



**ACC NCR**  
**Debunking Common Myths About**  
**Export Control (ITAR, EAR, and More)**

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## Presenters



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# What IS Export Compliance?

A critical component of the U.S. national security strategy is the organized control of goods and services that, in the wrong hands, would harm U.S. national security interests or frustrate our international objectives/priorities.



Several laws and regulations limit the ability of U.S. persons to export or provide such goods and services without prior governmental approval.



Export Compliance is simply the practice of properly complying with such laws and regulations.

The export compliance regulations we will focus on today are the International Traffic in Arms Regulations (“**ITAR**”) and the Export Administration Regulations (“**EAR**”).

# **OVERVIEW OF EXPORT REGULATIONS**

# What is the ITAR?

- The ITAR controls the temporary and permanent export and temporary import of “**defense articles**” (e.g., military equipment), **technical data** related to defense articles, and **defense services**.
- The ITAR prohibits the temporary and permanent export of defense articles, technical data, and defense services from the U.S. abroad or to a foreign person/entity, unless the export is authorized by license, or an exemption applies.
- The ITAR also controls the registration and licensing of persons engaged in **brokering activities**.



**22 C.F.R. Part 120-130**

# What is a “Defense Article?”

- A “**defense article**” is any item that is described in the [United States Munitions List](#), 22 C.F.R. § 121.1 (the “**USML**”) or provides the equivalent performance capabilities of an item described in the USML.
  - Includes “**technical data**” recorded or stored in any physical form, models, mockups, or other items that reveal technical data relating to items described in the USML.
  - Includes forgings, castings, and other unfinished products such as extrusions and machined bodies, which have reached a stage in manufacturing where they are **clearly identifiable** by mechanical properties, material composition, geometry, or function as defense articles.

# What Defense Articles are on the USML?

**Category I**  
**Firearms and Related Articles**

**Category II**  
**Guns and Armament**

**Category III**  
**Ammunition and 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, Laser, Imaging, and Guidance 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**

# What is “Technical Data?”

- **Information** that is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification of defense articles;
  - Examples:
    - Blueprints, drawings, or photographs of a defense article;
    - Planning documentation; and
    - Instructions on how to use a defense article.
- **Classified information** relating to defense articles and defense services;
- Information covered by an **invention secrecy order**; and
- Software directly related to defense articles.



# What is NOT “Technical Data?”

- Technical Data does not include:
  - Information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities;
  - Certain information in the “**public domain**”;
  - Certain types of telemetry data transmitted to or from a satellite or spacecraft;  
or
  - **Basic marketing information** on function or purpose or general system descriptions of defense articles.

# Common Myths: Technical Data

## Myth

1. If information is available on the internet, it is not Technical Data.
2. I only need to worry about Technical Data contained in documents or blueprints.

## Reality

1. Always review the content of information before sharing it with a foreign national – just because it is freely available online does NOT mean it is exempt from export controls.
2. Technical Data can be shared in any form – orally, visually, verbally, or otherwise (e.g., through a detailed product demonstration).

# What is a “Defense Service?”

- A “**defense service**” may be any one of the following:
  - Furnishing assistance (including training) to foreign persons, either in the United States or abroad, in the design, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;
  - Furnishing ANY technical data to ANY foreign person, either in the United States or abroad; or
  - 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 aids, orientation, training exercises, and military advice.

# Who is Subject to the ITAR?

- **U.S. persons** (i.e., lawful permanent resident, asylee, or refugee OR business entities incorporated/organized in the U.S.) must obtain DDTC authorizations to export or temporarily import items and services regulated by the ITAR.
- U.S. persons, and **foreign persons** located in the U.S. or located outside of the U.S. but owned or controlled by a U.S. person, must obtain DDTC authorizations **prior to engaging in brokering activities**.
- The following U.S. persons are **ineligible** for DDTC authorization:
  - Anyone convicted of violating specific criminal statutes;
  - Anyone debarred from contracting with the U.S. government;
  - Anyone ineligible to receive an export authorization from any other U.S. government agency; and
  - Anyone whose export license has been suspended or revoked.

