents must be retained by the person making the disclosure until the Directorate of Defense Trade Controls requests them or until a final decision on the disclosed information has been made.

(e) Certification. A certification must be submitted stating that all of the representations made in connection with the voluntary disclosure are true and correct to the best of that person's knowledge and belief. Certifications should be executed by an empowered official (See Sec. 120.25 of this subchapter), or by a senior officer (e.g. chief executive officer, president, vice-president, comptroller, treasurer, general counsel, or member of the board of directors). If the violation is a major violation, reveals a systemic pattern of violations, or reflects the absence of an effective compliance program, the Directorate of Defense Trade Controls may require that such certification be made by a senior officer of the company.

(f) Oral presentations. Oral presentation is generally not necessary to augment the written presentation.

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<sup>170</sup> The § 127.12(d)(1) level paragraphing is unnecessary, as there is no level (2) paragraph. The (i) through (iii) items should be renumbered (d)(1) through (3).

<sup>171</sup> So in original. Should be Electronic Export Information (EEI).

However, if the person making the disclosure believes a meeting is desirable, a request should be included with the written presentation.

(g) Send voluntary disclosures to the Office of Defense Trade Controls Compliance, Directorate of Defense Trade Controls. Consult the Directorate of Defense Trade Controls Web site at <http://www.pmdtc.state.gov> for the appropriate street address.

*History: 70 FR 34655, Jun. 15, 2005; amended at 71 FR 20534, Apr. 21, 2006; 72 FR 70777 Dec. 13, 2007.*





## PART 128: ADMINISTRATIVE PROCEDURES

### Section

- 128.1 Exclusion of Functions from the Administrative Procedure Act
- 128.2 Administrative Law Judge
- 128.3 Institution of Administrative Proceedings
- 128.4 Default
- 128.5 Answer and demand for oral hearing
- 128.6 Discovery
- 128.7 Prehearing Conference
- 128.8 Hearings
- 128.9 Proceedings Before and Report of Administrative Law Judge
- 128.10 Disposition of Proceedings
- 128.11 Consent Agreements
- 128.12 Rehearings
- 128.13 Appeals
- 128.14 Confidentiality of Proceedings
- 128.15 Orders Containing Probationary Periods
- 128.16 Extension of Time
- 128.17 Availability of Orders

*Authority: Secs. 2, 38, 40, 42, and 71, Arms Export Control Act, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2780, 2791, and 2797); E.O. 11958, 42 FR 4311; 22 U.S.C. 2651a; E.O. 12291, 46 FR 1981. History: 58 FR 39320, July 22, 1993, as amended at 71 FR 20534, Apr. 21, 2006, unless otherwise noted.*

### **§ 128.1 Exclusion of Functions from the Administrative Procedure Act**

The Arms Export Control Act authorizes the President to control the import and export of defense articles and services in furtherance of world peace and the security and foreign policy of the United States. It authorizes the Secretary of State to make decisions on whether license applications or other written requests for approval shall be granted, or whether exemptions may be used. It also authorizes the Secretary of State to revoke, suspend or amend licenses or other written approvals whenever the Secretary deems such action to be advisable. The administration of the Arms Export Control Act is a foreign affairs function encompassed within the meaning of the military and foreign affairs exclusion of the Administrative Procedure Act and is thereby expressly exempt from various provisions of that Act. Because the exercising of the foreign affairs function, including the decisions required to implement the Arms Export Control Act, is highly discretionary, it is excluded from review under the Administrative Procedure Act.

### **§ 128.2 Administrative Law Judge**

The Administrative Law Judge referred to in this part is an Administrative Law Judge appointed by the Department of State. The Administrative Law Judge is authorized to exercise the powers and perform the duties provided for in §§ 127.7, 127.8, and 128.3 through 128.16 of this subchapter.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 128.3 Institution of Administrative Proceedings**

(a) *Charging letters.* The Managing Director, Directorate of Defense Trade Controls, with the concurrence of the Office of the Legal Adviser, Department of State, may initiate proceedings to impose debarment or civil penalties in accordance with § 127.7 or § 127.10 of this subchapter, respectively. Administrative proceedings shall be initiated by means of a charging letter. The charging letter will state the essential facts constituting the alleged violation and refer to the regulatory or other provisions involved. It will give notice to the respondent to answer the charges within 30 days, as provided in § 128.5(a), and indicate that a failure to answer will be taken as an admission of the truth of the charges. It will inform the respondent that he or she is entitled to an oral hearing if a written demand for one is filed with the answer or within seven (7) days after service of the answer. The respondent will also be informed that he or she may, if so desired, be represented by counsel of his or her choosing. Charging letters may be amended from time to time, upon reasonable notice.

(b) *Service*. A charging letter is served upon a respondent:

(1) If the respondent is a resident of the United States, when it is mailed postage prepaid in a wrapper addressed to the respondent at that person's last known address; or when left with the respondent or the agent or employee of the respondent; or when left at the respondent's dwelling with some person of suitable age and discretion then residing herein; or

(2) If the respondent is a nonresident of the United States, when served upon the respondent by any of the foregoing means. If such methods of service are not practicable or appropriate, the charging letter may be tendered for service on the respondent to an official of the government of the country wherein the respondent resides, provided that there is an agreement or understanding between the United States Government and the government of the country wherein the respondent resident permitting this action.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

#### **§ 128.4 Default**

(a) *Failure to Answer*. If the respondent fails to answer the charging letter, the respondent may be held in default. The case shall then be referred to the Administrative Law Judge for consideration in a manner as the Administrative Law Judge may consider appropriate. Any order issued shall have the same effect as an order issued following the disposition of contested charges.

(b) *Petition to Set Aside Defaults*. Upon showing good cause, any respondent against whom a default order has been issued may apply to set aside the default and vacate the order entered thereon. The petition shall be submitted to [sic]<sup>172</sup> duplicate to the Assistant Secretary for Political-Military Affairs, U.S. Department of State, 2201 C Street, NW, Washington, DC 20520. The Director will refer the petition to the Administrative Law Judge for consideration and a recommendation. The Administrative Law Judge will consider the application and may order a hearing and require the respondent to submit further evidence in support of his or her petition. The filing of a petition to set aside a default does not in any manner affect an order entered upon default and such order continues in full force and effect unless a further order is made modifying or terminating it.

#### **§ 128.5 Answer and Demand for Oral Hearing**

(a) *When to Answer*. The respondent is required to answer the charging letter within 30 days after service.

(b) *Contents of Answer*. An answer must be responsive to the charging letter. It must fully set forth the nature of the respondent's defense or defenses. In the answer, the respondent must admit or deny specifically each separate allegation of the charging letter, unless the respondent is without knowledge, in which case the respondent's answer shall so state and the statement shall operate as denial. Failure to deny or controvert any particular allegation will be deemed an admission thereof. The answer may set forth such additional or new matter as the respondent believes support a defense or claim of mitigation. Any defense or partial defense not specifically set forth in an answer shall be deemed waived. Evidence offered thereon by the respondent at a hearing may be refused except upon good cause being shown. If the respondent does not demand an oral hearing, he or she shall transmit, within seven (7) days after the service of his or her answer, original or photocopies of all correspondence, papers, records, affidavits, and other documentary or written evidence having any bearing upon or connection with the matters in issue. If any such materials are in language<sup>173</sup> other than English, translations into English shall be submitted at the same time.

(c) *Submission of Answer*. The answer, written demand for oral hearing (if any) and supporting evidence required by § 128.5(b) shall be in duplicate and mailed or delivered to the designated Administrative Law Judge. A copy shall be simultaneously mailed to the Managing Director, Directorate of Defense Trade Controls, SA-1, Room 1200, Department of State, Washington, DC 20522-0112, or delivered to 2401 Street, NW., Washington, DC addressed to Managing Director, Directorate of Defense Trade Controls, SA-1, Room 1200, Department of State, Washington, DC 20037.

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<sup>172</sup> So in original. Should be "in," not "to."

<sup>173</sup> So in original. Probably should be "a language."

## **§ 128.6 Discovery**

(a) *Discovery by the Respondent.* The respondent, through the Administrative Law Judge, may request from the Directorate of Defense Trade Controls any relevant information, not privileged or otherwise not authorized for release, that may be necessary or helpful in preparing a defense. The Directorate of Defense Trade Controls may provide any relevant information, not privileged or otherwise not authorized for release, that may be necessary or helpful in preparing a defense. The Directorate of Defense Trade Controls may supply summaries in place of original documents and may withhold information from discovery if the interests of national security or foreign policy so require, or if necessary to comply with any statute, executive order or regulation requiring that the information not be disclosed. The respondent may request the Administrative Law Judge to request any relevant information, books, records, or other evidence, from any other person or government agency so long as the request is reasonable in scope and not unduly burdensome.

(b) *Discovery by the Directorate of Defense Trade Controls.* The Directorate of Defense Trade Controls or the Administrative Law Judge may make reasonable requests from the respondent of admissions of facts, answers to interrogatories, the production of books, records, or other relevant evidence, so long as the request is relevant and material.

(c) *Subpoenas.* At the request of any party, the Administrative Law Judge may issue subpoenas, returnable before him, requiring the attendance of witnesses and the production of books, records, and other documentary or physical evidence determined by he [sic]<sup>174</sup> Administrative Law Judge to be relevant and material to the proceedings, reasonable in scope, and not unduly burdensome.

(d) *Enforcement of Discovery Rights.* If the Directorate of Defense Trade Controls fails to provide the respondent with information in its possession which is not otherwise available and which is necessary to the respondent's defense, the Administrative Law Judge may dismiss the charges on her or his own motion or on a motion of the respondent. If the respondent fails to respond with reasonable diligence to the requests for discovery by the Directorate of Defense Trade Controls or the Administrative Law Judge, on her or his own motion or motion of the Directorate of Defense Trade Controls, and upon such notice to the respondent as the Administrative Law Judge may direct, may strike respondent's answer and declare the respondent in default, or make any other ruling which the Administrative Law Judge deems necessary and just under the circumstances. If a third party fails to respond to the request for information, the Administrative Law Judge shall consider whether the evidence sought is necessary to a fair hearing, and if it is so necessary that a fair hearing may not be held without it, the Administrative Law Judge shall determine whether substitute information is adequate to protect the rights of the respondent. If the Administrative Law Judge decides that a fair hearing may be held with the substitute information, then the proceedings may continue. If not, then the Administrative Law Judge may dismiss the charges.

## **§ 128.7 Pre-hearing Conference**

(a)(1) The Administrative Law Judge may, upon his own motion or upon motion of any party, request the parties or their counsel to a pre-hearing conference to consider:

- (i) Simplification of issues;
- (ii) The necessity or desirability of amendments to pleadings;
- (iii) Obtaining stipulations of fact and of documents to avoid unnecessary proof; or
- (iv) Such other matter as may expedite the disposition of the proceeding.

(2) The Administrative Law Judge will prepare a summary of the action agreed upon or taken at the conference, and will incorporate therein any written stipulations or agreements made by the parties.

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<sup>174</sup> So in original; probably intended to be "the".

(3) The conference proceedings may be recorded magnetically or taken by a reporter and transcribed, and filed with the Administrative Law Judge.

(b) If a conference is impracticable, the Administrative Law Judge may request the parties to correspond with the person to achieve the purposes of a conference. The Administrative Law Judge shall prepare a summary of action taken as in the case of a conference.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 128.8 Hearings**

(a) A respondent who had not filed a timely written answer is not entitled to a hearing, and the case may be considered by the Administrative Law Judge as provided in § 128.4(a). If any answer is filed, but no oral hearing demanded, the Administrative Law Judge may proceed to consider the case upon the written pleadings and evidence available. The Administrative Law Judge may provide for the making of the record in such manner as the Administrative Law Judge deems appropriate. If respondent answers and demands an oral hearing, the Administrative Law Judge, upon due notice, shall set the case for hearing, unless a respondent has raised in his answer no issues of material fact to be determined. If respondent fails to appear at a scheduled hearing, the hearing nevertheless may proceed in respondent's absence. The respondent's failure to appear will not affect the validity of the hearing or any proceedings or action thereafter.

(b) The Administrative Law Judge may administer oaths and affirmations. Respondent may be represented by counsel. Unless otherwise agreed by the parties and the Administrative Law Judge the proceeding will be taken by a reporter or by magnetic recording, transcribed, and filed with the Administrative Law Judge. Respondent may examine the transcript and may obtain a copy upon payment of proper costs.

### **§ 128.9 Proceedings Before and Report of Administrative Law Judge**

(a) The Administrative Law Judge may conform any part of the proceedings before him or her to the Federal Rules of Civil Procedure. The record may be made available in any other administrative or other proceeding involving the same respondent.

(b) The Administrative Law Judge, after considering the record, will prepare a written report. The report will include findings of fact, findings of law, a finding whether a law or regulation has been violated, and the Administrative Law Judge's recommendations. It shall be transmitted to the Assistant Secretary for Political-Military Affairs, Department of State.

### **§ 128.10 Disposition of Proceedings**

Where the evidence is not sufficient to support the charges, the Managing Director, Directorate of Defense Trade Controls or the Administrative Law Judge will dismiss the charges. Where the Administrative Law Judge finds that a violation has been committed, the Administrative Law Judge's recommendation shall be advisory only. The Assistant Secretary of State for Political-Military Affairs will review the record, consider the report of the Administrative Law Judge, and make an appropriate disposition of the case. The Managing Director may issue an order debarring the respondent from participating in the export of defense articles or technical data or the furnishing of defense services as provided in § 127.7 of this subchapter, impose a civil penalty as provided in § 127.10 of this subchapter, or take such action as the Administrative Law Judge may recommend. Any debarment order will be effective for the period of time specified therein and may contain such additional terms and conditions as are deemed appropriate. A copy of the order together with a copy of the Administrative Law Judge's report will be served upon the respondent.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 128.11 Consent Agreements**

(a) The Directorate of Defense Trade Controls and the respondent may, by agreement, submit to the Administrative Law Judge a proposal for the issuance of a consent order. The Administrative Law Judge will review the facts of the case and the proposal and may conduct conferences with the parties and may require the presentation of evidence in the case. If the Administrative Law Judge does not approve the proposal, the

Administrative Law Judge will notify the parties and the case will proceed as though no consent proposal had been made. If the proposal is approved, the Administrative Law Judge will report the facts of the case along with recommendations to the Assistant Secretary of State for Political-Military Affairs. If the Assistant Secretary of State for Political-Military Affairs does not approve the proposal, the case will proceed as though no consent proposal had been made. If the Assistant Secretary of State for Political-Military Affairs approves the proposal, an appropriate order may be issued.

(b) Cases may also be settled prior to service of a charging letter. In such an event, a proposed charging letter shall be prepared, and a consent agreement and order shall be submitted for the approval and signature of the Assistant Secretary for Political-Military Affairs, and no action by the Administrative Law Judge shall be required. Cases which are settled may not be reopened or appealed.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 128.12 Rehearings**

The Administrative Law Judge may grant a rehearing or reopen a proceeding at any time for the purpose of hearing any relevant and material evidence which was not known or obtainable at the time of the original hearing. A report for rehearing or reopening must contain a summary of such evidence, and must explain the reasons why it could not have been presented at the original hearing. The Administrative Law Judge will inform the parties of any further hearing, and will conduct such hearing and submit a report and recommendations in the same manner as provided for the original proceeding (Described in § 128.10).

### **§ 128.13 Appeals**

(a) *Filing of Appeals.* An appeal must be in writing, and be addressed to and filed with the Under Secretary of State for Arms Control and International Security, Department of State, Washington, DC 20520. An appeal from a final order denying export privileges or imposing civil penalties must be filed within 30 days after receipt of a copy of the order. If the Under Secretary cannot for any reason act on the appeal, he or she may designate another Department of State official to receive and act on the appeal.

(b) *Grounds and Conditions for Appeal.* The respondent may appeal from the debarment or from the imposition of a civil penalty (except the imposition of civil penalties pursuant to a consent order pursuant to § 128.11) upon the ground: (1) that the findings of a violation are not supported by any substantial evidence; (2) that a prejudicial error of law was committed; or (3) that the provisions of the order are arbitrary, capricious, or an abuse of discretion. The appeal must specify upon which of these grounds the appeal is based and must indicate from which provisions of the order the appeal is taken. An appeal from an order issued upon default will not be entertained if the respondent has failed to seek relief as provided in § 128.4(b).

(c) *Matters Considered on Appeal.* An appeal will be considered upon the basis of the assembled record. This record consists of (but is not limited to) the charging letter, the respondent's answer, the transcript or magnetic recording of the hearing before the Administrative Law Judge, the report of the Administrative Law Judge, the order of the Assistant Secretary of State for Political-Military Affairs, and any other relevant documents involved in the proceedings before the Administrative Law Judge. The Under Secretary of State for Arms Control and International Security may direct a rehearing and reopening of the proceedings before the Administrative Law Judge if he or she finds that the record is insufficient or that new evidence is relevant and material to the issues and was not known and was not reasonably available to the respondent at the time of the original hearings.

(d) *Effect of Appeals.* The taking of an appeal will not stay the operation of any order.

(e) *Preparation of Appeals*

(1) *General Requirements.* An appeal shall be in letter form. The appeal and accompanying material should be filed in duplicate, unless otherwise indicated, and a copy simultaneously mailed to the Managing Director, Directorate of Defense Trade Controls, SA-1, Room 1200, Department of State, Washington, DC 20522-0112 or delivered to 2401 E Street, NW., Washington, DC addressed to Managing Director, Directorate of Defense Trade Controls, SA-1, Room 1200, Department of State, Washington, DC 20037.

(2) *Oral presentation.* The Under Secretary of State for Arms Control and International Security may grant

the appellant an opportunity for oral argument and will set the time and place for oral argument and will notify the parties, ordinarily at least 10 days before the date set.

(f) *Decisions.* All appeals will be considered and decided within a reasonable time after they are filed. An appeal may be granted or denied in whole or in part, or dismissed at the request of the appellant. The decision of the Under Secretary of State for Arms Control and International Security will be final.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 128.14 Confidentiality of Proceedings**

Proceedings under this part are confidential. The documents referred to in § 128.17 are not, however, deemed to be confidential. Reports of the Administrative Law Judge and copies of transcripts or recordings of hearings will be available to parties and, to the extent of their own testimony, to witnesses. All records are available to any U.S. Government agency showing a proper interest therein.

### **§ 128.15 Orders Containing Probationary Periods**

(a) *Revocation of Probationary Periods.* A debarment or interim suspension order may set a probationary period during which the order may be held in abeyance for all or part of the debarment or suspension period, subject to the conditions stated therein. The Managing Director, Directorate of Defense Trade Controls, may apply, without notice to any person to be affected thereby, to the Administrative Law Judge for a recommendation on the appropriateness of revoking probation when it appears that the conditions of the probation have been breached. The facts in support of the application will be presented to the Administrative Law Judge, who will report thereon and make a recommendation to the Assistant Secretary of State for Political-Military Affairs. The latter will make a determination whether to revoke probation and will issue an appropriate order. The party affected by this action may request the Assistant Secretary of State for Political-Military Affairs to reconsider the decision by submitting a request within 10 days of the date of the order.

(b) *Hearings*

(1) *Objections upon Notice.* Any person affected by an application upon notice to revoke probation, within the time specified in the notice, may file objections with the Administrative Law Judge.

(2) *Objections to Order Without Notice.* Any person adversely affected by an order revoking probation, without notice may request that the order be set aside by filing his objections thereto with the Administrative Law Judge. The request will not stay the effective date of the order or revocation.

(3) *Requirements for Filing Objections.* Objections filed with the Administrative Law Judge must be submitted in writing and in duplicate. A copy must be simultaneously submitted to the Directorate of Defense Trade Controls. Denials and admissions, as well as any mitigating circumstances, which the person affected intends to present must be set forth in or accompany the letter of objection and must be supported by evidence. A request for an oral hearing may be made at the time of filing objections.

(4) *Determination.* The application and objections thereto will be referred to the Administrative Law Judge. An oral hearing if requested, will be conducted at an early convenient date, unless the objections filed raise no issues of material fact to be determined. The Administrative Law Judge will report the facts and make a recommendation to the Assistant Secretary for Political-Military Affairs, who will determine whether the application should be granted or denied and will issue an appropriate order. A copy of the order and of the Administrative Law Judge's report will be furnished to any person affected thereby.

(5) *Effect of Revocation on Other Actions.* The revocation of a probationary period will not preclude any other action concerning a further violation, even where revocation is based on the further violation.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 128.16 Extension of Time**

The Administrative Law Judge, for good cause shown, may extend the time within which to prepare and submit an answer to a charging letter or to perform any other act required by this part.

**§ 128.17 Availability of Orders**

All charging letters, debarment orders, orders imposing civil penalties, probationary periods, and interim suspension orders are available for public inspection in the Public Reading Room of the Department of State.





## PART 129: REGISTRATION AND LICENSING OF BROKERS

### Section

- 129.1 Purpose
- 129.2 Definitions
- 129.3 Requirement to Register
- 129.4 Registration Statement and Fees
- 129.5 Policy on Embargoes and Other Proscriptions
- 129.6 Requirement for License/Approval
- 129.7 Prior Approval (License)
- 129.8 Prior Notification
- 129.9 Reports
- 129.10 Guidance

Authority: Sec. 38, Pub. L. 104-164, 110 Stat. 1437, (22 U.S.C. 2778). History: 62 FR 67276, Dec. 24, 1997, unless otherwise noted.

### § 129.1 Purpose

Section 38(b)(1)(A)(ii) of the Arms Export Control Act (22 U.S.C. 2778) provides that persons engaged in the business of brokering activities shall register and pay a registration fee as prescribed in regulations, and that no person may engage in the business of brokering activities without a license issued in accordance with the Act.

### § 129.2 Definitions

(a) *Broker* means any person who acts as an agent for others in negotiating or arranging contracts, purchases, sales or transfers of defense articles or defense services in return for a fee, commission, or other consideration.

(b) *Brokering activities* means acting as a broker as defined in § 129.2(a), and includes the financing, transportation, freight forwarding, or taking of any other action that facilitates the manufacture, export, or import or<sup>175</sup> a defense article or defense service, irrespective of its origin. For example, this includes, but is not limited to, activities by U.S. persons who are located inside or outside of the United States or foreign persons subject to U.S. jurisdiction involving defense articles or defense services of U.S. or foreign origin which are located inside or outside of the United States. But, this does not include activities by U.S. persons that are limited exclusively to U.S. domestic sales or transfers (*e.g.*, not for export or re-transfer in the United States or to a foreign person). For the purposes of this subchapter, engaging in the business of brokering activities requires only one action as described above.

