



Tuesday, October 20
4:30 pm–6:00 pm

1008 Primer on International Trade Laws

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Faculty Biographies

Lauren Camilli

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Peter Lichtenbaum

Peter Lichtenbaum is vice president, regulatory compliance and international policy, BAE Systems Inc. His responsibilities include compliance and policy matters relating to defense trade controls, national security reviews of foreign investments, and other international issues.

Before joining BAE, he served as assistant secretary of commerce for Export Administration, and also served as acting under secretary for Industry and Security and as acting deputy under secretary for International Trade. At the Commerce Department, he administered the US dual-use export control system, participated in policy reviews of foreign investments in the United States, and managed programs relating to the US defense industrial base. He previously was a partner at Steptoe & Johnson in Washington, where he practiced international trade law.

He is a graduate of Harvard Law School and Harvard's Kennedy School of Government.

Susan Terranova

Susan Terranova is a senior attorney in the penalties branch in the Customs and Border Protection (CBP) Office of International Trade, Regulations and Rulings (R&R), which renders administrative decisions in customs cases involving seizures of merchandise and the assessment of monetary penalties and liquidated damages for any violations of the customs laws or the laws of other federal agencies. She is the author of the customs national guidelines for mitigation of export control violations, including the mitigation guidelines for civil penalties incurred for violations of the Foreign Trade Regulations, as well as several policy statements in this area. She has represented CBP in various private industry, other U.S. government agency and foreign government seminars. She is also an R&R attorney lecturer at the Federal Law Enforcement Training Centers' classes for CBP officers, Fines and Penalties Officers and paralegal specialists.

Ms. Terranova received a BA from Boston College and a JD from New England School of Law.

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I. The Export Administration Regulations ("EAR"), 15 C.F.R. Part 768 et seq. Key EAR Principles

- The EAR applies to goods, software and technology
- U.S. and non-U.S. persons alike are subject to the EAR
- The EAR applies to exports, re-exports and transshipments
- Licenses are often not required for exports/re-exports – it depends on **what** is being exported, and to **whom**, to **where**, and for **what purpose** the item is being exported or re-exported
- Export licenses are almost always required for exports to sanctioned countries, and are usually not granted
- There are significant penalties for non-compliance

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What is Subject to the EAR?

- The first step in complying with the EAR is determining whether a given export or re-export is "subject" to the EAR.
 - Most items (goods, software, or technology) in the United States (regardless of level of technical sophistication), even if of foreign origin (unless subject to the ITAR);
 - U.S.-origin items (goods, software, and technology), wherever located;
 - Certain foreign-produced products produced from U.S. technology;
 - Foreign-produced items "incorporating" more than "de minimis" U.S.-origin content

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What is Not Subject to the EAR?

- Any item, including technology, that is wholly non-U.S.-origin and that is outside the United States
- Items subject to State Department defense trade controls
- **Publicly Available Information:** generally accessible to the interested public in any form, at a price not to exceed cost of production and distribution
- **Educational Information**, which is released by instruction in:
 - catalog courses
 - teaching laboratories associated with academic institutions
 - Note: this does not include proprietary courses
- **Patent Information**
 - public information available in any patent applications and open patents
- **Fundamental Research**
 - "basic and applied research in science and engineering where the resulting information is ordinarily published and broadly shared within the scientific community"

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What is "Controlled" Under the EAR?

- Most items in the United States and all items of U.S.-origin located abroad are subject to the EAR
- However . . .
 - Not all such items are controlled for export or re-export, in that a license is required.
 - Whether an item requires a license depends on the item, the end user, the end use, and the destination

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How Do I Know if My Product is Controlled by the EAR?

- Export controls are based on the following:
 - The classification of the product.
 - The reason for control.
 - The destination of the export.
- The first step is proper classification of your product.
- Classification starts with the following question:
 - What possible categories on the Commerce Control List are relevant?

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The Commerce Control List

- The CCL is the comprehensive list of all dual-use items.
- Divided into ten categories. For example,
 - Category 1 - materials, chemicals, microorganisms, and toxins
 - Category 3 - electronics
 - Category 4 - computers
 - Category 5 - telecommunications/ information security (5A991)
- Each broad category contains different products organized by individual Export Control Classification Numbers (ECCN).

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Classification (cont.)

