

CHECKLIST OF COMPLIANCE ISSUES UNDER THE INTERNATIONAL TRAFFIC IN ARMS REGULATIONS

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The following is a Checklist of key issues for companies to consider in assessing compliance under the International Traffic In Arms Regulations (“ITAR”). This is not intended as a complete listing of all ITAR requirements but rather as a tool for evaluating the most common compliance risks for U.S. and foreign companies. In evaluating ITAR issues companies should also consider issues raised under the Export Administration Regulations (See Section 37 below).

1. Jurisdiction and Classification

- (a) Has the company properly determined if its products are on the U.S. Munitions List (“USML”) and subject to ITAR? Are any items listed as “Significant Military Equipment” and therefore subject to heightened ITAR requirements? If the company is not certain of the jurisdiction of a particular product it can submit a commodity jurisdiction request to DDTC.
- (b) A listing of steps for export classification under ITAR is set forth on Exhibit A attached hereto.
- (c) If a product is not subject to ITAR, has the company determined the proper classification for the product under the Export Administration Regulations (“EAR”)? This could be as a 600 Series item or a 9x515 item on the Commerce Control List (“CCL”), under another CCL category or EAR99.
- (d) Has the company maintained adequate records of the basis of its classification for each of its products?
- (e) If the company previously had items listed on the USML, has the company verified if jurisdiction for the item has been transferred to the jurisdiction of the Bureau of Industry and Security (“BIS”) under Export Control Reform?

2. Export Licenses For Exports of Defense Articles

- (a) If an export license is required for a transaction, has the company obtained the license (eg, DSP-5, DSP-6, DSP- 73, DSP-74)?

Note: This article contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not intended and should not be construed as legal advice.

- (b) In exporting a defense article under an export license, has the company complied with the terms, conditions and provisos set forth in the license?

3. ITAR – Controlled Technical Data and Software

- (a) Has the company sent or taken ITAR-controlled technical data (including drawings, specifications, models, brochures, e-mails, memoranda) or software out of the U.S. without a license or applicable exemption?
- (b) Has the company disclosed ITAR-controlled technical data to Foreign Persons¹ in the U.S. (including to its employees) without a license or applicable exemption?
- (c) Has the company transferred technical data regarding ITAR-controlled items without a license or applicable exemption to:
 - (i) Foreign sales agents or marketing intermediaries?
 - (ii) Foreign prospective customers as part of marketing proposals?
 - (iii) Prime or subcontractors, suppliers, program partners, foreign component manufacturers?
 - (iv) Persons in trade shows, marketing presentations?
- (d) Has the company transferred ITAR-controlled technical data to company employees who are Foreign Persons other than as specifically authorized in the company’s Technical Assistance Agreements or other DDTC authorizations? (This includes in both foreign offices and in U.S. offices.)
- (e) Have company employees taken ITAR-controlled technical data in overseas travel, including in documents, laptop computers, PDA’s, iPhones, iPads and similar devices without a license or applicable license exemption?
- (f) Has the company posted ITAR-controlled technical data or software on websites, chat rooms or transferred such items to Foreign Persons through e-mails, text messages, e-mail attachments, faxes, videos, telephone calls or other electronic communications?

4. Defense Services

- (a) Has the company performed any services for Foreign Persons related to any items on the USML, or items within the definition of Defense Services set forth at 22 CFR § 120.9,²

¹ The term “foreign person” is defined at 22 CFR § 120.16 as follows: *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).

without entering a Technical Assistance Agreement (“TAA”) or other applicable agreement approved by DDTC? (This includes services performed in the U.S. and overseas.)

- (b) If the company has entered a TAA or other agreement approved by DDTC, were the services performed by the company within the terms, conditions and provisos of such agreement?
- (c) Has the company performed services for a foreign military organization or foreign defense industry company in connection with an item regulated under the EAR?

5. Imports of Defense Items

- (a) Has the company imported any items (i) on the USML in temporary import transactions; or (ii) on the U.S. Munitions Import List in permanent import transactions, without obtaining a license or identifying an available exemption?
- (b) If the company obtained a license, were all aspects of the import transaction within the terms, conditions and provisos of such license?