(c) The term “*foreign defense article or defense service*” includes any non-United States defense article or defense service of a nature described on the United States Munitions List regardless of whether such article or service is of United States origin or whether such article or service contains United States origin components.

History: Amended at 71 FR 20534, Apr. 21, 2006.

### § 129.3 Requirement to Register

(a) Any U.S. person, wherever located, and any foreign person located in the United States or otherwise subject to the jurisdiction of the United States (notwithstanding § 120.1(c)<sup>176</sup>), who engages in the business of brokering activities (as defined in this part) with respect to the manufacture, export, import, or transfer of any defense article or defense service subject to the controls of this subchapter (see part 121) or any “foreign defense article or defense service” (as defined in § 129.2) is required to register with the Directorate of Defense Trade Controls.

(b) *Exemptions*. Registration under this section is not required for:

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<sup>175</sup> So in original. Probably should be “of”.

<sup>176</sup> Section 120.1(c) restricts eligibility for DDTC licenses to U.S. persons.

- (1) Employees of the United States Government acting in official capacity.
- (2) Employees of foreign governments or international organizations acting in official capacity.
- (3) Persons exclusively in the business of financing, transporting, or freight forwarding, whose business activities do not also include brokering defense articles or defense services. For example, air carriers and freight forwarders who merely transport or arrange transportation for licensed United States Munitions List items are not required to register, nor are banks or credit companies who merely provide commercially available lines or letters of credit to persons registered in accordance with part 122 of this subchapter required to register. However, banks, firms, or other persons providing financing for defense articles or defense services would be required to register under certain circumstances, such as where the bank or its employees are directly involved in arranging arms deals as defined in § 129.2(a) or hold title to defense articles, even when no physical custody of defense articles is involved.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

#### **§ 129.4 Registration Statement and Fees**

(a) General. The Department of State Form DS-2032 (Statement of Registration) and the transmittal letter meeting the requirements of §122.2(b) of this subchapter must be submitted by an intended registrant with a payment by check, payable to the Department of State, of the fees prescribed in Section 122.3(a) of this subchapter. Foreign brokers must submit a check in U.S. dollars payable through a U.S. financial institution that includes the registrant's legal name and address on the check. The Statement of Registration and transmittal letter must be signed by a senior officer (e.g., Chief Executive Officer, President, Secretary, Partner, Member, Treasurer, General Counsel) who has been empowered by the intended registrant to sign such documents. The intended registrant shall also submit documentation that demonstrates that it is incorporated or otherwise authorized to do business in the United States. The requirement to submit a Department of State Form DS-2032 and to submit documentation demonstrating incorporation or authorization to do business in the United States does not exclude foreign persons from the requirement to register. Foreign persons who are required to register shall provide information that is substantially similar in content as that which a U.S. person would provide under this provision (e.g., foreign business license or similar authorization to do business). The Directorate of Defense Trade Controls will notify the registrant if the Statement of Registration is incomplete either by notifying the registrant of what information is required or through the return of the entire registration package with payment. Registrants may not establish new entities for the purpose of reducing registration fees.

(b) A person required to register under this part who is already registered as a manufacturer or exporter in accordance with part 122 of this subchapter must also provide notification of this additional activity by submitting to the Directorate of Defense Trade Controls by registered mail a transmittal letter meeting the requirements of § 122.2(b) and citing the existing registration, and must pay an additional fee according to the schedule prescribed in § 122.3(a). Any person who registers coincidentally as a broker as defined in § 129.2 of this subchapter and as a manufacturer or exporter must submit a Statement of Registration that reflects the brokering activities, the § 122.2(b) transmittal letter, as well as the additional fee for registration as a broker.

(c) Other provisions of part 122, in particular, § 122.4 concerning notification of changes in information furnished by registrants and § 122.5 concerning maintenance of records by registrants, apply equally to registration under this part (part 129).

*History: 62 FR 67276, Dec. 24, 1997, as amended at 69 FR 70889, Dec. 8, 2004; 71 FR 20553, Apr. 21, 2006; 73 FR 55441, Sept. 25, 2008.*

#### **§ 129.5 Policy on Embargoes and Other Proscriptions**

(a) The policy and procedures set forth in this subparagraph apply to brokering activities defined in § 129.2 of this subchapter, regardless of whether the persons involved in such activities have registered or are required to register under § 129.3 of this subchapter.

(b) No brokering activities or brokering proposals involving any country referred to in § 126.1 of this subchapter may be carried out by any person without first obtaining the written approval of the Directorate of Defense Trade Controls.

(c) No brokering activities or proposal to engage in brokering activities may be carried out or pursued by any person without the prior written approval of the Directorate of Defense Trade Controls in the case of other countries or persons identified from time to time by the Department of State through notice in the Federal Register,<sup>177</sup> with respect to which certain limitations on defense articles or defense services are imposed for reasons of U.S. national security or foreign policy or law enforcement interests (e.g., an individual subject to debarment pursuant to § 127.7 of this subchapter).

(d) No brokering activities or brokering proposal may be carried out with respect to countries which are subject to United Nations Security Council arms embargo<sup>178</sup> (see also § 121.1(c) [sic]<sup>179</sup>).

(e) In cases involving countries or persons subject to paragraph (b), (c), or (d), above, it is the policy of the Department of State to deny requests for approval, and exceptions may be granted only rarely, if ever. Any person who knows or has reason to know of brokering activities involving such countries or persons must immediately inform the Directorate of Defense Trade Controls.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 129.6 Requirement for License/Approval**

(a) No person may engage in the business of brokering activities without the prior written approval (license) of, or prior notification to, the Directorate of Defense Trade Controls, except as follows:

(b) A license will not be required for:

(1) Brokering activities undertaken by or for an agency of the United States Government—

(i) for use by an agency of the United States Government; or

(ii) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means.

(2) Brokering activities that are arranged wholly within and destined exclusively for the North Atlantic Treaty Organization, any member country of that Organization, Australia, Japan, New Zealand, or South Korea, except in the case of the defense articles or defense services specified in § 129.7(a) of this subchapter, for which prior approval is always required.

*History: Amended at 71 FR 20534, Apr. 21, 2006; 74 FR 38342, Aug 3, 2009.*

### **§ 129.7 Prior Approval (License)**

(a) The following brokering activities require the prior written approval of the Directorate of Defense Trade

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<sup>177</sup> *E.g.*, Cuba, 73 FR 29172 (May 20, 2008); Cyprus, 57 FR 60265-01 (Dec. 18, 1992); Eritrea, 71 FR 11281 (Mar. 6, 2006), 73 FR 29172 (May 20, 2008); Guatemala; 58 FR 38597 (July 19, 1993); Iran; 73 FR 29172 (May 20, 2008); North Korea, 73 FR 29172 (May 20, 2008); Syria, 73 FR 29172 (May 20, 2008); Venezuela, 73 FR 29172 (May 20, 2008); Yemen, 57 FR 59852 (Dec. 16, 1992).

<sup>178</sup> *E.g.*, (the following countries are subject to varying U.N. Security Council Resolutions (UNSCR), but DDTTC may permit brokering activities for individual cases):

- Afghanistan: Embargo on members of Al-Qaeda and the Taliban, and persons or organizations associated with them. UNSCR 1390, Jan. 16, 2002
- Democratic Republic of Congo: UNSCR 1493, Jul. 28, 2003; UNSCR 1552, Jul. 27, 2004; UNSCR 1596, Apr. 18, 2005; UNSCR 1616, Jul. 29, 2005; UNSCR 1649, Dec. 21, 2005; and UNSCR 1654, Jan. 31, 2006.
- Cote d'Ivoire (Ivory Coast): UNSCR 1572, Nov. 15, 2004; and UNSCR 1643, Dec. 15, 2005.
- Iran: UNSCR 1737, Dec. 23, 2006.
- Iraq: UNSCR 661, Aug. 6, 1990; UNSCR 1546, June 8, 2004.
- Lebanon: UNSCR 1701, Aug. 11, 2006.
- Liberia: 57 FR 60265 (Dec. 18, 1992); 66 FR 46491 (Sep. 5, 2001); UNSCR 1689, Sept. 15, 2006; UNSCR 1683, June 12, 2006; UNSCR 1521, Dec. 22, 2003; UNSCR 1579, Dec. 21, 2004; UNSCR 1647, Dec. 20, 2005.
- North Korea: UNSCR 1718, Oct. 14, 2006.
- Sierra Leone: UNSCR 1171, June 5, 1998.
- Somalia: UNSCR 733, Jan. 23, 1992; UNSCR 1425, Jul. 22, 2002.
- Sudan: UNSCR 1556, Jul. 30, 2004; UNSCR 1591, Mar. 29, 2005.

<sup>179</sup> So in original. Should be § 126.1(c).

Controls:

(1) Brokering activities pertaining to certain defense articles (or associated defense services) covered by or of a nature described by part 121, to or from any country, as follows:

- (i) Fully automatic firearms and components and parts therefor;
- (ii) Nuclear weapons strategic delivery systems and all components, parts, accessories, attachments specifically designed for such systems and associated equipment;
- (iii) Nuclear weapons design and test equipment of a nature described by Category XVI of part 121;
- (iv) Naval nuclear propulsion equipment of a nature described by Category VI(e);
- (v) Missile Technology Control Regime Category I items (§ 121.16);
- (vi) Classified defense articles, services and technical data;
- (vii) Foreign defense articles or defense services (other than those that are arranged wholly within and destined exclusively for the North Atlantic Treaty Organization, Australia, Japan, New Zealand, or South Korea (see §§ 129.6(b)(2) and 129.7(a)).

(2) Brokering activities involving defense articles or defense services covered by, or of a nature described by, part 121, in addition to those specified in § 129.7(a), that are designated as significant military equipment under this subchapter, for or from any country not a member of the North Atlantic Treaty Organization, Australia, Japan, New Zealand, or South Korea whenever any of the following factors are present:

- (i) The value of the significant military equipment is \$1,000,000 or more;
- (ii) The identical significant military equipment has not been previously licensed for export to the armed forces of the country concerned under this subchapter or approved for sale under the Foreign Military Sales Program of the Department of Defense;
- (iii) Significant military equipment would be manufactured abroad as a result of the articles or services being brokered; or
- (iv) The recipient or end-user is not a foreign government or international organization.

(b) The requirements of this section for prior written approval are met by any of the following:

- (1) A license or other written approval issued under parts 123, 124, or 125 of this subchapter for the permanent or temporary export or temporary import of the particular defense article, defense service or technical data subject to prior approval under this section, provided the names of all brokers have been identified in an attachment accompanying submission of the initial application; or
- (2) A written statement from the Directorate of Defense Trade Controls approving the proposed activity or the making of a proposal or presentation.

(c) Requests for approval of brokering activities shall be submitted in writing to the Directorate of Defense Trade Controls by an empowered official of the registered broker; the letter shall also meet the requirements of § 126.13 of this subchapter.

(d) The request shall identify all parties involved in the proposed transaction and their roles, as well as outline in detail the defense article and related technical data (including manufacturer, military designation and model number), quantity and value, the security classification, if any, of the articles and related technical data, the country or countries involved, and the specific end-use and end-user(s).

(e) The procedures outlined in § 126.8(c) through (g) are equally applicable with respect to this section.

*History: Amended at 71 FR 20534, Apr. 21, 2006; 74 FR 38342, Aug 3, 2009.*

### **§ 129.8 Prior Notification**

(a) Prior notification to the Directorate of Defense Trade Controls is required for brokering activities with respect to significant military equipment valued at less than \$1,000,000, except for sharing of basic marketing information (e.g., information that does not include performance characteristics, price and probable availability

for delivery) by U.S. persons registered as exporters under Part 122.

(b) The requirement of this section for prior notification is met by informing the Directorate of Defense Trade Controls by letter at least 30 days before making a brokering proposal or presentation. The Directorate of Defense Trade Controls will provide written acknowledgment of such prior notification to confirm compliance with this requirement and the commencement of the 30-day notification period.

(c) The procedures outlined in § 126.8(c) through (g) are equally applicable with respect to this section.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 129.9 Reports**

Any person required to register under this part shall provide annually a report to the Directorate of Defense Trade Controls enumerating and describing its brokering activities by quantity, type, U.S. dollar value, and purchaser(s) and recipient(s), license(s) numbers for approved activities and any exemptions utilized for other covered activities.<sup>180</sup>

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 129.10 Guidance**

Any person desiring guidance on issues related to this part, such as whether an activity is a brokering activity within the scope of this Part, or whether a prior approval or notification requirement applies, may seek guidance in writing from the Directorate of Defense Trade Controls. The procedures and conditions stated in § 126.9 apply equally to requests under this section.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

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<sup>180</sup> Practice Tip: This section requires “brokers” registered under ITAR part 129 to file an annual report with DDTC enumerating and describing, among other things, brokering activities and the fees, commissions, or other consideration they have been paid or that was offered to them. ITAR part 130 requires applicants for ITAR licenses and agreements valued in an amount of U.S. \$500,000 or more to declare any fees or commissions made or offered or agreed to be made directly or indirectly, whether in cash or in kind, and whether or not pursuant to a written contract, for the solicitation or promotion or otherwise to secure the conclusion of a sale of defense articles or defense services to or for the use of the armed forces of a foreign country or international organization. Take care that your ITAR part 130 certifications and your § 129.9 broker reports are accurate and consistent. (Contributor: Gary Stanley, Esq., 202-686-4854, gstanley@glstrade.com)



## PART 130: POLITICAL CONTRIBUTIONS, FEES, AND COMMISSIONS

### Section

- 130.1 Purpose
- 130.2 Applicant
- 130.3 Armed Forces
- 130.4 Defense Articles and Defense Services
- 130.5 Fee or Commission
- 130.6 Political Contribution
- 130.7 Supplier
- 130.8 Vendor
- 130.9 Obligation to Furnish Information to the Directorate of Defense Trade Controls
- 130.10 Information to be Furnished by Applicant or Supplier to the Directorate of Defense Trade Controls
- 130.11 Supplementary Reports
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- 130.13 Information to be Furnished to Applicant, Supplier, or Vendor by a Recipient of a Fee or Commission
- 130.14 Recordkeeping
- 130.15 Confidential Business Information
- 130.16 Other Reporting Requirements
- 130.17 Utilization of and Access to Reports and Records

*Authority: Sec. 39, Arms Export Control Act, 90 Stat. 767 (22 U.S.C. 2779); E.O. 11958, 42 FR 4311, 3 CFR, 1977 Comp. p. 79; 22 U.S.C. 2651a. History: 58 FR 39323, July 22, 1993, unless otherwise noted*

### **§ 130.1 Purpose**

Section 39(a) of the Arms Export Control Act (22 U.S.C. 2779) provides that the Secretary of State shall prescribe regulations with respect to reporting on certain payments relating to sales of defense articles and defense services. The provisions of this part implement that requirement. Definitions which apply to this part are contained in §§ 130.2 through 130.8.

### **§ 130.2 Applicant**

*Applicant* means any person who applies to the Directorate of Defense Trade Controls for any license or approval required under this subchapter for the export of defense articles or defense services valued in an amount of \$500,000 or more which are being sold commercially to or for the use of the armed forces of a foreign country or international organization. This term also includes a person to whom the required license or approval has been given.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 130.3 Armed Forces**

*Armed forces* means the army, navy, marine, air force, or coast guard, as well as the national guard and national police, of a foreign country. This term also includes any military unit or military personnel organized under or assigned to an international organization.

### **§ 130.4 Defense Articles and Defense Services**

Defense articles and defense services have the meaning given those terms in paragraphs (3), (4) and (7) of section 47 of the Arms Export Control Act (22 U.S.C. 2794 (3), (4), and (7)). When used with reference to commercial sales, the definitions in §§ 120.6 and 120.9 of this subchapter apply.

### **§ 130.5 Fee or Commission.**

(a) *Fee or commission* means, except as provided in paragraph (b) of this section, any loan, gift, donation or other payment of \$1,000 or more made, or offered or agreed to be made directly or indirectly, whether in cash

or in kind, and whether or not pursuant to a written contract, which is:

- (1) To or at the direction of any person, irrespective of nationality, whether or not employed by or affiliated with an applicant, a supplier or a vendor; and
- (2) For the solicitation or promotion or otherwise to secure the conclusion of a sale of defense articles or defense services to or for the use of the armed forces of a foreign country or international organization.

(b) The term *fee or commission* does not include:

- (1) A political contribution or a payment excluded by § 130.6 from the definition of political contribution;
- (2) A normal salary (excluding contingent compensation) established at an annual rate and paid to a regular employee of an applicant, supplier or vendor;
- (3) General advertising or promotional expenses not directed to any particular sale or purchaser; or
- (4) Payments made, or offered or agreed to be made, solely for the purchase by an applicant, supplier or vendor of specific goods or technical, operational or advisory services, which payments are not disproportionate in amount with the value of the specific goods or services actually furnished.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 130.6 Political Contribution**

*Political contribution* means any loan, gift, donation or other payment of \$1,000 or more made, or offered or agreed to be made, directly or indirectly, whether in cash or in kind, which is:

- (a) To or for the benefit of, or at the direction of, any foreign candidate, committee, political party, political faction, or government or governmental subdivision, or any individual elected, appointed or otherwise designated as an employee or officer thereof; and
- (b) For the solicitation or promotion or otherwise to secure the conclusion of a sale of defense articles or defense services to or for the use of the armed forces of a foreign country or international organization. Taxes, customs duties, license fees, and other charges required to be paid by applicable law or regulation are not regarded as political contributions.

### **§ 130.7 Supplier**

*Supplier* means any person who enters into a contract with the Department of Defense for the sale of defense articles or defense services valued in an amount of \$500,000 or more under section 22 of the Arms Export Control Act (22 U.S.C. 2762).

### **§ 130.8 Vendor**

(a) *Vendor* means any distributor or manufacturer who, directly or indirectly, furnishes to an applicant or supplier defense articles valued in an amount of \$500,000 or more which are end-items or major components as defined in § 121.8 of this subchapter. It also means any person who, directly or indirectly, furnishes to an applicant or supplier defense articles or services valued in an amount of \$500,000 or more when such articles or services are to be delivered (or incorporated in defense articles or defense services to be delivered) to or for the use of the armed forces of a foreign country or international organization under:

- (1) A sale requiring a license or approval from the Directorate of Defense Trade Controls under this subchapter; or
- (2) A sale pursuant to a contract with the Department of Defense under section 22 of the Arms Export Control Act (22 U.S.C. 2762).

(b) [Reserved]

*History: Amended at 71 FR 20534, Apr. 21, 2006.*



### **§ 130.9 Obligation to Furnish Information to the Directorate of Defense Trade Controls**

(a) (1) Each applicant must inform the Directorate of Defense Trade Controls as to whether the applicant or its vendors have paid, or offered or agreed to pay, in respect of any sale for which a license or approval is requested:

(i) Political contributions in an aggregate amount of \$5,000 or more, or

(ii) Fees or commissions in an aggregate amount of \$100,000 or more. If so, applicant must furnish to the Directorate of Defense Trade Controls the information specified in § 130.10. The furnishing of such information or an explanation satisfactory to the Managing Director of the Directorate of Defense Trade Controls as to why all the information cannot be furnished at that time is a condition precedent to the granting of the relevant license or approval.

(2) The requirements of this paragraph do not apply in the case of an application with respect to a sale for which all the information specified in § 130.10 which is required by this section to be reported shall already have been furnished.

(b) Each supplier must inform the Directorate of Defense Trade Controls as to whether the supplier or its vendors have paid, or offered or agreed to pay, in respect of any sale:

(1) Political contributions in an aggregate amount of \$5,000 or more, or

(2) Fees or commissions in an aggregate amount of \$100,000 or more. If so, the supplier must furnish to the Directorate of Defense Trade Controls the information specified in § 130.10. The information required to be furnished pursuant to this paragraph must be so furnished no later than 30 days after the contract award to such supplier, or such earlier date as may be specified by the Department of Defense. For purposes of this paragraph, a contract award includes a purchase order, exercise of an option, or other procurement action requiring a supplier to furnish defense articles or defense services to the Department of Defense for the purposes of § 22 of the Arms Export Control Act (22 U.S.C. 2762).

(c) In determining whether an applicant or its vendors, or a supplier or its vendors, as the case may be, have paid, or offered or agreed to pay, political contributions in an aggregate amount of \$5,000 or more in respect of any sale so as to require a report under this section, there must be included in the computation of such aggregate amount any political contributions in respect of the sale which are paid by or on behalf of, or at the direction of, any person to whom the applicant, supplier or vendor has paid, or offered or agreed to pay, a fee or commission in respect of the sale. Any such political contributions are deemed for purposes of this part to be political contributions by the applicant, supplier or vendor who paid or offered or agreed to pay the fee or commission.

(d) Any applicant or supplier which has informed the Directorate of Defense Trade Controls under this section that neither it nor its vendors have paid, or offered or agreed to pay, political contributions or fees or commissions in an aggregate amount requiring the information specified in § 130.10 to be furnished, must subsequently furnish such information within 30 days after learning that it or its vendors had paid, or offered or agreed to pay, political contributions or fees or commissions in respect of a sale in an aggregate amount which, if known to applicant or supplier at the time of its previous communication with the Directorate of Defense Trade Controls, would have required the furnishing of information under § 130.10 at that time. Any report furnished under this paragraph must, in addition to the information specified in § 130.10, include a detailed statement of the reasons why applicant or supplier did not furnish the information at the time specified in paragraph (a) or paragraph (b) of this section, as applicable.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 130.10 Information to be Furnished by Applicant or Supplier to the Directorate of Defense Trade Controls**

(a) Every person required under § 130.9 to furnish information specified in this section in respect to any sale must furnish to the Directorate of Defense Trade Controls:

(1) The total contract price of the sale to the foreign purchaser;

- (2) The name, nationality, address and principal place of business of the applicant or supplier, as the case may be, and, if applicable, the employer and title;
- (3) The name, nationality, address and principal place of business, and if applicable, employer and title of each foreign purchaser, including the ultimate end-user involved in the sale;
- (4) Except as provided in paragraph (c) of this section, a statement setting forth with respect to such sale:
  - (i) The amount of each political contribution paid, or offered or agreed to be paid, or the amount of each fee or commission paid, or offered or agreed to be paid;
  - (ii) The date or dates on which each reported amount was paid, or offered or agreed to be paid;
  - (iii) The recipient of each such amount paid, or intended recipient if not yet paid;
  - (iv) The person who paid, or offered or agreed to pay such amount; and
  - (v) The aggregate amounts of political contributions and of fees or commission, respectively, which shall have been reported.