- Once you have determined the possible categories and product group, the question is: what are the physical characteristics, performance characteristics and application/use of the product, and do they fall within the scope of any individual ECCN?
- This is the hardest part of classification. It is critical that an individual with technical expertise be involved in this assessment.
- Classification is not easy: The extent of control on an item can depend on fine distinctions.
- This is complicated by the fact that the specifications used in ECCNs do not always correspond to specifications used in industry.

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What if My Product Doesn't Fit Into Any ECCN?

- At the end of each Category, there is a different type of classification, EAR-99.
- EAR-99 serves as a "basket" designation for items subject to the EAR, but not specifically described by any ECCN on the CCL.
- If this is where your product falls, then no license is required unless:
 - the end-use or end-user is controlled, or the export is to an embargoed destination

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What if I am not sure of the proper classification of my product?

- Exporters can request an official commodity classification from BIS.
- BIS will review the product and determine the appropriate ECCN.
- If BIS misclassifies the product, the exporter is not liable for any related export violations.

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End-user Controls/End-use Control

- U.S. economic sanctions and export control laws restrict or prohibit exports and re-exports to certain persons and entities based on one of two main reasons:
 - the activities of that person or entity (for example, chemical and biological weapons proliferation), or
 - that person or entity is subject to administrative or economic sanctions (for example, a person considered to be a terrorist organization, or an entity on the Denied Party List).
- It is critical that exporters screen against the various lists of prohibited or restricted end users prior to exporting any goods, services or technology.

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End-user Controls/End-use Control

- These agencies provide their own list or lists: BIS, OFAC, and the State Department's Directorate of Defense Trade Controls ("DDTC").
- These lists can change frequently, exporters should therefore check these agencies' websites as well as the Federal Register frequently for recent updates.

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Denied and Debarred Parties

- BIS maintains the Denied Persons List. These persons and entities are subject to Denial Orders, meaning that these parties are denied export privileges and may not receive or be shipped items subject to the EAR.
- The State Department maintains a similar list called the Debarred Parties List, which is a list of persons denied export privileges for items subject to the ITAR.

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Entity List

- BIS can impose licensing requirements on exports and re-exports that otherwise would not require a license, if there is an unacceptable risk of use in or diversion to activities related to nuclear, chemical or biological weapons or missile proliferation, even if the end use of the exported item is not primarily weapons-related.
- The Entity List is a list of end-users that have been determined to engage in the proliferation of nuclear, chemical and biological weapons, or missile technology and delivery systems. The Entity List puts exporters on notice of export license requirements that apply to exports or re-exports to these entities.

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Unverified Parties List

- BIS also maintains the Unverified List, which are persons or entities who were parties to a transaction with respect to which BIS was unable to conduct a pre-license check or a post-shipment verification.
- Transactions involving parties on this list are deemed to raise a "red flag", and additional due diligence is therefore mandated before proceeding with a transaction.
- It is not prohibited to deal with persons or entities on this list if, in the course of due diligence, the transaction is determined to involve legitimate activities.

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"Know Your Customer" and Red Flags

- The EAR cautions exporters to "know your customer" in order to avoid unlawful diversion to prohibited end users or destinations that require licensing from either BIS or OFAC.
- To ensure that the exporter does not inadvertently get involved in the illegal diversion of the items that its exports or re-exports, it should take steps to confirm that its customers are seeking the items for legitimate purposes.
- In this regard, the exporter's employees should be aware of "red flags," which are signs of abnormal circumstances that indicate that an export may be illegal.
- Exporters that ignore red flags expose themselves to potential liability.

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Red Flags Include

- The destination party is listed on the BIS "unverified list."
- The customer or its address is similar to one of the parties found on the BIS's list of denied persons.
- The customer or purchasing agent is reluctant to offer information about the end-use of the item.
- The product's capabilities do not fit the buyer's line of business, such as an order for sophisticated computers for a small bakery.
- The item ordered is incompatible with the technical level of the country to which it is being shipped, such as semiconductor manufacturing equipment being shipped to a country that has no electronics industry.
- The customer is willing to pay cash for a very expensive item when the terms of sale would normally call for financing.
- The customer has little or no business background.