# Who Qualifies as a “Foreign Person?”

- Any natural person not a lawful resident or “**protected individual**” under 8 U.S.C. § 1324(a)(3) (i.e., a person lawfully admitted into the U.S. as an asylee or refugee);
  - **NOTE:** VISA HOLDERS ARE NOT U.S. PERSONS, BUT US GREEN CARD HOLDERS ARE.
- Any foreign corporation, business association, partnership, or other entity not incorporated/organized to do business in the U.S.;
- Any international organization, such as the United Nations; and
- Foreign governments and any agency or subdivision thereof (e.g., diplomatic missions).

# Common Myths: Foreign Persons

## Myth

1. If I'm sharing information with an employee of a U.S. company, they are not considered a "foreign person."
2. If I'm talking to someone from a US company, I can assume they are a US person.

## Reality

1. Companies must obtain the required approvals before they can share information with any foreign person employees within the company.
2. While companies do have an obligation to disclose the presence of foreign nationals when engaging in discussions of export-controlled goods, in reality, they may not always do so.

# What is the EAR?

- The Export Administration Regulations (“**EAR**”) are U.S. regulations that control the export of “dual-use” items (i.e., articles that have both a military and a commercial application) and information related to such items (“**Technology**”).
- The EAR prohibits the temporary and permanent export of certain dual-use items and “**Technology**” from the United States to certain countries and certain foreign nationals, unless the export is authorized by a license, or an EAR exemption applies.



**15 C.F.R. Part 730 et. seq.**

# Which Dual-Use Items are Regulated?

- The EAR regulates those commercial and dual-use items found on the [Commerce Control List \(“CCL”\)](#).
- The CCL consists of **ten categories**:
  0. Nuclear Materials, Facilities, and Equipment (and Miscellaneous Items)
  1. Special Materials and Related Equipment, Chemicals, and Microorganisms, and Toxins
  2. Materials Processing
  3. Electronics
  4. Computers
  5. Telecommunications and Information Security
  6. Sensors and Lasers
  7. Navigation and Avionics
  8. Marine
  9. Aerospace and Propulsion
- Each category is further divided into **five product groups**:
  - A. Systems, Equipment, and Components
  - B. Test, Inspection, and Production Equipment
  - C. Material
  - D. Software
  - E. Technology



# What is the EAR99 Designation?

- If an item falls under the jurisdiction of BIS but is not listed on the CCL, then it is designated as “**EAR99.**”
- EAR99 items typically do not require an export license.
- **However**, before exporting an EAR99 item (i) to an embargoed or sanctioned country; (ii) to a party of concern; or (iii) in support of a prohibited end use, an exporter may be required to obtain a license.

# Common Myths: EAR Classifications

## Myth

1. If my item is “EAR99” there are absolutely no restrictions to where I can export.
2. I only need to look at the main categories on the CCL to figure out how my item is classified.

## Reality

1. Exports of EAR99 items may still require a license depending on the destination and end user.
2. Classification analyses take time and careful consideration of all potential options on the CCL. Just because a product is not obviously listed, does not mean it is not controlled.

# What Constitutes “Technology” Under the EAR?

- Under the EAR, technical information relating to controlled dual-use items AND the communication of such technical information are both characterized as “**Technology**.”
  - “**Technology**” is defined in EAR Part 772 as “[i]nformation necessary for the “development,” “production,” “use,” operation, installation, maintenance, repair, overhaul, or refurbishing (or other terms specified in ECCNs on the CCL that control “Technology”) of an item.”
    - **NOTE:** “Technology” may be in any tangible or intangible form, such as written or oral communications, blueprints, drawings, photographs, plans, diagrams, models, formulae, tables, engineering designs and specifications, computer-aided design files, manuals or documentation, electronic media or information revealed through visual inspection[.]”