6. Registration

- (a) Is the company registered with DDTC as a manufacturer, exporter and/or broker?
- (b) Has the company notified DDTC within 5 days of changes of information set forth in its Registration Statement?
- (c) Has the company provided the required 60 day advanced notification to DDTC of the intended sale or transfer of ownership or control of the company to a Foreign Person?
- (d) Note: Even if the company is exempt from registration under 22 CFR § 121.1(b), the company will still be subject to other requirements under ITAR such as the prohibition against exporting ITAR-controlled products without a license, the prohibition against disclosing ITAR-controlled technical data to foreign persons in the U.S. or abroad without a license and the prohibition against performing defense services for a foreign party without a Technical Assistance Agreement or other DDTC authorization.

7. Debarred Party List Review

- (a) Has the company conducted reviews of all parties to its transactions involving ITAR-controlled items to verify that such parties are not listed on DDTC’s Debarred Parties List?

² The term “Defense Service” is defined at 22 CFR § 120.9 as follows: (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; (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.

8. Export Clearance Requirements

- (a) Has the company complied with the export procedures for its exports of ITAR-controlled hardware – these may include:
- Electronic filing of export information under the Automated Export System (“AES”)
 - Applying destination control statement to documents under 22 CFR § 123.9(b)
 - Obtaining required documentation including End-Use Statements, DSP-83 Nontransfer and Use Statements (if required), etc.
- (b) Has the company complied with the export procedures for exports of ITAR-controlled unclassified technical data - these may include:
- Retaining export license document in company’s possession
 - Notifying DDTC of the export under 22 C.F.R. § 123.22(b)(3) (Form DS-4071)
 - Obtaining required export documentation (Form DSP-83, etc.)
- (c) Has the company complied with the export procedures for the performance of Defense Services - these may include:
- DDTC approves TAA or other agreement
 - Foreign recipient executes TAA
 - Fully executed TAA is submitted to DDTC within 30 days after it enters into force
 - If agreement not executed within one year of approval, notify DDTC in writing
 - Inform DDTC of initiation of export of technical data under 22 C.F.R. § 123.22(b)(3) (Form DS-4071)
 - Advise DDTC in writing if agreement is not concluded
 - Advise DDTC of impending termination of TAA not less than 30 days prior to termination

9. Reexports and Retransfers

- (a) If an ITAR-controlled item was properly exported (including ITAR-controlled technical data), was proper authorization obtained for reexports or retransfers of such items?

10. License/Agreement Administration

- (a) Has the company followed the requirements for proper administration of licenses, TAA’s and other agreements? Examples of such requirements include:
- Modifying TAA’s and other agreements in accordance with DDTC provisos
 - Executing TAA’s and providing copies to DDTC
 - Amending agreements as required due to changes such as scope, value, parties, etc.
 - Maintaining temporary export and import licenses and related shipment records

- Filing annual reports under Manufacturing License Agreements and Distribution Agreements

11. See-Through Rule

- (a) Has the company exported, reexported or retransferred an item that incorporates ITAR-controlled parts, components, attachments or accessories or is based upon ITAR-controlled technical data? If an item contains a part or component that is ITAR-controlled, or is based upon or incorporates ITAR-controlled technical data, under DDTC's interpretation under the "See-Through Rule" the entire end-item thereafter will become subject to ITAR (subject to certain limited exceptions).

12. Services For Foreign Military Customers Related to Items Controlled Under EAR

- (a) Will the company be performing services for foreign military customers in connection with the sale of items subject to EAR? Such transactions involve a heightened level of risk for the company to be performing defense services regulated under ITAR and companies should use an extra level of caution in such transactions. (See In the Matter of: Analytical Methods Inc., DDTC Charging Letter dated December 19, 2008, Consent Agreement dated January 23, 2009 and Order dated February 18, 2009, available on DDTC Website).

13. Reports For Sales Commissions, Fees and Political Contributions

- (a) Has the company or its Vendors (as defined at 22 CFR § 130.8) paid or offered to pay sales fees or commissions in connection with the sale of ITAR-controlled items in excess of \$100,000, or political contributions in excess of \$5,000? If so, determine if the company is required to file the requisite reports with DDTC and comply with the other requirements under 22 CFR Part 130.

14. Receipt, Tracking, Marking And Security For ITAR-Controlled Items

- (a) Does the company properly mark all ITAR-controlled products, technical data and software within the company's facilities to provide adequate notice that such items are ITAR-controlled?
- (b) Does the company provide adequate security within its facilities to prevent unauthorized access to ITAR-controlled items (including access by Foreign Persons)?
- (c) Does the company provide adequate notice to customers and other parties to which the company transfers ITAR-controlled items that such items are ITAR-controlled, through the use of destination control statements and other forms of notice such as under 22 CFR § 123.9(b)?

