

# An ITAR Primer for Small Business

**Presentation to NDIA Small Business Division  
Breakfast Meeting**

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**By**

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# What a Challenge!

- Like doing Cliff Notes® for War and Peace! Or 5 Minute ITAR Elevator Speech...
- Objective – to give you a broad overview and sense of the issues, and some tips.
- DE-MYSTIFY!
- Provide some resources for follow-up.

# What is the ITAR?

- International Traffic in Arms Regulations ("ITAR"), 22 C.F.R. Parts 120 – 130.
- Authority: Arms Export Control Act ("AECA"). Section 38 of the AECA (22 U.S.C. 2778) authorizes the President to control the export and import of defense articles and defense services.
- A violation of the ITAR is a violation of the statute.

# Who Promulgates and Administers the ITAR?

- ITAR is promulgated by and administered by State Department, Directorate of Defense Trade Controls ("DDTC")
- See Web Site:  
<http://www.pmddtc.state.gov/>

# Who else has authority over the ITAR?

- No one!
- State Department has the exclusive authority to make determinations regarding ITAR and applicability of licensing and approval of USML exports (and related activities).
- DoD, Commerce, other agencies DO NOT. Beware .....

# What does the ITAR Regulate?

- Permanent export of 'defense articles' from the United States;
- Provision of a 'defense service' to a foreign person;
- Temporary import of 'defense articles' into and back out of the United States.
- Permanent imports governed by BATFE – DoJ.

# Defense article:

## ITAR 120.6 Defense article.

- *Defense article* means any item or technical data designated in [The US Munitions List].... **This term 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 [The US Munitions List]. It does not include basic marketing information on function or purpose or general system descriptions.

# The United States Munitions List

- Set forth in ITAR Part 121.
- 21 Major Categories – can be very general
- Last Category – XXI - Miscellaneous – is Catch-All [“Any article not specifically enumerated in the other categories of the U.S. Munitions List which has substantial military applicability and which has been specifically designed, developed, configured, adapted, or modified for military purposes. The decision on whether any article may be included in this category shall be made by the Director, Office of Defense Trade Controls Policy.”]
- Includes ‘technical data’ relating to all the covered hardware, plus software.

# Technical data – note the broad definition:

## **ITAR 120.10 Technical data.**

(a) *Technical data* means, for purposes of this subchapter:

- (1) Information, other than software as defined in Sec. 120.10(a)(4), which is **required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles**. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation.
- (2) Classified information relating to defense articles and defense services;
- (3) Information covered by an invention secrecy order
- (4) Software as defined in §121.8(f) of this subchapter directly related to defense articles;
- (5) This definition does not include information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or information in the public domain as defined in §120.11. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

# Defense service:

## ITAR 120.9 Defense service.

(a) *Defense service* means:

- (1) The furnishing of assistance (including training) to foreign persons, **whether in the United States or abroad** in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;
- (2) **The furnishing to foreign persons of any technical data controlled under this subchapter (see §120.10), whether in the United States or abroad;** or
- (3) Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice.  
(See also §124.1.)

# What is an 'export'?

## ITAR 120.17 Export.

(a) *Export* means:

- (1) Sending or taking a defense article out of the United States in any manner, except by mere travel outside of the United States by a person whose personal knowledge includes technical data; or
- (2) Transferring registration, control or ownership to a foreign person of any aircraft, vessel, or satellite covered by the U.S. Munitions List, **whether in the United States or abroad**; or
- (3) Disclosing (including oral or visual disclosure) or transferring **in the United States** any defense article to an **embassy, any agency or subdivision of a foreign government** (e.g., diplomatic missions); or
- (4) Disclosing (including oral or visual disclosure) or transferring technical data to a foreign person, **whether in the United States or abroad**; 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) omitted re space launches.]

# More Regulations! Why should we comply?

- The penalties are severe, civil and criminal;
- Most customers (the Big Guy Primes) require compliance – see their NDAs, PIAs, Teaming Agreements, RFPs, Annual Reps and Certs, and contracts;
- US DoD – in some contracts – explicitly requires it. (DFARS 252.204-7008 Export-Controlled Items.)
- Compliance and Knowledge can give you, a small business, a competitive edge.
- Compliance enables wider business sales range – accessing the global market (customers and vendors).

