

# EXPORT ESSENTIALS: YOUR GUIDE TO THE FUNDAMENTALS OF EXPORT LAWS AND LICENSING



**PATTON BOGGS** LLP  
ATTORNEYS AT LAW

Giovanna M. Cinelli, Partner

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## STATUTE

- Arms Export Control Act (“AECA”), 22 U.S.C. App. §§ 2778, *et seq.*
  - ❖ Grants President:
    - Control over the export and import of defense articles and services;
    - Authority to designate items on the United States Munitions List (“USML”); and
    - Authority to issue export licenses
    - Delegates control over defense articles, services and data to the Secretary of State, who may confer with the Secretary of Defense



## DIRECTORATE OF DEFENSE TRADE CONTROLS (“DDTC”)

- **Mission:** To “[a]dvance national strategic objectives and U.S. foreign policy goals through timely enforcement of defense trade controls and the formulation of defense trade policy.”
  - ❖ Administers the ITAR
  - ❖ Issues licenses
  - ❖ Administers the USML



## DIRECTORATE OF DEFENSE TRADE CONTROLS (“DDTC”)

- ❖ Enforces, in conjunction with the Customs Service, the Immigration and Customs Enforcement (“ICE”) agency, the AECA and ITAR
- ❖ Administers registration program for brokers, manufacturers and exporters of defense articles, services and technical data
- ❖ Submits reports to Congress concerning defense trade



## INTERNATIONAL TRAFFIC IN ARMS REGULATIONS (“ITAR”), 22 C.F.R. §§ 120 - 130

- Executive Order 11958 authorizes drafting of the ITAR
- ITAR Sections:
  - ❖ § 120 -- Purpose and Definitions
  - ❖ § 121 -- The United States Munitions List (USML)
  - ❖ § 122 -- Registration of Manufacturers and Exporters



## INTERNATIONAL TRAFFIC IN ARMS REGULATIONS (“ITAR”), 22 C.F.R. §§ 120 - 130

- ITAR Sections: (cont'd)
  - ❖ § 123 -- Licenses for the Export of Defense Articles
  - ❖ § 124 -- Agreements, Off-Shore Procurement and Other Defense Services
  - ❖ § 125 -- Licenses for the Export of Technical Data and Classified Defense Articles
  - ❖ § 126 -- General Policies and Provisions



## INTERNATIONAL TRAFFIC IN ARMS REGULATIONS (“ITAR”), 22 C.F.R. §§ 120 - 130

- ITAR Sections: (cont'd)
  - ❖ § 127 -- Violations and Penalties
  - ❖ § 128 -- Administrative Procedures
  - ❖ § 129 -- Registration and Licensing of Brokers
  - ❖ § 130 -- Political Contributions, Fees and Commissions



## INTERNATIONAL TRAFFIC IN ARMS REGULATIONS (“ITAR”), 22 C.F.R. §§ 120 - 130

- Controls items subject to the ITAR:
  - ❖ *“The President is authorized to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List.” 50 U.S.C. App. §§ 2778*



## INTERNATIONAL TRAFFIC IN ARMS REGULATIONS (“ITAR”), 22 C.F.R. §§ 120 - 130

- ❖ Administers the commodity jurisdiction process, which partially implements the President’s authority to designate items on the USML
- ❖ Coordinates with Defense



## INTERNATIONAL TRAFFIC IN ARMS REGULATIONS (“ITAR”), 22 C.F.R. §§ 120 - 130

- Premised on Licenses and/or Policy of Denial
  - ❖ “Rule of Thumb:” Licenses are required for most activities and/or transactions
  - ❖ Presumption of denial on the basis of end-user, end use, and/or destination: § 126.1
    - Destination: Belarus, Cuba, Iran, Libya, North Korea, Syria and Vietnam
    - Arms embargo: Burma, People’s Republic of China (“PRC”), Haiti, Liberia, Somalia, and Sudan



## INTERNATIONAL TRAFFIC IN ARMS REGULATIONS (“ITAR”), 22 C.F.R. §§ 120 - 130

- ❖ Presumption of denial on the basis of end-user, end use, and/or destination: § 126.1
  - Generally: Whenever activity or transactions are not in furtherance of world peace, security or the foreign policy of the U.S.



## LICENSING

- Obtain Prior to Activity

Generally, any person or company who intends to export or temporarily import a defense article must obtain the approval of DDTC prior to conducting the activity. The appropriate license application must be submitted to seek approval.