(b) In responding to paragraph (a)(4) of this section, the statement must:

- (1) With respect to each payment reported, state whether such payment was in cash or in kind. If in kind, it must include a description and valuation thereof. Where precise amounts are not available because a payment has not yet been made, an estimate of the amount offered or agreed to be paid must be provided;
- (2) With respect to each recipient, state:
  - (i) Its name;
  - (ii) Its nationality;
  - (iii) Its address and principal place of business;
  - (iv) Its employer and title; and
  - (v) Its relationship, if any, to applicant, supplier, or vendor, and to any foreign purchaser or end-user.

(c) In submitting a report required by § 130.9, the detailed information specified in paragraph (a)(4) and (b) of this section need not be included if the payments do not exceed:

- (1) \$2,500 in the case of political contributions; and
- (2) \$50,000 in the case of fees or commissions. In lieu of reporting detailed information with respect to such payments, the aggregate amount thereof must be reported, identified as miscellaneous political contributions or miscellaneous fees or commissions, as the case may be.

(d) Every person required to furnish the information specified in paragraphs (a) and (b) of this section must respond fully to each subdivision of those paragraphs and, where the correct response is “none” or “not applicable,” must so state.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

### **§ 130.11 Supplementary Reports**

(a) Every applicant or supplier who is required under § 130.9 to furnish the information specified in § 130.10 must submit a supplementary report in connection with each sale in respect of which applicant or supplier has previously been required to furnish information if:

- (1) Any political contributions aggregating \$2,500 or more or fees or commissions aggregating \$50,000 or more not previously reported or paid, or offered or agreed to be paid by applicant or supplier or any vendor;
- (2) Subsequent developments cause the information initially reported to be no longer accurate or complete (as in the case where a payment actually made is substantially different in amount from a previously reported estimate of an amount offered or agreed to be paid); or
- (3) Additional details are requested by the Directorate of Defense Trade Controls with respect to any

miscellaneous payments reported under § 130.10(c).

(b) Supplementary reports must be sent to the Directorate of Defense Trade Controls within 30 days after the payment, offer or agreement reported therein or, when requested by the Directorate of Defense Trade Controls, within 30 days after such request, and must include:

- (1) Any information specified in § 130.10 required or requested to be reported and which was not previously reported; and
- (2) The Directorate of Defense Trade Controls license number, if any, and the Department of Defense contract number, if any, related to the sale.

### **§ 130.12 Information to be Furnished by Vendor to Applicant or Supplier**

(a) In order to determine whether it is obliged under § 130.9 to furnish the information specified in § 130.10 with respect to a sale, every applicant or supplier must obtain from each vendor, from or through whom the applicant acquired defense articles or defense services forming the whole or a part of the sale, a full disclosure by the vendor of all political contributions or fees or commission paid, by vendor with respect to such sale. Such disclosure must include responses to all the information pertaining to vendor required to enable applicant or supplier, as the case may be, to comply fully with §§ 130.9 and 130.10. If so required, they must include the information furnished by each vendor in providing the information specified.

(b) Any vendor which has been requested by an applicant or supplier to furnish an initial statement under paragraph (a) of this section must, except as provided in paragraph (c) of this section, furnish such statement in a timely manner and not later than 20 days after receipt of such request.

(c) If the vendor believes that furnishing information to an applicant or supplier in a requested statement would unreasonably risk injury to the vendor's commercial interests, the vendor may furnish in lieu of the statement an abbreviated statement disclosing only the aggregate amount of all political contributions and the aggregate amount of all fees or commissions which have been paid, or offered or agreed to be paid, or offered or agreed to be paid, [sic]<sup>181</sup> by the vendor with respect to the sale. Any abbreviated statement furnished to an applicant or supplier under this paragraph must be accompanied by a certification that the requested information has been reported by the vendor directly to the Directorate of Defense Trade Controls. The vendor must simultaneously report fully to the Directorate of Defense Trade Controls all information which the vendor would otherwise have been required to report to the applicant or supplier under this section. Each such report must clearly identify the sale with respect to which the reported information pertains.

(d)(1) If upon the 25th day after the date of its request to vendor, an applicant or supplier has not received from the vendor the initial statement required by paragraph (a) of this section, the applicant or supplier must submit to the Directorate of Defense Trade Controls a signed statement attesting to:

- (i) The manner and extent of applicant's or supplier's attempt to obtain from the vendor the initial statement required under paragraph (a) of this section;
- (ii) Vendor's failure to comply with this section; and
- (iii) The amount of time which has elapsed between the date of applicant's or supplier's request and the date of the signed statement;

(2) The failure of a vendor to comply with this section does not relieve any applicant or supplier otherwise required by § 130.9 to submit a report to the Directorate of Defense Trade Controls from submitting such a report.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*

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<sup>181</sup> So in original; unnecessarily repeating the words, "or offered or agreed to be paid,".

### **§ 130.13 Information to be Furnished to Applicant, Supplier, or Vendor by a Recipient of a Fee or Commission**

(a) Every applicant or supplier, and each vendor thereof;

(1) In order to determine whether it is obliged under § 130.9 or § 130.12 to furnish information specified in § 130.10 with respect to a sale; and

(2) Prior to furnishing such information, must obtain from each person, if any, to whom it has paid, or offered or agreed to pay, a fee or commission in respect of such sale, a timely statement containing a full disclosure by such a person of all political contributions paid, or offered or agreed to be paid, by it or on its behalf, or at its direction, in respect of such sale. Such disclosure must include responses to all the information required to enable the applicant, supplier or vendor, as the case may be, to comply fully with §§ 130.9, 130.10, and 130.12.

(b) In obtaining information under paragraph (a) of this section, the applicant, supplier or vendor, as the case may be, must also require each person to whom a fee or commission is paid, or offered or agreed to be paid, to furnish from time to time such reports of its political contributions as may be necessary to enable the applicant, supplier or vendor, as the case may be, to comply fully with §§ 130.9, 130.10, 130.11, and 130.12.

(c) The applicant supplier or vendor, as the case may be, must include any political contributions paid, or offered or agreed to be paid, by or on behalf of, or at the direction of, any person to whom it has paid, or offered or agreed to pay a fee or commission in determining whether applicant, supplier or vendor is required by §§ 130.9, 130.11, and 130.12 to furnish information specified in § 130.10.

### **§ 130.14 Recordkeeping**

Each applicant, supplier and vendor must maintain a record of any information it was required to furnish or obtain under this part and all records upon which its reports are based for a period of not less than five years following the date of the report to which they pertain.

### **§ 130.15 Confidential Business Information**

(a) Any person who is required to furnish information under this part may identify any information furnished hereunder which the person considers to be confidential business information. No person, including any applicant or supplier, shall publish, divulge, disclose, or make known in any manner, any information so identified by a vendor or other person unless authorized by law or regulation.

(b) For purposes of this section, *confidential business information* means commercial or financial information which by law is entitled to protection from disclosure. (See, e.g., 5 U.S.C. 552(b) (3) and (4); 18 U.S.C. 1905; 22 U.S.C. 2778(e); Rule 26(c)(7), Federal Rules of Civil Procedure.)

### **§ 130.16 Other Reporting Requirements**

The submission of reports under this part does not relieve any person of any requirements to furnish information to any federal, state, or municipal agency, department or other instrumentality as required by law, regulation or contract.

### **§ 130.17 Utilization of and Access to Reports and Records**

(a) All information reported and records maintained under this part will be made available, upon request for utilization by standing committees of the Congress and subcommittees thereof, and by United States Government agencies, in accordance with § 39(d) of the Arms Export Control Act (22 U.S.C. 2779(d)), and reports based upon such information will be submitted to Congress in accordance with sections 36(a)(7) and 36(b)(1) of that Act (22 U.S.C. 2776(a)(7) and (b)(1)) or any other applicable law.

(b) All confidential business information provided pursuant to this part shall be protected against disclosure to the extent provided by law.

(c) Nothing in this section shall preclude the furnishing of information to foreign governments for law

enforcement or regulatory purposes under international arrangements between the United States and any foreign government.

*History: Amended at 71 FR 20534, Apr. 21, 2006.*



## APPENDIX A — INTERNATIONAL COUNTRY CODES





## BY COUNTRY

Afghanistan: AF  
Albania: AL  
Algeria: AG  
Andorra: AN  
Angola: AO  
Anguilla: AV  
Antarctica: AY  
Antigua & Barbuda: AC  
Argentina: AR  
Armenia: AM  
Australia: AS  
Austria: AU  
Azerbaijan: AJ

Bahamas: BF  
Bahrain: BA  
Bangladesh: BG  
Barbados: BB  
Belarus: BO  
Belgium: BE  
Belize: BH  
Benin: BN  
Bermuda: BD  
Bhutan: BT  
Bolivia: BL  
Bosnia-Herzegovina: BK  
Botswana: BC  
Brazil: BR  
Brunei: BX  
Bulgaria: BU  
Burkina: UV  
Burma (Myanmar): BM  
Burundi: BY

Cambodia: CB  
Cameroon: CM  
Canada: CA  
Cape Verde: CV  
Cayman Islands: CJ  
Central African Republic: CT  
Chad: CD  
Chile: CI  
China (Mainland): CH  
China (Taiwan): TW  
Colombia: CO  
Comoros: CN  
Congo: CF  
Costa Rica: CS  
Crete: GR  
Croatia: HR  
Cuba: CU  
Cyprus: CY  
Czech Republic: EZ

Denmark: DA  
Diego Garcia: IO  
Djibouti: DJ  
Dominica: DO  
Dominican Republic: DR  
Dubai: TC

Ecuador: EC  
Egypt: EG  
El Salvador: ES  
Equatorial Guinea: EK  
Eritrea: ER  
Estonia: EN  
Ethiopia: ET

Falkland Islands: FA  
Faroe Islands: FO  
Fiji: FJ

Finland: FI  
France: FR  
French Guiana: FG  
French Polynesia: FP  
French So and Antarctic Lands FS

Gabon: GB  
Gambia: GA  
Gaza Strip: GZ  
Georgia: GG  
Germany: GM  
Ghana: GH  
Gibraltar: GI  
Greece: GR  
Greenland: GL  
Grenada: GJ  
Guadeloupe: GP  
Guatemala: GT  
Guinea: GV  
Guinea-Bissau: PU  
Guyana: GY

Haiti: HA  
Honduras: HO  
Hong Kong: HK  
Hungary: HU

Iceland: IC  
India: IN  
Indonesia: ID  
Iran: IR  
Iraq: IZ  
Ireland: EI  
Israel: IS  
Italy: IT  
Ivory Coast (Cote d'Ivoire): IV

Jamaica: JM  
Japan: JA  
Jordan: JO

Kazakhstan: KZ  
Kenya: KE  
Kiribati: KR  
Korea, North: KN  
Korea, South: KS  
Kosovo: KV  
Kuwait: KU  
Kyrgyzstan: KG

Laos: LA  
Latvia: LG  
Lebanon: LE  
Lesotho: LT  
Liberia: LI  
Libya: LY  
Liechtenstein: LS  
Lithuania: LH  
Luxembourg: LU

Macau: MC  
Macedonia: MK  
Madagascar: MA  
Malawi: MI  
Malaysia: MY  
Maldives: MV  
Mali: ML  
Malta: MT  
Marshall Islands: RM  
Martinique: MB  
Mauritania: MR  
Mauritius: MP  
Mexico: MX  
Micronesia: FM  
Midway Islands: MQ

Moldova: MD  
 Monaco: MN  
 Mongolia: MG  
 Montenegro: MW  
 Montserrat: MH  
 Morocco: MO  
 Mozambique: MZ  
 Myanmar (see Burma)  
  
 Namibia: WA  
 Nauru: NR  
 Nepal: NP  
 Netherlands: NL  
 Netherlands Antilles: NA  
 New Caledonia: NC  
 New Zealand: NZ  
 Nicaragua: NU  
 Niger: NG  
 Nigeria: NI  
 Niue: NE  
 Norfolk Islands: NF  
 Northern Mariana Islands: CQ  
 Norway: NO  
  
 Okinawa: JA  
 Oman: MU  
  
 Pakistan: PK  
 Palau: PS  
 Panama: PM  
 Papua New Guinea: PP  
 Paraguay: PA  
 Peru: PE  
 Philippines: RP  
 Poland: PL  
 Portugal: PO  
 Puerto Rico: RQ  
  
 Qatar: QA  
  
 Reunion: RE  
 Romania: RO  
 Russia: RS  
 Rwanda: RW  
 Ryukyu Islands: JA  
  
 Saint Kitts and Nevis: SC  
 Saint Lucia: ST  
 Saint Vincent and Grenadines: VC  
 San Marino: SM  
 Sao Tome and Principe: TP  
 Saudi Arabia: SA  
 Senegal: SG  
 Serbia: SR  
 Seychelles: SE  
 Sierra Leone: SL  
 Singapore: SN  
 Slovakia: LO  
 Slovenia: SI  
 Solomon Islands: BP  
 Somalia: SO  
 South Africa: SF  
 Spain: SP  
 Spratly Islands: PG  
 Sri Lanka: CE  
 Sudan: SU  
 Suriname: NS  
 Swaziland: WZ  
 Sweden: SW  
 Switzerland: SZ  
 Syria: SY  
  
 Taiwan: TW  
 Tajikistan: TI  
 Tanzania: TZ

Tasmania: AS  
 Thailand: TH  
 Togo: TO  
 Tokelau: TL  
 Tonga: TN  
 Turks and Caicos Islands: TK  
 Trinidad & Tobago: TD  
 Trust Terr. of Pacific Islands: PS  
 Tunisia: TS  
 Turkey: TU  
 Turkmenistan: TX  
  
 Uganda: UG  
 Ukraine: UP  
 United Arab Emirates: TC  
 United Kingdom: UK  
 United States: US  
 Uruguay: UY  
 Uzbekistan: UZ  
  
 Vanuatu: NH  
 Venezuela: VE  
 Vietnam: VM  
 Virgin Islands (U.S.): VO  
  
 Wake Island: WQ  
 Western Sahara: WI  
 Western Samoa: WS  
  
 Yemen: YM  
  
 Zaire: CG  
  
 Zambia: ZA  
 Zimbabwe: ZI

### BY CODE

AC Antigua & Barbuda  
 AF Afghanistan  
 AG Algeria  
 AJ Azerbaijan  
 AL Albania  
 AM Armenia  
 AN Andorra  
 AO Angola  
 AR Argentina  
 AS Australia  
 AS Tasmania  
 AU Austria  
 AV Anguilla  
 AY Antarctica  
  
 BA Bahrain  
 BB Barbados  
 BC Botswana  
 BD Bermuda  
 BE Belgium  
 BF Bahamas, The  
 BG Bangladesh  
 BH Belize  
 BK Bosnia-Herzegovina  
 BL Bolivia  
 BM Burma (Myanmar)  
 BN Benin  
 BO Belarus  
 BP Solomon Islands  
 BR Brazil  
 BT Bhutan  
 BU Bulgaria  
 BX Brunei  
 BY Burundi  
  
 CA Canada  
 CB Cambodia  
 CD Chad

CE	Sri Lanka	JA	Ryukyu Islands
CF	Congo	JM	Jamaica
CG	Zaire	JO	Jordan
CH	China (Mainland)		
CI	Chile	KE	Kenya
CJ	Cayman Islands	KG	Kyrgyzstan
CM	Cameroon	KN	Korea, North
CN	Comoros	KR	Kiribati
CO	Colombia	KS	Korea, South
CQ	Northern Mariana Islands	KU	Kuwait
CS	Costa Rica	KV	Kosovo
CT	Central African Republic	KZ	Kazakhstan
CU	Cuba		
CV	Cape Verde	LA	Laos
CY	Cyprus	LE	Lebanon
EZ	Czech Republic	LG	Latvia
		LH	Lithuania
DA	Denmark	LI	Liberia
DJ	Djibouti	LO	Slovakia
DO	Dominica	LS	Liechtenstein
DR	Dominican Republic	LT	Lesotho
		LU	Luxembourg
EC	Ecuador	LY	Libya
EG	Egypt		
EI	Ireland	MA	Madagascar
EK	Equatorial Guinea	MB	Martinique
EN	Estonia	MC	Macau
ER	Eritrea	MD	Moldova
ES	El Salvador	MG	Mongolia
ET	Ethiopia	MH	Montserrat
		MI	Malawi
FA	Falkland Islands	MK	Macedonia (Former Yugo. Rep.)
FG	French Guiana	ML	Mali
FI	Finland	MN	Monaco
FJ	Fiji	MO	Morocco
FM	Micronesia	MP	Mauritius
FO	Faroe Islands	MQ	Midway Islands
FP	French Polynesia	MR	Mauritania
FR	France	MT	Malta
FS	French So and Antarctic Lands	MU	Oman
		MV	Maldives
GA	Gambia, The	MW	Montenegro
GB	Gabon	MX	Mexico
GG	Georgia, Republic of	MY	Malaysia
GH	Ghana	MZ	Mozambique
GI	Gibraltar		
GJ	Grenada	NA	Netherlands Antilles
GL	Greenland	NC	New Caledonia
GM	Germany	NE	Niue
GP	Guadeloupe	NF	Norfolk Islands
GR	Crete	NG	Niger
GR	Greece	NH	Vanuatu
GT	Guatemala	NI	Nigeria
GV	Guinea	NL	Netherlands
GY	Guyana	NO	Norway
GZ	Gaza Strip	NP	Nepal
		NR	Nauru
HA	Haiti	NS	Suriname
HK	Hong Kong	NU	Nicaragua
HO	Honduras	NZ	New Zealand
HR	Croatia		
HU	Hungary	PA	Paraguay
		PE	Peru
IC	Iceland	PG	Spratly Islands
ID	Indonesia	PK	Pakistan
IN	India	PL	Poland
IO	Diego Garcia	PM	Panama
IR	Iran	PO	Portugal
IS	Israel	PP	Papau New Guinea
IT	Italy	PS	Trust Territory of Pacific Islands
IV	Ivory Coast (Cote d'Ivoire)	PS	Palau
IZ	Iraq	PU	Guinea-Bissau
JA	Japan	QA	Qatar
JA	Okinawa		

RE	Reunion
RM	Marshall Islands
RO	Romania
RP	Philippines
RQ	Puerto Rico
RS	Russia
RW	Rwanda
SA	Saudi Arabia
SC	Saint Kitts and Nevis
SE	Seychelles
SF	South Africa
SG	Senegal
SI	Slovenia
SL	Sierra Leone
SM	San Marino
SN	Singapore
SO	Somalia
SP	Spain
SR	Serbia
ST	Saint Lucia
SU	Sudan
SW	Sweden
SY	Syria
SZ	Switzerland
TC	United Arab Emirates
TC	Dubai
TD	Trinidad & Tobago
TH	Thailand
TI	Tajikistan
TK	Turks and Caicos Islands
TL	Tokelau
TN	Tonga
TO	Togo
TP	Sao Tome and Principe
TS	Tunisia
TU	Turkey
TW	China (Taiwan)
TX	Turkmenistan
TZ	Tanzania
UG	Uganda
UK	United Kingdom
UP	Ukraine
US	United States
UV	Burkina
UY	Uruguay
UZ	Uzbekistan
VC	Saint Vincent and Grenadines
VE	Venezuela
VM	Vietnam
VO	Virgin Islands (US)
WA	Namibia
WI	Western Sahara
WQ	Wake Island
WS	Western Samoa
WZ	Swaziland
YM	Yemen
ZA	Zambia
ZI	Zimbabwe

## APPENDIX B — ITAR AMENDMENTS

[2009 amendments, in reverse chronological order.]

### **6 August 2009: 74 FR 39212-39213: 22 CFR Part 123; Temporary Export Exemption for Body Armor**

\* ACTION: Final rule.

\* SUMMARY: The Department of State is amending the International Traffic in Arms Regulations (ITAR) to add an exemption for the temporary export of body armor for exclusive personal use to destinations not subject to restrictions under the ITAR §126.1 and to Afghanistan and Iraq under specified conditions.

\* EFFECTIVE DATE: This rule is effective [insert date of publication in the Federal Register].

\* SUPPLEMENTARY INFORMATION: U.S. individuals are traveling to hazardous areas in foreign countries where they need to wear body armor for personal safety. Consequently, the Department of State is amending the International Traffic in Arms Regulations (ITAR) to add an exemption for the temporary export of body armor covered by 22 CFR 121.1, Category X(a)(1). The exemption is available for destinations not subject to restrictions under ITAR §126.1 and to Afghanistan and Iraq under specified conditions. In order to use the exemption, the protective equipment must be for the individual's exclusive use and must be returned to the United States. The individual may not re-export the protective equipment to a foreign person or otherwise transfer ownership. The protective equipment may not be exported to any country where the importation would be in violation of that country's laws. The U.S. person declaring the temporary export of body armor to U.S. Customs and Border Protection should use CBP Form 4457 entitled the

"Certificate of Registration for Personal Effects Taken Abroad." The export information is not required to be reported electronically using the Automated Export System (AES). Upon re-entering the United States, the CBP Form 4457 should be presented. In the event the body armor is lost or otherwise not returned to the United States, a detailed report about the incident must be submitted to the Office of Defense Trade Controls Compliance. The report should describe all attempts to locate the body armor.

### **3 August 2009: 74 FR 38342-38344: 22 CFR Parts 123, 124, 126, and 129; Congressional Certification Regarding South Korea**

\* ACTION: Final rule.

\* SUMMARY: The Department of State is amending the International Traffic in Arms Regulations (ITAR) regarding Congressional certification for the Republic of Korea (also referred to as South Korea). South Korea is now in the same category as the countries in the North Atlantic Treaty Organization (NATO), Japan, Australia, and New Zealand concerning certification to Congress, requiring such certification prior to granting any license for export of major defense equipment sold under a contract in the amount of \$25,000,000 or more, or for defense articles or defense services sold under a contract in the amount of \$100,000,000 or more, provided the transfer does not include any other countries. The ITAR is being amended at numerous sections to reflect these statutory changes and to update two provisions.

\* EFFECTIVE DATE: This rule is effective August 3, 2009.