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Penalties and Enforcement

Recently increased penalties for violations of the U.S. export control regulations:

- Maximum civil penalties raised from \$50,000 to up to \$250,000 per violation, or twice the amount of the violative transaction
- For each willful violation by a company or individual, a criminal fine of up to \$1,000,000
- In addition, for each willful violation by an individual, imprisonment up to 20 years
- It shall be unlawful for a person to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under the statute

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II. The International Traffic in Arms Regulations ("ITAR"), 22 CFR Part 120 et seq.

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Focus of Defense Trade Controls:

- Export, retransfer and reexports of U.S. defense hardware and technical data
 - Also applies to temporary imports of defense articles into the United States.
- U.S. persons providing defense services
- Brokering of defense hardware

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Defense articles and technical data

- Described in U.S. Munitions List (USML) in the ITAR. 22 CFR Part 121.
- USML contains 21 categories of defense articles: e.g., military aircraft, night vision, equipment for communication satellites.
- USML also controls tech data directly related to the defense hardware.
- Equipment specifically designed for military use can be a defense article.

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Key regulatory requirements

- U.S. persons manufacturing or exporting defense articles must register with DDTC. 22 CFR Part 122.
- Almost all exports, retransfers, and re-exports of U.S. defense articles and tech data must be licensed by the State Department, Directorate of Defense Trade Controls (DDTC).
 - Transfer of tech data to a foreign person in the United States is an export.

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Defense Services

- U.S. persons assisting foreign persons to develop, produce, operate (etc.) defense articles.
- Also applies to military training
- Applies even where the assistance doesn't involve supply of a defense article or controlled tech data.

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Brokering

- Applies to U.S. persons who facilitate the manufacture, export or import of defense articles or defense services, regardless of origin. 22 CFR Part 129. E.g., financing, transporting, forwarding.
- Also applies to foreign persons who are "otherwise subject to U.S. jurisdiction"
- Brokers must register with State DDTC
- Brokers must seek prior approval for certain activities.

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Penalties

- Civil penalties up to \$500,000 per violation
- Possible debarment from ITAR activities, usually for up to three years
- Huge potential criminal penalties of \$1 million and 10 years imprisonment for corporations and individuals
- Some recent cases: ITT \$100M (2007), Boeing \$3M (2008); Lockheed \$4M (2008); Northrop Grumman \$15M (2008); Qioptiq \$25M (2008).

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III. Treasury (OFAC) Sanctions Programs

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Overview of U.S. Economic Sanctions Law

- Comprehensive Sanctions Schemes:
 - Iran and Sudan (excluding Southern Sudan)
 - Cuba: most restrictive
- Limited Sanctions Regimes:
 - Syria,
 - Burma (or Myanmar), and
 - North Korea
 - Diversion risk -- UAE
- Sanctions against Individuals/Entities: Blocked Persons and Specially Designated Nationals ("SDNs")
- Facilitation: U.S. persons prohibited from "facilitating" dealings by foreign persons

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Who is Subject to Economic Sanctions?

"U.S. Person" includes:

- U.S. corporations and all their employees, regardless of location and nationality
- U.S. citizens
- U.S. permanent residents (*i.e.*, green card holders)
- Any persons located in the United States
- Branch offices of U.S. corporations, including foreign branches
- For Cuba and North Korea: All foreign subsidiaries/controlled entities

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Potential Reach of U.S. Economic Sanctions Laws

- U.S. entities -- including non-U.S. citizens working for them
- U.S. personnel outside the United States, even if working for a non-U.S. company
- In some instances, foreign subsidiaries of U.S. companies
- In some instances, non-U.S. companies doing business with U.S. companies

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Sanctioned Persons or Entities

- OFAC's Specially Designated Nationals and Blocked Persons List ("SDNs")
 - Individuals or entities that are owned or controlled by or acting on behalf of sanctioned country, or who engage in activities contrary to U.S. interests
 - Transactions with SDNs are blocked, and must be reported in many instances
 - U.S. persons may not deal with an SDN in any way
 - Prohibitions extend to entities owned/controlled by an SDN

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Sanctioned Persons or Entities

- There are many reasons to get on the SDN list:
- *Anti-terrorism* Measures:
 - Persons involved in terrorist activities
- *Drug Trafficking*: Kingpin Act of 1991 and Foreign Narcotics Kingpin Sanctions Regulations
 - Latin America is key area of risk (e.g., Colombia)
- *For a variety of national security/foreign policy reasons*:
The list includes persons/entities from Cuba, Balkans, Belarus, Burma, Côte D'Ivoire, D.R. of Congo, Iran, former Iraqi Regime, Liberia, Sudan, Syria, Zimbabwe

