



ACQUISITION HOUR WEBINAR

Export Controls – ITAR, EAR and Associated Requirements

December 2, 2015



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ITAR

Overview of program requirements and responsibilities

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Wisconsin Procurement Institute

December 2, 2015



Image copied from: <https://www.nh.gov/nhsl/ww2/ww59prt.html>



“The Spies had come without warning. They plied their craft silently, stealing secrets from the world’s most powerful military. They were at work for months before anyone noticed their presence. And when American officials finally detected the thieves, they saw that it was too late. The damage done.”

What happens when ----



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Economic Espionage

- Economic and industrial espionage has a long history. The work of Father [Francois Xavier d'Entrecolles](#) in [Jingdezhen, China](#) to reveal to Europe the manufacturing methods of [Chinese porcelain](#) in 1712 is sometimes considered an early case of industrial espionage.^[27]
- Historical accounts have been written of industrial espionage between [Britain](#) and [France](#).^[28] Attributed to Britain's emergence as an "industrial creditor," the second decade of the 18th century saw the emergence of a large-scale state-sponsored effort to surreptitiously take British industrial technology to France.^[28] Witnesses confirmed both the inveigling of tradespersons abroad and the placing of apprentices in England.^[29] Protests by those such as iron workers in [Sheffield](#) and steel workers in [Newcastle](#),^[clarification needed] about skilled industrial workers being enticed abroad, led to the first English legislation aimed at preventing this method of economic and industrial espionage.^{[30][29]}

Copied from: http://en.wikipedia.org/wiki/Industrial_espionage -- Origins of Industrial Espionage

General Idea – National Intellectual Property

- Intellectual Property – private sector
 - Segregated duties
 - Limited access
 - Controls on distribution***
 - Non-disclosure agreement employees
 - Non-disclosure agreement visitors
 - Trade secrets
 - Copy rights
 - Patents



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Program – administration & relationship

- The U.S. State Department’s Directorate of Defense Trade Controls (“DDTC”) administers the International Traffic in Arms Regulations (the “ITAR”)
- ITAR – regulations 22 C.F.R. Parts 120 – 130, which implement the Arms Export Control Act (the “AECA”)
- These regulate international defense trade involving the United States.

Arms Export Control Act (AECA)

- ITAR implements this act (22CFR 120-130) see: ecfr.gov
- Provides authority to control the export of –
 - Defense articles
 - Defense services
- President (via AECA) charged with exercising this authority
 - Authority delegated to Secretary of State
 - Website: <https://www.pmddtc.state.gov/index.html>
- Regulations are frequently updated and revised
 - Reflects changes in international political and security climate
 - Takes into account technological development

Is it only about the registration fee?

Rationale for Regulating Defense Exports

- Sale, export, and re-transfer of defense articles and defense services
 - Integral part of safeguarding U.S. national security
 - Furthering U.S. foreign policy objectives
- Authorizations to transfer defense articles and provide defense services – if applied judiciously
 - Can help meet the legitimate needs of friendly countries
 - Deter aggression
 - Foster regional stability
 - Promote the peaceful resolution of disputes
- Indiscriminate arms transfers --- potentially adverse consequences

Related programs and regulations

- DFAR requirements
- Joint Certification Program (JCP) – US- Canada
- Nuclear Regulatory Commission
- Missile Technology Export Controls
- Export Administration Regulations (EAR)
 - Commerce Control List
 - The Department of State has also adopted an Order of Review. When classifying your product, you should always begin with the USML Order of Review. If you determine the item in question is not subject to the ITAR because it is not enumerated or otherwise described on the USML and that it is not subject to the exclusive jurisdiction of another agency (such as the Nuclear Regulatory Commission), the item is subject to the EAR. You should then start your analysis of the CCL and may consult the CCL Order of Review.
 - eg. Export of Shotguns to Canada

Overview – U.S. Export Controls

- The U.S. Department of Commerce's Bureau of Industry and Security (BIS)
 - administers and enforces export controls on dual-use and certain munitions items for the Department of Commerce through Export Administration Regulations (EAR) under the authority of the International Emergency Economic Powers Act (IEEPA).
- The Department of State, which controls the export of defense articles and defense services subject to the International Traffic in Arms Regulations (ITAR),
- The Department of Energy, which controls exports and re-exports of technology related to the production of special nuclear materials
- The Nuclear Regulatory Commission, which controls the export of certain nuclear materials and equipment
- The Department of the Treasury -- administers economic sanctions programs.