\* SUPPLEMENTARY INFORMATION: Section 203 of the Public Law 110-429 amended, inter alia, Sections 3(d)(3)(A)(i), 36(c), and 36(d)(2)(A) of the Arms Export Control Act by inserting "Republic of Korea" before "New Zealand." This amendment added South Korea to the category of countries for which higher dollar thresholds apply for mandatory certification to Congress in advance of approving the export or transfer of defense articles and defense services. South Korea is now in the same category as the countries in the North Atlantic Treaty Organization (NATO), Japan, Australia, and New Zealand concerning certification to Congress, requiring such certification prior to granting any license for export of major defense equipment sold under a contract in the amount of \$25,000,000 or more, or for defense articles or defense services sold under a contract in the amount of \$100,000,000 or more, provided the transfer does not include any other countries.

The ITAR is being amended at numerous sections, as described below, to reflect these statutory changes and to update two provisions.

Section 123.9(e) of the ITAR is being amended to add "South Korea." This section is also being amended to correct outdated information regarding the dollar limits for sales without prior written approval and to add New Zealand to the list of countries eligible for certain reexports or retransfers without prior written approval.

Section 123.15 of the ITAR entitled "Congressional certification pursuant to Section 36(c) of the Arms Export Control Act" is being amended to add "South Korea" at sections 123.15(a)(1), 123.15(a)(2), and 123.15(b).

Section 124.11 of the ITAR entitled "Congressional certification pursuant to Section 36(d) of the Arms Export Control Act" is being amended to add "South Korea" at section 124.11(b).

Section 126.8 of the ITAR entitled "Proposals to foreign persons relating to significant military equipment" is being amended to add "South Korea" at section 126.8(a)(ii).

Part 129 of the ITAR regarding brokering activities is being amended at section 129.6(b)(2) to add "South Korea" to the category of NATO, Japan, Australia, and New Zealand for purposes of an exemption from prior written approval.

Sections 129.7(a)(1)(vii) and 129.7(a)(2) are being amended to add "South Korea" to the category of NATO, Japan, Australia, and New Zealand or purposes of defining brokering activities requiring prior written approval.

#### **20 July 2009: 74 FR 35115; 22 C.F.R 121.1(c), Cat XII(c) Correction**

\* ACTION: Correcting amendment.

\* SUMMARY: The Department of State published a final rule in the Federal Register on September 9, 1994 (59 FR 46548), revising Category XII(c) of the United States Munitions List. The language in the note after paragraph (c) contains a typographical error by using the term "hold" instead of "hole." A technical error in that rule resulted in the unintended removal of the note after Category XII paragraph (c). Consequently, a correction was published on April 24, 2009 (74 FR 18628) to restore the language in the note after Category XII paragraph (c). That correction used the term ``hold" when the correct term is "hole." This document corrects the typographical error dating from September 9, 1994 to utilize the correct term ``hole."

\* DATES: Effective Date: Effective on July 20, 2009.

\* SUPPLEMENTARY INFORMATION: The Department of State published a final rule (Public Notice 4723) in the Federal Register of May 21, 2004, amending Category XII of the United States Munitions List. This document restores the language in the note after Category XII(c).

#### **24 April 2009: 74 FR 18628: 22 CFR Part 121.1(c), Category XII: The United States Munitions List; Correction**

\* ACTION: Correcting amendment.

\* SUMMARY: The Department of State published a final rule in the Federal Register on May 21, 2004 (69 FR 29222), revising Category XII(c) of the United States Munitions List. A technical error in that rule resulted in the unintended removal of language in a note after Category XII paragraph (c). This document corrects the final regulations by restoring the language in the note.

\* DATES: Effective on April 24, 2009.

\* SUPPLEMENTARY INFORMATION: The Department of State published a final rule (Public Notice 4723) in the Federal Register of May 21, 2004, amending Category XII of the United States Munitions List. This document restores the language in the note after Category XII(c).

# APPENDIX C — MONOGRAPH ON U.S. DEFENSE TRADE ENFORCEMENT

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Revised October 14, 2009

## Foreword

The purpose of this monograph is to provide a legal and compliance practitioner's reference guide on the enforcement of international defense trade controls in the United States, with an emphasis on the U.S. State Department's civil and administrative enforcement program. Part 1 is an executive summary of U.S. defense trade controls and their enforcement by the U.S. federal government. Part 2 is a detailed chronological digest of all reported civil penalty cases that the State Department has settled since 2001.

Part 3 is a chronological table of those cases intended to provide a "snapshot" of key enforcement data. This monograph is provided for general informational purposes only, and does not constitute the provision of legal advice or professional services. Corrections, criticisms, and suggestions are welcomed.

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## *Part 1: Executive Summary of U.S. Defense Trade Controls Enforcement*

### **Overview**

The U.S. State Department's Directorate of Defense Trade Controls ("DDTC") administers the International Traffic in Arms Regulations (the "ITAR"), 22 C.F.R. Parts 120 – 130, which implement the Arms Export Control Act (the "AECA") and regulate international defense trade involving the United States. In most cases, companies in the United States that engage in ITAR-regulated activities must register with DDTC and pay an annual fee.

The ITAR regulate the permanent and temporary exportation from the United States, temporary importation into the United States, and retransfer from an authorized end user, of defense articles and technical data identified on the U.S. Munitions List at Part 121 of the ITAR. The ITAR also regulate the provision by U.S. persons of defense services to non-U.S. persons, as well as certain defense brokering activities whether conducted by U.S. or non-U.S. persons. ITAR-regulated activities require prior DDTC authorization unless a specific ITAR exemption applies.

### **Strict Enforcement**

As reflected by the AECA, DDTC's mission and authority are driven by no less than the "furtherance of world peace and the security and foreign policy of the United States...." DDTC views the privilege to engage in defense trade as one which must be exercised with extraordinary integrity, transparency, and competency. Against this ideological backdrop it is unsurprising that the U.S. government enforces defense trade controls aggressively. Because of the potential for serious harm to vital national interests, even technical or unintentional violations carry substantial penalties to serve as a deterrent for careless behavior. Collateral consequences include negative publicity and corresponding reputational damage.

### **Criminal Penalties**

Criminal penalties for willful misconduct under the AECA and ITAR include a fine of up to \$1 million, and imprisonment for up to ten years, per violation. To establish willfulness, the government typically must

prove there was a specific intent to violate a known legal duty.<sup>182</sup>

### **Civil Penalties and Administrative Enforcement**

DDTC is authorized to impose a civil penalty of up to \$500,000 per violation. The standard of intent for civil penalties is strict liability; i.e., no intent is required to violate the law. In accordance with well-settled principles, DDTC often holds parent companies liable for the acts of their subsidiaries. And when a company with compliance problems is sold off, DDTC may assess penalties against both the seller and buyer under the theory of successor liability, as it has done in several cases.

Agency officials have explained publicly that DDTC pursues civil penalties for significant violations that impact U.S. national security or foreign policy interests, as well as for significant violations that challenge the U.S. government's regulatory authority. Many cases have involved unauthorized technology transfers and exports to China and other countries of concern to the United States. And to the latter point, recent cases have reflected a trend for DDTC to penalize companies that it perceives have flouted DDTC's authority, questioned its judgment, or deceived the agency in some manner.

For example, a 2006 case against Boeing, which resulted in a \$15 million fine and burdensome mandatory compliance requirements, was driven largely by the fact that the company, following advice of counsel, disregarded DDTC's position on the classification of an aircraft guidance component and defied the agency's mandates. A companion case against Goodrich Corporation and L-3 Communications was advanced on the premise that Goodrich misled DDTC by omitting material information in a request for a commodity jurisdiction determination. In its draft charging letter, DDTC publicly rebuked the company's outside lawyers for "aiding and abetting" the alleged misconduct and L-3 paid for violations that occurred before it acquired the company.

Civil penalties may be assessed together with or independent from criminal penalties. Typically DDTC pursues civil penalties through a negotiated settlement process that begins with the presentation of a draft charging letter describing the violations DDTC intends to charge, and concludes with the execution of a consent agreement and order resolving the case.

DDTC calculates civil penalties aggressively, and often charges a separate violation for each instance of repetitive conduct. For example, in a case involving numerous unauthorized shipments of the same type of defense article or technical data to the same end user, DDTC typically assesses a separate fine for each shipment, which can result in staggering cumulative penalties. In addition, one transaction often results in multiple violations. For example, shipping a defense article or transferring controlled technical data improperly will, depending on the circumstances, lead to several distinct charges, including making an unauthorized exportation, conspiring to violate the ITAR, aiding and abetting a violation, and making a false statement or omitting a material fact on a related shipping document.

A formal hearing procedure before an administrative law judge is available under Part 128 the ITAR, with evidentiary safeguards and rights to a rehearing and an appeal. But for all intents and purposes, administrative due process is nonexistent. No reported administrative enforcement matter to date has ever involved such a hearing. As a practical matter, DDTC's authority (and demonstrated willingness) to suspend defense trade activities pending the outcome of an enforcement case has discouraged anyone from ever pursuing a formal hearing. As a further disincentive to challenge its authority, DDTC asserts the position that defense trade enforcement is largely immune from judicial review under the Administrative Procedure Act because of the sensitive national security and foreign policy interests implicated.

### **Debarment, Denial, Revocation, and Suspension**

Debarment is a prohibition from engaging directly or indirectly in ITAR-regulated defense trade. A criminal conviction under the AECA, the Export Administration Act, the Foreign Corrupt Practices Act, U.S. sanctions laws, or other specified national security laws triggers an automatic statutory debarment for three

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<sup>182</sup> Jurisprudence varies in different federal judicial circuits on the precise legal elements for establishing willful intent to violate federal criminal law.



years. And any violation of the ITAR, regardless of intent, may trigger discretionary administrative debarment, likewise for a period of three years.

Reinstatement of defense trade privileges is not automatic; the debarred party must petition DDTC and demonstrate that it has mitigated law enforcement concerns raised by the conduct triggering debarment. As a matter of administrative discretion, DDTC often will waive the three-year period and permit a debarred party to petition for reinstatement after one year. Nevertheless, reinstatement is a costly, burdensome, and often lengthy process.

An indictment under the AECA or the other specified criminal statutes, ineligibility to contract with the U.S. government, denial of export or import privileges by another government agency, imposition of missile proliferation sanctions, or even the mere suspicion of violations of U.S. trade controls, provides DDTC with discretionary authority to deny, revoke, or suspend defense trade authorizations. In such cases, the petition process and timing for restoration of defense trade privileges varies depending on the precise nature of the conduct triggering the adverse action.

The ability to control and deny access to the U.S. defense market provides DDTC with powerful leverage to compel even non-U.S. companies to comply with its mandates.

#### Directed Remediation

In addition to a fine and the prospect of debarment or other limitations on defense trade privileges, administrative enforcement generally includes execution of a consent agreement under which the respondent is required to institute enhanced compliance measures, usually for a period of three to five years.

These measures include appointing a Special Compliance Official, often from outside the company, as well as conducting compliance audits with DDTC-approved outside auditors, instituting a “cradle-to-grave” export tracking system, and dedicating a specified and typically substantial amount of money to compliance improvements. Each consent agreement is tailored to the nature of the violations, the level of cooperation, and the adequacy of existing compliance measures at the time of settlement.

#### Voluntary Disclosure

DDTC has created powerful incentives for companies to make voluntary disclosures of suspected violations. Although no guarantees are offered, submission of a voluntary disclosure is well-recognized as a substantial mitigating factor, and often results in DDTC taking no enforcement action. In fact, agency officials have stated publicly that they expect regulated companies to submit voluntary disclosures as a reflection of transparency and a commitment that their compliance programs actually work to detect and correct violations.

Conversely, DDTC looks suspiciously upon companies without a track record for making disclosures, perceiving them as having something to hide. Moreover, nondisclosure is treated as an aggravating factor in calculating penalties when violations are discovered—as often they are—through other sources. The risk that violations will be revealed independently is significant because of the participation of other parties in a defense trade transaction such as suppliers or shippers who themselves may be inclined to make a disclosure to protect their own interests. Other variables include the possibility of a Customs seizure when paperwork is not in order, the prospect of a competitor who believes the other company is gaining an unfair advantage by not following the rules, a disgruntled employee or whistleblower, and investigative media reporting.

In some cases, what is perceived as a voluntary decision may actually be a mandatory duty to disclose. For example, Section 126.1(e) of the ITAR requires that “[a]ny person who knows or has reason to know of ... a proposed or actual sale” of ITAR-controlled defense articles, defense services or technical data to an ITAR-proscribed country (e.g., China) “must immediately inform” DDTC. In addition, the failure to disclose a prior violation may constitute a material omission on a subsequent license application or a public company securities report, or cause a false statement on a subsequent compliance certification.

#### Statistics and Trends

DDTC publishes on its website copies of final settlement documents for ITAR administrative enforcement cases (*i.e.*, draft charging letters, consent agreements, and orders). See [http://www.pmdtdc.state.gov/compliance/consent\\_agreements.html](http://www.pmdtdc.state.gov/compliance/consent_agreements.html). While it is unclear if the list of published cases is exhaustive, available documentation reflects that the State Department has settled forty-one cases since

1978 (with one additional undated case). On average, the State Department has settled approximately two cases per year, and in no year has the number of cases exceeded five. Several companies have been penalized multiple times; e.g., Boeing (five times); Lockheed Martin (three times); L-3 (two times); Raytheon (two times); ITT (two times); Hughes (two times); Security Assistance International (two times).

Available information reflects that approximately 5,700 companies presently are registered with DDTC, which suggests the odds of a company becoming the target of an ITAR administrative enforcement action are statistically insignificant. Nevertheless, DDTC's enforcement program has a well-recognized *in terrorem* effect on the defense industry, both in the United States and abroad. As noted above, DDTC uses its considerable powers aggressively to make harsh examples of targeted companies.

### **Learning from ITAR Enforcement Cases**

Whatever the odds that any given company will become the target of an enforcement action, a close study of DDTC cases, especially more recent examples as summarized in this monograph, provides invaluable information about DDTC's priorities, concerns, and expectations. In particular, the often sharp and reproachful rhetoric in draft charging letters effectively illustrates the types of conduct that DDTC finds especially egregious. Perhaps more importantly, as a reflection of what DDTC expects from companies to strengthen their compliance programs in the wake of settled violations, the directed remediation measures set forth in consent agreements provide a blueprint of best practices that every company should consider when benchmarking its own program.

### **Part 2 : *ITAR Administrative Enforcement Digest (2001 – 2009)***

“AECA”:	Arms Export Control Act
“DDTC”:	State Department, Directorate of Defense Trade Controls
“EAR”:	Export Administration Regulations, 15 C.F.R. Parts 730 - 774
“ITAR”:	International Traffic in Arms Regulations, 22 C.F.R. Parts 120 – 130
“SCO”:	Special/Senior Compliance Officer/Official

*Citations to the applicable provisions of the ITAR for similar violations sometimes are inconsistent from case to case, which is a reflection of DDTC enforcement practice.*

**2009:**

**Air Shunt Instruments, Inc.**

**Settled:** July 8, 2009

Air Shunt Instruments settled charges concerning the unauthorized exportation of military aircraft parts to the United Arab Emirates and to Thailand. DDTC noted that Air Shunt Instruments did not voluntarily disclose the violations, which became known to DDTC only following notice that the company was being prosecuted in federal court for a criminal violation of the AECA in connection with the matter. Although the Department elected to impose civil penalties because of the “national security and foreign policy interests involved”, DDTC gave mitigating consideration to the fact that Air Shunt Instruments had implemented remedial compliance measures at the time of the settlement.

**Charges:** Four violations, as follows:

- (1) (1) Three charges of exporting defense articles without authorization; two charges pertain to the exportation of military aircraft parts to the United Arab Emirates, and one charge pertains to the exportation of a military aircraft gyroscope to Thailand (ITAR § 127.1(a)(1)).
- (2) One charge of misrepresenting and omitting material facts by filing a Shipper’s Export Declaration falsely indicating that no license was required (ITAR § 127.2(a)).

**Penalty:**

\$100,000, of which \$70,000 is suspended on the condition that it is eligible to be credited toward preexisting compliance measures, and \$30,000 of which is suspended on the condition that it is to be applied over a two-year period to directed remediation.

**Directed Remediation**

- (3) Strengthen policies, procedures, and training within twelve months of settlement.
- (4) Ensure that adequate resources are devoted to ITAR compliance.
- (5) Agree to arrange and facilitate a DDTC on-site review with minimum notice for the duration of the consent agreement, which is no sooner than thirty months after settlement and following a determination by DDTC that the terms of the agreement have been fulfilled.
- (6) Conduct an external audit, subject to prior DDTC approval of the auditor and audit plan, and submit a final report of findings and recommendations within twelve months of settlement. Complete a follow-up audit to confirm implementation of any recommended improvements within twenty-four months of settlement.
- (7) Incorporate the foregoing measures into any ITAR-affected business acquisitions, notify DDTC sixty days prior to any contemplated sale of its business or any division, and require the purchaser in such case to agree to be bound by the terms of the settlement, including the foregoing measures.

**Analytical Methods, Inc.**

**Settled:** February 18, 2009

**Summary:** Analytical Methods settled charges concerning the unauthorized exportation of ITAR-controlled technical data and defense services pertaining to computational dynamic fluid simulation software, which is used for design testing in a virtual environment that simulates flying through air or traveling through water. DDTC noted that Analytical Methods voluntarily disclosed the violations and cooperated in the investigation,

which the Department considered a significant mitigating factor in determining sanctions. But as noted in the proposed charging letter, DDTC elected nonetheless to impose penalties because of the “significant national security interests involved as well as the systemic and repetitive nature of the violations...”

**Charges:** Twenty-nine violations, as follows:

- (8) Six charges of exporting technical data without authorization; five charges pertain to China and one to Turkey (ITAR § 127.1(a)(1)).
- (9) Six charges of causing the unauthorized exportation of technical data to China by providing the data to a U.S. person with knowledge that it would be transferred (ITAR § 127.1(a)(3)).
- (10) One charge of failing to report an exportation to a proscribed country (ITAR § 126.1(e)).
- (11) Thirteen charges of providing unauthorized defense services to Turkey, Singapore, the United Kingdom, and Israel (ITAR § 127.1(a)(1)).
- (12) Two charges of engaging in the unregistered manufacture and exportation of defense articles and defense services (ITAR § 127.1(a)(5)).
- (13) One charge of misrepresenting and omitting material facts by filing export control documents with false statements about the classification of software (ITAR § 127.2(a)).

**Penalty:** \$500,000, of which \$100,000 is payable within fifteen days of settlement, \$200,000 is eligible to be credited toward preexisting compliance measures, and \$200,000 is applied over a three-year period to directed remediation.

**Directed Remediation:**

- (1) Appoint an internal SCO within thirty days of settlement, with DDTC concurrence, who will oversee and support ITAR compliance.
- (2) Implement a formal ITAR compliance program that includes annual training and a compliance manual.
- (3) Ensure that the SCO has appropriate legal support and oversight.
- (4) Agree to arrange and facilitate a DDTC on-site review with minimum notice for the duration of the consent agreement, which is no sooner than three years after settlement and following a determination by DDTC that the terms of the agreement have been fulfilled.
- (5) Conduct an external audit, subject to prior DDTC approval of the auditor and audit plan, and submit a final report of findings and recommendations within eighteen months of settlement. Complete a follow-up audit to confirm implementation of any recommended improvements before the two-and-a-half year anniversary of settlement.
- (6) Certify to DDTC three months before the three-year anniversary of settlement that remedial measures have been implemented pursuant to the consent agreement and that the compliance program is adequate, with the understanding that the terms of the consent agreement remain in force until DDTC lifts them following certification.

**2008:**

**Qioptiq**

**Settled:** December 19, 2008

**Summary:**

In a case related to the landmark ITT enforcement matter described below, Qioptiq settled numerous charges concerning the unauthorized exportation and retransfer by predecessor companies of ITAR-controlled technical data and defense articles pertaining to military optical components incorporated into night vision

equipment.

DDTC noted that Qioptiq voluntarily disclosed a number of the violations and cooperated in the investigation, which the Department considered a significant mitigating factor in determining sanctions. DDTC also gave mitigating consideration to the fact that the violations took place before Qioptiq acquired the companies that actually engaged in the transgressions. But as noted in the proposed charging letter, DDTC elected nonetheless to impose penalties: (1) because “[m]any of the violations identified in [the] proposed charging letter...were not voluntarily disclosed but were uncovered based on directed questioning by the Government”; and (2) due to “the significant national security interests involved as well as the systemic and longstanding nature of the violations....”

Concerning the systemic and longstanding nature of the violations, DDTC reproduced in its proposed charging letter excerpts from internal records of Thales, the previous owner of the companies that actually engaged in the transgressions, to establish that business units involved in ITAR-regulated activities had “limited or no ITAR training and a longstanding lack of support for ITAR compliance.”

**Charges:** One hundred sixty-three violations, as follows:

- (1) Ten charges of exporting night vision-related technical data without authorization by exceeding the scope of a technical assistance agreement and exporting the data to Singapore, as well as by exporting prior to the execution of the agreement (ITAR §§ 127.1(a)(1), 127.1(a)(4), and 127.1(d)).
- (2) One charge of transferring classified ITAR technical data without authorization (ITAR § 125.3(b)).
- (3) One charge of misrepresenting and omitting material facts by filing export control documents containing false statements that unauthorized exports of technical data were authorized under a technical assistance agreement (ITAR § 127.2(a)).
- (4) Eighty-one charges of retransferring technical data without authorization to employees and subcontractors in China, a proscribed country (ITAR §§ 127.1(a)(1) and 126.1(a)(1)).
- (5) Fourteen charges of exporting defense articles without authorization to Israel, France, and Singapore (ITAR § 127.1(a)(1)).
- (6) Thirteen charges of retransferring technical data (exported to Singapore with and without authorization) to third country foreign national employees and subcontractors prohibited by proviso in Singapore without authorization (ITAR §§ 127.1(a)(1) and 127.1(a)(4)).
- (7) Thirty charges of retransferring without authorization night vision components manufactured using U.S.-origin ITAR-controlled technical data to NATO countries, Israel, Egypt, and Pakistan (ITAR § 127.1(a)(1)).
- (8) One charge of transferring without authorization U.S.-origin ITAR-controlled technical data, and defense articles manufactured using such technical data, to Iran, a proscribed country (ITAR §§ 127.1(a)(1) and 126.1(a)(1)).
- (9) Two charges of transferring without authorization a defense article manufactured using U.S.-origin ITAR-controlled technical data to Cyprus, a proscribed country (ITAR §§ 127.1(a)(1) and 126.1(a)(1)).
- (10) Ten charges of retransferring technical data without authorization to subcontractors in Belgium, Germany, Hungary, the Netherlands, Russia, Singapore, Switzerland, and the United Kingdom (ITAR §§ 127.1 (a)(1) and 127.1(a)(4)).