# Penalties -- Important to Understand and Ignorance Is No Excuse:

- Criminal:
  - Up to \$1,000,000 per violation
  - Up to 10 years **imprisonment**
- Civil:
  - Seizure of articles and any vessel, aircraft or vehicle involved in attempted delivery
  - Revocation of exporting privileges
  - Fines of up to \$500,000 per violation
  - **Debarment**

# Most Significant Penalty for Your Business— Debarment:

- Loss of (direct and indirect) export and import privileges (including revocation of all licenses and approvals);
- Loss of right to do business with the US Government [FAR 9.4]
  - Prime Contracts
  - Subcontracts

**THIS COULD HAVE CATASTROPHIC  
CONSEQUENCES FOR YOUR BUSINESS  
AS A WHOLE**

## OK. How do we comply?

- (1) Registration with State Dept. DDTTC;
- (2) Obtain licenses and approvals, when required;
- (3) Have ITAR Control Plan for company (including Technology Control Plan);
- (4) Training, keeping current on issues, company awareness program.
- (5) Robust recordkeeping.

# Registration with DDTC – ITAR Part 1

## ITAR 122.1 Registration requirements.

- (a) Any person who engages in the United States in the business of either manufacturing or exporting defense articles or furnishing defense services is required to register with the Directorate of Defense Trade Controls. For the purpose of this subchapter, engaging in the business of manufacturing or exporting defense articles or furnishing defense services requires only one occasion of manufacturing or exporting a defense article or furnishing a defense service. **Manufacturers who do not engage in exporting must nevertheless register.**
- (b) *Exemptions.* Registration is not required for:
- (1) Officers and employees of the United States Government acting in an official capacity.
  - (2) **Persons whose pertinent business activity is confined to the production of unclassified technical data only.**
  - (3) Persons all of whose manufacturing and export activities are licensed under the Atomic Energy Act of 1954, as amended.
  - (4) Persons who engage only in the fabrication of articles for experimental or scientific purpose, including research and development

# Registration – You Need to Designate an “Empowered Official” for Company

## **ITAR 120.25 Empowered Official.**

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

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

# Your Empowered Official

- Responsible for ITAR compliance;
- Maintain Control Plans;
- Oversee training and awareness program; attend training;
- Sign all license/approval applications (digital certificate required – see D-Trade web page).

# Obtain Export Licenses

- Need to apply for export license for USML hardware or technical data that can be exported in media (e.g. drawings, blueprints, SoW).
- Most common: DSP-5 for permanent export of unclassified defense articles.
- ITAR 123.9 destination and approval of reexports or retransfers.

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

**RESTRICTIONS ARE ON USE, END USER, NON-TRANSFER AND NO RE-EXPORT! Any changes require prior DDTTC approval.**

# Obtain DDTC Approvals – TAAs and MLAs

- Licensing of the export of technical data and for the manufacturing abroad of US defense articles is done by a Technical Assistance Agreement (TAA) or Manufacturing License Agreement (MLA).
- Permits discussions and ‘back and forth” within defined scope.
- Follow the Agreements Guidelines published by DDTC on their web site.
- Tell full and complete story.
- Don’t forget subcontractors (“sublicensees”) and dual national/third country employees of foreign party.

# Not sure your items are USML? Other Questions?

- Remember – State Dept. has exclusive jurisdiction.
- You can obtain a Commodity Jurisdiction Determination about your item(s). ITAR 120.4. Binding.
- You can obtain advisory opinions on other issues. ITAR 126.9. Not binding.
- Ask DDTC help desk – phone or email. (I find them very responsive to emails.) See DDTC web site.

# Exemptions -- Caution

- There are numerous ITAR exemptions. Too much to cover here.
- Word of caution: you must follow all the conditions precisely. (*e.g.* sending technical data to your employees working overseas)
- Be careful if DoD asks you to export anything....requires very specific procedures.
- Canadian exemption: ITAR 126.5. Be careful!