Defense Security Cooperation Agency

- www.dsca.mil
- Defense Security Cooperation Agency is responsible for administering the Department of Defense's Excess Defense Articles (EDA) program.
- Working under authorities established in the Foreign Assistance Act of 1961 and the Arms Export Control Act, defense articles declared as excess by the Military Departments can be offered to foreign governments or international organizations in support of U. S. national security and foreign policy objectives. Typically, EDA is transferred to support U. S. allies in their modernization efforts and to assist Latin American and Caribbean nations in their counter-narcotics programs.

DSCA – Purpose of the Program

- Transfers excess defense equipment to foreign governments or international organizations.
- Typically used for modernization of partner forces.
- Excess defense articles provided to partner nation at a reduced price (based on the condition of the equipment) or as a grant.
- Partner nations pay for packing, crating, handling, and transportation (PCH&T), as well as refurbishment if applicable – EDA is “as is, where is”.

Interagency effort

- State Department
 - Seeks technical support and national security assessments
 - Department of Defense
 - Works closely with U.S. Customs and Border Protection
 - Review of defense industry registration
 - Performance of defense export end-use check
 - Investigation
 - Civil penalties
 - Works with the Intelligence Community
 - Review alleged diversions and unauthorized transfers
 - Cooperates with the Justice Department and U.S. Attorneys
 - Pre-trial consultations, trial documentary preparation, expert testimony

Basic Framework -

- ITAR – implements AECA – Arms Export Control Act (22 U.S.C. 2778-2780)
- DDTC – Directorate of Defense Trade Controls, Bureau of Political-Military Affairs
 - Administers Defense Export Regulations
 - Controlling the export and temporary import of defense articles and defense services covered by the United States Munitions List (USML)

- Registration
- Licensing
- Monitoring
- Compliance

Basic Framework - requirements

- Registration
 - U.S. persons that manufacture or export defense articles, furnish defense services
 - U.S. and foreign person engaged in arms brokering
 - Information submitted – reviewed by Treasury Department
 - Ensure there are no outstanding law enforcement concerns
 - Does not confer any export privileges
 - Is a prerequisite to export licensing approval
- Registrants, IAW AECA are charged a fee - \$2,250 (initial fee)
 - State Department retains the money
 - Helps support defense export control function

Registration

- All manufacturers, exporters, and brokers of defense articles, related technical data and defense services as defined on the United States Munitions List (Part 121 of the ITAR) (PDF, 7MB) are required to register with the Directorate of Defense Trade Controls (DDTC).
- Registration is primarily a means to provide the U.S. Government with necessary information on who is involved in certain manufacturing, exporting and brokering activities.
- Registration does not confer any export rights or privileges, but is a precondition for the issuance of any license or other approval for export.

Registration Code

- Once an entity has properly registered with DDTC, a unique registration code will be assigned to the registrant.
- The DDTC registration code consist of a letter prefix, M (assigned to a manufacturer and/or exporter) or K (assigned to a broker), followed by four or five digits (e.g. K-1234 or M 12345).
- The code is proprietary to the registrant and should be handled as such.
- Company registration codes should not be posted online or given out freely to the public.

Registration – period of validity

- The period of validity for new and renewal registrations is twelve months from the date of issuance.
- The expiration date is included in the registration letter issued by DDT

Registration – review time

- The average review time for a registration request is 45 days.
- We recommend you send your complete registration package electronically through the Electronic Form Submission (EFS) up to a maximum of 60 days in advance of the renewal expiration.
- Intended registrants will save time and money on mail delivery and receive an acknowledgement that their submission has been received. Electronic submission will improve review and adjudication of your registration request.
- Effective January 1, 2014 registration submissions must be submitted electronically.