**Penalty:** \$25 million, of which \$15 million is payable within thirty days of settlement, \$5 million is eligible to be credited toward preexisting compliance measures, and \$5 million is applied over a three-year period toward directed remediation.

**Directed Remediation:**

- (1) Appoint within forty-five days of settlement an internal SCO, subject to DDTC’s prior and continuing approval, with a requirement that the SCO report on compliance to senior corporate and legal management, and to DDTC, at specified times for the appointment term.
- (2) Conduct an internal review within one hundred twenty days to establish the necessary actions to ensure

that sufficient resources are dedicated to compliance, including the use of additional resources from compliance cross-trained employees on a part time basis when needed. Ensure that adequate resources are dedicated to ITAR compliance and establish policies and procedures to address lines of authority, staffing, performance evaluations, career paths, promotions, and compensation for employees with ITAR compliance responsibility.

- (3) Establish legal department oversight of trade compliance within thirty days of settlement.
- (4) Agree to arrange and facilitate DDTC on-site reviews with minimum notice for the term of the consent agreement.
- (5) Strengthen policies, procedures, and training within twelve months of settlement.
- (6) Conduct an external audit, subject to prior DDTC approval of the auditor and audit plan, and submit a final report of findings and recommendations within eighteen months of settlement. Complete a follow-up audit to confirm implementation of any recommended improvements before the two-and-one-half year anniversary of settlement.
- (7) Certify to DDTC three months before the three-year anniversary of settlement that remedial measures have been implemented pursuant to the consent agreement and that the compliance program is adequate, with the understanding that the terms of the consent agreement remain in force until DDTC lifts them following certification.

## **Lockheed Martin Corporation**

**Settled:** August 1, 2008.

**Summary:** Lockheed settled charges concerning the unauthorized exportation of classified and unclassified technical data pertaining to missile systems, as well as charges concerning the failure to provide required notice to DDTC for proposals to sell significant military equipment. DDTC noted that Lockheed voluntarily disclosed the violations and implemented remedial measures, which the Department considered a significant mitigating factor in determining sanctions.

**Charges:** Eight violations, as follows:

- (1) Three charges of failing to provide prior notice for proposals to sell significant military equipment; namely, Hellfire missiles to the United Arab Emirates (ITAR § 126.8(a)(2)).
- (2) One charge of exporting technical data in the form of performance specifications for the Hellfire missile without authorization to the United Arab Emirates (ITAR § 127.1(a)(1)).
- (3) One charge of exporting classified technical data in the form of performance specifications for the Hellfire missile without authorization to the United Arab Emirates (ITAR § 125.3(a)).
- (4) Two charges of failing to follow proper Defense Department procedures for exporting classified technical data concerning the Joint Air-to-Surface Standoff missile to the United Arab Emirates (ITAR § 125.3(b)).
- (5) One charge of failing to obtain a Non-Transfer and Use Certificate (Form DSP-83) for the exportation of classified technical data (ITAR § 123.10(a)).

**Penalty:** \$4 million, of which \$1 million is applied over two years to directed remediation.

### **Directed Remediation:**

- (1) Establish full corporate legal department oversight of trade compliance within thirty days of settlement and continue local legal department oversight at the operating level.
- (2) Appoint an internal SCO, subject to DDTC's prior and continuing approval, within sixty days of settlement for two years, with a requirement that the SCO report on compliance to senior corporate and legal management, and to DDTC, at specified times for the appointment term.
- (3) Conduct an internal review of ITAR compliance resources throughout four specified business units within its Electronic Systems business segment within 120 days of settlement.

- (4) Provide status reports to DDTC on compliance program improvements within six month of settlement and semi-annually thereafter.
- (5) Modify procedures as necessary within thirty days of settlement to ensure compliance with ITAR notification and authorization requirements regarding proposals and presentations concerning the sale of significant military equipment to foreign persons.
- (6) Agree to arrange and facilitate a DDTC on-site review with minimum notice for two years.
- (7) Ensure that adequate resources are dedicated to ITAR compliance and establish policies and procedures to address lines of authority, staffing, performance evaluations, career paths, promotions, and compensation for employees with ITAR compliance responsibility.
- (8) Provide external training within 120 days of settlement, with a focus on the areas of concern identified in the draft charging letter. Commission an independent evaluation of the effectiveness of the training within prescribed timelines. Maintain detailed training records.
- (9) Conduct an external audit, subject to prior DDTC approval of the auditor and audit plan, and submit a final report of findings and recommendations within two years of settlement.
- (10) Certify to DDTC at the conclusion of the two-year term that remedial measures have been implemented pursuant to the consent agreement and that the compliance program is adequate.
- (11) Incorporate the foregoing measures into any ITAR-affected business acquisitions, notify DDTC thirty days prior to any contemplated sale of the Missiles and Fire Control business unit, and require the purchaser in such case to agree to be bound by the terms of the settlement, including the foregoing measures.

## **The Boeing Company**

**Settled:** June 17, 2008

**Summary:** Boeing settled charges that it engaged in what DDTC characterized in its charging letter as a “serious, systemic, and longstanding” pattern of administrative violations over the course of a thirty-year period in connection with the valuation of manufacturing license agreements. DDTC noted that Boeing voluntarily disclosed the violations and implemented remedial measures, which the Department considered a significant mitigating factor in determining sanctions.

**Charges:** Forty violations, as follows:

- (1) Twenty charges of violating license conditions by exceeding the values of DDTC-approved manufacturing license agreements (ITAR § 127.1(a)(4)).
- (2) Ten charges of failing to submit required amendments DDTC-approved manufacturing license agreements (ITAR § 124.1(c)).
- (3) Five charges of omitting material facts from submissions for the approval of manufacturing license agreements by understating the value of the agreements (ITAR § 127.2(a)).
- (4) Five charges of failing to abide by the administrative terms and conditions associated with the approval of manufacturing license agreements (ITAR §§ 127.1(a)(4), 127.2, and 124.1(c)).

**Penalty:** \$3 million, none of which is allocated to directed remediation.

### **Directed Remediation:**

- (1) Strengthen policies, procedures, and training within twelve months of settlement, especially regarding the administration of manufacturing license agreements and technical assistance agreements. Maintain detailed training records.
- (2) Continue to implement an automated export compliance system to strengthen internal controls over the administration of manufacturing license agreements and technical assistance agreements.
- (3) Conduct an external audit, subject to prior DDTC approval of the auditor and audit plan, and submit a

final report of findings and recommendations within eighteen months of settlement. Complete a follow-up audit to confirm implementation of any recommended improvements before the two-and-a-half year anniversary of settlement.

(4) Certify to DDTC at the conclusion of the three-year term of the consent agreement that remedial measures have been implemented pursuant to the agreement and that the compliance program is adequate.

(5) Incorporate the foregoing measures into any business acquisitions that are involved in the administration of manufacturing license agreements or technical assistance agreements within six months of acquisition.

## **Northrop Grumman Corporation**

**Settled:** March 25, 2008

**Summary:** Northrop settled charges that, between 1994 and 2003, Northrop and its predecessor in interest, Litton Industries, Inc. (acquired in 2001), exported militarized versions of aircraft inertial navigation systems, as well as related software source code and defense services, to unauthorized end users, including in proscribed destinations. DDTC noted that Northrop voluntarily disclosed the violations and cooperated with DDTC's subsequent investigation, which the Department considered a significant mitigating factor in determining sanctions.

**Charges:** One hundred ten violations, as follows:

(1) One charge of exporting technical data in the form of software related to significant military equipment used for Air Force One without authorization to an end user in Russia (ITAR § 127.1(a)(1)).

(2) Twenty-seven charges of exporting defense articles constituting significant military equipment, including technical data in the form of embedded software, without authorization to ITAR-proscribed countries; namely, Angola, Indonesia, China, and Ukraine (ITAR § 126.1(e)).

(3) Twenty-seven charges of failing to report an exportation to a proscribed country (ITAR § 126.1(e)).

(4) Forty-six charges of exporting defense articles constituting significant military equipment, including technical data in the form of embedded software, without authorization to end users in Austria, Brazil, Brunei, Greece, Israel, Malaysia, Singapore, South Korea, Thailand, the United Kingdom, and Yemen (ITAR § 127.1(a)(1)).

(5) One charge of exporting defense services to end users in Brazil, Indonesia, Israel, Malaysia, Singapore, and the United Kingdom (ITAR § 127.1(a)(1)).

(6) One charge of exporting technical data constituting significant military equipment in the form of software without authorization to Canada (ITAR § 127.1(a)(1)).

(7) One charge of reexporting defense articles constituting significant military equipment, including technical data in the form of embedded software, without authorization to end users in Romania, South Korea, Indonesia, and the United Kingdom (ITAR § 127.1(a)(1)).

(8) Five charges of exporting technical data constituting significant military equipment in the form of software without authorization to the United Kingdom (ITAR § 127.1(a)(1)).

(9) One charge of failing to obtain a non-transfer and use certificate (Form DSP-83) for the exportation and reexportation of significant military equipment; namely, defense articles and technical data in the form of software (ITAR § 123.10(a)).

Penalty: \$15 million, allocated as follows: (1) \$10 million payable in annual installments over a three-year period (three \$3 million payments and one \$1 million payment); (2) \$5 million suspended on the condition that \$4 million be allocated toward directed remediation over three years, with \$1 million credited for compliance measures implemented since 2004.

**Directed Remediation:**

(1) Appoint an internal SCO, subject to DDTC's prior and continuing approval, within sixty days of



settlement for three years, with a requirement that the SCO report on compliance to the senior management, the Compliance, Public Issues and Policy Committee of the Board of Directors (“CPIP”), the Export/Import Policy Council, and DDTC at specified times for the appointment term.

- (2) Conduct an internal review of ITAR compliance resources within 120 days of settlement.
- (3) Establish legal department oversight of trade compliance within thirty days of settlement.
- (4) Agree to arrange and facilitate a DDTC on-site review with minimum notice for three years.
- (5) Strengthen policies, procedures, and training within twelve months of settlement, including training Empowered Officials on identifying ITAR controlled items and services, and preparing commodity jurisdiction requests, within 180 days of settlement.
- (6) Conduct an external audit, subject to prior DDTC approval of the auditor and audit plan, and submit a final report of findings and recommendations within eighteen months of settlement. Conduct a follow-up audit to confirm implementation of any recommended improvements at the two-and-a-half year anniversary of settlement.
- (7) Continue to implement comprehensive automated export compliance systems to strengthen internal controls for ensuring ITAR compliance, and provide to DDTC semi-annual updates outlining the status of the systems commencing six months from settlement. The systems will automate processes involving jurisdiction/classification, license requests, hardware shipments, exportation of technical data and defense services, and denied party screening. Additionally, the systems will track the decision process from the initiation of a request for potential export authorization or clarification of an existing authorization to its conclusion to facilitate oversight and monitoring, as well as cover the identification, review, and approval of technical data and defense services prior to exportation.
- (8) Develop a means to alert users to ITAR requirements regarding electronic transmissions of ITAR-controlled technical data, and train all employees with electronic accounts to prevent unintentional or accidental unauthorized transmissions.
- (9) Issue a reminder within thirty days of settlement of the availability of the company’s ethics hotline for reporting concerns, and submit an annual report to DDTC evaluating the hotline’s effectiveness.
- (10) Certify to DDTC at the conclusion of the three-year term that remedial measures have been implemented pursuant to the consent agreement and that the compliance program is adequate.
- (11) Incorporate the foregoing measures into any ITAR-affected business acquisitions, notify DDTC three months prior to any contemplated sale of the Electronic Systems Sector, and require the purchaser in such case to agree to be bound by the terms of the settlement, including the foregoing measures.

## **2007:**

### **ITT Corporation**

#### **Civil Case:**

**Settled:** December 21, 2007

**Summary:** ITT settled charges that it violated the ITAR in connection with the unauthorized exportation of night vision products and technology.

**Charges:** Two hundred eight<sup>183</sup> violations, as follows:

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<sup>183</sup> The draft charging letter contains a discrepancy; *i.e.*, 208 charges are alleged but 207 charges are described in the corresponding charging paragraphs.

- (1) One charge of misrepresenting and omitting material facts in connection with a prior voluntary disclosure (ITAR § 127.2(a)).
- (2) One hundred sixty-two charges of exporting technical data constituting significant military equipment to Singapore, Hong Kong, and Canada (ITAR § 127.1(a)(1)).
- (3) Two charges of exporting defense articles without authorization to China, an ITAR-proscribed country (ITAR §§ 127.1(a)(1) and 126.1(a)).
- (4) Thirty-six charges of causing or conspiring to make the unauthorized exportation of technical data to Singapore, Israel, India, and Hong Kong (ITAR § 127.1(a)(3)).
- (5) One charge of causing or conspiring to make the unauthorized exportation of technical data to China, an ITAR-proscribed country (ITAR § 127.1(d)).
- (6) One charge of failing to report an exportation to a proscribed country (ITAR § 126.1(e)).
- (7) One charge of misrepresenting and omitting material facts from a permanent export license application (ITAR § 127.2(a)).
- (8) One charge of failing to obtain a non-transfer and use certificate (Form DSP-83) for the exportation of significant military equipment and classified technical data (ITAR § 123.10(a)).
- (9) One charge of exporting classified technical data without authorization to the United Kingdom (ITAR §§ 127.1(a)(1) and 125.3).
- (10) One charge of failing to file a Shippers Export Declaration in connection with an unauthorized exportation of technical data (ITAR § 123.22(b)).

**Penalty:** \$28 million, allocated as follows: (1) \$20 million, payable in \$4 million annual installments commencing within ten days of settlement; (2) \$8 million, \$3 million of which is credited from the prior 2004 settlement with DDTC described further below, and \$5 million of which is applied toward directed remediation over a five-year period. In addition, ITT Night Vision Division is debarred from ITAR-controlled defense trade for three years, with leave to petition for reinstatement after March 28, 2007. Specific transaction exceptions to the debarment may be requested on a case-by-case basis, when based on overriding national security and foreign policy interests.

**Directed Remediation:**

- (1) Appoint an outside SCO, (who may also serve as the independent monitor required in connection with the related criminal matter described below), subject to DDTC approval, for a minimum of four years, to be succeeded by an internal SCO for an additional year, with a requirement that the SCO report on compliance to senior management, the board of directors, and DDTC every ninety days for the first six months, and semi-annually thereafter for the remainder of the term.
- (2) Continue to promote and publicize the availability of the company's Ombudsman Program for reporting suspected violations without fear of retaliation, and report on the program's effectiveness semiannually.
- (3) Strengthen compliance policies, procedures, and training within twelve months of settlement.
- (4) Continue to implement a comprehensive automated export compliance system to strengthen internal controls for ensuring ITAR compliance. The system will cover the initial identification of all technical data and technical assistance and will be accessible to DDTC on request.
- (5) Continue the internal export process review of ITT Night Vision as required under the previous 2004 settlement with DDTC, under the supervision of a process analysis expert independent from the existing export compliance function at ITT Night Vision. Provide DDTC with the status of the verification plan for the review within sixty days of settlement and a final report within 120 days of receipt of DDTC's final comments on the verification plan.
- (6) Conduct an external audit using outside legal counsel, subject to prior DDTC approval of the auditor and audit plan, and submit a final report of findings and recommendations to DDTC within twenty-four months of settlement.

(7) Develop a means to alert users to ITAR requirements regarding electronic transmissions of ITAR-controlled technical data, and train all employees with electronic accounts to prevent unintentional or accidental unauthorized transmissions.

(8) Agree to arrange and facilitate a DDTC on-site review with minimum notice for three years, with the understanding that any such review may be coordinated with reviews conducted pursuant to the settlement terms of the related criminal matter described below.

(9) Certify to DDTC at the conclusion of the five-year term that remedial measures have been implemented pursuant to the consent agreement and that the compliance program is adequate.

(10) Incorporate the foregoing measures into any ITAR-affected business acquisitions within six months of acquisition, notify DDTC thirty days prior to any contemplated sale of the Night Vision or Aerospace/Communications business divisions, and require the purchaser in such case to agree to be bound by the terms of the settlement, including the foregoing measures.

**Criminal Case:**

**Settled:** March 27, 2007

**Summary:** On March 27, 2007, ITT and the U.S. Justice Department entered into a Deferred Prosecution Agreement under which ITT agreed to plead guilty to criminal charges filed by the Department concerning the unauthorized exportation of night vision products and technology. The Department and ITT agreed to file a “joint deferral motion” and the Department agreed to seek dismissal of one of the charges if ITT complies with all of its obligations under the Agreement at the end of the five-year deferral period. If ITT has fully and successfully implemented an agreed Remedial Action Plan under the Agreement in three years, as determined by a Justice Department review, the Department will seek an earlier dismissal of the charge in question, and the Agreement will be considered completed, except for the investments in advanced night vision technology, which will continue for the full five-year period.

**Charges:** Three counts, as follows:

(1) Willful exportation of defense articles without a license (on or between March 2001 and August 2001) (22 U.S.C. §§ 2778(b)(2) and (b)(3); ITAR §§ 127.1(a) and 127.3).

(2) Willful omission of statements of material fact in arms exports reports (on or between April 2000 and October 2004) (22 U.S.C. § 2778(c); 18 U.S.C. § 2).

(3) Willful exportation of defense articles without a license (on or between January 1996 and May 2006) (22 U.S.C. §§ 2778(b)(2) and (b)(3); ITAR §§ 127.1(a) and 127.3). The Department agreed to defer and seek dismissal of this charge.

**Penalty:** \$100,000,800, allocated as follows:

(1) \$2,000,800 for fines and special assessments;

(2) \$28,000,000 for forfeited proceeds and reimbursement of U.S. government investigative costs;

(3) \$50,000,000 for research and development of advanced night vision technology for the benefit of the U.S. government over a five year period (in lieu of a suspended criminal penalty); and

(4) \$20,000,000 civil penalty to DDTC (in connection with a consent agreement the terms of which are summarized above).

In addition, DDTC debarred ITT Night Vision Division, permitting petition for reinstatement after March 28, 2007. The Justice Department did not allocate any penalty funds toward directed remediation.

**Directed Remediation:**

(1) Retain an independent monitor selected by the United States to monitor ITT’s compliance with the Remedial Action Plan for five years after the date of the order granting the joint deferral motion.

(2) Undertake a Remedial Action Plan, which includes:

a. annual compliance certifications by business unit leaders and the CEO, to be provided no later than

- June for each year the Agreement is in effect;
- b. establishing an Executive Manager of Compliance;
  - c. annual training programs, the first of which is to take place within nine months of the order granting the joint deferral motion;
  - d. maintaining a record of all training for ten years after the order granting the joint deferral motion;
  - e. mandatory reporting of all ITAR/EAR violations within one week of discovery;
  - f. completing a classified materials disclosure and security audit within one year of the order granting the joint deferral motion;
  - g. performing a compliance audit within two years of the order granting the joint deferral motion, and correcting identified deficiencies within thirty months of the order.

## **2006:**

### **Lockheed Martin Sippican**

**Settled:** December 12, 2006

**Summary:** Lockheed settled charges that its subsidiary (then Sippican, Inc.) violated the conditions of technology transfer approvals related to a joint U.S.-Australia naval missile decoy program. Although the alleged violations predate Lockheed's acquisition of Sippican, Lockheed was charged under the theory of successor liability.

**Charges:** Six violations, as follows:

- (1) One charge of disclosing technical data exceeding the scope of the applicable technical assistance agreement and in violation of one of the agreement's provisos (ITAR § 127.1(a)(4)).
- (2) One charge of disclosing technical data following the lapse of the applicable technical assistance agreement (ITAR § 127.1(a)).
- (3) One charge of disclosing technical data to unauthorized recipients (ITAR § 127.1).
- (4) One charge of failing to establish a Defense Security Service approved Technology Control Plan and provide a copy of the same to DDTC, as required by the applicable technical assistance agreement (ITAR § 127.1(a)(4)).
- (5) One charge of transferring unauthorized classified technical data (ITAR § 125.3).
- (6) One charge of using an export control document containing a false statement or misrepresenting or omitting a material fact for failing to notify DDTC in a subsequent application for a technical assistance agreement that unauthorized technical data transfers took place outside the scope of the previous related agreement data (ITAR § 127.2(a)).

**Penalty:** \$3 million, none of which is allocated to directed remediation.

**Directed Remediation:**

- (1) Establish legal department oversight of trade compliance within thirty days of settlement.
- (2) Appoint an internal SCO, subject to DDTC approval, within sixty days of settlement for two years, with a requirement that the SCO report on compliance to the senior management and to DDTC semi-annually for the appointment term.
- (3) Strengthen compliance training within 120 days of settlement, especially concerning classified information procedures and compliance with agreement provisos.
- (4) Submit to DDTC for review and concurrence within 150 days of settlement a white paper proposing the

establishment of a comprehensive export compliance system, accessible to DDTC, to strengthen internal controls for tracking the decision process from the initiation of a request for potential export authorization or clarification of an existing authorization to its conclusion. Implement the same within 180 days of DDTC's concurrence with the proposal.

(5) Conduct an internal audit, subject to DDTC approval of a draft verification plan to be submitted within twelve months of settlement, and submit a final report of findings and recommendations to DDTC within 210 days of DDTC's concurrence with verification plan.

(6) Agree to arrange and facilitate a DDTC audit with minimal notice for two years.

(7) Certify to DDTC at the conclusion of the two-year term that remedial measures have been implemented pursuant to the consent agreement and that the compliance program is adequate.

## **Security Assistance International , Inc. and Henry L. Lavery III**

**Settled:** December 12, 2006

**Summary:** Defense trade consulting firm settled charges that it committed improprieties concerning the submission of an ITAR license application on behalf of a client not properly registered with DDTC and the failure to comply with ITAR administrative requirements.

**Charges:** Four violations, as follows:

(1) One charge of omitting material facts from a temporary export license application (ITAR § 127.2(a)).

(2) One charge of aiding and abetting an unregistered U.S. company in obtaining a temporary export license that it was ineligible to receive (ITAR § 127.1(d)).

(3) One charge of failing to maintain records as prescribed by the ITAR (ITAR §§ 127.1(d) and 122.5).

(4) One charge of violating the terms of a temporary import license by failing to provide required export documentation (ITAR § 127.1(a)(4)).