15. Processing, Handling or Forwarding of ITAR-Controlled Items

- (a) Does the company track ITAR-controlled items if it receives them within its facilities? Even if a company merely receives, processes, stores, or otherwise handles USML items without providing any other value-added functions, ITAR requirements may arise. Companies should review their supply chain operations and inventory to determine if ITAR-controlled items are received, stored or otherwise handled by the company in its operations and take protective measures including marking, securing and controlling such items.

16. Controls In Company IT System

- (a) Does the company maintain adequate controls in its information technology system to protect against unauthorized access, disclosure and transfer of ITAR-controlled technical data and software, including:
- Adequate data security to prohibit access by unauthorized persons (including Foreign Persons) to the company's data system
 - Adequate security processes to limit access by Foreign Person employees of the company to ITAR-controlled technical data and software that are stored, processed or transmitted in the company's data system
 - Procedures for prominently marking ITAR-controlled technical data and software such as in e-mails, attachments, Word documents, PowerPoint slides, spreadsheets, electronic drawings, text messages and other electronic messaging
 - Limitations on the transfer and copying of ITAR-controlled technical data and software stored in the company's IT system
- (b) Does the company have specialized controls for the storage, processing and transfer of ITAR-controlled technical data and software for the following:
- For all network resources including laptop computers, cellular phones, iPads and other portable electronic devices
 - For disclosures of controlled items in Webex/Sharepoint and other collaborative meetings
 - For disclosure of controlled items in file-sharing and drop-box resources
 - Access to controlled items through virtual private networks/Citrix connections
 - Disclosures to controlled items on company websites, intranet sites, social media platforms
- (c) Special ITAR requirements apply for the storage and processing of ITAR-controlled technical data or software "in the cloud"
- (d) Does the company locate computer servers or other IT equipment which it uses to store, process or transmit ITAR-controlled or EAR-controlled technical data or software outside the U.S.?
- (e) Does the company utilize Foreign Persons (including Foreign Person employees) or foreign companies to provide IT support or administration services in connection with the design, operation or maintenance of the computer system including: (i) not permitting Company employees who are Foreign Persons to perform such services as part of their employment for the Company; and (ii) not permitting outside contracting firms who are foreign companies or employ Foreign Persons to perform such services?
- (f) For contracts with U.S. government agencies, are there special data security controls for required under the contacts (eg., see DFARS §252.204-7012)

17. Manufacturing License Agreements and Distribution Agreements

- (a) Is the company licensing ITAR-controlled technical data to permit the manufacture overseas of an item on the USML? If yes, the company will most likely be required to enter into a Manufacturing License Agreement (“MLA”) approved by DDTC unless an exemption applies. See 22 CFR Part 124.
- (b) Is the company establishing a warehouse or distribution point abroad for defense articles exported from the U.S. for subsequent distribution to entities in a sales territory approved by DDTC? If yes, the Company will most likely be required to enter into a Distribution Agreement (“DA”) approved by DDTC unless an exemption applies. See 22 CFR Part 124.
- (c) If the company is a party to an MLA or DA, has it operated within the terms and conditions set forth in such agreements?
- (d) Has the company filed its annual reports with DDTC related to operations under the MLA or DA?
- (e) Has the company maintained records related to its manufacturing of ITAR-controlled products as required under the MLAs and DA’s?

18. Brokering

- (a) Has the company engaged in “brokering” activity as defined at 22 C.F.R. Part 129?³ If so, has it registered as a broker with DDTC?

³ The term “broker” is defined at 22 CFR § 129.2 (a) as follows: (a) *Broker* means any person (*see* § 120.14 of this subchapter) described below who engages in the business of brokering activities: (1) Any U.S. person (*see* § 120.15 of this subchapter) wherever located; (2) Any foreign person (*see* § 120.16 of this subchapter) located in the United States; or (3) Any foreign person located outside the United States where the foreign person is owned or controlled by a U.S. person. **Note to paragraph (a)(3):** For purposes of this paragraph, “owned by a U.S. person” means more than 50 percent of the outstanding voting securities of the firm are owned by a U.S. person, and “controlled by a U.S. person” means one or more U.S. persons have the authority or ability to establish or direct the general policies or day-to-day operations of the firm. U.S. person control is rebuttably presumed to exist where U.S. persons own 25 percent or more of the outstanding voting securities unless one foreign person controls an equal or larger percentage.

