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PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

U.S. EXPORT CONTROL COMPLIANCE REQUIREMENTS FOR GOVERNMENT CONTRACTORS

By Joseph D. West, Judith A. Lee, and Jason A. Monahan

Violations of export control requirements can result in substantial civil and criminal penalties, including debarment and loss of export privileges. Government contractors frequently are at a higher risk for export control violations because they may deal in classified or sensitive items, software, and technology and in items, software, and technology specifically designed for military applications.

Government contractors that have overseas subsidiaries or operations or that sell or provide services to overseas distributors or customers, whether private or governmental, must comply with the U.S. export control laws and regulations. Even Government contractors with no overseas subsidiaries, operations, or sales must comply with the U.S. export control laws and regulations if they hire foreign national employees in the United States.¹ Accordingly, all Government contractors should be familiar with the U.S. export controls and should take appropriate measures, including adopting compliance programs, training employees, and applying for necessary export licenses, to ensure compliance.

This BRIEFING PAPER provides a basic overview of the U.S. export control laws and regulations that most frequently apply to Government contractors—the Export Administration Regulations and the International Traffic in Arms Regulations—and discusses the requirements and prohibitions imposed under each. The PAPER also discusses a number of “hot topics” in U.S. export controls of particular relevance and importance to Government contractors.

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Export Administration Regulations

The Export Administration Regulations (EAR)² have been promulgated under the authority of the Export Administration Act (EAA)³ and, during

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periods where the EAA is in lapse, under the authority of the International Emergency Economic Powers Act (IEEPA).⁴ The EAA is not permanent legislation and has been in lapse since August 21, 2001. Several efforts to enact a new and permanent version of the EAA have failed, but such legislation is currently pending in Congress. During those periods where the EAA is in lapse, including at present, the EAR have been maintained in force by Executive Order under the IEEPA.⁵ The U.S. Department of Commerce's Bureau of Industry and Security (BIS), formerly known as the Bureau of Export Administration (BXA), is responsible for administering and enforcing the EAR.

The EAR govern the "export" and "reexport" of all "items subject to the EAR," including all items in the United States and all U.S.-origin items, wherever located. "Export" means an actual shipment or transmission of items subject to the EAR out of the United States or release of technology or software subject to the EAR to a foreign national in the United States.⁶ "Reexport" means an actual shipment or transmission of items subject to the EAR from one foreign country to another foreign country or release of technology or software subject to the EAR to a foreign national outside the United States.⁷

The EAR require a BIS license or other approval for the export or reexport of certain items, depending on the intended destination, end-user, and end-use of the item. As a matter of policy, the BIS will refuse to issue a license or grant other approval for the export of any item to an embargoed country, to a prohibited end-user, or for a prohibited end-

use, such as the development or proliferation of chemical, biological, or nuclear weapons.

The EAR impose restrictions on the export or reexport of items for a variety of reasons. During the Cold War, the EAR were designed to prevent the export and reexport of sensitive and technologically advanced items to the Soviet Union, Warsaw Pact countries, and the People's Republic of China. Although many of these Cold War-related export controls remain in place today (particularly with respect to exports and reexports to the People's Republic of China), the current focus of the EAR is to prevent the proliferation of weapons of mass destruction and to limit the ability of unfriendly countries and rogue regimes to support or engage in terrorism or other acts of violence against the United States and its allies.

■ Jurisdiction

The EAR control the export and reexport of all "items subject to the EAR." The term "item" is defined to include "commodities, software, and technology."⁸ The phrase "items subject to the EAR" is defined extremely broadly to include the following items:

- (1) "All items in the United States, including in a U.S. Foreign Trade Zone or moving in transit through the United States from one foreign country to another."⁹
- (2) "All U.S. origin items, wherever located."¹⁰
- (3) "U.S. origin parts, components, materials or other commodities integrated abroad into foreign-made products, U.S. origin



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software commingled with foreign software, and U.S. origin technology commingled with foreign technology” in quantities exceeding de minimis levels.¹¹

- (4) “Certain foreign-made direct products of U.S. origin technology or software.”¹²
- (5) “Certain commodities produced by any plant or major component of a plant located outside the United States that is a direct product of U.S. origin technology or software.”¹³

The applicable “de minimis level” for the export or reexport of a particular item will depend on the country to which the item will be exported or reexported. With some exceptions, the applicable de minimis level for exports or reexports to most countries is 25% or less of the total value of the foreign-made item. For reexports or reexports to terrorist-supporting countries (e.g., Cuba, Iran, Sudan, and Syria), the applicable de minimis level is 10% or less of the total value of the foreign-made item.¹⁴

The following items are explicitly excluded from the jurisdiction of the EAR, although the export and reexport of these items may be restricted under other applicable U.S. export control laws and regulations:

- (a) Items that are exclusively controlled for export or reexport by another U.S. Government department or agency, including the Department of State (see discussion of the International Traffic in Arms Regulations below), Department of the Treasury, Nuclear Regulatory Commission, Department of Energy, or the Patent and Trademark Office.¹⁵
- (b) “Prerecorded phonograph records, reproducing in whole or in part, the content of printed books, pamphlets, and miscellaneous publications, including newspapers and periodicals; printed books, pamphlets, and miscellaneous publications including bound newspapers and periodicals; children’s picture and painting books; newspapers

and periodicals, unbound, excluding waste; music books; sheet music; calendars and calendar blocks, paper; maps, hydrographical charts, atlases, gazetteers, globe covers, and globes (terrestrial and celestial); exposed and developed microfilm reproducing, in whole or in part, the content of any of the above; exposed and developed motion picture film and soundtrack; and advertising printed matter exclusively related thereto,” i.e., “information and informational materials.”¹⁶

- (c) Publicly available technology and software, except for certain software containing advanced encryption technology.¹⁷
- (d) Foreign-made items with less than the de minimis percentage of controlled U.S. content.¹⁸

Accordingly, the EAR govern the export and reexport of all “items subject to the EAR,” including all commodities, software, and technology in the United States, regardless of origin, and all U.S.-origin commodities, software, and technology, wherever located. The EAR apply directly to all individuals and entities located in the United States engaging in exports or reexports of commodities, software, or technology in the United States to any foreign destination. The EAR also apply extraterritorially to all individuals and entities outside the United States, including foreign subsidiaries of U.S. companies and foreign individuals and entities with no connection to the United States, engaged in reexports of U.S.-origin commodities, software, or technology.¹⁹

All Government contractors, whether doing business in the United States or overseas, are subject directly to the EAR whenever they export, reexport, or otherwise transfer U.S.-origin commodities, technology, or software to any foreign destination or end-user. Government contractors also need to be concerned about their foreign subsidiaries or affiliates. A Government contractor could be liable for civil penalties²⁰ if one of its foreign subsidiaries or affiliates engaged in a prohibited reexport of U.S.-

origin commodities, technology, or software.²¹ A Government contractor could be liable for criminal penalties²² if it knowingly approves or facilitates a foreign subsidiary's or other party's (e.g., customer, distributor, or joint venture partner) prohibited reexport of U.S.-origin commodities, technology, or software.²³

■ Export Licensing Requirements

Although the jurisdictional scope of the EAR is extremely broad, covering all exports and reexports of U.S.-origin commodities, technology, and software, wherever located, the portion of export and reexport transactions requiring a BIS license is relatively small. With a number of important exceptions, most U.S.-origin items, particularly unsophisticated consumer goods, may be exported and reexported to most destinations and end-users without a BIS license.