**Penalty:** \$75,000 (suspended) and administrative debarment, with leave to apply for reinstatement after one year.

**Directed Remediation:** None.

## **L3 Communications Corporation/L3\_Titan Corporation**

**Settled:** October 18, 2006

**Summary:** L-3 settled charges that its subsidiary Titan failed to report commissions paid to third parties in its applications for exports of defense articles to France, Japan, and Sri Lanka, and that Titan made false statements in those applications that there were no reportable commissions. Although the alleged violations predate L-3's acquisition of Titan, L-3 was charged under the theory of successor liability.

**Charges:** Six violations, as follows:

(1) Three charges of making false statements on an export or temporary control document (ITAR §§ 127.1(d) and 127.2).

(2) Three charges of failing to report commissions as required by ITAR Part 130 (ITAR §§ 127.1(d), 130.9 and 130.10).

**Penalty:** \$1.5 million, of which \$500,000 is applied over three years to directed remediation.

**Directed Remediation:**

(1) Strengthen policies, procedures, and training within six months of settlement, especially in the areas of fees and commissions (ITAR Part 130), brokering, exemptions, role of empowered official, and fines and

penalties.

- (2) Engage an outside advisor within thirty days of settlement to improve Part 130 compliance.
- (3) Submit improved Part 130 compliance policies and procedures to DDTC within nine months of settlement.
- (4) Conduct an external audit of Part 130 compliance within twelve months of settlement, and report findings and recommendations to DDTC within eighteen months of settlement.
- (5) Agree to arrange and facilitate a DDTC audit with minimal notice for three years.
- (6) Issue a reminder within thirty days of settlement that L-3's general counsel office provides oversight on trade compliance.
- (7) Certify to DDTC on the second anniversary of settlement and at the conclusion of the three-year term that remedial measures have been implemented pursuant to the consent agreement and that the compliance program is adequate.

## The Boeing Company

**Settled:** March 28, 2006

**Summary:** Boeing settled charges concerning the unauthorized exportation of the QRS-11 quartz rate sensor, a defense article controlled under Category XII of the U.S. Munitions List.

**Charges:** Eighty-six violations as follows:

- (1) Seventeen charges of exporting defense articles without authorization after the manufacturer informed the respondent that the QRS-11 was a defense article (all instances involving China, an ITAR-proscribed country) (ITAR §§ 127.1(a)(1), 126.1(a) and 126.1(e)).
- (2) Two charges of exporting defense articles without authorization after DDTC informed the respondent that the QRS-11 was a defense article (one instance involving China) (ITAR §§ 127.1(a)(1), 126.1(a) and 126.1(e)).
- (3) Forty charges of exporting defense articles without authorization after DDTC's Managing Director informed the respondent that the QRS-11 was a defense article (two instances involving China) (ITAR §§ 127.1(a)(1), 126.1(a) and 126.1(e)).
- (4) Eight charges of misrepresenting or omitting material facts on an export or temporary control document (ITAR § 127.2(a)).
- (5) Fifteen charges of making false statements on an export or temporary control document (ITAR § 127.2(a)).
- (6) Three charges of failing to file a Shipper's Export Declaration (ITAR § 123.22(b)).
- (7) One charge of failing to report an exportation to a proscribed country (ITAR § 126.1(e)).

**Penalty:** \$15 million. Noting Boeing's enforcement record (three prior settlements since 1998), DDTC did not allocate any penalty funds to directed remediation, requiring instead that Boeing pay those costs out of pocket.

### **Directed Remediation:**

- (1) Create a senior management position within 120 days of settlement responsible for compliance throughout the company, with a position description to DDTC, and a requirement to provide annual compliance reports to DDTC for three years, as well as meet with the SCO on no less than a quarterly basis for three years.
- (2) Appoint an outside SCO, subject to DDTC approval, for a minimum of two years, to be succeeded by an internal SCO for an additional year, with a requirement that the SCO report on compliance to senior management, the board of directors, and DDTC every ninety days for the first six months, and semi-annually thereafter for the remainder of the term.
- (3) Strengthen compliance policies, procedures, and training, especially in the area of commodity

classification.

- (4) Conduct an external audit no later than eighteen months after settlement, subject to prior DDTC approval of audit plan, and report findings and recommendations to DDTC no later than two years after settlement.
- (5) Agree to arrange and facilitate a DDTC audit with minimum notice for three years.
- (6) Certify to DDTC at the conclusion of the three-year term that remedial measures have been implemented pursuant to the consent agreement and that the compliance program is adequate.

## **Goodrich Corporation/L3 Communications Corporation**

**Settled:** March 28, 2006

**Summary:** Goodrich and L-3 Communications settled charges that a former Goodrich subsidiary acquired by L-3: (1) omitted material facts in a commodity jurisdiction determination (specifically, that the commodity in question contained the QRS-11 quartz rate sensor, a defense article controlled under Category XII of the U.S. Munitions List); and (2) exported or caused the exportation of the QRS-11 without authorization. L-3 was charged under the theory of successor liability.

**Charges** Twenty-six violations, as follows:

- (1) One charge of omitting material facts from an export or temporary control document (ITAR § 127.2).
- (2) Twenty-five charges of exporting defense articles without authorization (ITAR §§ 127.1(a)(1) and 127.1(a)(3)).

**Penalty:** \$7 million, of which \$1.25 million is payable by Goodrich and \$2 million by L-3, and \$3.75 million is applied to directed remediation over three years (\$1.75 million for Goodrich and \$2 million for L-3).

**Directed Remediation:** Applicable both to Goodrich and L-3:

- (1) Appoint an internal SCO, subject to DDTC approval, within fifteen days of settlement for three years, with a requirement that the SCO report on compliance to the senior management, board of directors, and DDTC every ninety days for the first six months, and semi-annually thereafter for the remainder of the term.
- (2) Submit to DDTC a draft plan for a review (to be conducted by an independent consultant in L-3's case) of export classification procedures and practices spanning the previous seven years, within ninety days of settlement, and following the review report findings and recommendations to senior management and DDTC within twelve months of settlement.
- (3) Submit to DDTC within sixty days of settlement a plan to strengthen compliance policies, procedures, and training within 270 days, especially in the area of commodity classification.
- (4) Issue a reminder within thirty days of settlement that the company's general counsel office provides oversight on trade compliance.
- (5) Submit to DDTC within 150 days of settlement a white paper proposing the establishment of an electronic export compliance system to track the classification and jurisdiction of products down to the component and part level, and implement the initial phase of the system within twelve months of settlement.
- (6) Issue a reminder within thirty days of settlement (sixty for L-3) of the availability of the company's ethics hotline for reporting concerns, and submit an annual report to DDTC evaluating the hotline's effectiveness.
- (7) Conduct an external audit, subject to prior DDTC approval of audit plan, to be commenced no later than two years after settlement, and report findings and recommendations to DDTC by the third anniversary.
- (8) Agree to arrange and facilitate a DDTC audit with minimum notice for three years.
- (9) Certify to DDTC at the conclusion of the three-year term that remedial measures have been implemented pursuant to the consent agreement and that the compliance program is adequate.

**2005:**

## **Orbit/FR Inc.**

**Settled:** August 29, 2005

**Summary:** Orbit/FR settled civil charges arising from its guilty plea in 2000 to two criminal violations of the AECA related to the unauthorized exportation of a missile and military aircraft radome measurement system, and the provision of defense services related to an antenna measurement system.

**Charges:** Four violations, as follows:

- (1) Two charges of exporting defense articles without authorization to China, an ITAR-proscribed country (ITAR §§ 127.1(a)(1) and 126.1(e)).
- (2) Two charges of providing unauthorized defense services to China (ITAR §§ 127.1(a)(1) and 126.1(e)).

**Penalty:** \$500,000, of which \$200,000 is applied to directed remediation over three years, and \$200,000 is suspended.

### **Directed Remediation:**

- (1) Appoint an outside SCO, subject to DDTC approval, for a minimum of two years, to be succeeded by an internal SCO for an additional year, with a requirement that the SCO report on compliance to the senior management, board of directors, and DDTC every sixty days for the first six months, and every ninety days thereafter for the remainder of the term.
- (2) Strengthen policies, procedures, and training within 120 days of settlement.
- (3) Establish senior management and legal department oversight of trade compliance within thirty days of settlement.
- (4) Issue a reminder within thirty days of settlement of the availability of the company's ethics hotline for reporting concerns, and submit a quarterly report to senior management and DDTC evaluating the hotline's effectiveness.
- (5) Conduct an external audit, subject to prior DDTC approval of audit plan, to be commenced no later than twelve months after settlement, and report findings and recommendations to DDTC by the second anniversary.
- (6) Agree to arrange and facilitate a DDTC audit with minimum notice for three years.
- (7) Certify to DDTC at the conclusion of the three-year term that remedial measures have been implemented pursuant to the consent agreement and that the compliance program is adequate.

### **Additional Undertakings:**

- (8) Respondent's Israeli corporate parent agreed that its direct and indirect foreign subsidiaries would refrain from engaging in even wholly-non-U.S. defense trade with ITAR-proscribed countries (e.g., China) for three years, and agreed to provide DDTC with compliance assurances prior to the resumption of such activities.
- (9) Respondent agreed that its direct and indirect foreign subsidiaries would refrain from engaging in even wholly-non-U.S. defense trade with ITAR-proscribed countries (e.g., China) for six years, and agreed to provide DDTC with compliance assurances prior to the resumption of such activities.

## **The DirecTV Group and Hughes Network Systems Inc.**

**Settled:** January 26, 2005

**Summary:** Hughes Network Systems and its parent, DirecTV Group, settled charges concerning the



unauthorized exportation of satellite-related technical data, defense services, and defense articles to foreign person employees and other end users, including in ITAR-proscribed countries.

**Charges:** Fifty-six violations, as follows:

- (1) Nineteen charges of failing to report the exportation of technical data and defense services to China and India, ITAR-proscribed countries at the time (ITAR § 126.1(e)).
- (2) Nineteen charges of exporting technical data and defense services without authorization to China and India (ITAR § 127.1(a)(1)).
- (3) Three charges of willfully causing, or aiding and abetting, ITAR violations (ITAR § 127.1(d)).
- (4) Fifteen charges of exporting technical data, defense services, and defense articles without authorization to non-proscribed countries (ITAR § 127.1(a)(1)).

**Penalty:** \$5 million, of which \$1 million is applied over three years to directed remediation. In addition, DDTC debarred Hughes Network Systems (Beijing) Co. Ltd., permitting petition for reinstatement after May 14, 2005.

**Directed Remediation:**

- (1) Continue to implement directed remedial measures imposed under March 2003 consent agreement between DDTC and Hughes Electronics Corporation (now DirectTV) (see below).
- (2) Participate on a “lessons learned” panel during a 2005 defense trade seminar sponsored by the Society for International Affairs.
- (3) Review existing compliance program and provide report of findings to DDTC within ninety days of settlement.
- (4) Conduct an audit within 180 days of Hughes Network Systems (Beijing) Co. Ltd. and other foreign subsidiaries involved in the activities at issue, and report findings and recommendations within thirty days of completing audit.
- (5) Certify to DDTC at the conclusion of the three-year term that remedial measures have been implemented pursuant to the consent agreement and that the compliance program is adequate.

**2004:**

**ITT Industries**

**Settled:** November 1, 2004

**Summary:** ITT Industries settled charges concerning the unauthorized exportation of night vision products and the unauthorized exportation of space remote sensing technical data and defense services.

**Charges:** Ninety-five violations, as follows:

- (6) Twenty-one charges of violating the terms of temporary export licenses (ITAR §§ 123.5(a) and 127.1(a)(4)).
- (7) Seventy-two charges of failing to comply with license provisos when exporting defense articles (ITAR § 127.1(a)(4)).
- (8) Two charges of failing to comply with technical assistance agreement provisos when exporting technical data and defense services (ITAR § 127.1(a)(4)).

Penalty: \$8 million, of which \$5 million is applied to directed remediation over five years.

**Directed Remediation:**

- (1) management, board of directors, and DDTC every ninety days for the first six months, and semi-annually

thereafter for the remainder of the term.

- (2) Strengthen policies, procedures, and training within 270 days of settlement.
- (3) Submit to DDTC within 180 days of settlement a white paper proposing the establishment of an automated export compliance system, and implement the system within 180 days of DDTC's concurrence with proposal.
- (4) Establish legal department oversight of trade compliance within thirty days of settlement.
- (5) Publicize within sixty days of settlement the availability of the company's Ombudsman Program for reporting concerns, with a semi-annual report to senior management and DDTC evaluating the hotline's effectiveness.
- (6) Conduct an independent audit of ITT Night Vision, subject to DDTC approval within 120 days of settlement of draft verification plan, and submit a final report of findings and recommendations to DDTC within 210 days of DDTC's concurrence with verification plan.
- (7) Conduct a comprehensive audit of directed remedial measures within twelve months of DDTC approval of audit plan, which must be submitted to DDTC within twelve months of settlement.
- (8) Agree to arrange and facilitate a DDTC audit with minimum notice for five years.
- (9) Certify to DDTC at the conclusion of the five-year term that remedial measures have been implemented pursuant to the consent agreement and that the compliance program is adequate.

## **General Motors Corporation and General Dynamics Corporation**

**Settled:** November 1, 2004

**Summary:** General Motors, and General Dynamics as successor owner of portions of General Motors' defense activities, settled charges concerning the unauthorized exportation of technical data about light armored vehicles to foreign person employees, including nationals of proscribed countries.

**Charges:** Two hundred forty-eight violations, as follows:

- (1) Thirteen charges of failing to report the exportation of technical data to foreign person employees who were nationals of ITAR-proscribed countries; specifically, China, Syria, Iran, and Afghanistan (ITAR § 126.1(e)).
- (2) Thirteen charges of exporting technical data without authorization to foreign person employees who were nationals of ITAR-proscribed countries (ITAR § 127.1(a)(1)).
- (3) Thirteen charges of willfully causing, or aiding and abetting, ITAR violations (ITAR § 127.1(d)).
- (4) Fifty-four charges of violating license conditions (ITAR § 127.1(a)(4)).
- (5) Fifty-four charges of failing to account for the acts of employees, agents, and authorized persons (ITAR § 127.1(b)).
- (6) Fifty charges of exporting technical data without authorization to employees who were foreign nationals or dual nationals (ITAR § 127.1(a)(1)).
- (7) Fifty charges of exporting technical data and defense services without authorization to foreign vendors and suppliers (ITAR §§ 127.1(a)(1) and 126.5).
- (8) One charge of misrepresenting or omitting material facts on an export or temporary control document (ITAR § 127.2(a)).

**Penalty:** \$20 million, of which \$10 million is payable by General Motors, and \$10 million is applied to directed remediation (\$5 million each to General Motors and General Dynamics) for five years.

**Directed Remediation:**

**General Dynamics**

- (1) Designate a Director, Trade Compliance, who must report on compliance to the senior management, board of directors, and DDTC every sixty days for the first six months, and semi-annually thereafter for the remainder of the term.
- (2) Strengthen compliance training within 120 days of settlement.
- (3) Submit to DDTC within ninety days of settlement a white paper proposing the establishment of a Computer Compliance Control System, and implement the system within 180 days of DDTC's concurrence with proposal.
- (4) Establish legal department oversight of trade compliance within 120 days of settlement.
- (5) Issue a reminder within thirty days of settlement of the availability of the company's ethics hotline for reporting concerns, with a semi-annual report to senior management and DDTC evaluating the hotline's effectiveness.
- (6) Conduct a comprehensive audit of directed remedial measures within twelve months of DDTC final comments on audit plan, which must be submitted to DDTC within twelve months of settlement, and report findings and recommendations to senior management and DDTC by the second anniversary of settlement.
- (7) Agree to arrange and facilitate DDTC audit with minimum notice for five years.
- (8) Certify to DDTC at the conclusion of the five-year term that remedial measures have been implemented pursuant to the consent agreement and that the compliance program is adequate.

### **General Motors**

- (1) Appoint an outside SCO, subject to DDTC approval, for three years, to be succeeded by an internal SCO for two years, with a requirement that the SCO report on compliance to the senior management and DDTC every sixty days for the first six months, and semi-annually thereafter for the remainder of the term.
- (2) Strengthen compliance training within 180 days of settlement.
- (3) Submit to DDTC within sixty days of settlement a white paper proposing the establishment of a comprehensive computerized export tracking system, and implement the system within 120 days of DDTC's concurrence with proposal.
- (4) Establish legal department oversight of trade compliance within 180 days of settlement.
- (5) Establish and publish within thirty days of settlement the availability of a hotline for reporting defense trade concerns, and submit a quarterly report to senior management and DDTC evaluating the hotline's effectiveness.
- (6) Conduct a comprehensive audit of directed remedial measures within twelve months of DDTC final comments on audit plan, which must be submitted to DDTC within twelve months of settlement, and report findings and recommendations to senior management and DDTC.
- (7) Agree to arrange and facilitate a DDTC audit with minimum notice for five years.
- (8) Certify to DDTC at the conclusion of the five-year term that remedial measures have been implemented pursuant to the consent agreement and that the compliance program is adequate.

### **2003:**

### **EDO Corporation**

**Settled:** November 24, 2003

**Summary:** EDO Corporation, as successor to Condor Systems, Inc., settled civil charges arising from Condor's 2003 guilty plea to federal criminal charges regarding the unlawful exportation of a signal processing system to Sweden.

**Charges:** Forty-seven violations as follows:

- (1) Four charges of exporting classified technical data without authorization (ITAR § 127.1(a)(1)).
- (2) Eleven charges of exporting unclassified technical data without authorization (ITAR § 127.1(a)(1)).
- (3) Four charges of exporting defense services without authorization (ITAR § 127.1(a)(1)).
- (4) Twelve charges of violating license conditions (ITAR § 127.1(a)(4)).
- (5) Three charges of making false statements on an export or temporary control document (ITAR § 127.2).
- (6) Thirteen charges of omitting material facts from an export or temporary control document (ITAR § 127.2).

**Penalty:** \$2.5 million, of which \$575,000 is applied to directed remediation over three years, and \$175,000 is credited for existing remedial measures.

**Directed Remediation:**

- (1) Appoint an outside SCO, subject to DDTC approval, for one year, to be succeeded by an internal SCO for two years, with a requirement that the SCO report on compliance to the senior management, board of directors, and DDTC every sixty days for the first six months, and every ninety days thereafter for the remainder of the term.
- (2) Strengthen policies, procedures, and training within 120 days of settlement, especially in the area of acquisition due diligence.
- (3) Establish legal department oversight of trade compliance within thirty days of settlement.
- (4) Issue a reminder within thirty days of settlement of the availability of the company's ethics hotline for reporting concerns, and submit a quarterly report to senior management and DDTC evaluating the hotline's effectiveness.
- (5) Conduct an external audit, subject to prior DDTC approval of audit plan, to be completed within 120 days of settlement, and report findings and recommendations to DDTC. Agree to arrange and facilitate a DDTC audit with minimum notice for three years.
- (6) Certify to DDTC at the conclusion of the three-year term that remedial measures have been implemented pursuant to the consent agreement and that the compliance program is adequate.

## **Multigen-Paradigm Inc.**

**Settled:** September 25, 2003

**Summary:** Multigen-Paradigm Inc. ("MPI") settled charges that it exported ITAR-controlled visual sensor simulation software, associated technical data, and defense services without authorization to numerous countries, including China. Computer Associates International Inc. ("CA") acquired MPI in 2000 and voluntarily disclosed the violations, which predated the acquisition. Although not named as a respondent, CA was specifically identified in the draft charging letter as being ultimately responsible for MPI's compliance both before and after the acquisition.

**Charges:** Twenty-four charges of exporting defense articles, technical data, and defense services without authorization to numerous countries, including China, an ITAR-proscribed country (ITAR §§ 127.1(a)1, 126.1(a) and 126.1(e)).

**Penalty:** \$2 million, of which \$250,000 is applied to directed remediation for three years, and \$1.5 million is credited for existing remedial measures.

**Directed Remediation:**

- (1) Strengthen compliance training within 120 days of settlement.
- (2) Establish legal department oversight of trade compliance within 120 days of settlement.
- (3) Submit to DDTC within 120 days of settlement a report outlining an electronic tracking system that will

enable the U.S. government to monitor the respondent's technical data and proposed technical assistance.

(4) Conduct a comprehensive audit of directed remedial measures within eighteen months of settlement, subject to DDTC's prior review of the audit plan, and report findings and recommendations to DDTC by the second anniversary of settlement.

(5) Agree to arrange and facilitate a DDTC audit with minimum notice for three years.

(6) Certify to DDTC at the conclusion of the three-year term that remedial measures have been implemented pursuant to the consent agreement and that the compliance program is adequate.

## **Agilent Technologies Inc.**

**Settled:** August 20, 2003

**Summary** Agilent settled charges that SAFCO Technologies Inc., which it acquired in 2000, exported ITAR-controlled signal processing equipment to Israel and Singapore without authorization, prior to Agilent's acquisition of SAFCO.

**Charges:** Three charges of exporting defense articles without authorization (ITAR § 127.1(a)(1)).

**Penalty:** \$225,000.

**Directed Remediation:** None.

## **Hughes Electronics Corporation & Boeing Satellite Systems**

**Settled:** March 4, 2003

**Summary:** Hughes Electronics Corporation and Boeing Satellite Systems ("BSS") settled charges concerning the unauthorized exportation of satellite technology to China. The Boeing Company acquired BSS (formerly Hughes Space and Communications) in 2000, and BSS was charged under a theory of successor liability.

**Charges:** One hundred twenty-three violations as follows:

(1) One hundred thirteen charges of exporting technical data and defense services without authorization to China, an ITAR-proscribed country (ITAR §127.1(a)(1)).

(2) Five charges of proposing the exportation of defense services, or failing to report the exportation of technical data and defense services, to China, an ITAR-proscribed country (ITAR § 126.1(e)).

(3) One charge of conspiring or causing the unauthorized exportation of defense services (ITAR §127.1(a)(3)).

(4) Two charges of willfully causing, aiding, abetting, counseling, demanding, inducing, procuring, or permitting ITAR violations (ITAR § 127.1(d)).

(5) One charge of misrepresenting or omitting material facts on an export or temporary control document (ITAR § 127.2).

(6) One charge of failing to report commissions as required by ITAR Part 130 (ITAR § 130.9).

**Penalty:** \$32 million, of which \$8 million is applied to directed remediation over seven years (\$6 million to BSS and \$2 million to Hughes), and \$4 million is credited to existing remedial measures (\$2 million to each respondent).