The term “brokering activities is defined at 22 CFR § 129.2(b) as follows: (b) *Brokering activities* means any action on behalf of another to facilitate the manufacture, export, permanent import, transfer, reexport, or retransfer of a U.S. or foreign defense article or defense service, regardless of its origin. (1) Such action includes, but is not limited to: (i) Financing, insuring, transporting, or freight forwarding defense articles and defense services; or (ii) Soliciting, promoting, negotiating, contracting for, arranging, or otherwise assisting in the purchase, sale, transfer, loan, or lease of a defense article or defense service. (2) Such action does not include: (i) Activities by a U.S. person in the United States that are limited exclusively to U.S. domestic sales or transfers (*e.g.*, not for export); (ii) Activities by employees of the U.S. Government acting in an official capacity; (iii) Activities by regular employees (*see* § 120.39 of this subchapter) acting on behalf of their employer, including those regular employees who are dual nationals or third-country nationals that satisfy the requirements of § 126.18 of this subchapter; **Note to paragraph (b)(2)(iii):** The exclusion does not apply to persons subject to U.S. jurisdiction with respect to activities involving a defense article or defense service originating in or destined for any proscribed country, area, or person identified in § 126.1 of this subchapter. (iv) 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; (v) Activities performed by an affiliate, as defined in § 120.40 of this subchapter, on behalf of another affiliate; or (vi) Activities

- (b) If the company retains third parties to engage in “brokering activity” on behalf of the company as defined in § 129.2(a) and (b) have such third parties registered with DDTC under 22 CFR Part 129?
- (c) If a party is engaged in brokering activities, has it obtained the requisite DDTC advanced approval of brokering transactions, filed its annual reports and complied with the other requirements under 22 CFR Part 129?
- (d) Has the company engaged in any brokering activities involving the “proscribed countries” identified in 22 CFR §126.1? If so, has the company filed its mandatory disclosure of such activity with DDTC as required under 22 CFR §126.1(e)(2)?

19. Recordkeeping

- (a) Has the company complied with the ITAR recordkeeping requirements as set forth at 22 CFR § 122.5?

20. Use of ITAR Exemptions

- (a) Has the company relied on exemptions from requirements under ITAR? If so, has it complied with all of the applicable conditions for use of such ITAR exemptions? For example, in many instances use of exemptions under ITAR may not be permitted in transactions: (i) involving “proscribed destinations” set forth at 22 CFR § 126.1; (ii) for which Congressional notification is required pursuant to 22 CFR §123.15; (iii) involving items designated as Significant Military Equipment (See 22 CFR §120.7); (iv) involving persons who are ineligible under 22 CFR § 120.1(c); (v) involving the establishment of offshore procurement arrangements or producing defense articles offshore; or (vi) by parties that are not registered with DDTC under 22 CFR Part 122. See 22 CFR §§123.16, 125.4, 125.6 and 124.3.
- (b) If the company has relied on exemptions, has it maintained adequate records of its reliance on the exemptions in specific transactions as required under ITAR?
- (c) If the company has relied on license exemptions under 22 CFR §125.4 for controlled technical data, has it prepared and retained the certifications required under 22 CFR §125.6?

21. Section 126.1 Proscribed Countries; Significant Military Equipment, Major Defense Equipment

- (a) Has the company engaged in any sale, export, transfer, reexport or retransfer, or made any proposals or sales presentations, involving defense articles or defense services to any of the

by persons, including their regular employees (*see* § 120.39 of this subchapter), that do not extend beyond acting as an end-user of a defense article or defense service exported pursuant to a license or other approval under parts 123, 124, or 125 of this subchapter, or subsequently acting as a reexporter or retransferor of such article or service under such license or other approval, or under an approval pursuant to § 123.9 of this subchapter. (c) For the purposes of this subchapter, engaging in the business of brokering activities requires only one occasion of brokering as described in paragraph (b) of this section.

“Proscribed Countries” identified in 22 CFR § 126.1? If yes, the company is required to report such activities to DDTC under 22 CFR § 126.1(e)(2).