The EAR include the Commerce Control List (CCL),²⁴ which provides detailed descriptions of the particular categories of commodities, technology, and software for which a BIS license or other approval may be required for export or reexport. The items included in the CCL are "dual-use" items, meaning that they can be used both in commercial applications and in military and other strategic applications.²⁵ (Items that are specifically designed for a military-related use are controlled under the International Traffic in Arms Regulations, described below.) Items subject to the EAR but not included in the CCL are referred to as "EAR99" items and, as noted above, may be exported and reexported to most destinations and end-users without a BIS license.²⁶ In contrast, "dual-use" items included on the CCL may require a BIS license, depending on the destination to which they will be exported or reexported.

The CCL is divided into the following 10 categories of commodities, technology, and software:²⁷

- (1) Nuclear Materials, Facilities, and Equipment.
- (2) Materials, Chemicals, Microorganisms, and Toxins.

- (3) Materials Processing.
- (4) Electronics.
- (5) Computers.
- (6) Telecommunications and Information Security.
- (7) Sensors and Lasers.
- (8) Navigation and Avionics.
- (9) Marine.
- (10) Propulsion Systems, Space Vehicles, and Related Equipment.

Each of the CCL's 10 categories contains numerous Export Control Classification Numbers (ECCNs), followed by detailed descriptions of the particular categories of items controlled under the ECCN. The items described under each ECCN are controlled for one or more of the following reasons: Chemical and Biological Weapons (CB); Nuclear Nonproliferation (NP); National Security (NS); Missile Technology (MT); Regional Stability (RS); Firearms Convention (FC); Crime Control (CC); and Antiterrorism (AT). Just because an item is described by an ECCN and controlled for one or more of the above-listed reasons does not necessarily mean that a BIS license will be required for the export or reexport of the item. Depending on the reason the particular item is controlled (e.g., AT or CB), it may be possible to export or reexport the item to some or most countries without a BIS license. Items that are controlled for AT reasons only, for example, generally may be exported or reexported without a BIS license to all countries except for Cuba, Iran, Libya, North Korea, Sudan, or Syria, depending on the intended end-user and end-use. Exports and reexports to these and other countries may be prohibited under statutes and regulations administered and enforced by other U.S. Government departments and agencies, including the Department of the Treasury's Office of Foreign Assets Control (OFAC). The OFAC regulations restrict or prohibit trade and other transactions with a number of countries, including Cuba, Iran, Libya, Myanmar (Burma), North Korea, Sudan, Syria, and Zimbabwe.²⁸

For example, ECCN 5B001 controls various “[t]elecommunications test, inspection and production equipment” for NS and AT reasons.²⁹ A review of the EAR’s Commerce Country Chart³⁰ indicates that items controlled under ECCN 5B001 may be exported or reexported to Western Europe, Australia, Canada, Hong Kong, Japan, New Zealand, South Korea, and Turkey without a BIS license. Exports and re-exports of items controlled under ECCN 5B001 to all other countries, however, require a BIS license.

Even if an item is controlled under an ECCN and the Commerce Country Chart indicates that a BIS license is required to export or re-export the item to a particular country, one or more of the EAR’s license exceptions may authorize the export or reexport of the item to that country without a BIS license. License exceptions are set forth in Part 740 of the EAR³¹ and cover special risk-reducing circumstances, such as low-value shipments,³² temporary imports, exports, and reexports,³³ and exports and reexports of items in personal baggage.³⁴ The availability of a particular license exception depends on the item and the item’s intended country of destination, end-user, and end-use.

One license exception that is particularly relevant for Government contractors is License Exception GOV.³⁵ License Exception GOV states that no BIS license is required for the export or reexport of certain controlled items and software if the items or software are being exported or reexported for any of the following uses:

- (a) The official use of personnel and agencies of the U.S. Government located overseas.³⁶
- (b) The personal use of members of the U.S. Armed Forces or civilian personnel of the U.S. Government located overseas.³⁷
- (c) The official use of agencies of U.S. allies.³⁸
- (d) The official use of diplomatic and consular missions of U.S. allies, depending on the country where the mission is located.³⁹

- (e) The official use of the International Atomic Energy Agency or European Atomic Energy Community.⁴⁰

Because License Exception GOV contains a number of restrictions and reporting requirements, Government contractors should review the EAR and consult with an export compliance expert before relying upon the exception.

■ General Prohibitions

Part 736 of the EAR⁴¹ lists 10 General Prohibitions that apply to all exports and reexports of items subject to the EAR, including exports and reexports of EAR99 items and exports and reexports made under a license exception. The first three General Prohibitions are based on the CCL and Commerce Country Chart and are better understood as affirmative requirements to seek a BIS license for the export or reexport of items listed on the CCL when required based on the item’s ECCN and the Commerce Country Chart.⁴²

General Prohibition Four prohibits all exports, reexports, and export-related transactions (e.g., financing or shipping) to individuals and entities on the BIS Denied Persons List or BIS Entity List.⁴³ Individuals and entities on the Denied Persons List⁴⁴ have been denied export privileges under a BIS denial order. Entities named on the Entity List⁴⁵ are entities whose activities impose a risk of diverting exported and reexported items into programs related to the development or proliferation of weapons of mass destruction. Accordingly, all companies exporting or reexporting items subject to the EAR should screen the names of all parties related to the transaction, including the end-user, consignee, distributor, freight forwarder, and other intermediaries, against the Denied Persons List and Entity List before shipment. If any of those parties is named on the Denied Persons List or Entity List, a BIS license may be required. Although not mandated under General Prohibition Four, other U.S. export control laws and regulations, including the OFAC regulations, prohibit U.S. companies from engaging in trade and most other transactions and dealings

with individuals and entities named on other U.S. Government lists, including OFAC's list of Specially Designated Nationals and Blocked Persons.⁴⁶

General Prohibitions Five and Seven prohibit the export or reexport of any item subject to the EAR if there is knowledge or reason to know that the intended end-user or end-use of the item is related to the development or proliferation of weapons of mass destruction.⁴⁷ For example, although an export license generally is not required for the export or reexport of EAR99 items to India, if a company intending to export an EAR99 item to India becomes aware that the item will be used for a prohibited end-use (e.g., after discussions with a distributor or customer), or if the company should have known that the item will be used for a prohibited end-use (e.g., the intended end-user is a weapons research and development facility), the company will be required to obtain a BIS license before shipment.

To comply with the requirements of General Prohibitions Five and Seven, Government contractors should take into account any "red flags" indicating that an export or reexport may be destined for a prohibited end-use, end-user, or destination. Examples of "red flags" are provided in the *Guidelines* at the conclusion of this PAPER. If one or more "red flags" are present, a Government contractor has a duty to investigate the suspicious circumstances and inquire about the end-use, end-user, or ultimate country of destination. Government contractors should not engage in "willful blindness" by cutting off the flow of information that comes in the normal course of business, such as by instructing employees to tell potential customers to refrain from discussing the actual end-use, end-user, or ultimate country of destination of items being exported.