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Key Take-Aways

- Easier to avoid direct contacts with sanctioned countries, harder to avoid violations arising from indirect contacts
- Facilitation rules are not meant to be a total secondary boycott:
 - U.S. companies can do business with – and own (except for Cuban sanctions) --companies that do business in sanctioned countries
 - Basic variables are: how much business does the third-country entity do in sanctioned countries, and what business is the U.S. company doing with the third-country entity?
- Due diligence, compliance programs and training essential

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What Do You Consider if There is a Possible Violation?

- Have to be very careful not to compound the problem
 - make sure there are no additional violations that occur as the activity is unwound
- Consider whether there are any blocking obligations
- Consider whether a voluntary disclosure is appropriate

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Penalties Increased Dramatically

- Increased penalties for OFAC violations
 - Civil Penalties increased to \$250,000 or twice the value of the transaction
 - OFAC may apply these retroactively
 - Criminal Penalties increased to \$1,000,000 and/or 20 years imprisonment
- Unlawful Acts – It shall be unlawful for a person to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under IEEPA

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IV. Compliance Programs

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Need for a Corporate Compliance Program

- Educate company's employees of laws that affect your business
- Prevent violations from occurring, saving company money in the long run
- If your company is charged with a violation, an effective compliance program may yield the following benefits:
 - Proof of company's lack of intent in violating laws
 - Reduction of criminal sentence
 - Reduction of both criminal and civil penalties
- Avoid reputational damage

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Export Controls: Bureau of Industry and Security

- March 17, 2007 Remarks of Assistant Secretary of BIS on nine elements of an Effective Compliance Program:
 - The company has performed a meaningful risk analysis
 - The existence of a formal written compliance program
 - Appropriate senior organizational officials are responsible for overseeing the export compliance program
 - Adequate training is provided to employees
 - The company adequately screens its customers and transactions
 - The company meets recordkeeping requirements
 - The existence and operation of an internal system for reporting export violations
 - The existence and result of internal/external reviews or audits
 - Remedial activity has been taken in response to export violations

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OFAC's Approach

- An effective compliance program is a substantial mitigating factor under OFAC's current enforcement guidelines
- OFAC has different expectations depending on an individual company's risk posture
- Other companies can draw lessons from OFAC's risk templates for banking and NGO sector

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Key Elements of Screening Programs

- A necessary first step in compliance programs for ALL U.S. companies
- Should screen against the OFAC list, BIS list, and choose relevant international lists
- Choose screening system that is best for company
 - cost and effectiveness should be commensurate with risk
- Goal should be to screen ALL known parties involved in transactions
 - vendors
 - account holders
 - counter-parties
 - ancillary parties (banks, freight-forwarders)
- Screen new relationships and specific transactions
- Develop re-screening protocols
- Develop system for handling results of screening
 - work instructions
 - guidance on processing "hits"
 - recordkeeping
 - escalation protocols

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Key Approaches to Compliance Program Structure

- Tailor to individual risks and business structure
- Strategic allocation of responsibility
 - ensure that personnel know who to call
 - require escalation to objective, trained manager of questions
- Written materials should include guidelines, rules and examples
 - guidelines provide basic explanations of the law and standards for employee conduct
 - rules delineate strict requirements which, if violated, could lead to disciplinary action
 - examples assist the employee to apply the rules to a specific work function
- Where an activity or program carries significant and particularized risk, consider unique measures/procedures for those activities

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Don't Work in a Vacuum

- Pay attention to other laws that apply to international business
 - FCPA
 - anti-boycott
 - export controls
 - securities laws
 - anti-money laundering
- Make sure there is communication among all stake holders in the compliance area

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ITAR Back-Up Slides

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ITAR

- Covers Defense Articles, Defense Services and related Technical Data
- Defense Articles: "specifically designed, developed, configured, adapted or modified for a military application." These items are on the U.S. Munitions List ("USML").
- BUT, even if your item is not specifically listed on the USML:

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ITAR

- Potential Traps for Commercial Operations:
 - Adaptation/Modification of a product for a defense end use
 - A U.S. person assisting a foreign defense end-user can provide a Defense Service
 - Use of a Defense Article for civilian purposes