## LICENSING

- Registration: Prerequisite to any authorizations granted or used under the ITAR - § 122
  - ❖ All U.S. persons that manufacture or export defense article, furnish defense services, or U.S. and foreign persons engaged in arms brokering
  - ❖ Does not confer any export privileges
  - ❖ Prerequisite to export licensing approval



## LICENSING

- Registration (cont'd):
  - ❖ Legal status, export eligibility, foreign ownership/affiliations, legally responsible personnel, areas of activity
  - ❖ Informs the U.S. Government about the U.S. defense industrial base



# LICENSING

- Purpose of Licensing
  - ❖ To provide insight into transfers of or activities related to defense articles, services and/or related data
  - ❖ To control the scope of approved activities subject to the ITAR through the issuance of limitations and provisos



## LICENSING

- Purpose of Licensing (cont'd)
  - ❖ To provide and impose recordkeeping
  - ❖ To provide a framework for reporting



# LICENSING

- Elements:
  - ❖ Registration of parties
  - ❖ Determination of USML category
  - ❖ Determine scope of activity to be licensed
  - ❖ Analyze licensing options:
    - DSP-5: Permanent export of unclassified defense articles and technical data
    - DSP-73: Temporary export of unclassified USML items



## LICENSING

- ❖ Analyze licensing options:
  - DSP-61: Temporary import of unclassified USML items
  - DSP-85: Classified exports
  - Technical Assistance Agreements (“TAA”): Transfer/export/ import of defense services and technical data; also authorizes defense article exports in rare circumstances
  - Manufacturing License Agreements (“MLA”): Authorizes the transfer of technical data, defense services and defense articles (rarely) sufficiently detailed to permit the manufacture of USML items



## LICENSING

- ❖ Complete appropriate license request and submit with supporting documentation
- ❖ Receive license approval
- ❖ Analyze provisos, limitations or other actions taken by DDTC
- ❖ Conduct activity pursuant to authorizations
- ❖ Return exhausted/used/expired authorizations
- ❖ Maintain records
- ❖ Submit any required reports



# LICENSING

- Licensing Requests
  - ❖ DSP-5:



# LICENSING

- Licensing Requests
  - ❖ DSP-61:



# LICENSING

- Licensing Requests
  - ❖ DSP-73:



# LICENSING

- Licensing Requests
  - ❖ DSP-85



## EXEMPTIONS

- § 125.4(b)
- § 126.3 Exceptions
  - ❖ Exceptional or undue hardship
  - ❖ Or in the interest of the United States Government



## EXEMPTIONS

- § 126.4 Shipments by or for United States Government agencies
  - ❖ Temporary import, or temporary export, of any defense article, including technical data
  - ❖ Performance of a defense service, by or for any agency of the U.S. Government for official use by the agency
  - ❖ Foreign assistance, cooperative project or sales program authorized by law and subject to control by the President



# EXEMPTIONS

- § 126.5 Canadian Exemption



## EXEMPTIONS

- § 126.6 Foreign-owned Military Aircraft and Naval Vessels, and the Foreign Military Sales Program
  - ❖ Foreign-owned military aircraft and naval vessels, and the Foreign Military Sales program



## AGREEMENTS

- Generally
  - ❖ Used to authorize transfers of defense services and technical data related to USML items or to services provided
  - ❖ Scope of activities, destination and parties involved generally determine how the agreement is drafted
  - ❖ Must be obtained prior to any export/transfer



## AGREEMENTS

- Generally (cont'd)
  - ❖ Government generally issues limitations and provisos to any approvals
  - ❖ Usually lasts up to ten years



## AGREEMENTS

- Technical Assistance Agreement (“TAA”)
  - ❖ An agreement for the performance of a defense service(s) or the disclosure of technical data
  - ❖ Does *not* grant a right or license to manufacture defense articles



## AGREEMENTS

- TAA (cont'd)
  - ❖ Assembly of defense articles is included, provided no production rights or manufacturing know-how are conveyed
  - ❖ Should such rights be transferred, a Manufacturing License Agreement would be required



## AGREEMENTS

- Manufacturing License Agreement (“MLA”)
  - ❖ U.S. person grants a foreign person an authorization to manufacture defense articles abroad and which involves or contemplates:
    - The export of technical data (as defined in § 120.10) 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
  - ❖ Letter format, four year standard duration



## AGREEMENTS

- Elements of the TAA and MLA Package
  - ❖ Transmittal Letter per § 124.12
  - ❖ One original Certification Letter per § 126.13 signed by an empowered official
  - ❖ Proposed agreement
  - ❖ Required § 124.7 information contained within the main body of the agreement
  - ❖ Required §§ 124.8 and 124.9 clauses (if applicable) contained within the main body of the agreement



## AGREEMENTS

- Elements of the TAA and MLA Package
  - ❖ Signature block for each party at end of main body of the agreement
  - ❖ Attachments, appendices or annexes (*i.e.*, such as Statement of Work, defense articles to be exported)
  - ❖ Supporting technical data, white paper, etc. (*i.e.*, relevant to technology export issues)



## DEFINITIONS

- Export (§ 120.17)
  - ❖ Sending or taking a defense article out of the United States in any manner
  - ❖ Disclosing or transferring in the United States any defense article to an embassy or any agency or subdivision of a foreign government
  - ❖ Disclosing or transferring technical data to a foreign person, even in the United States or in a foreign diplomatic mission or consular office
  - ❖ Performing a defense service for a foreign person, even in the United States