Registration Fees – 3 Tier

- To align registration fees with the cost of licensing, compliance and other related activities
- The first tier is an annual flat fee of \$2,250.00. The first tier fee is applicable to:
 - First time registrants (Manufacturer, Exporters and stand-alone Brokers);
 - Annual registration renewals for stand-alone Brokers (U.S. and foreign owned or controlled by U.S. persons);
 - Registrants who did not submit any license applications or request for authorization during the twelve month period, ending 90 days prior to the expiration of the current registration.
- The second tier is a set fee of \$2,750 for registrants renewing their registration who have submitted and received a favorable authorization on ten or fewer license applications or request for authorization during a twelve month period, ending 90 days prior to the expiration of their current registration.
- The third tier is a calculated fee for registrants who have submitted and received favorable authorization on more than ten license applications or request for authorization during the twelve month period, ending 90 days prior to the expiration of the current registration. For these registrants, the fee calculation is \$2,750 plus \$250 times the total number of applications over ten. To ensure fairness to those registrants who may fall within the third tier who may have many applications but all of a low value, there is a provision for a reduced fee if the fee calculated above is greater than 3 percent of the total value of all applications. In such cases, the fee will be 3 percent of the total value of all applications or \$2,750, whichever is greater.

Defense Article

- any item or technical data designated in §121.1 <USML> of this subchapter. The policy described in §120.3 is applicable to designations of additional items.
- includes technical data recorded or stored in any physical form, models, mockups or other items that reveal technical data directly relating to items designated in §121.1 of this subchapter.
- includes forgings, castings, and other unfinished products, such as extrusions and machined bodies, that have reached a stage in manufacturing where they are clearly identifiable by mechanical properties, material composition, geometry, or function as defense articles.
- It does not include basic marketing information on function or purpose or general system descriptions.

Defense Article -2

- (a) For purposes of this subchapter, a specific article or service may be designated a defense article (*see* §120.6 of this subchapter) or defense service (*see* §120.9 of this subchapter) if it:
 - (1) Meets the criteria of a defense article or defense service on the U.S. Munitions List; or
 - (2) Provides the equivalent performance capabilities of a defense article on the U.S. Munitions List.
- (b) For purposes of this subchapter, a specific article or service shall be determined in the future as a defense article or defense service if it provides a critical military or intelligence advantage such that it warrants control under this subchapter.
- NOTE TO PARAGRAPHS (A) AND (B): An article or service determined in the future pursuant to this subchapter as a defense article or defense service, but not currently on the U.S. Munitions List, will be placed in U.S. Munitions List Category XXI until the appropriate U.S. Munitions List category has been amended to provide the necessary entry.
- (c) A specific article or service is not a defense article or defense service for purposes of this subchapter if it:
 - (1) Is determined to be under the jurisdiction of another department or agency of the U.S. Government (*see* §120.5 of this subchapter) pursuant to a commodity jurisdiction determination (*see* §120.4 of this subchapter) unless superseded by changes to the U.S. Munitions List or by a subsequent commodity jurisdiction determination; or
 - (2) Meets one of the criteria of §120.41(b) of this subchapter when the article is used in or with a defense article and specially designed is used as a control criteria (*see* §120.41 of this subchapter).
- NOTE TO §120.3: The intended use of the article or service after its export (*i.e.*, for a military or civilian purpose), by itself, is not a factor in determining whether the article or service is subject to the controls of this subchapter.
- [78 FR 22753, Apr. 16, 2013]