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The ITAR

<ul style="list-style-type: none"> ▪ 120: Purpose & Definitions ▪ 121: U.S. Munitions List (USML) ▪ 122: Registration <ul style="list-style-type: none"> ▪ Manufacturing & Exporting ▪ 123: Licenses – Defense Articles <ul style="list-style-type: none"> ▪ Permanent & Temporary Export, Temporary Import ▪ 124: Agreements – TAAs, MLAs, Offshore Procurement 	<ul style="list-style-type: none"> ▪ 125: Licenses – Technical Data ▪ 126: General Policies & General Exemptions ▪ 127: Violations & Penalties ▪ 128: Administrative Procedures ▪ 129: Brokers – Registration & Licensing ▪ 130: Political Contributions, etc.
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ITAR Administration

- The Directorate of Defense Trade Controls (“DDTC”) administers, interprets, and enforces the ITAR (for civil penalties)
- The Defense Department plays a key role in determining ITAR jurisdiction questions and reviewing licenses
- The Department of Justice is in charge of criminal enforcement

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Registration Requirements

- Any U.S. entity that is in the business of manufacturing OR exporting defense articles, OR providing defense services must register with the State Department
- Registrations must be renewed annually
- Registrants must notify DDTC of changes to registrations within five days
- All registrants must have a compliance program

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Empowered Official

- Each Registrant must have at least one "Empowered Official" which is someone who:
 - is directly employed by the Registrant in a management position
 - is empowered in writing to sign license applications or other requests for authorization from DDTC
 - understands the ITAR
 - has independent authority to inquire into any aspect of a proposed transaction covered by the ITAR and verify the legality of the transaction and the accuracy of information to be submitted to DDTC, and refuse to sign an application without prejudice to his/her employment if concerns arise

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Key Elements of the ITAR

- The following ITAR concepts help define which of an exporter's activities trigger compliance obligations and risk of liability

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U.S. Munitions List ("USML")

- 21 categories (from firearms and ammo to tanks and stealth bombers)
 - includes parts, components, accessories, etc.
 - "specially designed or modified for military application"
- Significant Military Equipment (SME)
- Generally similar to other countries' control lists (multilateral regimes)
- Major exception: civilian communications satellites
- Items can only be deleted with consent of Congress

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Export (§ 120.17)

- Sending or taking a defense article out of the United States
- Disclosing (including oral or visual disclosure) or transferring technical data to a foreign person whether in the United States or abroad
 - Careful – DDTTC is of the view that merely providing access to a foreign person, with actual disclosure, is an export
- Performing a defense service on behalf of or for the benefit of a foreign person, whether in the United States or abroad

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Foreign Person (§ 120.16)

- An individual who is neither a U.S. citizen nor a permanent U.S. resident
 - Green card holder = U.S. person
 - H1B Visa = foreign person
- Foreign corporation, partnership, trust, society or other entity that is not incorporated or organized to do business in the United States

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Defense Articles (§ 120.3)

- Article can be designated a defense article if it:
 - (1) Is specifically designed, developed, configured, adapted or modified for a military application, and
 - Does not have predominant civil applications, and
 - Does not have performance equivalent (defined by form, fit and function) to those of an article used for civil applications; or
 - (2) Is specifically designed, developed, configured, adapted or modified for a military application, and has significant military or intelligence applicability such that control under the ITAR is necessary

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Defense Articles: Some Key Points

- Intended use of the article after export is not relevant in determining whether an article is a defense article. The focus is on design intent, not actual use
- Foreign-made articles are defense articles if on the USML
- Modification of a catalog part could make an item ITAR controlled
- Testing to military spec does not make an item ITAR-controlled unless there is subsequent modification
- "see through" rule: ITAR parts in non-ITAR item make non-ITAR item into ITAR-controlled item
- Commodity jurisdiction determinations are available to confirm if article is a defense article

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Technical Data (§ 120.10)

- Information which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles
- Includes information in the form of blueprints, drawings, photographs, plans, instructions and documentation
- Key Point:
 - May include emails, faxes, and other documents that may appear less technical than specifications
 - Even telephone conversations may convey technical data
- Does not include general scientific principles, information in the public domain, or "basic marketing information on function or purpose or general system descriptions of defense articles."