For example, in 1999, the U.S. Government charged McDonnell Douglas Corporation and one of its senior officials with violating the EAR by submitting false information to the BIS to obtain licenses authorizing the export of aircraft machine tools to China.⁴⁸ When

submitting its license applications to the BIS, McDonnell Douglas submitted an end-user statement indicating that the end-user of the machine tools would be a commercial aircraft parts manufacturer in China. Based on this end-user statement, the BIS issued the required export licenses. Once the machine tools were exported to China, however, they were diverted to a military aircraft parts manufacturer. The U.S. Government alleged that McDonnell Douglas "had reason to know and acted with willful blindness to the fact that [its] end user designation was false and misleading."⁴⁹ Specifically, the U.S. Government alleged that McDonnell Douglas was so determined to maintain a favorable relationship with its customer in China, which had threatened to cancel a separate \$1 billion contract if McDonnell Douglas did not agree to export the machine tools to China, that the company chose to ignore various "red flags" that should have alerted it to the likely possibility that the machine tools would be diverted to an unauthorized military end-use. McDonnell Douglas was required to pay a \$2.12 million administrative penalty to settle the U.S. Government's charges.⁵⁰

General Prohibition Six prohibits the export or reexport of items subject to the EAR to embargoed countries.⁵¹ General Prohibition Six is separate from, but related to, the U.S. economic and trade sanctions administered and enforced by OFAC, which, at present, impose comprehensive economic and trade sanctions against Cuba,⁵² Iran,⁵³ Sudan,⁵⁴ and Syria.⁵⁵ While the OFAC regulations generally apply to U.S. citizens and permanent residents, U.S. companies (including foreign branches) and persons located in the United States only, with some important exceptions, General Prohibition Six applies more broadly to all persons, including non-U.S. citizens and companies, engaged in the export or reexport of items subject to the EAR.

General Prohibition Eight prohibits the export or reexport of items subject to the EAR through or transit through certain countries unless a license exception or BIS license authorizes such an export or reexport directly to the country.⁵⁶ General Prohibition Nine pro-

hibits violations of terms or conditions of any BIS license, any license exception, or any order issued under the EAR.⁵⁷ General Prohibition Ten is a “catch-all” provision that prohibits proceeding with any transaction with knowledge or reason to know that a violation of the EAR has occurred or is about to occur.⁵⁸

■ Deemed Exports & Deemed Reexports

The EAR state that the “export” of technology or software includes “[a]ny release of technology or source code subject to the EAR to a foreign national.”⁵⁹ The EAR clarify that “[s]uch release is deemed to be an export to a home country or countries of the foreign national.”⁶⁰ Similarly, with respect to “reexports” of technology or software, the EAR state that “[a]ny release of technology or source code subject to the EAR to a foreign national of another country is a deemed reexport to the home country or countries of the foreign national.”⁶¹

In other words, if a BIS license is required to export or reexport technology or software directly to a particular country, a BIS license also is required to release the technology to nationals of that country who are located in the United States or third countries. This is commonly referred to as the “deemed export” rule because the release of technology or software to a foreign national located in the United States or a third country is deemed to be an export to the home country of the foreign national.

Under the EAR, “technology” is defined as “[s]pecific information necessary for the ‘development,’ ‘production,’ or ‘use’ of a product. The information takes the form of ‘technical data’ or ‘technical assistance.’”⁶² The EAR further specify that “technical data” “[m]ay take forms such as blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals and instructions written or recorded on other media or devices such as disk, tape, [and] read-only memories” and that “technical assistance” “[m]ay take forms such as instruction, skills training, working knowledge, [and] consulting services.”⁶³

A “foreign national” is any individual who enters the United States for temporary stay under a nonimmigrant visa (e.g., H-1B, L-1, H-3, or F-1 visa). Individuals who are permanent resident aliens (i.e., “green card” holders) or “protected individuals” under the Immigration and Naturalization Act are not considered “foreign nationals” and, for purposes of the EAR, have the same status as U.S. citizens.⁶⁴

A “release” of technology or software to a foreign national may occur through any of the following actions:⁶⁵

- (1) Visual inspection by a foreign national of U.S.-origin equipment or facilities.
- (2) Oral exchange of information in the United States or abroad.
- (3) Application to a situation abroad of personal knowledge or technical experience acquired in the United States.

Accordingly, Government contractors that employ foreign nationals need to determine whether any of their foreign national employees has access to technology or software listed on the CCL (“controlled technology or software”) and thus may require a BIS license. Foreign nationals most likely to be affected are those from embargoed countries (e.g., Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria) and certain other countries of concern (e.g., China, India, and Pakistan). A Government contractor that employs foreign nationals will need to determine, based on each foreign national’s country of citizenship and the specific technology or software to which the each foreign national will have access, whether a BIS license is required. Until such time as all necessary BIS licenses are obtained, measures should be taken to ensure that foreign national employees do not access controlled technology or software. Because it may take several months to obtain a BIS license, Government contractors should consider whether a BIS license will be required before hiring a foreign national who will require access to controlled technology or software as part of that individual’s employment.

To obtain a BIS license authorizing the release of controlled technology or software to a foreign national employee, the Government contractor must provide the BIS with a letter of explanation regarding the foreign national and that individual's background, the location of employment where the technology or software will be used, a description of the technology and software, how the foreign national will receive and use the technology or software, and the types of products or output to be produced with the technology or software source code. U.S. Government enforcement officials regularly screen visa applications to deny entry into the United States to foreign nationals who pose security concerns. BIS enforcement officials also conduct investigative checks of employers of foreign nationals for potential export violations.

Government contractors also need to be concerned about the deemed export rule whenever they allow foreign nationals to visit their facilities and whenever they exchange information or participate in joint ventures and other projects with or involving foreign nationals. Due to the broad definition of "technology" under the EAR,⁶⁶ there are many ways in which technology could be released to a foreign national during a facility visit or through participation in a project, possibly requiring a BIS license.

■ Penalties

Violations of the EAR may result in substantial civil and criminal penalties. The BIS may impose a civil penalty of up to \$11,000 *per violation* of the EAR.⁶⁷ The BIS may also deny a company's export privileges, either temporarily or permanently, by issuing a denial order and including the company on the Denied Persons List. An individual or entity named on the Denied Persons List is prohibited from applying for, obtaining, or using any BIS license, license exception, or export control document, and other individuals and entities are prohibited from exporting, reexporting or otherwise transferring any item subject to the EAR to any individual or entity named on the Denied Persons List.⁶⁸

Knowing violations of the EAR may result in criminal penalties of up to five times the value of the exports or reexports involved or \$50,000, whichever is greater, and/or imprisonment for up to five years for individuals.⁶⁹ Willful violations of the EAR may result in criminal penalties of up to five times the value of the exports or reexports involved or \$1 million, whichever is greater, and/or imprisonment for up to 10 years for individuals.⁷⁰ Of particular relevance to Government contractors, the EAR states that violations of the EAR may also result in the "Department of Defense, among other agencies...suspend[ing] the right of any person to contract with the U.S. Government."⁷¹

International Traffic In Arms Regulations

The International Traffic in Arms Regulations (ITAR)⁷² have been promulgated under the statutory authority of the Arms Export Control Act (AECA)⁷³ and are administered and enforced by the U.S. Department of State's Directorate of Defense Trade Controls (DDTC). As discussed in greater detail below, while the EAR govern the export and reexport of "dual-use" items (i.e., items that can be used both in commercial applications and in military and other strategic applications),⁷⁴ the ITAR govern the export and reexport of "defense articles" and "defense services."