# What Constitutes “Technology” Under the EAR?

- The provision of **training and instruction** which communicates technical information to a foreign person is regulated under the EAR because it is considered “Technology.”
- This is similar to the way the provision of training and instruction which communicates technical data pertaining to defense articles to foreign persons is regulated as a “defense service” under the ITAR.

# Common Myths: ITAR v. EAR

## Myth

1. If my product is classified under the ITAR it means I will never be able to get an export license.
2. If my product is EAR-controlled, I don't need to worry about export licenses.

## Reality

1. While many exporters think of the EAR as less strict than the ITAR, one is not necessarily better than the other. It is more important to gain a clear understanding of where your product falls.
2. While the EAR contains many license exceptions, it does not mean the products can be shipped without any oversight.

# **EXPORTS UNDER THE ITAR AND EAR**

## Requirements for Exporting under the ITAR and EAR

- Generally speaking, unless an **exclusion** or an **exemption** applies, a U.S. person **MUST** obtain an export authorization from the U.S. government before exporting any **ITAR-controlled defense articles, CCL-controlled items, technical data, defense services, or technology.**
- This authorization comes in the form of a “license.”
- **NOTE:** Under the EAR, the precise destination of an export will invariably determine whether a license is required.

# But How Do I Know if I Am “Exporting” in the First Place?

Will there be . . .

- An **actual shipment or transmission** out of the U.S.?
- Or the sending or taking of a defense article out of the U.S. in any manner?

Is there a . . .

- **Transfer of registration, control, or ownership** of any aircraft, vessel, or satellite subject to the ITAR by a U.S. person to a foreign person;

Will you . . .

- **Perform a defense service** on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad?

Will you . . .

- **Release or otherwise transfer** a defense article to an embassy or to any of its agencies or subdivisions, such as a diplomatic mission or consulate, in the U.S.?

Will you . . .

- **Release technical data** in the U.S. to a foreign person?
- Or allow visual or other inspection by foreign persons of a defense article that reveals technical data to a foreign person?
- Or conduct oral or written exchanges with foreign persons of technical data in the U.S. or abroad?

**This is an export  
under the ITAR!**

**This is a “deemed  
export” under the  
ITAR!**



## But How Do I Know if I Am “Exporting” in the First Place?

Will there be . . .

- An **actual shipment or transmission** out of the U.S.?
  - Or the sending or taking of an EAR-controlled item out of the U.S. in any manner?

Is there a . . .

- **Transfer of a U.S. person’s registration, control, or ownership of:**
  - A **spacecraft** subject to the EAR that is not eligible for export under License Exception STA **or**
  - Any other **spacecraft** subject to the EAR to a person in or a national of a **Country Group D:5** country?

Will you . . .

- **Release or otherwise transfer “Technology”** or source code (but not object code) to a foreign person in the U.S.?

This is an export  
under the EAR!

This is a  
“deemed export”  
under the EAR!

# Common Myths: Exports

## Myth

1. If my item does not leave the U.S., it wasn't exported.
2. If I'm displaying my item at a foreign trade show, it's not actually "exported." If it's a U.S. trade show, there are never any export issues to consider.

## Reality

1. Both the ITAR and EAR prohibit "deemed" exports, which can occur even if nothing leaves U.S. soil.
2. While some limited exceptions apply for foreign trade shows and demonstrations, in most instances a license is required. U.S. trade shows and demonstrations may require licenses in certain circumstances.

# Types of Licenses Under the ITAR

## 1. Manufacturer License and Exporter License

## 2. License via Agreement

- Technical Assistance Agreement - “An agreement (e.g., contract) for the **performance** of a defense service(s) or the **disclosure** of technical data” (22 C.F.R. § 120.22).
- Manufacturing License Agreement - “An agreement (e.g., contract) whereby a U.S. person grants a foreign person an **authorization to manufacture defense articles abroad** and which involves or contemplates:
  - The export of technical data...or defense articles or the performance of a defense service; or
  - The use by the foreign person of technical data or defense articles previously exported by the U.S. person...” (22 C.F.R. § 120.21).
- 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...” (22 C.F.R. § 120.23).