**Directed Remediation:** Applicable both to Hughes and BSS:

(1) Appoint an outside SCO, subject to DDTC approval, for three years, to be succeeded by an internal SCO for two years, with a requirement that the SCO report on compliance to the senior management, board of directors, and DDTC every sixty days for the first six months, and semi-annually thereafter for the remainder of the term.

- (2) Strengthen compliance training within 120 days of settlement.
- (3) Hughes to institute a comprehensive computerized document control system within 120 days of settlement that will enable the U.S. government to monitor the respondent's technical data and proposed technical assistance. BSS to provide DDTC with access to existing "Space Link System" within sixty days.
- (4) Establish legal department oversight of trade compliance within 120 days of settlement.
- (5) Establish a hotline for reporting defense trade concerns within 120 days of settlement (thirty days for BSS), and submit a quarterly report to in-house counsel and DDTC evaluating the hotline's effectiveness.
- (6) Conduct a comprehensive audit of directed remedial measures within eighteen months of settlement, subject to DDTC's prior review of the audit plan, and report findings and recommendations to DDTC by the second anniversary of settlement.
- (7) Agree to arrange and facilitate a DDTC audit with minimum notice for seven years.

## **Raytheon Company**

**Settled:** February 27, 2003

**Summary:** Raytheon Company settled civil charges with the Justice Department concerning the unauthorized exportation of defense articles, technical data, and defense services to Canada and to Pakistan, and the unauthorized retransfer of defense articles through Canada to Pakistan, concerning the AN/TRC-170 troposcatter system.

**Charges:** Twenty-six violations, as follows:

- (1) Fifteen charges of exporting defense articles and technical data without authorization (ITAR § 127.1(a)(1)).
- (2) Six charges of conspiring or causing the unauthorized exportation of defense articles or defense services (ITAR §127.1(a)(3)).
- (3) Four charges of omitting material facts or making false statements on an export or temporary control document (ITAR § 127.2).
- (4) One charge of willfully inducing, or aiding and abetting, ITAR violations (ITAR § 127.1(d)).

**Penalty:** \$25 million, of which \$20 million is payable to U.S. Customs in lieu of forfeiture, \$3 million is payable as a civil penalty, and \$2 million is applied to directed remediation.

### **Directed Remediation**

- (1) Appoint an outside SCO, subject to DDTC approval, for one year, to be succeeded by an internal SCO for two years (which DDTC in its discretion may waive if satisfied by remedial measures within the first year), with a requirement that the SCO report on compliance to the senior management, board of directors, and DDTC quarterly for the first six months, and semi-annually thereafter for the remainder of the term.
- (2) Agree to arrange and facilitate a DDTC audit with minimum notice for the settlement term.

**2002:**

## **Dr. Wah Lim**

**Settled:** January 10, 2002

**Summary:** Dr. Lim settled charges arising from his conduct related to the Space Systems/Loral case described immediately below.

**Penalty:** \$100,000, of which \$50,000 is suspended. In addition, Dr. Lim was debarred for three years, with debarment suspended after the first year on the condition that he comply with the ITAR.

**Directed Remediation:** None.

## **Space Systems/Loral Inc.**

**Settled:** January 9, 2002

**Summary:** Space Systems/Loral Inc. settled charges that it violated the express terms and conditions of munitions licenses, and committed other violations, related to the unauthorized exportation of satellite technology to China.

**Charges:** Sixty-four violations as follows:

- (1) Sixty charges of violating the express terms and conditions of munitions licenses by exporting technical data and defense services without authorization (ITAR § 127.1).
- (2) One charge of transferring or proposing to transfer defense services to China, an ITAR-proscribed country (ITAR § 126.1(e)).
- (3) Three charges of misrepresenting or omitting material facts on an export or temporary control document (ITAR § 127.2).

**Penalty:** \$20 million, of which \$6 million is applied to directed remediation over seven years.

**Directed Remediation:**

- (1) Appoint an outside SCO, subject to DDTC approval, for two years, to be succeeded by an internal SCO for two years, with a requirement that the SCO report on compliance to the senior management, board of directors, and DDTC every sixty days for the first six months, and semi-annually thereafter for the remainder of the term.
- (2) Strengthen compliance training within 120 days of settlement.
- (3) Institute a comprehensive computerized document control system within 120 days of settlement that will enable the U.S. government to monitor the respondent's technical data and proposed technical assistance.
- (4) Establish legal department oversight of trade compliance within 120 days of settlement.
- (5) Establish a hotline for reporting defense trade concerns within 120 days of settlement, and submit a quarterly report to in-house counsel and DDTC evaluating the hotline's effectiveness.
- (6) Conduct a comprehensive audit of directed remedial measures within eighteen months of settlement, subject to DDTC's prior review of the audit plan, and report findings and recommendations to DDTC by the second anniversary of settlement.
- (7) Agree to arrange and facilitate a DDTC audit with minimum notice for four years.

## **2001:**

### **Motorola Corporation**

**Settled:** May 3, 2001

**Summary:** Motorola settled charges that it exported satellite technology to Germany and Russia in violation of the express terms and conditions of munitions licenses.

**Charges:** Twenty-five charges of violating the express terms and conditions of munitions licenses by exporting technical data and defense services without authorization (ITAR § 127.1)

**Penalty:** \$750,000, of which \$150,000 is applied within three years to directed remediation.

**Directed Remediation:**

- (1) Establish legal department oversight of defense trade compliance.
- (2) Institute computerized document control system that will enable the U.S. government to monitor the respondent's technical data and proposed technical assistance.
- (3) Attest that corrective measures have been implemented in accordance with representations to DDTC.
- (4) Conduct a comprehensive audit of directed remedial measures and report findings and recommendations to DDTC within 180 days of settlement.
- (5) Provide an account of compliance expenditures on the first anniversary of settlement.
- (6) Agree to arrange and facilitate a DDTC audit with minimum notice for three years.

## **The Boeing Company**

**Settled:** March 30, 2001

**Summary:** The Boeing Company settled charges concerning the unauthorized exportation between 1979 and 1999 of airborne early warning system technology to Australia, Italy, Malaysia, Singapore, Spain, and Turkey.

**Charges** One hundred ten violations, as follows:

- (1) One hundred seven charges of exporting defense articles, technical data, and defense services without authorization, mostly in violation of the express terms and conditions of munitions licenses (ITAR § 127.1).
- (2) Three charges of omitting material facts from an export or temporary control document (ITAR § 127.2).

**Penalty:** \$4.2 million, of which \$400,000 is applied toward directed remediation for a three-year period.

**Directed Remediation:**

- (1) Appoint an internal Special Officer for three years to ensure defense trade compliance, with a requirement that he report his finding and recommendations to senior management and DDTC every sixty days for the first six months, and semi-annually thereafter for the remainder of the term.
- (2) Agree to arrange and facilitate a DDTC audit with minimum notice for three years.

*[Editor's Note: The full version of John Pisa-Relli's above monograph contains an "ITAR Administrative Enforcement Case Table (2001 – 2009)," which is omitted from this reprint, but is available from Mr. Pisa-Relli (john.pisa-relli@us.thalesgroup.com) upon request.]*



## APPENDIX D — “Tiny Little Cheat-Sheets”

Handy Cut-Out and Fold Reference Cards for Wallet or Badge Protector  
for ITAR 126.1 Presumed Denial Countries and ITAR Exemptions (Next Page)

(Use “File/Print Preview” to view)

### ITAR Presumed Denial Countries

1. Afghanistan 126.1(g) +
2. Belarus 126.1(a)
3. Burma 126.1(a)
4. China 126.1(a)
5. Congo (DRC) 126.1(c), (i)
6. Cote d'Ivoire (Ivory Coast)  
126.1(c), 129.5(d)
7. **CUBA** 126.1(a), (d)\*
8. Cyprus #+
9. Eritrea 126.1(a)+
10. Fiji #
11. Guatemala +
12. Haiti 126.1(j)
13. Indonesia #
14. **IRAN** 126.1(a), (c), (d)#
15. Iraq 126.1(c), (f)
16. Lebanon, 126.1(c)
17. Liberia 126.1(a), (c)
18. Libya 126.1(k)
19. N. Korea 126.1(a),(c),(d)#
20. Palestine/Hamas #
21. Sierra Leone 126.1(c)
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### **Bold: State Sponsors of Terror**

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\*: OFAC embargo also applies  
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(Revised 3 Feb 2009)

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## **APPENDIX E — GLOSSARY**

(See Index entries for items found in the ITAR. This list includes many items not found in the ITAR.)

ABI: Automated Broker Interface (CBP)  
ACE: Automated Commercial Environment (CBP)  
ACS: Automated Commercial Systems (CBP)  
ACT: Assessment Compliance Testing (CBP)  
ACN: Application Control Number  
AECA: Arms Export Control Act  
AES: Automated Export System  
AESTIR: Automated Export System Trade Interface Requirements  
ALJ: Administrative Law Judge  
ATF: Treasury Dept. Bureau of Alcohol, Tobacco, Firearms and Explosives (obsolete – see BATFE)  
ATF-4522: International Import Certificate  
BATFE: Justice Dept. Bureau of Alcohol, Tobacco, Firearms & Explosives  
BIS: Commerce Dept. Bureau of Industry & Security  
BIS-645P: International Import Certificate  
BIS-711 Statement by Ultimate Consignee and Purchaser  
BIS-748P: EAR Multipurpose Application  
BL: Bill of Lading  
Blue Lantern: DDTC end-use monitoring program  
BXA: (Obsolete. See BIS)  
CA: Comprehensive Authorizations  
CBP: U.S. Customs & Border Protection  
CBP Form 28: Request for Information  
CBP Form 214: Application for Foreign-Trade Zone Admission and/or Status Designation  
CBP Form 3229: Certificate of Origin  
CBP Form 3299: Declaration for Free Entry of Unaccompanied Articles  
CBP Form 3311: Declaration for Free Entry of Returned American Products  
CBP Form 3461: Entry/Immediate Delivery  
CBP Form 7501: Entry Summary  
CBP Form 7512: Transportation Entry and Manifest of Goods Subject to CBP Inspection and Permit  
CBP Form 7523: Entry and Manifest of Merchandise Free of Duty, Carrier's Certificate and Release  
CBP Form 7553: Notice of Intent to Export, Destroy or Return Merchandise for Purposes of Drawback  
CCATS: Commodity Classification Automated Tracking System (EAR)  
CCL: Commerce Control List  
CEP: Circle of Equal Probability  
CFR: Code of Federal Regulations  
CJ: Commodity Jurisdiction  
COCOM: Coordinating Committee for Multilateral Export Controls  
COO: Country of Origin  
CPIP: Compliance, Public Issues and Policy Committee of the Board of Directors  
CTP: Composite Theoretical Performance . A measure of computational performance given in millions of theoretical operations per second (Mtops).  
C-TPAT: Customs-Trade Partnership Against Terrorism  
CUI: Controlled Unclassified Information  
CWC: Chemical Weapons Convention  
DD-1513: (Obsolete) DSAA Letter of Offer and Acceptance  
DDTC: Directorate of Defense Trade Controls  
DE&C: DepAsstSecArmy for Defense Exports & Cooperation  
DFOISR: Directorate for Freedom of Information and Security Review (Obsolete. See OFOISR)  
DHS: Dept. of Homeland Security  
DIS: Defense Investigative Service (Obsolete. See Defense Security Service)  
DOC: Dept. of Commerce  
DOD: Dept. of Defense  
DOJ: Dept. of Justice



DOS: Dept. of State  
DPL: Denied Person List  
DPS: Denied Party Screening  
DS-: Permanent internal forms used by the State Department and the Foreign Service  
DSP-: Older public-use State Department forms  
DS-2032: Statement of Registration  
DS-4048: Projected Sales of Major Weapons in Support of Section 25(a)(1) of the Arms Export Control Act  
DS-4071: Export Declaration of Defense Technical Data or Services  
DS-6001, Request for an Advisory Opinion  
DS-6002, Prior Notification  
DS-6003, Request for Reconsideration of Unclassified Provisos  
DS-6004, Request To Change End User, End Use and/or Destination of Hardware  
DSAA: Defense Security Assistance Agency  
DSCA: Defense Security Cooperation Agency  
DSP-5: Application/License for Permanent Export of Unclassified Defense Articles and Related Technical Data  
DSP-9: (Obsolete. See DS-2032)  
DSP-53: International Import Certificate  
DSP-61: Application/License for Temporary Import of Unclassified Defense Articles  
DSP-73: Application/License for Temporary Export of Unclassified Defense Articles  
DSP-83: Non-transfer and use certificate  
DSP-85: Application/License for Permanent/Temporary Export or Temporary Import of Classified Defense Articles and Related Classified Technical Data  
DSP-94: Authority to Export Defense Articles and Defense Services sold under the Foreign Military Sales program  
DSP-119: Amendment to License for Export or Import of Defense Articles  
DSS: Defense Security Service  
DTAG: Defense Trade Advisory Group  
DTCL: Defense Trade Controls Licensing  
DTCP: Defense Trade Controls Policy  
D-Trade: DDTC Electronic License Submission  
DTSA: Defense Technology Security Administration  
DUNS: Dun & Bradstreet Number  
EAA: Export Administration Act  
EAR: Export Administration Regulations  
EAR 99: (ECCN for No License Required)  
EARB: Export Administration Review Board (BIS)  
ECCN: Export Control Classification Number  
EEI: Electronic Export Information (replaced the term SED in Foreign Trade Regulations (FTR))  
EI: Encryption Items. A reason for control on the Commerce Control List (EAR)  
ELA: Encryption Licensing Agreement or Arrangement  
ELAIN - Export License Application and Information Network (BIS)  
ELISA: Export License Status Advisor (DOD)  
Ellie Net: DDTC Electronic License Submission  
EMI: Electromagnetic interference  
EMP: electromagnetic pulse  
EMS: Export Management System  
ENDP: Exception to National Disclosure Policy  
EO: Empowered Official  
EPCI: Enhanced Proliferation Control Initiative  
EPCI: DDTC Eligible Party Certification Indicator (EEI data element)  
ERIC: Electronic Request for Item Classification (BIS)  
ESAR: ACE Entry Summary, Accounts, Revenue  
Extranchek: BIS end-use monitoring program

FADEC: Full Authority Digital Engine Controls  
FCPA: Foreign Corrupt Practices Act  
FEM: Fatal Error Message  
FMF/FMFP: Foreign Military Financing/FMF Program  
FMS: Foreign Military Sales  
FOCI: Foreign Ownership, Control, or Influence (DoD)  
FPPI: Foreign Principal Party in Interest  
FTR: Foreign Trade Regulations (to replace FTSR)  
FTSR: Foreign Trade Statistics Regulations  
FTZ: Foreign Trade Zone  
GBL: Government Bill of Lading  
GC: General Correspondence  
Golden Sentry: DoD end-use monitoring program  
GPA: Global Project Authorization  
GPS: Global Positioning System  
GSN: General Software Note  
HTSA: the CBP abbreviation of HTSUSA  
HTSUSA: Harmonized Tariff Schedule of the United States  
HWA: Hold Without Action (BIS)  
ICE: U.S. Immigration & Customs Enforcement  
IC/DV: Import Certificate/Delivery Verification  
ICP: Internal Control Program  
IEEPA: International Emergency Economic Powers Act  
IIN: Importer Identification Number  
IPT: Integrated Product Team  
ISO: International Standards Organization  
ITAR: International Traffic in Arms Regulation  
ITN: Internal Transaction Number  
JCS: Joint Chiefs of Staff  
JF-: Joint forms originated and used by two or more U.S. Government agencies  
LO: Licensing Officer  
LOA: Letter of Offer and Acceptance  
LO/CLO: Low Observation/Counter Low Observable  
LOI: Letter of Intent; Letter of Instruction  
MCTL: Militarily Critical Technologies List  
MDA: Missile Defense Agency  
MDE: Major Defense Equipment  
MILSPEC: Military Specification  
MLA: Manufacturing license agreement  
MOA: Memorandum of Agreement  
MONUC: United Nations Organization Mission in the Democratic Republic of the Congo  
MOU: Memorandum of Understanding  
MPA: Major Project Authorizations  
MTCR: Missile Technology Control Regime  
MTEC: Missile Technology Export Control Group  
NASA: National Aeronautical and Space Administration  
NATO: North Atlantic Treaty Organization  
NDA: Non-Disclosure Agreement  
N.E.S.: Not elsewhere specified (EAR)  
NDP: National Disclosure Policy  
NIPO: Navy International Program Office  
NISPOM: National Industrial Security Program Operating Manual  
NLR: No License Required  
NMFTA: National Motor Freight Traffic Association

NRC: Nuclear Regulatory Commission  
NSA: National Security Agency  
ODTC: Office of Defense Trade Controls (Obsolete. See DDTC)  
OEF: Operation Enduring Freedom  
OFAC: Office of Foreign Assets Control  
OFOISR: Office of Freedom of Information and Security Review (Obsolete. See OSR)  
OIF: Operation Iraqi Freedom  
OSR: Office of Security Review  
OPA: Offshore Procurement Agreement  
OSD: Office of the Secretary of Defense  
OUSD/P: Office Under Secretary of Defense for Policy  
PD: Prior disclosure (CBP)  
PEA: Post Entry Amendment (CBP)  
PM/DTC: Bureau of Political – Military Affairs, Defense Trade Controls  
PM/RSAT: Bureau of Political - Military Affairs, Regional Security Arms  
PSA: Post Summary Adjustment (CBP)  
RET: Routed Export Transaction  
RFI: Representative of a Foreign Interest (FOCI)  
RFI: Request for Information/Customs CF-28  
RFP: Request for Proposal  
RFQ: Request for Quote/Quotation  
RPL: Restricted Parties List  
RWA: Return Without Action  
SAF/IAD: Secretary of the Air Force, International Affairs Division  
SAMM: Security Assistance Management Manual  
SBU: Sensitive but Unclassified (obsolete; replaced by CUI)  
SIL: Supplemental Information Letter (CBP)  
SED: Shipper’s Export Declaration (Obsolete. See EEI)  
SF-: Standard forms that originate in a U.S. gov’t agency and are approved through GSA.  
SCO: Special Compliance Officer  
SME: Significant Military Equipment  
SOW: Statement of Work  
TAA: Technical Assistance Agreement  
TCP: Technology Control Plan  
TD: Treasury Decision  
TSA: Technology Safeguards Agreement  
TTCP: Technology Transfer Control Plan  
TRN: Transportation Reference Number  
US&FCS: U.S. & Foreign Commercial Service  
USC: U.S. Code  
USG: U.S. Government  
USML: U.S. Munitions List  
USPPI: U.S. Principal Party in Interest  
USTR: U.S. Trade Representative  
VD: Voluntary Disclosure (ITAR)  
VEU: Validated End-Users (EAR)  
VSD: Voluntary Self-Disclosure (EAR)  
WDA: Warehouse Distribution Agreement  
WMD: Weapons of Mass Destruction  
WTO: World Trade Organization  
XTN: External Transaction Number

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- Acquisition: 126.14(a)(4)
- Approved for public release: 125.4(b)(13)
- Basic operations, maintenance, and training relating to a defense article lawfully exported: 125.4(b)(5)
- Canadian: 126.5(b), (c); 126.6
- Certification for use: 125.6
- Classified defense articles: (generally) 125.4
- Copies previously authorized: 125.4(b)(4)
- Disclosed per DOD request: 125.4(b)(1)
- Exports in furtherance of an agreement: 124.3
- Firearms and ammunition: 125.4(b)(5)
- Granted an exemption in writing: 125.4(b)(11)
- Institutions of higher learning: 125.4(b)(10)
- Joint venture: 126.14(a)(4)
- Merger: 126.14(a)(4)
- MLA: 125.4(b)(2)
- Models & mock-ups (not in): 123.16(b)(4)
- Returned to Source: 125.4(b)(7)
- Sent by a U.S. corporation to a U.S. person overseas or to U.S. Gov't agency: 125.4(b)(9)
- Recordkeeping: 123.26
- Specifically exempt under part 126: 125.4(b)(12)
- TAA: 125.4(b)(2)
- Teaming arrangement: 126.14(a)(4)
- U.S. Gov't contract: 125.4(b)(3)

*Temporary import: 123.4*

*Temporary export:*

- See Export, temporary

*Temporary suspension or modification of any or all regulations: 126.2*  
*Training and military service: 124.2*  
*U.S. agencies, by or for: 126.4*  
*value:*

- Under \$100: 123.17(a)
- Under \$500: 123.16(b)(2)

*Warehouse, bonded: 123.6*  
*Warehouse or distribution points: 123.7*  
**Exemptions and Exceptions** (by section number; for export unless specified for import):  
*122.1(b): Registration requirements*  
*123.4(a)(1): Import for overhaul, service, and repair*  
*123.4(a)(2): Import for enhancement or upgrade*  
*123.4(a)(3): Import for exhibition, demonstration, or marketing*  
*123.4(a)(4): Articles rejected for permanent import*  
*123.4(a)(5): Import under FMS*  
*123.4(b): Import for incorporation into other articles*  
*123.6: FTZ and U.S. Customs bonded warehouses*  
*123.9(a): Shipper's Export Declaration*  
*123.9(e): Re-export to NATO, Australia, or Japan*  
*123.11(b): Movement of vessels & aircraft outside of U.S.*  
*123.12: Shipment between U.S. possessions*  
*123.13: Domestic aircraft shipment via a foreign country*  
*123.15(c): Congressional certification*  
*123.16(a): Proscribed destinations, MTCR, SME, SED*  
*123.16(b)(1): Unclassified hardware in support of agreements*  
*123.16(b)(2): Parts under \$500, split orders*  
*123.16(b)(3): Packing cases*  
*123.16(b)(4): Unclassified models and mockups*  
*123.16(b)(5): Public exhibitions and trade shows*  
*123.16(b)(9): Unclassified hardware to U.S. subsidiaries overseas*  
*123.16(b)(10): Institutions of higher learning*  
*123.17(a): Firearms components of value under \$100*  
*123.17(b): Antique firearms*  
*123.17(c): Temporary export of firearms*  
*123.17(d): Export by foreign persons of firearms imported under 27 CFR*  
*123.17(e): Ammunition for firearms*  
*123.17(f), (g): Body Armor*  
*123.18(a)(1): Firearms to servicemen's clubs*

123.18(a)(2): Firearms for personal use of military member or DOD employee

123.18(a)(3): Firearms for personal use of USG employee

123.18(b): Ammunition for exempt firearms

123.19: Shipment from Canada or Mexico transiting USA

123.23: Monetary value of shipments (10%)

123.26: Recordkeeping for exemptions

124.2(a): Training in basic operation and maintenance of defense articles lawfully exported or authorized for export to the same recipient

124.2(b): Services by member of military forces of a foreign nation by U.S. person

124.2(c): Unclass maintenance, training, & tech data, for NATO countries, Australia, Japan, or Sweden

124.3(a): Unclassified tech data in furtherance of approved MLA or TAA

124.3(b): Classified tech data in furtherance of approved MLA or TAA

124.16: Retransfer tech data and services to NATO, EU, Australia, Japan, New Zealand, and Switzerland.

