

# US Export Controls Trade Compliance Training

ITAR Webinar – June 16, 2022

**US Export Controls – From EAR to ITARnity**  
Ever-challenging US Export Controls Compliance

27-29 June 2022

# Purpose of US Export Controls

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- Foreign Policy
  - Support Allies in Mutual Foreign Policy and National Security Goals
  - Promote interoperability with Allies
- National Security
- Human Rights
- Regional Stability
- Proliferation
- Qualitative Military Edge - Keep the good stuff out of the wrong hands

# Laws, Regulations and Government Agencies

	Defense Articles & Services	Other Items	Dealings – Sanctioned Countries / Persons
<b>Government Agency</b>	US Department of State, Directorate of Defense Trade Controls (DDTC)	US Department of Commerce, Bureau of Industry and Security (BIS)	US Department of the Treasury, Office of Foreign Assets Control (OFAC)
<b>Legal Authority</b>	Arms Export Control Act (AECA)	Export Control Reform Act (ECRA)	International Emergency Economic Powers Act (IEEPA), Trading with the Enemy Act (TWEA)
<b>Implementing Regulations</b>	International Traffic in Arms Regulations (ITAR)	Export Administration Regulations (EAR)	Sanctions Regulations 31 C.F.R. 501-599 North Korea, Cuba, Syria, Sudan, Iran, Russia, Burma, Yemen, Mali, etc.
<b>Control List</b>	US Munitions List (USML)	Commerce Control List (CCL)	--
<b>Website</b>	<a href="http://pmdtc.state.gov">pmdtc.state.gov</a>	<a href="http://bis.doc.gov">bis.doc.gov</a>	<a href="http://treas.gov/offices/enforcement/ofac">treas.gov/offices/enforcement/ofac</a>

# What is an Export?

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- **EAR** – “Export” means an actual shipment or transmission of items out of the United States; a release of technology or software to a foreign national in the United States; or a transfer by a person in the United States of registration, control, or ownership of certain spacecraft to a person in or a national of any other country.
- **ITAR** – “Export” can be done in many ways, including: sending or taking a defense article outside the United States; transferring registration, control or ownership to a foreign person of any aircraft, vessel, or satellite, *whether in the US or abroad*; disclosing or transferring any defense article or technical data to or performing a defense service for a foreign person, *whether in the US or abroad*.