## 3. Broker License

# Exports to § 126.1 Countries

- So far, we have focused on the export of goods, services, and data, and the licenses required to do so. However, the unlicensed provision of proposals and presentations concerning defense articles, defense services, and technical data to the following countries is also prohibited under 22 C.F.R. § 126.1:

Afghanistan  
Belarus  
Burma  
Central African Republic  
China  
Cuba  
Cyprus  
Democratic Republic of Congo

Eritrea  
Haiti  
Iran  
Iraq  
Lebanon  
Libya  
North Korea  
Russia

Somalia  
South Sudan  
Sudan  
Syria  
Venezuela  
Zimbabwe

- The ITAR defines the terms “proposal” and “presentation” as “the communication of information in sufficient detail that it would **permit an intended purchaser to decide to acquire the article in question** or to enter into an agreement...”
- Thus, it is crucial that before even engaging in discussions with parties located in these proscribed countries, trade counsel be contacted, and licensing initiatives be assessed.

# **BROKERING UNDER THE ITAR**

# What Constitutes “Brokering” Under the ITAR?

- **“Brokering activities”** are defined under the ITAR as any action on behalf of another to facilitate the **manufacture, export, permanent import** [to the U.S.], **transfer, reexport, or retransfer** of a U.S. or foreign defense article or defense services, regardless of origin.
  - Such action includes, but is not limited to:
    - Financing, insuring, transporting, or freight forwarding defense articles or defense services; or
    - Soliciting, promoting, negotiating, contracting for, arranging, or otherwise assisting in the purchase, sale, transfer, loan, or lease of a defense article or defense service.

# Requirement to Register and Report

- Generally, any person who engages in the “**business of brokering activities**” (i.e., one or more instances of “brokering”) is required to register with the DDTC.
- Registration is a precondition to receiving a brokering license AND using an exemption to the requirement to obtain a brokering license.
- Registrations must be renewed yearly and must be accompanied by a **brokering report**.

# Contents of Brokering Report

- Annual brokering reports must include:
  - A **description of the brokering activities** that were conducted via a license approval or were exempt from approval;
  - **Identification of all persons who participated in the activities**, including each person's name, address, nationality and country where located, and role or function;
  - The **quantity, description, and U.S. dollar value** of the **defense articles** or **defense services** brokered; and
  - The type and **U.S. dollar value** of any **consideration received** or expected to be received, directly or indirectly, by any person who participated in the brokering activities, and the source thereof.





# Under What Circumstances are Brokering Licenses Required?

- Brokering of any foreign defense article or defense services (with exemptions).
- Brokering activities that involve any country, area, or person referred to in § 126.1 of the ITAR or identified by the Department of State as embargoed for the purposes of U.S. national security, foreign policy, or law enforcement interests.

# Under What Circumstances are Brokering Licenses Required?

- Brokering of the following U.S. origin defense articles or defense services:
  - **Firearms** and **other weapons** of a nature described by Category I(a) through (d), Category II(a) and (d), and Category III(a) of §121.1 or Category I(a) through (c), Category II(a), and Category III(a) of the **USML**;
  - Rockets, bombs, and grenades as well as launchers for such defense articles of a nature described by Category IV(a), and launch vehicles and missile and anti-missile systems of a nature described by Category IV(b) (including man-portable air-defense systems);
  - **Vessels of war** described by Category VI;
  - **Tanks** and **military vehicles** described by Category VII;
  - **Aircraft** and **unmanned aerial vehicles** described by Category VIII;
  - **Night vision-related defense articles** and inertial platform, **sensor, and guidance-related systems** of a nature described by Category XII(c) and (d);
  - **Chemical agents and precursors** described by Category XIV(a), (c), and (e), **biological agents and biologically derived substances** described by Category XIV(b), and **equipment** described by Category XIV(f) **for dissemination of the chemical agents and biological agents** described by Category XIV(a), (b), and (e);
  - **Submersible vessels** described by Category XX; and
  - **Miscellaneous articles** of a nature described by Category XXI.