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Temporary Import (Section 120.18)

- 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 any defense article that is in transit to another foreign destination

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Defense Services (§ 120.9)

- Furnishing of assistance, including training, to foreign persons in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles
- Military training and advice
- ITAR-controlled technical data need not be transferred or exported for a service to be a defense service

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Defense Services: Key Points

- Defense services covered by ITAR are those involving U.S. person providing services to foreign person
- A defense service may be performed regardless of whether the underlying defense article is of U.S. or foreign origin, and may include assisting a foreign person to convert a commercial item into a defense article
- A defense service may be performed even when no technical data is involved (e.g., all the information relied upon in furnishing defense services to a foreign government/ person is in the public domain)

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Brokering Under the ITAR (Part 129)

- Brokers include any person (U.S. or foreign) who acts as an agent for others in negotiating or arranging contracts, purchases, sales or transfers of defense articles or services in return for a fee, commission or other consideration
 - "Brokering activities" have been defined to include financing, transportation, freight forwarding, or the "taking of any other action that facilitates" the regulated activity, irrespective of the article's or service's origin
- Certain brokers must register with DDTC
- Certain brokering activities will require prior approval or notification to the DDTC and the provision of annual reports

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Scope of ITAR, In Sum:

- Export, re-export, transfer of U.S.-origin defense articles, technical data
- Disclosures of technical data "deemed" export
- The provision of a defense service
- Foreign defense articles made (in part) from U.S.-origin ITAR-controlled technical data
- Temporary import of U.S.-origin or non-U.S.-origin defense articles

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Four Categories of Activities Requiring License or Approval

- Defense Articles (USML) (export and temporary import)
- Technical Data (export and temporary import)
- Defense Services
- Brokering Activities
- ★ Licenses are required for these activities for all destinations (Canada excepted in some circumstances), unless there is an applicable exemption
- ★ Licenses are denied for embargoed destinations (including China and Iran, among others)

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ITAR Authorizations

- DSP-5 – License for permanent export of defense articles
- Technical Assistance Agreement (“TAA”) – an agreement for the performance of a defense service or the disclosure of technical data. These can cover the assembly of defense articles also, as long as production rights or manufacturing know-how are not provided. If they are, they need a Manufacturing License Agreement
- DSP-73 – Temporary Export License
- DSP-61 – Temporary Import License
 - There is an exemption for returns for repairs or replacement, but specific procedures must be followed in order to use it

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ITAR Part 127 Prohibitions

- Unlawful to:
 - Export, attempt or conspire to export, or cause to be exported a defense article or technical data or to furnish a defense service for which a license is required without first obtaining a license
 - Use any export documentation containing a false statement or misrepresenting or omitting a material fact for the purpose of exporting any defense article or technical data or furnish any defense service
 - For example, all license applications and documents supporting exports must be accurate and complete
 - DDTC will treat as a “material omission” failure to disclose the fact that an exporter has already engaged in activities for which authorization is sought

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Potential Penalties for Violation of ITAR

- Civil penalties up to \$500,000 per violation
- Debarment from ITAR activities, usually for up to three years
- Huge potential criminal penalties of \$1 million and 10 years imprisonment for corporations and individuals if the Department of Justice pursues criminal charges
- Generally, DDTC will bring charges in cases where there is a very serious compromise to national security or pattern of no corporate commitment to compliance
- When DDTC brings charges, fines are typically in the millions and post-charging monitoring requirements imposed

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ITAR Compliance Programs

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Key Aspects of Export Policy and Procedures

- Statement of policy regarding compliance with applicable export control laws
- Definitions of key terms relevant to export control laws
- Description of personnel responsible for implementing procedures for compliance with U.S. export controls
- Description of employee responsibilities

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Key Elements of Export Procedures

- Process (and flow chart) for identifying and tracking ITAR-controlled hardware, technology, and services, so that Company can apply for licenses at earliest possible stage
- Process to identify nationality (including dual and third-country nationality) of all individuals with access (whether incidental or constant) to controlled technology and items
- Description of company's export shipment process
- Procedures for handling import and domestic shipment of defense articles

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Key Elements of Export Compliance Procedures

- Recordkeeping
 - Recordkeeping procedures for maintaining records relating to U.S.-origin products for five years from the expiration of the State Department license or other approval
- Training
 - Process to ensure education, training, and provision of guidance to all employees involved on exports (including those in departments such as Traffic, Marketing, Contracts, Security, Legal, Public Relations, Engineering, Executive Office)
- Screening
 - Procedure for screening customers and embargoed countries