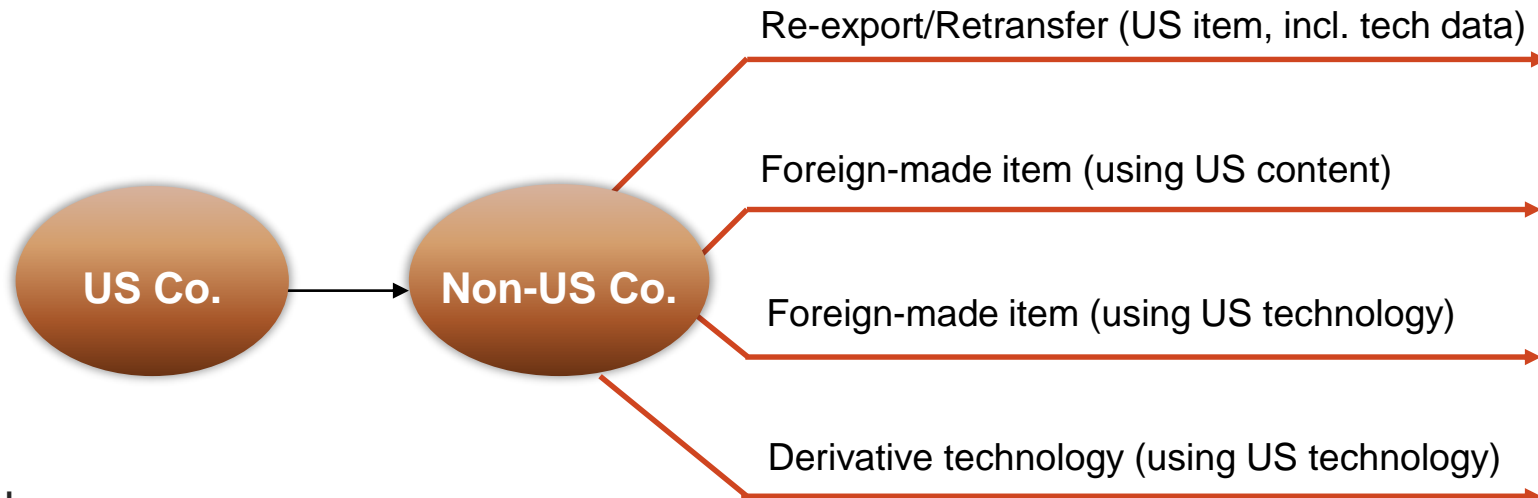
# Fundamental Questions

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- The application of export controls depends on:
  - WHERE: Place of export?
    - Example: Every person or article in US, including non- US nationals and foreign-origin products, are subject to US export controls.
  - WHO: Nationality of the exporter?
    - Example: A US national or a US company is subject to US export controls, even when all export activities occur outside of US.
    - May also be subject to the local country's export controls.
  - WHAT: Origin of the goods and/or technology being exported?
    - Example: US-origin items remain subject to US controls even after they leave the US.
    - May also be subject to the local country's export controls.

# US Controls on US-Origin Items

- US laws and regulations govern:
  - All exports from the United States
  - Re-exports and retransfers of US-content



- Excluded:
  - EAR: Publicly available information, *de minimis* controlled US content in foreign item
  - ITAR: Public domain, basic marketing information, general system descriptions, US-components in foreign made article to NATO+

# Why File a Commodity Jurisdiction (CJ) Request?

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- For re-designation of an article or service currently covered by the USML
  - 30 day notice to Congress
  - Example: To remove commercial communications satellites from Cat. XV(a)
- If doubt exists as to whether an article or service is covered by the USML or EAR
  - Example: To establish that a specifically designed component should not be under DDTC jurisdiction
- To determine whether to register with DDTC
- Do not want to rely on the Original Equipment Manufacturer (OEM)
- Do NOT need to be registered to apply for a CJ
- Need to establish an account in DECCS – Defense Export Controls + Compliance System

# Defense Article

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- On the US Munitions List (USML)
- Hardware (items)
- Technical Data
  - Recorded and stored in any format
  - Models, mock-ups or other items that reveal technical data
- It does not include basic marketing information on function or purpose or general system descriptions



# Defense Service

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- Furnishing of assistance, including training, to foreign persons in the US or abroad
  - Encompasses the ...
    - Design
    - Development
    - Engineering
    - Modification
    - Destruction
  - Manufacture
  - Production
  - Assembly
  - Operation
  - Processing
- ...of defense articles
- Furnishing of training or other assistance to foreign persons, whether in the US or abroad, in relation to a defense article such as military training of foreign units and forces
  - NOTE: May involve public domain data or commercial hardware (COTS)
  - Must obtain State Department approval of a Technical Assistance Agreement (TAA) or other prescribed agreement before furnishing a defense service

# Definition of an Export under the ITAR

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- Sending or taking a **defense article** or **technical data** out of the United States (not including knowledge in one's brain)
- Disclosing, by any means, or transferring a defense article or technical data to a **foreign person** in the United States or abroad
- Performing a **defense service** on behalf of or for the benefit of a foreign person in the United States or abroad
- Transferring registration, control or ownership of any aircraft, vessel or satellite covered by the USML to a foreign person in the United States or abroad (may include launch vehicles)

# Re-export/Retransfer

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- The transfer of defense articles or defense services to a new end-use, end-user, or individual
  - Re-export – from one foreign country to another foreign country or third country national
  - Retransfer – within the same foreign country
- Requires prior DDTC approval or exemption
- Deemed Export and Deemed Re-export

# US and Foreign Person Definitions

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- US Person Definition:
  - A lawful permanent resident of the US
    - US citizens, green card holders and protected individuals
  - Any other entity incorporated to do business in the United States (corporation, business association, partnership, trust, society or other)
  - Governmental entity (federal, state, local) and US military
- Foreign Person Definition:
  - NOT a lawful permanent resident of the US (in the US or abroad)
  - Any other entity NOT incorporated to do business in the United States International organizations (e.g., NATO, UN), foreign governments, diplomatic missions and embassies

# License Requirements and Applications

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- Every export or temporary import of a defense article must be made pursuant to:
  - A license; or
  - An exemption
- Types of Licenses:
  - DSP-5 (unclassified) permanent export
  - DSP-73 (unclassified) temporary export
  - DSP-61 (unclassified) temporary import
  - DSP-85 (classified) export or temporary import