■ "Defense Articles"

The ITAR define the term "defense article" to include any item or technical data specifically designed, modified, or equipped for military purposes and designated in the U.S. Munitions List (USML).⁷⁵ The USML, which is published at Part 121 of the ITAR, comprises the following 20 categories of articles, services, and related technical data that have been designated as defense articles and defense services pursuant to §§ 38 and 47(7) of the AECA:⁷⁶

- (1) Firearms, Close Assault Weapons, and Combat Shotguns.
- (2) Guns and Armament.
- (3) Ammunition/Ordnance.

- (4) Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs, and Mines.
- (5) Explosives and Energetic Materials, Propellants, Incendiary Agents, and Their Constituents.
- (6) Vessels of War and Special Naval Equipment.
- (7) Tanks and Military Vehicles.
- (8) Aircraft and Associated Equipment.
- (9) Military Training Equipment and Training.
- (10) Protective Personnel Equipment and Shelters.
- (11) Military Electronics.
- (12) Fire Control, Range Finder, Optical, and Guidance and Control Equipment.
- (13) Auxiliary Military Equipment.
- (14) Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment.
- (15) Spacecraft Systems and Associated Equipment.
- (16) Nuclear Weapons, Design, and Testing Related Items.
- (17) Classified Articles, Technical Data, and Defense Services Not Otherwise Enumerated.
- (18) Directed Energy Weapons.
- (19) Submersible Vessels, Oceanographic, and Associated Equipment.
- (20) Miscellaneous Articles.

Components, parts, accessories, attachments, and associated equipment specifically designed, modified, configured, or adapted for defense articles are, frequently, themselves defense articles. For example, Category VIII of the USML, “Aircraft and Associated Equipment,” not only covers “[a]ircraft, including but not limited to helicopters, nonexpansive balloons, drones, and

lighter-than-air aircraft, which are specifically designed, modified, or equipped for military purposes,”⁷⁷ but also covers “[c]omponents, parts, accessories, attachments, and associated equipment (including ground support equipment) specifically designed or modified” for most of the defense articles covered under Category VIII.⁷⁸

This coverage can create compliance difficulties for Government contractors, particularly when components, parts, accessories, attachments, and associated equipment are also used for nonmilitary purposes. For example, the various components of military aircraft brakes (e.g., linings and discs and, perhaps, bolts and gaskets) may be considered defense articles under Category VIII(h) of the USML if they are specifically designed, modified, configured, or adapted for use in military aircraft brakes.⁷⁹ Frequently, however, such components, particularly smaller components such linings, discs, bolts, and gaskets, are also suitable for commercial aircraft brakes. If, however, a company were to use those components for commercial aircraft brakes, those brakes, even though developed for use in commercial aircraft, could become subject to the ITAR due to the fact that they incorporate defense articles. A 2002 report from the DOD to the President’s Commission on the Future of the U.S. Aerospace Industry suggested that items “without unique military capabilities,” such as landing gears, brakes, nuts and bolts, and basic fuel, electrical, and hydraulic components, could be removed from the USML without affecting national security.⁸⁰

When there is doubt whether a particular item is a defense article controlled under the ITAR or a “dual-use” item controlled under the EAR, a commodity jurisdiction request can be filed with the DDTC.⁸¹ The commodity jurisdiction request must include a history of the item’s design, development, and use, and brochures, specifications, and other documentation related to the item must be submitted for the DDTC’s consideration.⁸² The DDTC, in consultation with the Departments of Defense and Commerce and other U.S. Govern-

ment agencies, is responsible for determining on a case-by-case basis whether the item is a defense article controlled under the ITAR or a “dual-use” item controlled under the EAR, taking into account the number, variety, and predominance of the item’s civil applications, the nature, function, and capability of the item’s civil applications, and the nature, function, and capability of the item’s military applications.⁸³

■ “Defense Services”

The ITAR define the term “defense service” to include the following services:

- (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.”⁸⁴
- (2) “The furnishing to foreign persons of any technical data controlled under [the ITAR], whether in the United States or abroad.”⁸⁵
- (3) “Military training of foreign units and forces, regular and irregular, including formal or information 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.”⁸⁶

The furnishing of “technical data” to “foreign persons” includes foreign governments, embassies, and missions, whether in the United States or another country.⁸⁷ The term “technical data” is defined broadly under the ITAR to include the following:

- (a) “Information...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 and documentation.”⁸⁸

- (b) “Classified information relating to defense articles and defense services.”⁸⁹
- (c) “Information covered by an invention secrecy order.”⁹⁰
- (d) “Software...directly related to defense articles.”⁹¹

The ITAR’s definition of “technical data” expressly excludes the following categories of information:⁹²

- (1) “[I]nformation concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities.”
- (2) “[B]asic marketing information on function or purpose or general system descriptions of defense articles.”
- (3) Information in the “public domain.”

Information is in the “public domain” if it is published and generally accessible or available to the public through sales at newsstands and bookstores; through subscriptions available without restriction; at libraries open to the public; through patents available at any patent office; through unlimited distribution at a conference, meeting, seminar, trade show, or exhibition generally accessible to the public in the United States; or through fundamental research in science and engineering at accredited institutions of higher learning in the United States where the resulting information is ordinarily published and shared broadly with the scientific community.⁹³

■ Jurisdiction

All U.S. persons (defined under the ITAR to include all U.S. citizens and permanent resident aliens, entities incorporated in the United States, and federal, state, or local governmental entities)⁹⁴ and foreign governmental entities in the United States that export or temporarily import defense articles must obtain a license or other approval from the DDTTC.

Government contractors in the United States engaged in the manufacture, export, or temporary import of defense articles or in the supply of defense services are subject directly to the ITAR. Government contractors in the United States also need to be concerned about their foreign subsidiaries. Foreign subsidiaries of U.S. companies are subject directly to the ITAR whenever they reexport or transfer U.S.-origin defense articles or defense services to a destination, end-user, or end-use not previously authorized by the DDTC.⁹⁵ A Government contractor in the United States could be subject to civil penalties⁹⁶ if one of its foreign subsidiaries engaged in a prohibited reexport or transfer of U.S.-origin defense articles or defense services. A Government contractor in the United States could be subject to criminal penalties⁹⁷ if it knowingly approved or facilitated a foreign subsidiary's or other foreign party's (e.g., customer, distributor, or joint venture partner) prohibited reexport or transfer of U.S.-origin defense articles or defense services.⁹⁸