- (b) Note that special heightened restrictions exist under ITAR for transactions involving: (i) the “proscribed countries” set forth at 22 CFR 126.1, including China (and will be subject to a policy of denial for license applications); (ii) items that are designated on the U.S. Munitions List as “Significant Military Equipment” (See 22 CFR 120.7); (iii) Major Defense Equipment (See 22 CFR § 120.8); and (iv) classified technical data and services (See USML Category XVII – Note for classified technical data the Company will be subject to requirements under ITAR as well as under NISPOM).

22. Foreign Military Sales

- (a) If the company is relying on the exemption for Foreign Military Sales transactions set forth at 22 CFR § 126.6 (c), has the company complied with all of the conditions applicable to the use of such exemption (including authorization under a Letter of Authorization)? If not the company will be required to obtain a license or other authorization from DDTC unless another exemption applies.

23. Classified Defense Articles and Technical Data

- (a) Have the company’s exports of classified defense articles and technical data complied with the provisions of 22 CFR § 125.3 and 125.9, including use of DSP-85, as well as the NISPOM? Note that classified articles, technical data and defense services not otherwise enumerated are listed on the USML under Category XVII and hence are subject to requirements under ITAR in addition to requirements under NISPOM.

24. Transactions With Affiliates

- (a) If an export license is normally required for a particular product, the company will be required to obtain a license even if the shipment is to foreign subsidiaries, other foreign offices, joint ventures or other foreign affiliates of the company unless a license exemption applies.

25. Foreign Travel By Company Employees

- (a) Employees should avoid taking defense articles and ITAR-controlled technical data and software in foreign travel on laptops, iPhones, iPads, other PDA’s, flash drives and other devices unless a license is obtained or an exemption is available.

26. Obligations In Working With Subcontractors and Other Program Partners

- (a) Will the Company be working with subcontractors, prime contractors, teaming partners or other independent parties in the transaction? For subcontractors under many Department of Defense contracts, the company will be required to “flow down” ITAR/export control requirements to its subcontractors – See DFARS 225.79 and DFARS 252.225-7048. The company should coordinate with such parties regarding ITAR compliance in performing the transaction. Prime contractors are advised to verify that subcontractors are conducting their operations involving the transaction in compliance with ITAR requirements, including complying with registration requirements, obtaining licenses and TAA’s, reporting and recordkeeping requirements.

27. Congressional Notification For Defense Articles and Agreements

- (a) Has Congressional Notification been provided in connection with exports of defense articles that exceed the threshold amounts set forth at 22 CFR § 123.15, or major defense equipment as defined at 22 CFR § 120.8? Has Congressional Notification been provided for TAA’s and MLA’s for manufacturing abroad defense items classified as Significant Military Equipment as set forth in 22 CFR § 124.11?

28. Parts and Components – Definition of “Specially Designed”?

- (a) For parts, components, attachments and accessories that are still covered under USML “catch-all” provisions following Export Control Reform, do such items fall within the definition of “Specially Designed” as set forth at 22 CFR § 120.41?

29. ITAR Issues In Mergers and Acquisitions

- (a) If the company is registered under ITAR and is acquired by a foreign company, has it provided the 60 day advanced notification to DDTC under 22 CFR § 122.4(b) and provided the additional notifications to DDTC required under 22 CFR § 122.4(c)? Have the parties amended their registration statements as required under 22 CFR § 122.4(a)? Have the parties obtained the requisite authorization to transfer licenses, TAA’s and other authorizations as may be required under the transaction?
- (b) A common entry point for ITAR-controlled items into a company is through mergers and acquisitions. If a company acquires another company and the target company has items in its possession that are on the USML (including in the form of finished products, parts and components, research and development, inventory, or other items elsewhere in its supply chain), upon consummation of the acquisition the acquiring company will most likely have ownership or control (either directly or indirectly) over the USML items and ITAR requirements will most likely apply. This can occur regardless of whether the acquisition is structured as the purchase of stock, purchase of assets or merger. In addition, if the target company has committed ITAR violations prior to the acquisition, the acquiring company may become liable for such violations if proper precautions are not taken.⁴ Companies undertaking acquisition transactions involving ITAR-controlled items should (i) conduct detailed ITAR due diligence review of the target company prior to the acquisition to