# Exports to Overseas Subsidiary – 123.16(b)(9)

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- No license required for export by a US person of any unclassified component, part, tool or test equipment to a subsidiary, affiliate or facility owned or controlled by the US person, if to be used for manufacture, assembly, testing, production, or modification
- Requirements:
  - US person is registered
  - Defense article exported under this exemption may not be sold or transferred without the appropriate license or other approval

# Exemptions under Part 126

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- Transfers by or for USG Agencies – 126.4
- Canadian Exemptions – 126.5
- Foreign Military Aircraft and Naval Vessels – 126.6(b)
- Foreign Military Sales (FMS) Program – 126.6(c)
- Australian Defense Trade Cooperation Treaty Exemption – 126.16
- UK Defense Trade Cooperation Treaty Exemption – 126.17

# Exemption under the Australian and UK Defense Trade Cooperation Treaties – 126.16 and 126.17

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- Exemption: Except for items identified in Supplement No. 1 to Part 126, no license required for exports of Defense Articles and Defense Services to Australia or the UK if all of the following conditions are met:
  - Exporter is registered with DDTC and qualified to export the items;
  - Australian/UK recipient is a member of the Approved Community;
  - Any intermediate consignees are eligible to handle defense articles;
  - Export is for an end-use specified in the Treaties;
  - Export documentation is maintained by exporter and recipient; and
  - Congressional notification is made for major weapons sales.



# What is “Technical Data” under ITAR?

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- Information, other than software, required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles
  - Includes information in the form of blueprints, drawings, photographs, plans, instructions and documentation
- Classified information relating to defense articles and defense services
- Information covered by an invention secrecy order
- Software as defined in § 120.45(f) directly related to defense articles

# What “Technical Data” Does NOT Include

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- Information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities
  - Conceptual level only
  - Not applied to a specific defense article
- Basic marketing information on the function or purpose of defense articles, or general system descriptions of defense articles
  - Conceptual level only
  - Not PDR, CDR, ICD, detailed RFP requirements
- Information in the “public domain” as defined in § 120.11
  - Through an enumerated channel

# Information in the “Public Domain”

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- Clearance required to place information in public domain
- Internet does not count as clearance
- Information published and generally accessible or available to the public:
  - Sales at newsstands, bookstores, subscriptions, public libraries, patents available at the patent office, unlimited distribution at conferences, seminars, trade shows or exhibitions which are open to the public, and fundamental research in science and engineering at accredited institutions of higher learning in the US (subject to qualifications)
- WikiLeaks does NOT count

# What Constitutes an Export of Technical Data?

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- Actual shipment or transmission out of the United States
- Releasing or otherwise transferring technical data to a foreign person in the US is a deemed export
  - Includes sending via electronic media (websites, email systems and servers)
  - Includes technical data recorded or stored in any physical form, models, mock-ups or other items that reveal technical data directly relating to defense articles

# Agreement Requirement

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- DDTC approval required before defense services may be furnished
  - Technical Assistance Agreement
  - Manufacturing License Agreement
  - Offshore Procurement Agreement
  - Distribution Agreement
- Defense Service means:
  - Furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles
  - Furnishing to foreign persons of any technical data, whether in the US or abroad
  - Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the US or abroad or by correspondence courses, technical, educational or information publications and media of all kinds, training aid, orientation, training exercise, and military advice

# Activities Frequently Requiring Agreements

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- Marketing products to foreign parties
- Supporting sales to foreign parties
- Providing overseas maintenance or training support
- Technical studies or evaluations with foreign parties
- Offshore procurement
- Release of manufacturing data or rights
- Efforts to import technology from abroad
- Supporting a foreign military sales case (ITAR 126.6)
- Supporting US Government-sponsored foreign contracts (ITAR 126.4)

# TAA or MLA

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- **TECHNICAL ASSISTANCE AGREEMENT (TAA) ITAR 120.22**
  - An agreement 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 may be included, but providing production rights or manufacturing know-how are not conveyed
- **MANUFACTURING LICENSE AGREEMENT (MLA) ITAR 120.21**
  - An agreement whereby a US person grants a foreign person an authorization to manufacture defense articles and which involves or contemplates:
    - The export of technical data or defense articles or the performance of a defense service; or
    - The use by the foreign person of technical data or defense articles previously exported by the US person
  - A MLA involves the licensing of manufacturing defense article abroad, which requires the US party providing manufacturing know-how to the foreign party (i.e., teaches the foreign party how to manufacture the item)
  - A MLA can also involve just the assembly of hardware abroad and no actual manufacturing, if the foreign party requires manufacturing data in order to complete the assembly.