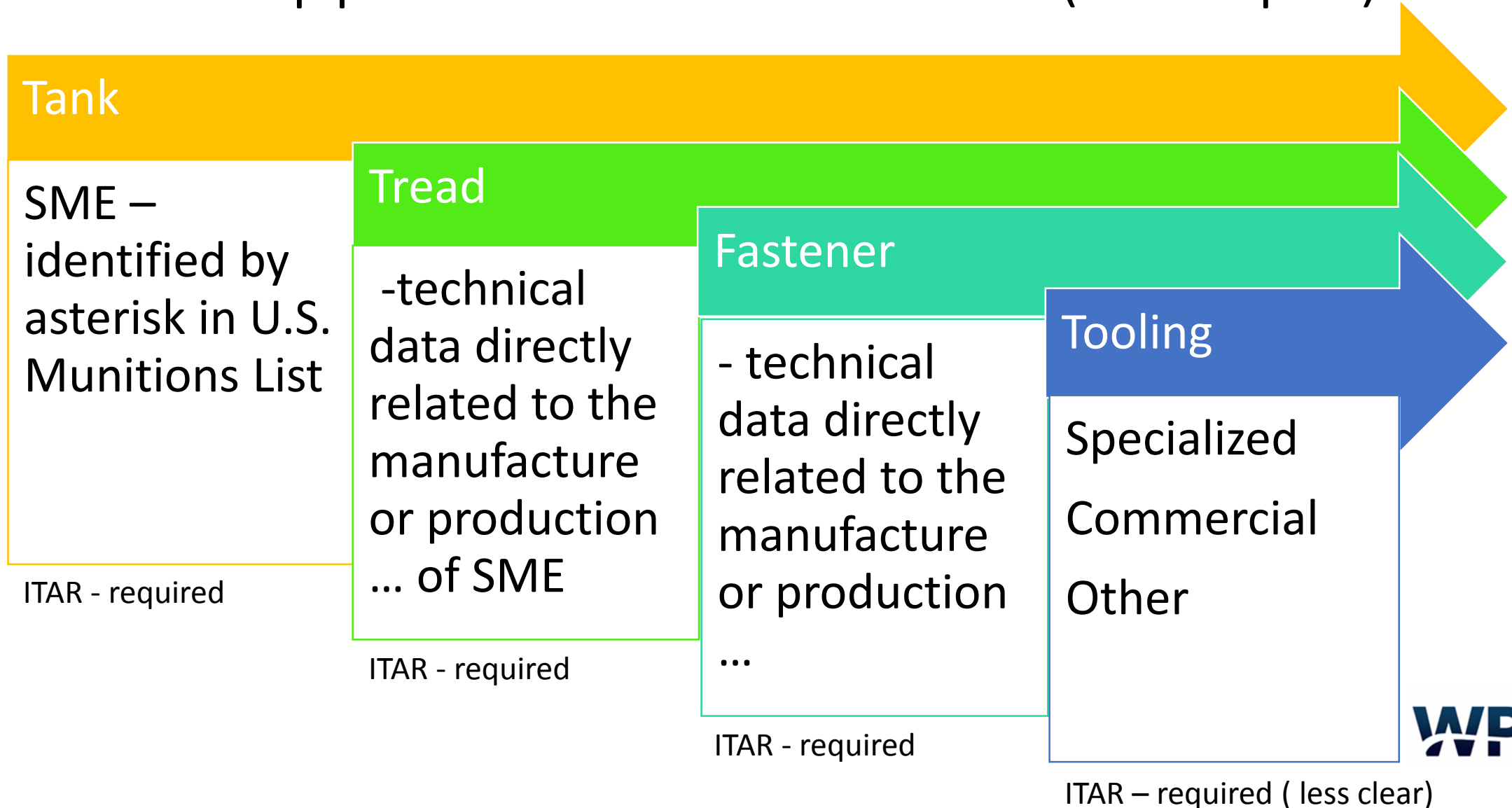
Significant Military Equipment

- (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.
- [58 FR 39283, July 22, 1993, as amended at 62 FR 67275, Dec. 24, 1997]

SME – extension to

- (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 designed SME.