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Key Elements of Technology Control Plan

- Marking of ITAR Technical Data and shipments of ITAR Defense Articles
- Safeguarding ITAR Technical Data
 - Segregated and secured electronic storage and rules for use
 - Segregated and secured hard copy storage and rules for handling
- Restrictions on Access for Foreign National Employees and Visitors to certain areas
 - physical security measures
 - badges that differentiate U.S. and foreign nationals

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Penalty and Seizure Authorities

- CBP enforces the laws of over 140 federal agencies, both for exports and imports of merchandise.
- To enforce the export control laws of other agencies, such as the Department of State, CBP utilizes the seizure authority of 19 U.S.C. 1595a(d) and 22 U.S.C. 401 (exportation contrary to law) to seize merchandise that is being exported or has been exported contrary to any U.S. laws.
- 19 U.S.C. 1595a(c)(2)(B) (Importation contrary to law) is used to seize temporary or permanent imports in violation of the export/import control laws.

Other Agencies Statutes

- **Department of State:**
 - 22 USC 2778-Arms Export Control Act.
 - Directorate of Defense Trade Controls (DDTC).
- **Commerce Department:**
 - 50 USC 1701-1706-International Emergency Economic Powers Act (IEEPA).
 - 50 USC 2401-Export Administration Act.
 - 13 USC 301. (Census laws)
- **Also ATF, DEA, OFAC, DOT, etc.**

Other Agency Regulations

- Regulations implementing the statutory laws:
 - Code of Federal Regulations (CFR)
- Sample Regulatory Provisions:
 - International Traffic in Arms Regulations (ITAR) at 22 CFR Parts 120-130, for State Dept.
 - Export Administration Regulations (EAR) at 15 CFR Parts 730-799 for Commerce Dept.'s Bureau of Industry Security (BIS)
 - Foreign Trade Regulations (FTR) at 15 CFR Part 30 for Census Bureau's trade statistics

19 U.S.C. 1595a(d)

- Seizure of Merchandise:
- Sent or exported, or attempted to be sent or exported from U.S. contrary to law, or the proceeds or value thereof;
- property used to facilitate the exporting/sending, or attempted exporting/sending of the merchandise, or the receipt, purchase, transportation, concealment, or sale of merchandise prior to export

22 U.S.C. 401

- Provides for seizure of illegal exports, attempted exports and intended exports of arms or munitions of war or *other articles* in violation of law, or whenever there is probable cause to believe that any such arms, munitions or other articles are intended to be or are being or have been exported or removed from the U.S. in violation of law.
- Provides for detention and seizure of the vessel, aircraft, or vehicle that has been or is being used in exporting or attempting to export the arms, munitions of war or other articles
- Provides for seizure of technology controlled by DOC, which is intended to be or is being exported contrary to law.

Export Control Clearance Violations by Carriers -19 USC 1436- PENALTY

- Failure to File Outward Manifest
- Filing False manifest
- For late filing of manifest and other documents when filing incomplete, see L.D. provision in 19 CFR 113.64(d) or the new FTR regulations in 15 CFR 30.47.
- Failure to transmit proof of filing citations or exemption legends for merchandise subject to AES filing

Carrier Violations OF NEW FTR (Census Regulations)-PENALTY

- 15 CFR 30.45:
- Failure to deliver the complete manifest or other required documentation, in accordance with CBP regulations (if filing complete)
- Failure to ensure that the appropriate document contains all the AES proof of filing citations for which EEI (Electronic Export Information) is required, or the exemptions legends covering the cargo, as provided to carrier by USPP1 or its agent
- Accepting a paper SED

Carrier AES Violations -PENALTY

- Failing to notate the manifest as to the basis of an AES exemption, when a manifest is required. Otherwise, an oral declaration will suffice - 15 CFR 30.45(e).
- 30.47 violations:
- If filing incomplete, the failure of the carrier who files a paper manifest to file the manifest and all filing citations, or exemption legends within 4 business days after clearance (where clearance is required) or departure (where clearance is not required).
- If filing incomplete, the failure of carrier who files an electronic manifest to file the manifest and all required filing citations and/or exemption legends no later than 10 business days after departure from each port.