■ Registration

The ITAR require “[a]ny person who engages in the United States in the business of either manufacturing or exporting defense articles or furnishing defense services” to register with the DDTC.⁹⁹ Even manufacturers of defense articles that do not engage in any export activities are required to register with the DDTC.¹⁰⁰ In addition, all U.S. persons, wherever located, and all foreign persons located in the United States that are engaged in the business of brokering (i.e., financing, transporting, or freight-forwarding) of defense articles or defense services are required to register with the DDTC.¹⁰¹ The purpose of such registration is to provide the U.S. Government with necessary information on who is involved in certain manufacturing and exporting activities subject to the ITAR.¹⁰² Registration with the DDTC is a prerequisite for applying for licenses or other approvals for the export of defense articles or furnishing of defense services; the DDTC will not consider export license applications or other requests for approval submitted by unregistered entities.¹⁰³

Companies that have registered with the DDTC are required to notify the DDTC of any change in corporate ownership (e.g., merger), change in the company's senior officers, establishment, acquisition, or divestment of a subsidiary or foreign affiliate, a change in location, or the dealing in an additional category of defense articles or defense services.¹⁰⁴ Failure to do so within five days of the event will result in a violation of the ITAR.¹⁰⁵ Companies that have registered with the DDTC are also required to notify the DDTC within 60 days of any intended sale or transfer to a foreign person of ownership or control of the company or any of its subsidiaries.¹⁰⁶

All entities required to register with the DDTC pursuant to of the ITAR¹⁰⁷ are required to appoint an “Empowered Official” to be responsible for signing license applications and other requests for approvals on behalf of the entity and for monitoring the entity's overall compliance with the ITAR. The “Empowered Official” must be a U.S. citizen, a direct employee of the registered entity, and in a position having authority for policy or management within the registered entity.¹⁰⁸

■ Export Licensing Requirements

The ITAR impose licensing requirements upon a broad range of activities, including exports, temporary imports, reexports, and transfers of defense articles and defense services. The ITAR defines “export” to include the following activities:

- (1) “Sending or taking a defense article out of the United States in any manner.”¹⁰⁹
- (2) “Transferring registration, control or ownership to a foreign person of any aircraft, vessel, or satellite covered by the [USML], whether in the United States or abroad.”¹¹⁰
- (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).”¹¹¹

- (4) “Disclosing (including oral or visual disclosure) or transferring technical data to a foreign person, whether in the United States or abroad.”¹¹²
- (5) “Performing a defense service on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad.”¹¹³

While, under the EAR, the requirement to obtain a BIS license depends on a particular item’s ECCN and intended destination, the ITAR generally require a DDTC license for any export or reexport of a defense article or defense service, regardless of destination, unless the export or reexport qualifies for an ITAR exemption.¹¹⁴ Applications for licenses authorizing the permanent export of defense articles must be submitted to the DDTC on Form DSP-5 (for unclassified articles) or Form DSP-85 (for classified articles), while applications for licenses authorizing the temporary export of defense articles must be submitted on Form DSP-73 (for unclassified articles) or Form DSP-85 (for classified articles).¹¹⁵ The license application should include copies of supporting brochures and other documents and, if related to a commercial sale, copies of the purchase order, letter of intent, or similar documentation.¹¹⁶ The average processing time for most license applications is 15 days; more complex license applications requiring consultation with other U.S. Government departments and agencies may require 50 or more days for approval.¹¹⁷ Export licenses issued by the DDTC are valid for four years and expire when the total value or quantity authorized has been shipped or when the date of expiration has been reached, whichever comes first.¹¹⁸

Exports or transfers of defense services and technical data also are subject to the ITAR’s licensing requirements. The most common method for obtaining DDTC authorization for the export or transfer of defense services or technical data is through the submission and approval of a manufacturing license agreement (MLA) or technical assistance agreement (TAA). An MLA is an agreement whereby a U.S. person grants a foreign person an authorization to manufacture defense articles

abroad and which involves or contemplates (a) the export of technical data or defense articles or the performance of a defense service or (b) the use by the foreign person of technical data or defense articles previously exported by the U.S. person.¹¹⁹ A TAA is an agreement for the performance of a defense service or the disclosure of technical data, as opposed to an agreement granting a right or license to manufacture defense articles.¹²⁰ Once the DDTC approves an MLA or TAA, the defense services or technical data described in the agreement may be exported or transferred without further DDTC licensing or authorization.¹²¹

There are a number of exemptions to the ITAR’s export licensing requirements, all of which apply to exports of unclassified defense articles only.¹²² If one or more of these exemptions applies to an export of a defense article, no license will be required from the DDTC. The most commonly applicable ITAR exemptions include the following:

- (a) Exports of defense articles in furtherance of approved MLAs or TAAs.¹²³
- (b) Exports of components or spare parts for previously exported defense articles, provided that the value of the components or spare parts does not exceed \$500 and that the components or spare parts do not enhance the capability of the defense article.¹²⁴
- (c) Exports of nonoperable models or mock-ups of defense articles.¹²⁵
- (d) Exports of *certain* defense articles to “Canadian-registered persons.”¹²⁶
- (e) Exports for end-use by a U.S. Government agency in a foreign country.¹²⁷
- (f) Exports of defense articles, technical data, or defense services sold, leased, or loaned by the DOD to a foreign country or international organization under the Foreign Military Sales Program pursuant to a Letter of Offer and Acceptance authorizing such transfer.¹²⁸

■ Deemed Exports

The ITAR define the term “export” to include “[d]isclosing (including oral or visual disclosure) or transferring technical data to a foreign person, whether in the United States or abroad.”¹²⁹ Accordingly, although the ITAR do not use the term “deemed export,” the ITAR require a license or other DDTC approval for the transfer of ITAR-controlled technical data to foreign nationals in the United States. Such technical data may include information required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification of defense articles and may be in the form of blueprints, drawings, photographs, plans, instructions, or documentation.¹³⁰

Government contractors that employ foreign nationals need to determine whether any foreign national employees have access to technical data controlled under the ITAR. Unlike under the EAR, where the requirement to obtain a deemed export license depends on the nationality of a foreign national employee, a license or other DDTC approval is required for the release of any ITAR-controlled technical data to any foreign national employee, regardless of the employee’s nationality. Government contractors also need to be concerned about the deemed export rule whenever they allow foreign nationals to visit their facilities and whenever they exchange information or participate in joint ventures and other projects with or involving foreign nationals. Due to the broad definition of “technical data” under the ITAR, there are many ways in which technology could be released to a foreign national during a facility visit or through participation in a project, possibly requiring a DDTC license or DDTC-approved MLA or TAA.

■ Penalties

Violations of the ITAR may result in substantial civil and criminal penalties. The DDTC may impose a civil penalty of up to \$500,000 *per violation* of the ITAR.¹³¹ Willful violations of the ITAR may result in criminal penalties of up to \$1 million per violation or twice the gross gain resulting from the violation, which-

ever is greater, and/or imprisonment for up to ten years for individuals.¹³² Individuals and entities that have been convicted of violating or conspiring to violate the AECA or ITAR may also be subject to “statutory debarment” under the ITAR, which will result in their being ineligible for licenses and other approvals from the DDTC for the export or transfer of defense articles or defense services for a period of three years.¹³³

“Hot Topics”

■ Export Compliance Program Requirements For Defense Contractors

On July 12, 2005, the DOD published a proposed rule that, if implemented, would affect all DOD contractors.¹³⁴ The proposed rule would amend the Defense Federal Acquisition Regulation Supplement (DFARS)¹³⁵ to require DOD contractors to implement and maintain effective export compliance programs designed to prevent unauthorized transfers to foreign nationals of “export-controlled information and technology,” *i.e.*, technology and technical data controlled under the EAR or ITAR.