# Common Myths: Brokering

## Myth

1. If the deal was unsuccessful, I have no brokering to report.
2. I only need to worry about reporting brokering activities annually.
3. I need to worry about brokering for EAR-controlled items.

## Reality

1. Reporting requirements are tied to any instance of brokering activities – whether they are successful or not.
2. Certain types of brokering requires *prior approval* in the form of a broker license – not just annual reporting.
3. Brokering is not regulated under the EAR.

# **COMPLIANCE WITH EXPORT CONTROL LAWS**

# Basic Elements of Compliance

Recordkeeping

Licensing

Training

Written Compliance Policies

Registration

Product Classification

# ITAR/EAR Compliance Strategies

- A good compliance program should be:
  - Clearly documented in writing
  - Tailored to the business
  - Regularly reviewed/updated
  - Fully supported by management
- Exporters, temporary importers, and brokers should pay attention to the following:
  - Complete registration requirements
  - Know the relevant USML/ECCN category
  - Know the end user and end use of the defense article or service
  - Know prohibited destinations
  - Screen all parties/partners & ensure information is accurate and complete
  - Know whether the transaction is covered by an exemption and, if so, understand exemption requirements
  - Ensure all information provided on a request for license or other approval is accurate
  - Be aware of reporting requirements
- DDTC issued guidance is available online at: [https://www.pmddtc.state.gov/ddtc\\_public?id=ddtc\\_kb\\_article](https://www.pmddtc.state.gov/ddtc_public?id=ddtc_kb_article)
- BIS issued guidance is available online at: <https://www.bis.doc.gov/index.php/compliance-a-training>

# Common Myths: Export Compliance

## Myth

1. Companies with Facility Security Clearances (“**FCLs**”) or USG contracts cannot engage in direct commercial sales/exports.
2. If an exception applies, I don’t need to have any supporting documentation.
3. Only products developed for the US Government or military are ITAR controlled.

## Reality

1. So long as exports are conducted with the proper licenses in place, and company’s SF-328 reporting requirements and contractual requirements are followed, there should be no adverse impacts to a company’s FCL or USG contract.
2. Good recordkeeping is even more important when a company uses an exception, since it provides justification in case of an inquiry.
3. Any product which fits the descriptions within the USML may be ITAR-controlled, regardless of how it was developed.

# **FIRESIDE CHAT WITH BAE SYSTEMS**



# Discussion Questions

- What are some of the top myths or misconceptions you have heard or experienced. How have you dispelled some of these myths?
- When interacting with compliance officers or other staff members, do you find that there is a difference in how small companies approach export compliance relative to large companies? What are the impacts (if any) of these different approaches?
- Most defense contractors rely on the innovation of new products and technologies. However, we often see that newer products don't neatly fit into an established export classification category because they are so innovative. What advice can you share for how the attendees of this session might be able to navigate such an issue?

# Discussion Questions Cont'd

- From your perspective “in-house,” what other strategies can you recommend for maintaining a strong compliance program? What advice do you have for companies that may not have a compliance program in place and are just starting to think about how to implement such a program as their company grows? What advice do you have for companies that would like to strengthen existing compliance programs and adapt them to growth?
- Perhaps the most important aspect of implementing a compliance program is its messaging within an organization. How have you navigated this particular requirement?
- Have you seen any new export compliance issues arise as a result of remote work? How have you addressed these challenges?
- What other general advice do you have for today’s attendees?

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