SME – Application of definition (example)



USML categories

- Category I—Firearms, Close Assault Weapons and Combat Shotguns
- Category II—Guns and Armament
- Category III—Ammunition/Ordnance
- Category IV—Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs, and Mines
- Category V—Explosives and Energetic Materials, Propellants, Incendiary Agents, and Their Constituents
- Category VI—Surface Vessels of War and Special Naval Equipment
- Category VII—Ground Vehicles
- Category VIII—Aircraft and Related Articles
- Category IX—Military Training Equipment and Training
- Category X—Personal Protective Equipment
- Category XI—Military Electronics
- Category XII—Fire Control, Range Finder, Optical and Guidance and Control Equipment
- Category XIII— Materials and Miscellaneous Articles
- Category XIV—Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment
- Category XV— Spacecraft and Related Articles
- Category XVI—Nuclear Weapons Related Articles
- Category XVII—Classified Articles, Technical Data, and Defense Services Not Otherwise Enumerated
- Category XVIII—Directed Energy Weapons
- Category XIX—Gas Turbine Engines and Associated Equipment
- Category XX—Submersible Vessels and Related Articles
- Category XXI—Articles, Technical Data, and Defense Services Not Otherwise Enumerated

USML – Order of review

- Begin with a review of the general characteristics
- These will guide you to the appropriate category
- Then match the particular
 - Characteristics
 - Function

USML – Composition of an entry

- Defense articles are enumerated by an alpha paragraph designation
- May include subparagraphs
- Each category starts with end platform designation
 - Major systems
 - Parts
 - Components
 - Accessories
 - Attachments
- Most categories will contain an entry tech data

USML – example

- Category II – Guns and Armament – category 2 of 16
- (a) Guns over caliber .50 (12.7 mm, whether towed, airborne, self-propelled, or fixed, including but not limited to, howitzers mortars, cannon and recoilless rifles.
- (g) Tooling and equipment specifically ...
- (h) Test and evaluations equipment – designed or modified for ..
- (j) All other components, parts, accessories, attachments and associated equipment specifically designed or modified for this cat
- (k) Technical data – para's (a-j) directly related to mfg or prd of any DA

License

- License means a document bearing the word “license” issued by the Deputy Assistant Secretary of State for Defense Trade Controls, or his authorized designee, that permits the export, temporary import, or brokering of a specific defense article or defense service controlled by this subchapter.
- Other approval means a document issued by the Deputy Assistant Secretary of State for Defense Trade Controls, or his authorized designee, that approves an activity regulated by this subchapter (e.g., approvals for brokering activities or retransfer authorizations), or the use of an exemption to the license requirements as described in this subchapter.

Licensing (1)

- Department of State approval of a licensing application required
 - Prior to –
 - Export of defense articles or services
 - About 30% of the applications are referred to other offices and agencies
 - Computerized review of all parties to the proposed transaction
 - Compared to “watch list”
 - Match triggers full compliance review before final action
- License application review process
 - Clarifies the ultimate end-use and end-users
 - Related facts

Licensing (2)

- Enforcement perspective
 - Avenue to prevent or eliminate diversions
 - Assists the U.S. Government in
 - Investigations and prosecutions should an export violation be suspected or reported
- Submission of license application
 - Companies must certify eligibility to export
 - Understanding of the laws governing such exports
 - Meet conditions in terms of documentation
 - Handling requirements – especially classified material
- Required legends on shipping documents – re: selling/transfer

Licensing - Compliance

- End use check
 - Program name – “Blue Lantern”
 - U.S. Diplomatic posts
 - Cooperation of U.S. Customs and Border Protection
 - Foreign government
 - Pre-license checks
 - Post-shipment verification of defense exports
- Other Compliance Mechanisms
 - Broad authority – suspend, deny or revoke license approvals
 - Working with law enforcement – can prosecute criminally (prison/fines)
 - Remedial assistance is also offered

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).

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.

U.S. Person

- U.S. person means a person (as defined in §120.14 of this part) who is a lawful permanent resident as defined by 8 U.S.C. 1101(a)(20) or who is a protected individual as defined by 8 U.S.C. 1324b(a)(3). 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.
- [71 FR 20537, Apr. 21, 2006]

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).
- [71 FR 20537, Apr. 21, 2006]

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 by license, written approval, or exemption pursuant to this subchapter.
- [77 FR 16597, Mar. 21, 2012]

Temporary import

- means bringing into the United States from a foreign country any defense article 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).