The proposed rule contains a new DFARS Subpart 204.73, “Export-Controlled Information and Technology at Contractor, University, and Federally Funded Research and Development Center Facilities,” and an associated contract clause. The proposed subpart would require DOD Contracting Officers to ensure that contracts identify any export-controlled information and technology that will be used or generated in connection with a contract. The proposed contract clause would be used in solicitations and contracts for research and development or for services or supplies that may involve the use or generation of export-controlled information or technology.

The proposed clause would require DOD contractors to:

- (1) Comply with all applicable laws and regulations regarding export-controlled information and technology, including

registration with the DDTC in accordance with the ITAR.

- (2) Maintain an effective export compliance program that includes adequate controls over physical, visual, and electronic access to export-controlled information and technology to ensure that access by foreign firms and individuals is restricted as required by the EAR and ITAR.
- (3) Maintain an access control plan that includes unique badging requirements for foreign nationals and segregated work areas for export-controlled information and technology.
- (4) Conduct initial and periodic training on export compliance controls for those employees who have access to export-controlled information and technology.
- (5) Perform periodic assessments to ensure full compliance with U.S. export control laws and regulations.

The requirements of the proposed rule could increase the risk and burden of performing DOD contracts, particularly for DOD contractors that currently do not have export compliance programs or personnel trained in the U.S. export laws and regulations. DOD contractors that fail to comply with the obligations set forth in the proposed rule, if adopted, could be found in breach of contract, which could potentially lead to termination of any affected contract, suspension or debarment, or other sanctions.

As of October 2005, the DOD has received over 130 comments in response to its proposed rule. The majority of the comments express concern about, or opposition to, the proposed rule and urge the DOD either to revise the proposed rule to make it less burdensome for affected parties or decline to adopt it. A number of the comments argue that the proposed rule is unnecessary, since all Government contractors already are subject to U.S. export control laws and regulations, and that the proposed rule, if adopted, will impose substantial financial and administrative burdens on DOD contractors. Specifi-

cally, many DOD contractors, particularly small to medium-sized companies with little or no prior export compliance experience, will be required to retain outside experts to assist with the development and implementation of compliance programs and access control plans, employee training, and periodic audits of export compliance. At least two U.S. Senators, Senators Jeff Bingaman (D-N.M.) and Lamar Alexander (R-Tenn.), Co-Chairs of the Senate Science and Technology Caucus, have expressed concern about the proposed rule and have asked the DOD to reconsider the proposed rule and its “wide-ranging unintended and detrimental consequences.”¹³⁶

■ Proposed Broadening Of The Deemed Export Rule

On March 28, 2005, the BIS published an advanced notice of proposed rulemaking, titled “Revision and Clarification of Deemed Export Related Regulatory Requirements,” that, if adopted, would require U.S. companies to obtain deemed export licenses for certain foreign national employees currently not covered under the EAR’s “deemed export” rule.¹³⁷

The proposed rule would make a number of substantial modifications to the current deemed export rule. Most importantly, the proposed rule would redefine the term “home country” to mean an individual’s *country of birth* rather than the individual’s country of citizenship or permanent residence. Accordingly, a Chinese national who has obtained citizenship or permanent residency in Canada would, under the proposed rule, be considered a Chinese national, not a Canadian citizen or permanent resident alien, for purposes of deemed export licensing requirements. Under the current deemed export rule, an individual’s “most recent” citizenship or permanent residency is controlling, such that a Chinese national who has obtained citizenship or permanent residency in Canada would be considered a Canadian citizen or permanent resident alien, not a Chinese national, for purposes of deemed export licensing requirements. Accordingly, if the proposed rule is implemented, U.S. companies, including Government contractors, may be required to obtain deemed export

licenses for many of their foreign national employees who, currently, do not require deemed export licenses.

The proposed rule would have a significant impact on foreign workers hired by U.S. companies to work in the United States under nonimmigrant visas (e.g., H-1B, L-1, H-3, or F-1 visas). If the proposed rule is adopted, U.S. companies will be required not only to determine a foreign employee's citizenship or permanent residency status, but also the foreign employee's country of birth. Because U.S. law generally prohibits an employer from inquiring into an applicant's place of birth or immigration status, beyond whether an applicant has the right to work in the United States, it could be difficult for U.S. companies to obtain this information.

The proposed rule, in its current form, would not affect foreign employees who have obtained U.S. citizenship or permanent resident status. Any individual, regardless of country of birth, who has obtained U.S. citizenship or permanent resident status would continue to be considered a "U.S. person" for purposes of deemed export licensing requirements.

The BIS received over 300 comments in response to the proposed rule. Comments were submitted by a wide variety of entities, including private companies (e.g., Boeing, Dow Chemical, 3M, Intel, and IBM), academic institutions (e.g., MIT, Harvard, Stanford), and Government agencies (e.g., National Aeronautics and Space Administration, National Science Foundation, the National Laboratories), and most of the comments expressed concern about, or opposition to, the proposed rule. The primary concern expressed by those opposed to the proposed rule is that it will impose additional financial and administrative burdens on U.S. companies by requiring them to inquire into and obtain country of birth information for each of their foreign national employees and, more importantly, will make it more difficult for U.S. companies, universities, and research institutions to recruit and employ skilled foreign nationals. It is unclear whether the BIS will adopt the proposed rule in its current form or whether, given the substantial opposition to the rule from the private sector, academia, and some U.S. Government agencies, the BIS will instead revise or decline to adopt the rule.

GUIDELINES

These *Guidelines* are designed to assist you in understanding U.S. export control compliance requirements. They are not, however, a substitute for professional representation in any specific situation.

1. All Government contractors should determine whether any of their products (items and software), services, or technology are controlled under the EAR or ITAR. If a Government contractor is uncertain whether a particular product or technology is controlled under the EAR or ITAR, the Government contractor should file a commodity jurisdiction request with the DDTC.

2. If a Government contractor believes that some of its products or technologies are controlled under the EAR, the Government contractor should determine the ECCN for each such product or technology. Frequently, a Government contractor will be able to self-

classify its products and technologies, provided that the contractor has personnel sufficiently familiar with the EAR and Commerce Control List. Alternatively, a Government contractor can file a classification request (which is different from a commodity jurisdiction request) with the BIS. The BIS will provide the Government contractor with the appropriate ECCN for each product or technology submitted for classification.

3. If a Government contractor determines that some of its products, services, or technology are controlled under the EAR or ITAR, the Government contractor should determine whether BIS or DDTC export licenses are required for the export or transfer of those products, services, or technology. Generally, a DDTC license or other approval will be required for all exports and transfers of ITAR-controlled products, services, or technology, with some exceptions. A BIS license may or may not be

required for the export or transfer of EAR-controlled products or technology, depending upon the intended destination, end-use, and end-user.

4. All Government contractors that produce, develop, or otherwise deal with EAR- or ITAR-controlled products, services, or technology should implement and maintain an effective export compliance program. As discussed above, proposed DOD revisions to the DFARS would require all DOD contractors to maintain effective export compliance programs, conduct initial and periodic training of appropriate employees, and perform periodic assessments to ensure compliance with the EAR and ITAR. A required element of an effective export compliance program is the appointment of an Export Compliance Officer and, if ITAR-controlled products, services, or technology are involved, an Empowered Official to oversee compliance with the EAR and ITAR.