125.2(b): Tech data for patent application

125.4(b)(1): Tech data disclosed per request or directive from DOD

125.4(b)(2): Tech data, classified or unclassified, in furtherance of approved MLA or TAA

125.4(b)(3): Tech data, classified or unclassified, in furtherance of contract with USG.

125.4(b)(4): Copies of tech data previously authorized for export to same recipient

125.4(b)(5): Basic operations, maintenance, and training related to article authorized for export to the same recipient

125.4(b)(6): Technical data related to firearms not exceeding caliber .50

125.4(b)(7): Tech data, classified or unclassified, returned to source

125.4(b)(8): Tech data related to classified previously authorized for export to same recipient

125.4(b)(9): Tech data sent by US company to local employee of same US company

125.4(b)(10): Disclosures by US institutions of higher learning to employees

125.4(b)(11): Tech data per exemption granted by DDTC for DOD, DOE, or NASA contracts

125.4(b)(12): Tech data exempt under part 126

125.4(b)(13): Tech data approved for public release by USG

125.4(c): Defense services and unclassified tech data to NATO, Australia, Japan, and Sweden for response to DOD request for quote, bid, or proposal

125.5(a): Disclosure of unclassified tech data during approved classified plant visit

125.5(b): Disclosure of classified tech data during approved classified plant visit

125.5(c): Disclosure of unclassified tech data during classified or unclassified plant visit approved by DDTC

126.2: Temporary suspension or modification of any or all regulations

126.3: Exceptions (undue hardship)

126.4(a): Temporary import or export by or for USG, or for program authorized by President, or by USG Bill of Lading

126.4(c): Urgent temporary import or temporary or permanent export of classified or unclassified articles, tech data, or defense service for USG

126.5(a): Temporary import and return of unclassified articles from Canada

126.5(b): Permanent and temporary export to Canada for Canadian Gov't or Canadian Registered Person

126.5(c): Defense services and tech data to Canada for Canadian Gov't or Canadian Registered Person

126.6(a): Article or tech data sold or lent by DOD to foreign country or organization delivered in USA

126.6(b): Entry and departure of foreign military aircraft and vessels

126.6(c): FMS

Exhibition: 120.11(a)(6):

Export (generally, see specific export activity listed separately)

Control documents: 127.2(b)

Defined: 120.17

Initial, notice of: 123.22(b)

Permanent

- Also see DSP-5
- Application for: 120.28(a); 123.1
- Compared to temporary imports: 123.4(a)(2)
- Canadian exemption: 126.5(b)
- Compared to temporary exports: 123.5(a)
- Filing of licenses: 123.22(a)
- For foreign launch vehicle/satellite: 126.4(a)
- Reexport/retransfer: 123.9(c)

Temporary:

- Also See DSP-73, DSP-85
- Afghanistan: 123.17(g)
- Body armor: 123.17(f), (g)

- Brokering prior approval: 129.7(b)(1)
- Firearms: 123.17(c)
- Generally: 123.5
- Hardware: 123.5(c)
- Iraq: 123.17(g)
- License, classified (DSP-85): 120.28(a)(6), 123.1(a)(4)
- License, unclassified (DSP-73): 123.22(a), (a)(2); 120.28(a)(4), 123.1(a)(2); 123.5(b), (c);
- Vessels & aircraft: 123.11(b)

Export Administration Act of 1979, 50 U.S.C. App. 2405(l):

*Aircraft components: 121.1 Cat VIII(h) Note*

*Authority: 120.27(2)*

*Criminal statutes: 120.29(c)*

*Denial, revocation, suspension, or amendment of licenses and other approvals: 126.7(a)(2)*

*MTCR: 121.16, Note to Item 18(a)*

Export Administration Regulations (EAR), 15 CFR 730-774

*Aircraft components: 121.1 Cat VIII(h) Note*

*Firearms: 121.1 Cat I(j) Note*

*Nuclear: 121.1 Cat XVI(a)*

*Relation to regulations of other agencies: 120.5*

*Spacecraft: 121.1 Cat XV(e) Note*

Exporter:

*Ascertain end-user and end-use: 123.9(a)*

*Exemptions: 120.1(d)*

*IC/DV: 123.14(b)*

*Registration: 120.4(b); 122.3; 22 U.S.C. 2278(b)(1)(A)(i)*

External Transaction Number (XTN): 123.22(a), (b)(2)

Facility security clearance code: 125.3(a)

Federal Aviation Administration: 121.1 Cat VIII(h) Note; 123.8(b)

Maritime Administration: 123.8(b)

Federal Register. 121.1(a); 123.22(b)(3) Note; 126.1; 127.7(c)

Fee:

*Broker registration: 129.4*

*Defined: 130.5*

*Clauses required in manufacturing license agreements: 124.9(a)*

*Political: generally, part 130*

*Manufacturer and exporter registration: 122.3*

*Reports of: 130.11*

Fiji: 126.1(a) footnote

Firearms:

*Commerce Dept.: 121.1 Cat I(j) Note*

*Exports: 123.17*

*Servicemen's clubs, consigned to: 123.18(a)(1)*

*USML: 121.1 Cat I, Cat III*

Fire Control:

*USML: 121.1 Cat XII*

Firmware: 121.8

Fit: 120.4(d)(2) Note

Foreign:

*Assistance Act: 123.16(b)(10)(i)*

*Consignees/ors: 126.13(b)*

*Corporation: 22 U.S.C. 2278(g)(9)(A)*

*Defense article or defense service: 129.2(c); 22 U.S.C. 2278(b)(1)(A)(ii)(IV)*

*End-user: 125.1(c)*

*Government: 22 U.S.C. 2278(g)(9)(B)*

*Import certificate: 127.2(b)(9)*

*Military Sales (FMS):*

- Application for export license: 123.1(c)(4)
- Destination control statement: 126.6(c)(6)(ii)
- DSP-94: 120.28(a)(7)
- Export license exemption: 126.6(c)
- Letters of transmittal: 124.12(a)(7)
- SME prior notification: 126.8(a)(2)
- Temporary import license exemption: 123.4(a)(5)

Foreign national (see also National):

*Definition: Not defined in the ITAR. (Defined in EAR, 15 CFR § 734.2(b)(2)(ii))*

*Deemed export: 120.17(a)(4) footnote*

*Employment at cleared facilities: 126.13(c)*

*Exemption for fundamental research: 125.4(d)(2)*

Foreign person:

*Defined: 120.16; 22 U.S.C. 2278(g)(9)(C)*

*Export w/o license for personal firearms: 123.17(d)*

Foreign production of technical data: 125.1(b)

Foreign Trade Zone:

*General: 126.3*

*Temporary import: 120.18*

Forfeiture: 127.6

Form

*Configuration: 120.4(d)(2) Note*

*Software: 120.4(d)(2) Note*

Form, fit, function:

*Commodity jurisdiction: 120.4(d)(2)*

*Policy on defense articles & services: 120.3(a)(ii)*

*Spacecraft: 121.1 Cat. XV(f)*

Forms :

*Generally: see alphabetical entries*

*Listed in ITAR: 120.28*

Freight forwarder:

*Broker registration, exemption for: 129.3(b)(3)*

*Defined: 49 U.S.C. 13102*

*FMS: 126.6(c)(6)(i)*

*License:*

- Amendments: 123.25(b)
- Applications: 126.13(b); 123.1(c)(2)

*Party to the export: 126.7(e)(2)*

*Registration exemption: 129.3(b)(3)*  
Full Authority Digital Engine Controls: 121.1 Cat VIII (b)  
Function: 120.4(d)(2) Note  
Fundamental research: 120.11(a)(8)  
General authorities and eligibility: 120.1  
General Correspondence (“GC”): (Not defined in ITAR, but refers to letter requests to DDTC for approval of matters for which no application form is designated, such as for exceptions under 126.3, advisory opinions under 126.9, and other written authorizations under 126.13.)  
General policies and provisions: part 126  
Guinea: 126.1(a) footnote  
Global Positioning System (GPS):  
*MTCR: 121.16, Item 11, Cat II(c)*  
*P-Code: 121.1 Cat XV(c)*  
*Receiving equipment: 121.1 Cat XV(c)*  
*USML: 121.1 Cat XV(c)*  
Global Project Authorization: 126.14(a)(3)(i)  
Government Bill of Lading: 126.4(a)  
Ground air traffic control radar: 121.1 Cat XI(3)(vi)  
Ground control stations: 121.1 Cat XV(b)  
Ground effect machines: 121.1 Cat VIII(g)  
Guatemala: 129.5(c) footnote  
Guidance and control:  
*Boosters & launchers: 121.5*  
*Sets: 121.16, Item 2, Cat I, Note (3)*  
*Systems: 121.1 Cat XII(a)*  
*Systems equipment: 121.5*  
*USML: 121.1 Cat XII*  
Guided missiles:  
*USML: 121.1 Cat IV*  
Gun:  
*Exports: 123.17*  
*Gun Control Act: 126.11*  
*USML: 121.1 Cat II*  
Haiti: 126.1(j)  
Hamas: 126.1(a) footnote  
Hardening criteria: 121.16 Item 11 Cat II(e)(3)  
Hardened missile launching facilities: 121.5  
Hardware  
*AES for: 120.30*  
*Exemptions for: 123.16*  
*Filing licenses for: 123.22*  
*Foreign production: 125.1(b)*  
*FMS: 126.6(c)(6)(iii)*  
*Major Program Authorization: 126.14(a)(2)*  
*Temporary export of: 123.5(c)*  
Hardship exception: 126.3  
Hearings: part 128  
Helicopter: 121.1 Cat VIII(a)  
Helmet: 121.1 Cat X(a)

Hong Kong: (not in ITAR text)  
Howitzer: 121.1 Cat II(a)  
Ignitor: 121.5  
Image intensification: 121.1 Cat XII(c)  
Imaging radar system: 121.1 Cat XI(a)(3)(v)  
Imaging sensor equipment: 121.16 Item 11 Cat II Note (2)(v)  
Immigration and Nationality Act: 126.13(a)(4)  
Import  
*ATF-4522: 120.28(a)(b)(1)*  
*Authority of AECA: 120.1*  
*BIS-645P: 120.28(a)(b)(1)*  
*Certificate/Delivery Verification (IC/DV): 123.14*  
*Control documents: 127.2(b)*  
*DSP-53: 120.28(a)(b)(1)*  
*DSP-61: 120.28(a)(3)*  
*DSP-85: 120.28(a)(6)*  
*Empowered Official’s authority: 120.25(a)(4)(i)*  
*Exemptions: 123.4*  
*International Import Certificate: 120.28(a)(b)(1)*  
*Jurisdiction: 123.2*  
*Licenses: 120.20, 123.1, 123.3*  
*Procedures and exceptions: 123.1, 123.4*  
*Registrations: 122.2(b)(1)(ii)*  
*Temporary:*

- Application for license: 123.1(a)(3)
- Bonds: 123.3(b)
- Classified items: 123.3(b)
- Control documents include: 127.2(b)
- Defined: 120.18
- DSP-61 123.1(a)(3), 123.4(a)
- Exemption: 123.4
- Filing license: 122.23(a)
- License (DSP-61): 123.1(a)(3), 123.3, 123.4(a)
- Procedures: 123.4(d)
- Seizure and forfeiture: 127.6(b)

*Treasury Dept jurisdiction.: 120.5, 120.18, 123.2*  
Import Certificate/Delivery Verification (IC/DV): 123.14  
Incapacitating agents: 121.1 Cat XIV  
Incendiary agents: 121.1 Cat V  
Indonesia:  
*Prohibited exports and sales: 126.1(a) footnote*  
Industrial Security Manual: (see National Industrial Security Program Operating Manual)  
Industrial Security Program Operating Manual: (see National Industrial Security Program Operating Manual)  
Inertial navigation systems: 121.1 Cat VIII(e)  
Information in all agreements: 124.7, 124.8  
Information security systems: 121.1 Cat XIII(b)  
Infrared focal plane arrays: 121.1 Cat XII(c)  
Initial export or transfer:



*Technical data license: 123.22(b)(3)(i),  
MLA or TAA: 123.22(b)(3)(ii)  
FMS: 126.6(c)(7)(iv)  
Voluntary disclosure: 127.12(c)(1)*

Institutions of higher learning (see Schools)

Instructions: 120.10(a)(1)

Insular possessions: 120.13

Insurance:  
*Ineligibility for exemptions: 124.15(d)  
Mandatory licenses: 124.15(d)  
Providers and underwriters: 124.15(d)*

Intelligence applications: 120.4(d)(3); 121.1 Cat XIII(b)

Internal Transaction Number (ITN): 123.22(a), (b)(2)

International Emergency Economic Powers Act (IEEPA): 120.27

International Import Certificate: See BIS-645P/ATF-4522/DSP-53

International Organization:  
*Armed Forces: 130.3  
Broker license not required: 129.3(b)(2)  
Brokering prior approval: 129.7(a)(2)(iv)  
Brokering applicant: 130.2  
Deposit of agreements: 124.4(b)(1)  
Export license not required: 126.6(a)(1)  
Fee or commission 130.5(a)(2)  
FMS: 126.6(c)  
Foreign person: 120.16  
Haiti: 126.1(j)  
License application: 123.1(c)(6)  
Political contribution: 130.6(b)  
Vendor: 130.8(a)*

International Security Assistance Force: 126.1(g)

Intervalometers: 121.5

Invention Secrecy Order: 120.10(a)(3)

Invoice:  
*Customs may require: 127.4(c)  
Export and temporary import control documents include: 127.2(b)  
Required statements on: 123.9(b); 124.9(a)(6); 124.14(c)(7)  
Temporary import: 123.4(d)(1)(ii)*

Iran:  
*Prohibited exports and sales: 126.1(a), (c), (d); 126.7(a)(8)  
Prohibited brokering activities 129.5(d) footnote*

Iraq:  
*Body armor exemption: 123.17(g)  
Prohibited exports and sales: 126.1(c), (f); 126.7(a)(8)  
Prohibited brokering activities 129.5(d) footnote*

Israel: 120.32

Ivory Coast (see Cote d'Ivoire):

Japan:  
*Brokering: 129.6(b)(2); 129.7(1)(a)(vii)  
DoD request for quote or bid: 125.4(c)  
Maintenance, training, & tech data: 124.2(c)  
Major non-NATO ally: 120.32  
Notice to Congress: 124.11(b)  
Proposals for sale of SME: 126.8(a)(1)(ii)  
Reexports or retransfers: 123.9(e); 124.16  
Special Comprehensive Export Authorization: 126.14  
Technical data supporting an acquisition, teaming arrangement, merger, joint venture: 125.14(a)(4)  
Training & military service: 124.2(c)*

Joint resolution, Congressional prohibition of certain exports: 123.15(a), 124.11(b)

Joint venture, technical data supporting: 126.14(a)(4)

Jordan: 120.32

Jurisdiction, commodity: 120.4

Knowingly: 127.1(d)

Korea: (See Republic of Korea, North Korea, and South Korea)

Kuwait: 120.32

Lasers:  
*USML: 121.1 Cat XII(b)*

Launch Vehicle:  
*Export of: 120.17(a)(6)  
USML: 121.1 Cat IV*

Law enforcement agency: 123.15(a)(3) footnote

Legible and legibility: (defined) 122.5(a)

Lebanon:  
*Prohibited exports and sales: 126.1(c)(5)  
Prohibited brokering activities 129.5(d) footnote*

Letter of intent: 123.1(c)(4), 123.27(a)

Letter of Offer and Acceptance: (see DD 1513)

Letter of transmittal (see Transmittal letter):

Liberia:  
*Prohibited exports and sales: 126.1(a), (c)  
Prohibited brokering activities 129.5(d) footnote*

Libya: 126.1(k)

Licenses:  
*Also see Forms  
Also see by type (e.g., import, export, temporary)  
Defined: 120.20  
Disposition: 123.21  
Duration: 123.22(c)  
Eligibility: 120.1(c)  
Expired: 122.5(a); 123.21(b)  
Renewal: 123.21  
Return to DDTC: 123.22(c)  
Satellites: 123.27(c)*

Licenses for export of defense articles: part 123

Licenses for export of technical data and classified defense articles: part 125  
Modified for military: 120.3(a)  
Major component:  
  *Defined: 121.8(b)*  
Major defense equipment:  
  *Congressional certification: 123.15(a)*  
  *Defined: 120.8; 22 U.S.C. 2794(6)*  
  *Reexports or retransfers: 123.9(e)(2)*  
  *Satellites: 123.27(a)(3)*  
  *Value of shipments: 123.23*  
Major Non-NATO Ally:  
  *Defined: 120.32*  
  *Licensing of satellites: 123.27(a)(1)*  
Major Program Authorization: 126.14(a)(2)  
Major Project Authorization: 126.14(a)(1)  
Mandatory:  
  *Documents to CBP: 123.22(a)*  
  *Duty to disclose proposed or actual sale to proscribed country: 126.1(e)*  
  *License for exports to insurance providers: 124.15(d)*  
  *License for launch failure: 124.15(b)*  
  *Obligation to report political contributions or fees: 130.9*  
  *Requirements of NDAA of 1999: 123.27(c)*  
Manufacturing know-how: :  
  *Canadian exemption: 126.5(c)(6)(vii)*  
  *NATO+3 exemptions: 125.4(c)(6)*  
  *MLA/TAA: 124.7(2)*  
  *Offshore procurement: 124.13(b)*  
  *Training and military service: 124.2(c)(4); 125.4(c)(5)*  
Manufacturing License Agreement (MLA):  
  *Amendments: 124.1(c)*  
  *Defined: 120.21*  
  *Clauses required: 124.8-.9*  
  *Denial, revocation, suspension: 126.7(a)(2)*  
  *Exemptions: 125.4(b)(2)*  
  *Explanatory letter: 124.12(a)*  
  *Generally: Part 124*  
  *Hardware exported in furtherance of: 123.16(b)(1)*  
  *Information required in: 124.7*  
  *Minor Amendments: 124.1(d)*  
  *Proposals containing SME: 126.8(a)-(c)*  
  *Reporting exports under: 123.22(b)(3)(ii)*  
  *Termination of: 124.6*  
Mapping:  
  *Aerial: 121.1 Cat. VIII(a); 121.16 Item 11(2)(i)*  
  *Contour: 121.16 Item 11(2)(i)*  
  *Scene: 121.16 Item 11(2)(ii)*  
Mariana Islands: 120.13

Marketing Information: 120.6, 120.10(a)(5), 123.4(3), 129.8(a)  
Meeting: 120.11(a)(6)  
Merger, technical data supporting: 126.14(a)(4)  
Mexico:  
  *Border shipments: 123.19*  
  *Pre-departure filing for emergency shipments: 123.22(b)(2)*  
Military:  
  *Aircraft & vessels, foreign owned: 126.6*  
  *Applications: 120.4*  
  *Electronics: 121.1 Cat XI*  
  *Defense articles: 120.3(b)*  
  *Demolition blocks and blasting caps: 121.11*  
  *Equipment, auxiliary: 121.1 Cat XIII*  
  *Sales: see FMS*  
  *MDE: 120.8*  
  *SME: 120.7*  
  Training:  
    ▪ 124.1(a)  
    ▪ Exemptions: 124.2  
    ▪ Foreign units: 120.9(a)(3)  
    ▪ USML: 121.1 Cat IX  
  *Vehicles: 121.1 Cat VII*  
Mines: 121.1 Cat IV  
Ministries of defense of foreign countries:  
Minor component:  
  *Defined: 121.8(b)*  
Miscellaneous Articles: 121.1 Cat XXI  
Misrepresentation or omission of facts: 127.2  
Missile Technology Control Regime (MTCR):  
  *Defined: 120.29*  
  *MTCR Annex: 120.29(b)*  
Models & mock-ups:  
  *Canadian exemption: 125.4(c)(5), 126.5(c)(6)(iv)*  
  *Defense article: 120.6*  
  *Export exemption: 123.16(b)(4)*  
  *MTCR: 121.16 Item 16-Cat 2*  
  *USML: 121.1 Cat II(h), Cat IX(f)(3), Cat XIV(i), Cat XVIII(d)*  
Modified for military application: 120.3(a), (b)  
Monetary value (see Value)  
Morocco: 120.32  
Mutual Security Act of 1954:  
National (i.e., foreign national):  
  *Canadian exemption, describing “Canadian national” as including “Canadian business entities organized under the laws of Canada” and distinguishing Canadian national from “dual citizen of Canada and a third country”:*  
    126.5(b)  
  *Congressional certification re: certain exports for satellite launch by “nationals” of the Russian Federation, Ukraine or Kazakhstan: 123.15(b)*

*Defined: (not defined in ITAR)*

*maintenance exemption for exports to foreign persons who are “nationals” of a NATO country, Australia, Japan or Sweden: 124.2(c)(6)*

*Disclosure of technical data to “national” of country other than country of ultimate end-use: 125.1(c)*

*Exports of defense services or related technical data to “nationals” of a NATO country, Australia, Japan or Sweden re: responding to quote or bid proposal: 125.4(c)*

*Exports of satellites or related items associated with launch by “nationals” of non-NATO countries or major non-NATO allies: 124.15(a), (c); 121.1 Cat XV(f) Note*

*Institutions of higher learning*

- *Fundamental research involving “nationals” of certain countries: 123.16(b)(10)(i), (iii); 125.4(d)(1), (2)*
- *Disclosures to foreign persons who are their employees, if employee is not a “national” of a proscribed country: 125.4(b)(10)(ii)*

*MLA/TAA clause limits transfers to third-country “national”: 124.8(5)*

*Status of natural person signing document, U.S. “national” distinguished from U.S. citizen and U.S. permanent resident: 126.13(a)(4)*

*Technology control plan recommended when “foreign nationals” are employed at or assigned to security-cleared facility: 123.13(c)*

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