⁴ For a detailed discussion of ITAR issues in merger and acquisition transactions, including a checklist of ITAR due diligence issues, see [Export Control Issues in Mergers and Acquisitions](http://www.williamsmullen.com/files/Publication/6b248ae0-c1e5-4dff-bf39-aae77ff78c1b/Presentation/PublicationAttachment/b997c198-361c-414a-aafe-b22710c09ee5/Export-Compliance-Issues-In-Mergers-And-Acquisitions%202011.pdf) at: <http://www.williamsmullen.com/files/Publication/6b248ae0-c1e5-4dff-bf39-aae77ff78c1b/Presentation/PublicationAttachment/b997c198-361c-414a-aafe-b22710c09ee5/Export-Compliance-Issues-In-Mergers-And-Acquisitions%202011.pdf>

ascertain if there will be any impact on the acquirer related to ITAR following the completion of the acquisition transaction; and (ii) upon the closing of the transaction take the requisite steps to comply with ITAR including amending registration statements, providing notifications to DDTC under 22 CFR §122.4(c), transferring licenses, agreements and other authorizations if required (with appropriate DDTC approval) and applying for licenses and TAA's if required.

30. Procedure To Limit Illegal Diversion, Transshipment and Reexports

- (a) Does the company face the risk of unauthorized diversions, transshipments, reexports or retransfers of its products in its transactions? An example of an unauthorized diversion is when a U.S. company exports an item to a foreign party and the foreign party, without the knowledge of the U.S. exporter, then transfers the item to a prohibited country, prohibited party or use it for a prohibited or unauthorized end-use. In certain instances, U.S. exporters can have liability for export violations arising from such transactions. The company should consider adopting a compliance procedure to reduce the risk of illegal diversion, transshipment, reexport or retransfer. For further information regarding such procedure, See "Illegal Diversion Emerging as Top Export Issue" at www.williamsmullen.com/printpdf/42787.

31. ITAR Compliance Program; ITAR Training

- (a) Has the company adopted an ITAR Compliance Program? Does it contain all of the recommended components including appointment of a compliance manager, written policies and procedures, risk assessment, employee training, recordkeeping, annual compliance audits, procedure if a violation is discovered, updating for changes in the law?
- (b) Does the company's senior management provide the proper level of support for ITAR compliance activities within the company?

32. Annual Compliance Audits

- (a) Has the company conducted its annual ITAR compliance audits for identification of weakness in the compliance processes, updated for new business risks and continual process improvement in its compliance activities?

33. Proper Resources For ITAR Compliance; Compliance Program

- (a) Has the company dedicated the proper level of resources to ITAR compliance including sufficient personnel, technical support and support by senior executives?
- (b) Has the company adopted an ITAR Compliance Program?
- (c) Has the company conducted annual ITAR compliance training for senior executives?
- (d) Has the company conducted annual ITAR compliance audits?

34. Special High Risk Issues For Foreign Companies

- (a) See-Through Rule - If a foreign company incorporates an ITAR-controlled part, component, attachment or accessory into the foreign company's product, or the product incorporates or is based on ITAR-controlled technical data, the entire product becomes ITAR-controlled.

Foreign companies in the defense industry must use great care to avoid incorporating ITAR-controlled parts, components, accessories and attachments into their end-products in order to avoid ITAR jurisdiction and regulation.

- (b) If foreign nationals are employed in the U.S. office of a foreign company (either branch or subsidiary), such persons will not be permitted to have access to ITAR-controlled technical data unless a license is obtained or an exemption applies.
- (c) If foreign national executives of a foreign company travel to the U.S. office for management meetings, plant inspections and other purposes, such persons will not be permitted to have access to ITAR-controlled technical data unless a license is obtained or an exemption applies.
- (d) If employees in the U.S. office of a foreign company travel to their foreign offices, they are not permitted to bring or discuss defense articles or ITAR-controlled technical data unless a license is available or an exemption applies.
- (e) If employees in the U.S. office of a foreign company communicate with Foreign Person employees in the foreign parent company through e-mails, telephone calls, internal memoranda, webex meetings, etc. the U.S. employees are not permitted to disclose ITAR-controlled technical data unless a license is obtained or an exemption applies.
- (f) If a foreign company manufactures an item that is listed on the USML, if the item is shipped to the U.S. it becomes subject to ITAR and the jurisdiction of the U.S. Department of State.
- (g) If a U.S. office of a foreign company stores ITAR-controlled technical data or software in its computer system in the U.S. (servers, "cloud resources," system work stations, laptops and other devices), the company must "firewall" the U.S. data system off from the computer resources of the foreign parent and other foreign affiliates.
- (h) Foreign companies will not be permitted to register with DDTC or apply for licenses and other authorizations (some exceptions will apply such as in applying for authorizations for foreign country reexports and retransfers). However a foreign company's subsidiary that is incorporated in the U.S. will generally be permitted to register and apply for licenses.
- (i) Special rules apply for dual and third country national employees of the parent company.