TAA – 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).

Deemed Export

- An export of technology or source code (except encryption source code) is "deemed" to take place when it is released to a foreign national within the United States. See §734.2(b)(2)(ii) of the Export Administration Regulations (EAR). For brevity, these questions and answers refer only to "technology" but apply equally to source code.
- Technology is "released" for export when it is available to foreign nationals for visual inspection (such as reading technical specifications, plans, blueprints, etc.); when technology is exchanged orally; or when technology is made available by practice or application under the guidance of persons with knowledge of the technology. See §734.2(b)(3) of the Export Administration Regulations (EAR).

Business Considerations

Impact on supply chain and costs

- Suppliers may have to also be ITAR compliant
- May impact production
- May impact transportation requirements
- May increase costs
- May create a need for greater planning and lead times
- What path are your emails taking?
 - What if the route uses a non-US router?
- Data storage – who has access?/who performs maintenance?

Contract management issues

- Flowdown clauses
- Managing access to information
 - Internally – staff and/or employees
 - On site – in the office
 - Offsite – home, conference, during travel
- Selection of subcontractors
- Print & document control, emails, copy services
- Copier hard drive
- IT systems and IT technical staff – in house / contract
- Visitor control

Employee considerations

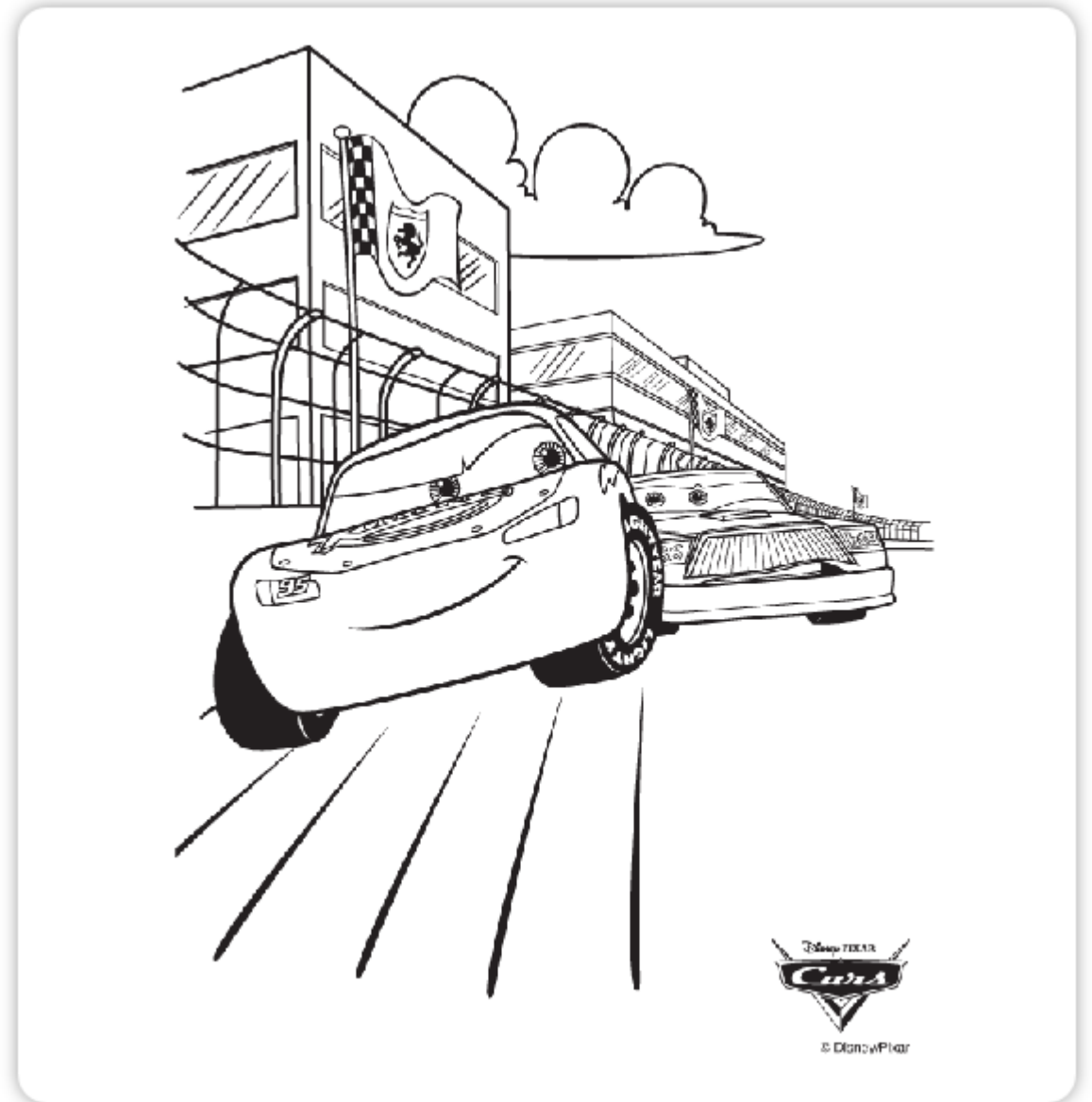
- Access to information
 - Country of birth
 - If not U.S.
 - No access
 - Access requires TAA – country of birth, may require more than 1 TAA
 - Segregation of duties
 - Badge identification
 - Document control
 - Hiring policy – administration, briefing
 - Departure process