# EMBARGOES

- There are many prohibited destinations and embargoed countries for which no license will be granted.
- ITAR 126.1 - Belarus, Cuba, Eritrea, Iran, North Korea, Syria, and Venezuela and to some extent Vietnam, Burma, China, Liberia, and Sudan and UN Embargoes. Read 126.1 in full.
- Check DDTC Embargoed Country Chart.
- PRC – No. Hong Kong – Case-by-case.

# Voluntary Disclosure

- You try hard to comply but everyone makes a mistake from time to time.
- ITAR Voluntary Disclosure Program – ITAR 127.12. Mitigates enforcement.
- Do it “immediately after violation is discovered”! Do complete review and report within 60 days. Follow details in the ITAR.
- Implement plan to prevent future occurrences.

## Some tips...

- Do you know where your defense articles are and who has access to them?
- Need to control access to all defense articles (hardware and technical data)
  - Foreign visitors
  - Foreign national employees
  - Temporary employees

## Some tips...continued

- Sending materials out of house – is FedEx Office printing your ITAR tech data?
- Who has access to your copying machine memory?
- Who manages your IT?
- Is your IT system open to the Internet? Hacking/espionage is rampant. Defense contractors are targets.
- Are you sending ITAR data by email?

## Some tips...continued

- Who handles your shipping?
  - Best to use regular and reputable Customs Broker and freight forwarder.
  - C-TPAT – Customs Trade Partnership Against Terrorism.
  - Customs agents enforce the ITAR!
  - Make sure your shipping documents are all in order and correspond exactly to your license(s).

## Some tips...continued

- **KNOW YOUR CUSTOMER!!**
- Use due diligence to ascertain if a proposed foreign party is *bona fide* and not proscribed, and no diversions risked.
- Check DDTC list; check other USG lists (e.g. see [http://www.cbp.gov/xp/cgov/trade/trade\\_outreach/blocked\\_denied\\_debarred.xml](http://www.cbp.gov/xp/cgov/trade/trade_outreach/blocked_denied_debarred.xml))
- Commercial screening services available

## Some tips...continued

- Licenses and Approvals applications:
  - Tell a full, coherent and complete story.
  - Who, what, where, why, when and how.
  - Identify all parties and full chain of custody, door to door.
  - Don't make the Government come back to you with questions, or send back incomplete license application.

## Some tips...conclusion.

### ■ PLAN AHEAD.

- Licenses and approvals take time. 30 – 45 days minimum, usually longer.
- Review all proposed transactions carefully– is there anything international about it? Foreign customer? Foreign supply chain? Foreign partners? Will **ANYTHING** we have cross any borders or involve any foreign nationals?

# Costs

- State Dept. registration \$2,250 to start then tiered fee schedule annually. See web page.
- Internal compliance? Add to your project costs and also general compliance in G&A.
- Outside advice: varies. Shop around but competence and experience counts.

# Resources

- DDTC Web page – check it regularly.
  - <http://www.pmddtc.state.gov/index.html>
  - Help desk & online guidance.
- NDIA International Div. Web page
  - <http://www.ndia.org/RESOURCES/EXPORTIMPORTCOMPLIANCERESOURCES/Pages/default.aspx>
- Society for International Affairs
  - <http://www.siaed.org/>
  - Excellent training programs, activities. Buy their Internal Training Video!
  - Join! Participate!

Other issues...lest you relax too much!

- Brokering requires registration and licensing. ITAR Part 129.
- Political contributions (foreign) and commissions/fees regulated. ITAR Part 130.
- Just too much to cover here!

# Reforms

- Reforms proposed by Administration.

<http://www.whitehouse.gov/the-press-office/fact-sheet-presidents-export-control-reform-initiative>

Too much to cover in this session.

- UK and Australia treaties – awaiting ratification. Exclusions are broad.

<http://www.pmdt.c.state.gov/treaties/index.html>

# Questions?

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