35. ITAR Violations

- (a) A listing of violations under ITAR as set forth in 22 CFR §127.1 and §127.2 are provided on Exhibit B attached hereto.
- (b) Violations include direct violations (such as exporting without a license and making a false statement) as well as indirect actions such as conspiring or "attempting" to engage in a violation, possession of a defense article with the intent of transferring it in violation of ITAR and misrepresenting or omitting a material fact.
- (c) Penalties for ITAR violations include up to 20 years imprisonment and financial fines of up to \$1,000,000 per violation for criminal violations, and lesser amounts for civil violations.

- (d) For a detailed discussion of steps to address ITAR violations see: [Dealing With Violations In Export and Import Transactions](#).

36. Voluntary Disclosures

- (a) If a violation or possible violation has occurred, has the company considered submitting a voluntary disclosure to DDTC to reduce or mitigate potential penalties and eliminate past compliance risks? (For a detailed discussion see: [Dealing With Violations In Export and Import Transactions](#)).

37. Regulation Under the Export Administration Regulations And Export Control Reform

- (a) Have any of the company's products been transferred from the USML to the CCL under Export Control Reform or are otherwise listed on the CCL? If yes, the company will be subject to regulation under the provisions of the Export Administration Regulations related to such products.
- (b) In addition, regardless of whether items have been transferred under Export Control Reform, companies should always consider compliance under the EAR when reviewing export compliance activities.

Please note: This memorandum is intended as a tool in assessing compliance under ITAR but does not attempt to address every requirement under ITAR. This article contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel. For more information, please visit our website at www.williamsmullen.com or contact [Thomas B. McVey](mailto:Thomas.B.McVey), 202.293.8118 or tmcvey@williamsmullen.com.

Additional Articles On ITAR Are Available At: [ITAR Articles](#).

**STEPS FOR DETERMINING EXPORT
JURISDICTION AND CLASSIFICATION**

The following are a number of steps to consider for determining the export jurisdiction and classifications for products (including end-products, systems, parts, components and accessories), technical data, software and defense services⁵:

- Start by determining if the item is listed on the US Munitions List and subject to ITAR. Review the provisions of the USML carefully to see if your item is identified on the list. In addition, review the newly adopted ITAR “Order of Review” set forth at 22 CFR § 121.1(b) and the recently revised legal standard set forth at 22 CFR §§ 120.3 and 120.4.
- For parts, components and accessories you may be required to review whether the item fits within the ITAR version of the definition of “Specially Designed” set forth at 22 CFR § 120.41⁶. When reviewing this definition follow the procedure set forth in 22 CFR § 121.1(d) and also review the “Notes” that accompany the definition as they provide further details regarding the application of the definition, including records to be reviewed. If necessary, review the “Decision Tree” guidance provided by DDTC for both (i) the Order of Review; and (ii) Specially Designed.⁷
- To obtain a written confirmation of whether the item is on the USML and subject to ITAR, apply for a commodity jurisdiction determination from DDTC.
- If the item is not subject to ITAR, assess if it is subject to the EAR or the jurisdiction of other federal agencies (See EAR § 734.3). To assess classification under the EAR, begin by reviewing EAR § 734.3(a) and related provisions, the Commerce Control List and the CCL Order of Review set out at EAR Part 774 Supplement No. 4. Under the EAR Order of Review, 600 Series items and the 9x515 ECCN items are given a higher priority in the classification process than other items on the CCL – review the 600 series and 9x515 ECCN items first, then review the rest of the CCL. Follow the BIS Order of Review to determine the item’s export control classification number (“ECCN”) or if it is EAR99.
- As part of this process you may be required to review the EAR definition of “Specially Designed” set out at EAR Part 772.⁸ You should also review the

⁵ See also [Export Classification - The Cornerstone of ITAR Compliance](#) available from the author.