Gateway to new opportunities or barrier

- Many primes will only work with ITAR registered subcontractors
- Primes seek
 - Partners & problems solvers
 - Companies that help to manage and reduce risk
 - Strengthen and support the overall effort
- ITAR registration
 - Indicates
 - Awareness of program
 - Establishment of procedures
 - Ability to maintain control over information

Compliance Guidelines


It's all about -
Keeping within
the lines



Pick an approach for success!



Program elements

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

Oops

- In horse-shoes and hand grenades – close counts
- In golf there are Mulligans
- When you hit send – who is receiving your email?
- When dealing with ITAR program information there are no
 - “do overs”

Whether you hit send, do not protect documents or service an order without performing due diligence, if the information is controlled by the program any of these events may create major issues.

Export

- (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; 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.

Violations (partial) 22 CFR 127

- 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

Quotes from part 127

(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;

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.

(d) A person with knowledge that another person is then ineligible pursuant to §§ 120.1(c) or 126.7 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) of this subchapter for such ineligible person; or

False Statements

- **A party to an export transaction** may be subject to criminal and/or administrative sanctions for making false statements to the U.S. Government in connection with an activity subject to the EAR.
- **Most frequently, the false statements are made on an export document or to a federal law enforcement officer.**
- Common types of false statements seen by BIS are statements on a Shipper's Export Declaration or AES Electronic Export Information filing that an export is
 - destined for one country when it is really destined for a sanctioned destination,
 - the export does not require a license (i.e., that it is "NLR") when in fact a license is required for the shipment,
 - false item valuations and statements that an export was shipped under a particular license number when in fact that license was for a different item.
 - False statements that are made to the U.S. Government indirectly through another person, such as a freight forwarder, constitute violations of the EAR.



questions?

Continuing Professional Education



CPE Certificate available, please contact:

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Upcoming WPI Events

- *Acquisition Hour Live Webinar Series – Every other Wednesday*
- *The DOD Supply Chain Session For Manufacturers Understanding Requirements and Obligations – December 3, 2015 – Appleton, WI*
- *Teaming and Partnering – December 8, 2015 – Milwaukee, WI*
- *Preparing Award Winning Federal Proposals – December 9, 2015 – Milwaukee, WI*
- *NCMA End of Year Federal Contractor Update – December 10, 2015 – Milwaukee, WI*
- *Government Contracting Opportunities for Small Business – December 15, 2015 – Madison, WI*
- *SAME Small Business Expo – March 9 – 10, 2016 – Northbrook, IL*

For Assistance or Additional Information - Contact

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