## DEFINITIONS

- U.S. Person (§ 120.15)
  - ❖ “a person who is a lawful permanent resident as defined by 8 U.S.C. 1101(a)(20) or who is a protected individual as defined by 8 U.S.C. 1324b(a)(3)”
  - ❖ includes any corporation, business association, partnership, society, trust, or any other entity, organization or group incorporated to do business in the United States
  - ❖ includes any governmental (federal, state or local) entity
  - ❖ does **not** include any foreign person defined in § 120.16



## DEFINITIONS

- Foreign Person (§ 120.16)
  - ❖ “any natural person who is not a lawful permanent resident as defined by 8 U.S.C. 1101(a)(20) or who is not a protected individual as defined by 8 U.S.C. 1324b(a)(3)”
  - ❖ includes any foreign corporation, business association, partnership, trust, society or any other entity or group not incorporated or organized to do business in the U.S.
  - ❖ includes international organizations, foreign governments and any agency or subdivision of foreign governments (e.g., diplomatic missions)



## DEFINITIONS

- Defense Service (§ 120.9)
  - ❖ furnishing assistance (e.g., training) to a foreign person in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing, or use of *defense articles*; or
  - ❖ furnishing ITAR-controlled *technical data* to foreign persons



## DEFINITIONS

- Defense Service (cont'd)
  - ❖ Defense services may be provided:
    - With technical data
    - With public domain information
    - See ITAR § 124.1(a). See also, *Loral Settlement Agreement* (2002); *Boeing/Hughes Settlement Agreement* (2003); *MultiGen-Paradigm, Inc. Settlement Agreement* (2003); and *EDO Corporation Settlement Agreement* (2003)



## DEFINITIONS

- Technical Data (§ 120.10)
  - ❖ Information *required* for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification of defense articles (emphasis added)
  - ❖ Classified information relating to defense articles and defense services



## DEFINITIONS

- Technical Data (cont'd)
  - ❖ Information covered by an invention secrecy order
  - ❖ Software (except data encryption) directly related to defense articles
  - ❖ Information does not necessarily have to be significant or substantial to affect the definition of technical data



## DEFINITIONS

- Public Domain (§ 120.11)
  - ❖ *Information published and generally accessible or available to the public* through:
    - Sales at newsstands and bookstores
    - Subscriptions which are available without restriction
    - Libraries open to the public or from which the public can obtain documents
    - Patents available at any patent office
    - Unlimited distribution at a conference, trade show or exhibition, generally accessible to the public, in *the United States*



## DEFINITIONS

- Public Domain (cont'd)
  - Public release *in any form* after approval by the cognizant U.S. Government department or agency
  - *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* in the *scientific community*
  - The mere placement of information on the Internet *does not* automatically render the information “public domain”



## DEFINITIONS

- Temporary Import (§ 120.18)
  - ❖ *Temporary import* means bringing into the United States from a foreign country any defense article that is to be returned to the country from which it was shipped or taken, or any defense article that is in transit to another foreign destination. Temporary import includes withdrawal of a defense article from a customs bonded warehouse or foreign trade zone for the purpose of returning it to the country of origin or country from which it was shipped or for shipment to another foreign destination. Permanent imports are regulated by the Attorney General under the direction of the Department of Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives



## DEFINITIONS

- Reexport or Retransfer (§ 120.19)
  - ❖ *Reexport or retransfer* means the transfer of defense articles or defense services to an end use, end user or destination not previously authorized



## DEFINITIONS

- Empowered Official (§ 120.25)
  - ❖ *Empowered Official* means a U.S. person who:
    - Is directly employed by the applicant or a subsidiary in a position having authority for policy or management within the applicant organization; and
    - Is legally empowered in writing by the applicant to sign license applications or other requests for approval on behalf of the applicant; and



## DEFINITIONS

- Empowered Official (cont'd)
  - Understands the provisions and requirements of the various export control statutes and regulations, and the criminal liability, civil liability and administrative penalties for violating the Arms Export Control Act and the International Traffic in Arms Regulations; and



## DEFINITIONS

- Empowered Official (cont'd)
  - Has the independent authority to:
    - Enquire into any aspect of a proposed export or temporary import by the applicant, and
    - Verify the legality of the transaction and the accuracy of the information to be submitted; and
    - Refuse to sign any license application or other request for approval without prejudice or other adverse recourse



## DEFINITIONS

- Manufacturing License Agreement (§ 120.21)
  - ❖ 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 (as defined in §120.10) 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. (See § 124 of this subchapter)



## DEFINITIONS

- Technical Assistance Agreement (§ 120.22)
  - ❖ An agreement (e.g., contract) for the performance of a defense service(s) or the disclosure of technical data, as opposed to an agreement granting a right or license to manufacture defense articles. Assembly of defense articles is included under this section, provided production rights or manufacturing know-how are not conveyed. Should such rights be transferred, § 120.21 is applicable