⁶ 22 CFR §121.1(d)(2) provides in pertinent part: “If your commodity or software is not enumerated on the U.S. Munitions, it may be controlled because of a specially designed control parameter. If so, begin any analysis with §120.41(a) and proceed through each subsequent paragraph....”

⁷ Available on the DDTC website.

⁸ As part of this process you may be required to review “Specially Designed” for the 600 Series items first and then again for the remainder of the CCL.

“Notes” included in this definition of Specially Designed as they provide important details in the application of this term. You may also want to review the BIS Decision Tree for Specially Designed.⁹

- If you wish to obtain written confirmation of the classification of the item under the EAR from the Bureau of Industry and Security (“BIS”), you can submit a request to BIS for a Commodity Classification Automated Tracking System (“CCATS”) determination. It should be noted, however, that BIS classification guidance is not binding on determining whether an item is subject to ITAR – only the State Department can provide guidance on whether an item is subject to ITAR.
- To assess if the item is subject to the jurisdiction of other federal agencies (for example, the U.S. Nuclear Regulatory Commission or the Department of Energy), refer to EAR §734.3(b) and such other agencies’ regulations as might apply to the specific item in question.
- For all export classifications (including under ITAR, EAR and other regulations), maintain written records of your determination to comply with the export recordkeeping requirements and as a defense if your classifications are ever challenged in the future.

⁹ Available on the BIS website.

ITAR VIOLATIONS AS SET FORTH
IN 22 CFR §127.1 and §127.2

§ 127.1 Violations.

(a) Without first obtaining the required license or other written approval from the Directorate of Defense Trade Controls, it is unlawful:

(1) To export or attempt to export from the United States any defense article or technical data or to furnish or attempt to furnish any defense service for which a license or written approval is required by this subchapter;

(2) To reexport or retransfer or attempt to reexport or retransfer any defense article, technical data, or defense service from one foreign end-user, end-use, or destination to another foreign end-user, end-use, or destination for which a license or written approval is required by this subchapter, including, as specified in §126.16(h) and §126.17(h) of this subchapter, any defense article, technical data, or defense service that was exported from the United States without a license pursuant to any exemption under this subchapter;

(3) To import or attempt to import any defense article whenever a license is required by this subchapter;

(4) To conspire to export, import, reexport, retransfer, furnish or cause to be exported, imported, reexported, retransferred or furnished, any defense article, technical data, or defense service for which a license or written approval is required by this subchapter; or

(5) To possess or attempt to possess any defense article with intent to export or transfer such defense article in violation of 22 U.S.C. 2778 and 2779, or any regulation, license, approval, or order issued thereunder.

(b) It is unlawful:

(1) To violate any of the terms or conditions of a license or approval granted pursuant to this subchapter, any exemption contained in this subchapter, or any rule or regulation contained in this subchapter;

(2) To engage in the business of brokering activities for which registration and 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) of this subchapter.

(3) To engage in the United States in the business of either manufacturing or exporting defense articles 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.

(c) Any person who is granted a license or other approval or acts pursuant to an exemption under this subchapter is responsible for the acts of employees, agents, brokers, and all authorized persons to whom possession of the defense article, which includes technical data, has been entrusted regarding the operation, use, possession, transportation, and handling of such defense article abroad. All persons abroad subject to U.S. jurisdiction who obtain custody of a defense article exported from the United States or produced under an agreement described in part 124 of this subchapter, and regardless 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.

(d) A person who is ineligible pursuant to §120.1(c)(2) of this subchapter, or a person with knowledge that another person is ineligible pursuant to §120.1(c)(2) of this subchapter, 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 ineligible person; or

(2) Order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance, or otherwise service or participate in any manner in any transaction subject to this subchapter that may involve any defense article, which includes technical data, defense services, or brokering activities, where such ineligible person may obtain any benefit therefrom or have any direct or indirect interest therein.

(e) No person may knowingly or willfully attempt, solicit, 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.

§127.2 Misrepresentation and omission of facts.

(a) It is unlawful to use or attempt 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, transferring, reexporting, retransferring, obtaining, or furnishing any defense article, technical data, or defense service. 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 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 subchapter, *export or temporary import control documents* include the following:

(1) An application for a permanent export, reexport, retransfer, or a temporary import license and supporting documents.

(2) Electronic Export Information filing.

(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 brokering activity regulated by this subchapter.
- (14) Any other shipping document that has information related to the export of the defense article or defense service.