# Dual National / Third Country National Employees

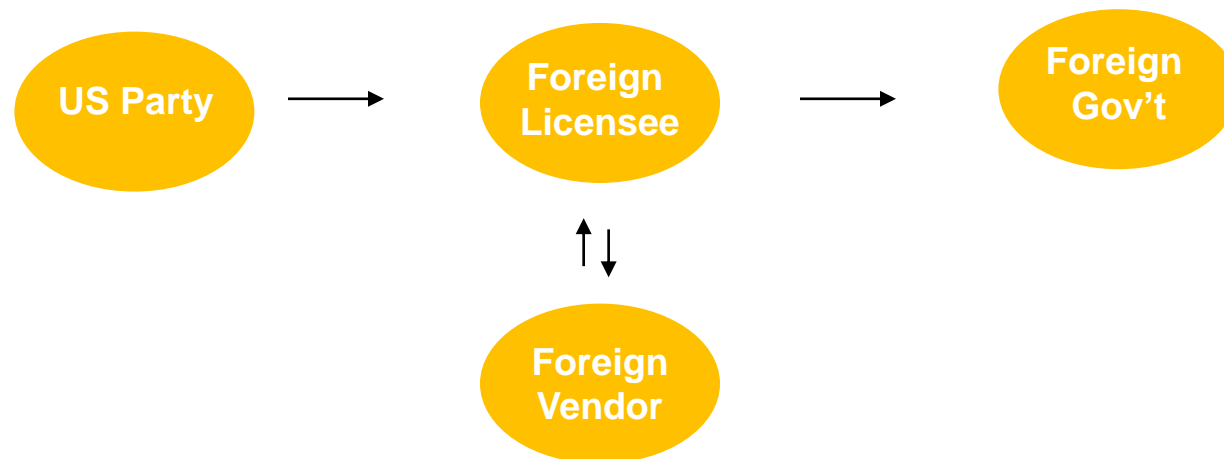
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- A dual national employee (DN) is an employee of a foreign licensee (or sub-licensee) who is a national of both the country of the employer and one or more additional countries
- A third country national employee (TCN) is an employee of the foreign licensee (or sub-licensee) who is a national of a country other than the country of the employer
- DN/TCN access to unclassified defense articles and retransfers of technical data and defense services under TAAs/MLAs
  - Permissible (without authorization) to bona fide regular employees of foreign signatories who are DN/TCNs of NATO, EU, Australia, Japan, New Zealand and Switzerland pursuant to §126.18(d) (other conditions apply)
  - Permissible (without authorization) pursuant to § 126.18(a)-(c) to bona fide regular employees of foreign signatories who are DN/TCNs, provided:
    - Transfers occur in end-user's country;
    - Transfers within scope of authorization;
    - Employee has host country security clearance or employer institutes screening process and employee executes NDA



# Sublicensing

- In TAA or MLA, applicant must provide the roles of the sub-licensees and a description of the technical data to be retransferred to the sub-licensee
  - Sublicensee must sign NDA and be in Approved Territory
    - Applicant is responsible for monitoring the foreign licensees selection of other foreign parties for sub-licensing and the retransfer of their technology
  - Sublicensees must be listed in Agreement and NDA must flow-down provisions in TAA or MLA



# Nontransfer and Use Assurances

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- Nontransfer and Use Certificate (Form DSP-83)
  - Significant military equipment (SME)
  - Classified defense articles, including technical data
  - Required by DDTC
- Signed by applicant, licensee, foreign government
- SME means items marked with asterisk on USML

# Distribution Agreement

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- Export of defense articles to a foreign person for retransfer within an approved territory
  - Unclassified defense articles exported under DSP-5 or 123.16(b)(1) exemption
- Agreement must include:
  - Description of the defense articles involved including test and support equipment
  - Country or countries that comprise the distribution territory
  - Distribution control plan: detailed statement of the terms and conditions under which the defense articles will be exported and distributed
    - Inventory control
  - End-use and end-user control/certification/reporting
    - Limited to the governments in territory
    - Private entities in territory procuring for government contract
  - Duration of the proposed agreement