5. All Government contractors that produce, develop, or otherwise deal with EAR- or ITAR-controlled products, services, or technology should be aware of the “deemed export” rule. As discussed above, if an export license is required to export software or technology directly to a particular country, an export license is also required to transfer or otherwise release that software or technology to foreign nationals of that country in the United States or third countries. The deemed export rule frequently applies to foreign national employees of Government contractors and other companies in the United States, but the rule applies equally to site visits by foreign nationals and other situations whether EAR- or ITAR-controlled software or technology may be released to foreign nationals. As discussed above, proposed DOD revisions to the DFARS would require DOD contractors to adopt measures to ensure compliance with the deemed export rule. Specifically, DOD contractors would be required to ensure that their export compliance programs include adequate controls over physical, visual, and electronic access to export-controlled information and technology to ensure that access by foreign firms and individuals is restricted

as required by the EAR and ITAR. DOD contractors also would be required to maintain access control plans that include unique badging requirements for foreign nationals and segregated work areas for export-controlled information and technology.

6. All Government contractors that export their products, services, or technology overseas should be aware of the following examples of “red flags” provided by the BIS at <http://www.bis.doc.gov/complianceand enforcement/RedFlagIndicators.htm>:

- (a) The customer or its address is similar to one of the parties found on a U.S. Government list of sanctioned parties, including the BIS Entity List, BIS Denied Persons List, DDTC Debarred Parties List, or OFAC list of Specially Designated Nationals and Blocked Persons.
- (b) The customer, distributor or purchasing agent is reluctant to offer information about the intended end-use or end-user of the item.
- (c) The product’s capabilities do not fit the customer’s line of business, e.g., an order for sophisticated computers for a small bakery.
- (d) The item ordered is incompatible with the technical level of the country to which it is being shipped, e.g., semiconductor manufacturing equipment being shipped to a country that has no electronics industry.
- (e) The customer is willing to pay cash for a very expensive item when the terms of sale would normally call for financing.
- (f) The customer has little or no business background.
- (g) The customer is unfamiliar with the product’s performance characteristics but still wants the product.
- (h) Routine installation, training, or maintenance services are declined by the customer.

- (i) Delivery dates are vague, or deliveries are planned for out of the way destinations.
- (j) A freight forwarding firm is listed as the product's final end-user.
- (k) The shipping route is abnormal for the product and destination.
- (l) Packaging is inconsistent with the stated method of shipment or destination.
- (m) When questioned, the customer is evasive and especially unclear about whether the purchased product is for domestic use, for export, or for reexport.

7. If one or more “red flags” is present, a Government contractor has a duty to investigate the suspicious circumstances and inquire about the end-use, end-user, or ultimate country of destination. Government contractors should not engage in “willful blindness” by cutting off the flow of information that comes in the normal course of business, such as by instructing employees to tell potential customers to refrain from discussing the actual end-use, end-user and ultimate country of destination of items being exported. The BIS provides “Know your Customer Guidance” at <http://www.bis.doc.gov/enforcement/knowcust.htm>.

★ REFERENCES ★

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| <ul style="list-style-type: none"> 1/ See generally Burgett & Sturm, “Foreign Nationals in U.S. Technology Programs: Complying With Immigration, Export Control, Industrial Security & Other Requirements,” Briefing Papers No. 00-3 (Feb. 2000). 2/ 15 C.F.R. pts. 730–774. 3/ 50 U.S.C.A. app. § 2401 et seq. 4/ 50 U.S.C.A. §§ 1701–1706. 5/ See Exec. Order No. 13,222 (Aug. 17, 2001), 66 Fed. Reg. 44,025 (Aug. 22, 2001). 6/ 15 C.F.R. § 734.2(b)(1). 7/ 15 C.F.R. § 734.2(b)(4). 8/ 15 C.F.R. § 772.1. 9/ 15 C.F.R. § 734.3(a)(1). 10/ 15 C.F.R. § 734.3(a)(2). 11/ 15 C.F.R. § 734.3(a)(3). 12/ 15 C.F.R. § 734.3(a)(4) (defining “direct product” to mean “the immediate product (including processes and services) produced directly by the use of technology or software”) 13/ 15 C.F.R. § 734.3(a)(5). 14/ 15 C.F.R. § 734.4. 15/ 15 C.F.R. § 734.3(b)(1). 16/ 15 C.F.R. § 734.3(b)(2). | <ul style="list-style-type: none"> 17/ 15 C.F.R. § 734.3(b)(3). 18/ 15 C.F.R. § 734.3(b)(4). 19/ See, e.g., Press Release, U.S. Attorney’s Office District of Connecticut, “Grand Jury Returns Superseding Indictment Charging California Man, Companies With Unlawfully Shipping to Iran” (Feb. 2, 2005), available at http://www.usdoj.gov/usao/ct/Press2005/20050202-3.html. 20/ See 15 C.F.R. § 764.3(a). 21/ See, e.g., Press Release, U.S. Department of Commerce, BIS, “Illinois Company and Two Foreign Affiliates Settles Charges Relating to Illegal Exports” (Feb. 24, 2004), available at http://www.bis.doc.gov/News/2004/MortonIntl2_24.htm. 22/ See 15 C.F.R. § 764.3(b). 23/ 15 C.F.R. § 764.3(b)(2)(iv). 24/ 15 C.F.R. pt. 774, Supp. 1. 25/ 15 C.F.R. § 730.3. 26/ 15 C.F.R. § 734.3(c). 27/ 15 C.F.R. pt. 774, Supp. 1. 28/ See 31 C.F.R. ch. 5. 29/ See 15 C.F.R. pt. 774, Supp. 1. 30/ 15 C.F.R. pt. 738, Supp. 1. 31/ 15 C.F.R. pt. 740. 32/ 15 C.F.R. § 740.3. |
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- 33/ 15 C.F.R. § 740.9.
- 34/ 15 C.F.R. § 740.14.
- 35/ 15 C.F.R. § 740.11.
- 36/ 15 C.F.R. § 740.11(b)(2)(ii).
- 37/ 15 C.F.R. § 740.11(b)(2)(i).
- 38/ 15 C.F.R. § 740.11(b)(2)(iii)(A). For purposes of License Exception GOV, U.S. allies, or “cooperating countries,” include Argentina, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, South Korea, Sweden, Switzerland, Taiwan, Turkey, and the United Kingdom. See 15 C.F.R. pt. 740, Supp. 1.
- 39/ 15 C.F.R. § 740.11(b)(2)(iv)(A).
- 40/ 15 C.F.R. § 740.11(a)(1).
- 41/ 15 C.F.R. pt. 736.
- 42/ 15 C.F.R. § 736.2(b)(1)–(3).
- 43/ 15 C.F.R. § 736.2(b)(4).
- 44/ See <http://www.bis.doc.gov/dpl/thedeniallist.asp>.
- 45/ See <http://www.bis.doc.gov/Entities/Default.htm>.
- 46/ See <http://www.treas.gov/offices/enforcement/ofac/sdn/>.
- 47/ 15 C.F.R. § 736.2(b)(5), (7).
- 48/ See *United States v. Hitt*, 249 F.3d 1010 (D.C. Cir. 2001).
- 49/ *Id.* at 1023.
- 50/ See Press Release, U.S. Department of Commerce, BIS, “Commerce Department Imposes \$2.12 Million Civil Penalty on McDonnell Douglas for Alleged Export Control Violations” (Nov. 14, 2001), available at <http://www.bis.doc.gov/news/archive2001/McDonnellDouglasFined.htm>.
- 51/ 15 C.F.R. § 736.2(b)(6).
- 52/ Cuban Assets Control Regulations, 31 C.F.R. pt. 515.
- 53/ Iranian Transactions Regulations, 31 C.F.R. pt. 560.
- 54/ Sudanese Sanctions Regulations, 31 C.F.R. pt. 538.
- 55/ Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, Pub. L. No. 175, 117 Stat. 2482 (Dec. 12, 2003); Exec. Order No. 13,338 (May 11, 2004), 69 Fed. Reg. 26,751 (May 13, 2005).
- 56/ 15 C.F.R. § 736.2(b)(8).
- 57/ 15 C.F.R. § 736.2(b)(9).
- 58/ 15 C.F.R. § 736.2(b)(10).
- 59/ 15 C.F.R. § 734.2(b)(2)(ii).
- 60/ 15 C.F.R. § 734.2(b)(2)(ii).
- 61/ 15 C.F.R. § 734.2(b)(5).
- 62/ 15 C.F.R. § 772.1.
- 63/ 15 C.F.R. § 772.1.
- 64/ 15 C.F.R. § 734.2(b)(2)(ii).
- 65/ 15 C.F.R. § 734.2(b)(3).
- 66/ 15 C.F.R. § 772.1.
- 67/ 15 C.F.R. § 764.3(a)(1). The \$10,000 maximum civil penalty per violation specified in the EAR is adjusted periodically pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990). The current maximum civil penalty per violation is \$11,000.
- 68/ 15 C.F.R. § 764.3(a)(2); see <http://www.bis.doc.gov/DPL/StandardOrders.htm>.
- 69/ 15 C.F.R. § 764.3(b)(1).
- 70/ 15 C.F.R. § 764.3(b)(2).
- 71/ 15 C.F.R. § 764.3(c)(2); see FAR 9.407-2.
- 72/ 22 C.F.R. pts. 120–130.
- 73/ 22 U.S.C.A. § 2778 et seq.
- 74/ 15 C.F.R. § 730.3.
- 75/ 22 C.F.R. § 120.6.
- 76/ 22 C.F.R. § 121.1(a); see 22 U.S.C. §§ 2778, 2794(7).
- 77/ 22 C.F.R. § 121.1, Category VIII(a).
- 78/ 22 C.F.R. § 121.1, Category VIII(h).
- 79/ See 22 C.F.R. § 121.1, Category VIII(h).

- 80/ See Peck, "Easily Imported Trouble in Export Controls," 1 Military Aerospace Tech. Issue 5 (Oct. 1, 2002), available at <http://www.military-aerospace-technology.com/article.cfm?DocID=296>.
- 81/ 22 C.F.R. § 120.4.
- 82/ 22 C.F.R. § 120.4(c).
- 83/ 22 C.F.R. § 120.4(d)(1).
- 84/ 22 C.F.R. § 120.9(a)(1).
- 85/ 22 C.F.R. § 120.9(a)(2).
- 86/ 22 C.F.R. § 120.9(a)(3).
- 87/ 22 C.F.R. § 120.16.
- 88/ 22 C.F.R. § 120.10(a)(1).
- 89/ 22 C.F.R. § 120.10(a)(2).
- 90/ 22 C.F.R. § 120.10(a)(3).
- 91/ 22 C.F.R. § 120.10(a)(4).
- 92/ 22 C.F.R. § 120.10(a)(5).
- 93/ 22 C.F.R. § 120.11.
- 94/ 22 C.F.R. § 120.15.
- 95/ 22 C.F.R. §§ 120.19, 127.1(a)(3).
- 96/ See 22 C.F.R. § 127.10; 22 U.S.C.A. § 2778(e).
- 97/ See 22 C.F.R. § 127.3(a); 22 U.S.C.A. § 2778(c).
- 98/ 22 C.F.R. § 127.1(a)(3).
- 99/ 22 C.F.R. § 122.1(a).
- 100/ 22 C.F.R. § 122.1(a).
- 101/ 22 C.F.R. §§ 129.2(b), 129.3(a).
- 102/ 22 C.F.R. § 122.1(c).
- 103/ 22 C.F.R. § 122.1(c).
- 104/ 22 C.F.R. § 122.4(a).
- 105/ 22 C.F.R. § 122.4(a).
- 106/ 22 C.F.R. § 122.4(b).
- 107/ See 22 C.F.R. § 122.1.
- 108/ 22 C.F.R. § 120.25.
- 109/ 22 C.F.R. § 120.17(1).
- 110/ 22 C.F.R. § 120.17(2).
- 111/ 22 C.F.R. § 120.17(3).
- 112/ 22 C.F.R. § 120.17(4).
- 113/ 22 C.F.R. § 120.17(5).
- 114/ 22 C.F.R. § 123.1(a).
- 115/ 22 C.F.R. § 123.1(a).
- 116/ 22 C.F.R. § 123.1(c).
- 117/ See U.S. Department of State, DDTC, "Defense Trade Controls—License Processing Times," at <https://pmdtc.org/processtime.htm>.
- 118/ 22 C.F.R. § 123.21(a).
- 119/ 22 C.F.R. § 120.21.
- 120/ 22 C.F.R. § 120.22.
- 121/ 22 C.F.R. § 124.1(a).
- 122/ 22 C.F.R. § 123.16(a).
- 123/ 22 C.F.R. § 123.16(b)(1).
- 124/ 22 C.F.R. § 123.16(b)(2).
- 125/ 22 C.F.R. § 123.16(b)(4).
- 126/ 22 C.F.R. § 126.5(b) (defining "Canadian-registered person" as any Canadian national (including Canadian business entities organized under the laws of Canada), dual national, and permanent resident registered in Canada in accordance with the Canadian Defense Production Act).
- 127/ 22 C.F.R. § 126.4(c).
- 128/ 22 C.F.R. § 126.6(c).
- 129/ 22 C.F.R. § 120.17(a)(4).
- 130/ 22 C.F.R. § 120.10(a)(1).
- 131/ 22 C.F.R. § 127.10; 22 U.S.C.A. § 2778(e).
- 132/ 22 C.F.R. § 127.3; 22 U.S.C.A. § 2778(c).
- 133/ 22 C.F.R. § 127.7.
- 134/ 70 Fed. Reg. 39,976 (July 12, 2005).
- 135/ 48 C.F.R. ch. 1.
- 136/ Letter from U.S. Senators Jeff Bingaman and Lamar Alexander to Kenneth Kreig, Undersecretary for Acquisition, Technology, and Logistics, U.S. Department of Defense (Oct. 12, 2005).
- 137/ 70 Fed. Reg. 15,607 (Mar. 28, 2005).

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