# What is “Brokering” under the ITAR?

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- Any action on behalf of another
- To facilitate the manufacture, export, permanent import, transfer, re-export or retransfer
- Of a US or foreign defense article or defense service
- Regardless of its origin

# Examples of “Brokering”

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- With respect to a defense article of defense service:
- Involvement in the movement
  - Financing
  - Insuring
  - Transporting
  - Freight forwarding
- Involvement in the purchase, sale, transfer, loan or lease
  - Soliciting
  - Promoting
  - Negotiating
  - Contracting for
  - Arranging
  - Otherwise assisting in

# Examples of Not “Brokering”

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- Activities by a US person in the United States that are limited exclusively to US domestic sales or transfers (e.g., not for export)
- Activities by employees of the US Government acting in an official capacity
- Activities that do not extend beyond administrative services, such as providing or arranging office space and equipment, hospitality, advertising, or clerical, visa, or translation services, collecting product and pricing information to prepare a response to Request for Proposal, generally promoting company goodwill at trade shows, or activities by an attorney that do not extend beyond the provision of legal advice to clients
- Activities performed by an affiliate, as defined in § 120.40 of this subchapter, on behalf of another affiliate
  - An *affiliate* of a registrant is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such registrant
- Activities involving EAR controlled items

# DDTC Voluntary Disclosure Policy

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- “The Department strongly encourages the disclosure of information to the Directorate of Defense Trade Controls by persons that believe they may have violated any export control provision of the Arms Export Control Act, or any regulation, order, license, or other authorization issued under the Arms Export Control Act.” 22 CFR127.12(a)
- DDTC takes position that disclosing shows
  - Support from senior officers on registration
  - Effective training across company
  - Good recordkeeping

# ITAR Civil Penalties

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- A fine not to exceed \$1,197,728 for each violation
  - \$1,036,566 for certain arms transactions with countries supporting acts of international terrorism
  - \$870,856, or five times the amount of the prohibited incentive payment, whichever is greater, for making proscribed incentive payments in connection with offset contracts
  - Maximum fines updated for inflation once a year
- Examples:
  - GM and General Dynamics agreed to a joint \$20 million settlement of 248 alleged ITAR violations for unlawful information transfers in its light armor vehicle program
  - ITT settled 95 alleged ITAR violations for \$8 million involving unlicensed exports of night vision technology



# DDTC Administrative Penalties

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- Denial, revocation, suspension or amendment of any license or other approval granted under the ITAR
- Denial of any application for ITAR approval
- Debarment (prohibition, for period of up to 3 years, on issuance of licenses)
  - Administrative debarment based on violation so serious that it is believed the violator cannot be relied upon to comply with ITAR
  - Statutory debarment is based on violation of any of 11 criminal statutes, including the AECA, the EAA, IEEPA and the FCPA
- Suspension (interim action if grounds for debarment)

# DDTC Criminal Penalties

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- For corporations, a fine of up to \$1,197,728 for each violation
- For individuals, the above fine and/or imprisonment for up to 10 years

# Compliance Programs

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- Technology Control Plan
- Exporters should have in place programs that assist in monitoring defense trade activities. Comprehensive operational compliance programs include manuals that articulate the processes to be followed in implementing the company program. Important elements of effective manuals include:
  - Organization Structure
  - Corporate Commitment and Policy
  - Identification, Receipt and Tracking of ITAR Controlled Items/Technical Data
  - Restricted/Prohibited Exports and Transfers
  - Recordkeeping
  - Internal Monitoring
  - Training
  - Violations and Penalties

# Consequences of Non-Compliance

- Non-compliance may result in investigations that disrupt normal business operations, add unintended costs and divert company resources
- Violations may result in fines or other penalties and can damage the company's reputation
- Export regulations are a matter of national security
- Violations are subject to criminal, civil and administrative penalties, including:
  - Imprisonment (up to 10 years)
  - Fines that may far exceed the value of the exports for each violation
  - Loss of export privileges
  - Listing as a restricted party

***Exporting is a privilege, not a right!***



# Questions?

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