Liquidated Damages under 19 CFR 113.64(g):

- For failure to redeliver merchandise within 30 days of redelivery notice.
- Notice of redelivery must be issued to the CARRIER within 10 days of CBP's discovery that there is reasonable cause to believe that an export violation has occurred.

Liquidated Damages under 19 CFR 113.64(g):

- Goods must still be in possession or control of carrier on the date that the redelivery demand is issued.

- If carrier fails to redeliver, liquidated damages notice issued at 3 times the value of the goods, subject to the limitation of the carrier's bond.

Carrier Seizures

- Seizure under 22 USC 401 and 19 U.S.C. 1595a(d):
- Vessel, Aircraft, Vehicles:
 - Seizure of COMMON CARRIER vessels, aircraft, buses or other common carrier vehicles may not be effected unless Master, Pilot or Driver had knowledge of the violation or was grossly negligent in not discovering the violation .

DDTC violations

- 22 U.S.C. 2778 gives U.S. President power to control import/export of defense articles & services.
- President designates items for U.S. Munitions List (USML) - these articles or services may not be exported or imported without a properly issued license or other authorization or under an applicable license exemption.
- regulatory provisions called International Traffic in Arms Regulations (ITAR) - 22 CFR Part 120 - 130

Some of the most common types of licenses issued by DDTC

- 1) permanent export license - 22 C.F.R. 123.1
- 2) temporary import license (includes in-transit movements) - 22 C.F.R. 123.3
- 3) temporary export license - 22 C.F.R. 123.5

DOS License Exemptions

- CBP shall permit the temporary import (and subsequent export) **without a license**, for a period of up to 4 years, of unclassified U.S.-origin defense articles if the article temporarily imported is:
 - serviced and returned to the country from which it was imported. See 22 CFR 123.4 or
 - it is a non-US origin unclassified defense articles article that is to be incorporated into another article or modified, enhanced, upgraded, altered, improved or serviced in any manner, etc. A DSP-5 is required for the re-export of such article.

DOS License Exemptions

- The importer must meet eligibility requirements of 22 CFR 120.1(b); (must be a DDTC registered importer/exporter).
- At the time of export, the ultimate consignee must be the same as the foreign consignee or end-user of record named at the time of import and must not be from a proscribed country listed in 126.1.
- At time of export, the export information must be filed in AES and it must identify 22 CFR 123.4 as the authority for the export, and the exporter or its agent must provide, as requested by CBP, the entry document number or a copy of the CBP document under which the article was imported.

Export Information Requirements

- Under DOS Regulations, U.S. exporters are required to report export information using AES for all **HARDWARE** exports.
 - Export information for hardware using license or license exemption must be filed before export, in accordance with to specific time frames. 22 CFR 123.22.
- Exports of technical data and defense services shall be reported directly to DDTC. (22 CFR 120.30).

License Filing Requirements

- Any license and any required documentation for the license or other approval (e.g., to support a license exemption) authorizing the permanent export of HARDWARE must be filed with CBP prior to the AES filing. (22 CFR 123.22).
- Licenses or other approvals for the permanent export of technical data and defense services shall be retained by the applicant (export info. sent directly to DDTC) and provided to CBP upon request.
- Temporary licenses of unclassified defense articles need not be filed with CBP, but must be retained and presented to CBP at the time of temporary import or export.

Requirements for export/import under a DOS license or exemption:

- Cite license number or exemption in Automated Export System (AES) record - Use of AES is mandatory unless there is a written exception from DOS.
- Time periods for AES filing:
 - By Air or Truck: 8 hours prior to departure
 - Sea or Rail: 24 hours prior to departure

Drug Enforcement Administration (DEA)

- 21 C.F.R. 1313 :
 - Requires that importers and exporters obtain DEA's permission for the importation and exportation of controlled chemicals by submitting Form 486 to DEA 15 days before an importation or exportation.
 - Waivers of the 15-day advance notification granted to "regular importers" or for entities with an established business relationship with the foreign customer. Notification in this instance is before or on the date of exportation.
 - Requires exporter to furnish CBP a copy of the DEA Form 486 covering the transaction, as part of the export documentation.

Drug Enforcement Administration

- Statutory Authority:
 - Chemical Diversion and Trafficking Act of 1988
 - Comprehensive Methamphetamine "Speed" Control Act.
- Implementing Regulation:
 - 21C.F.R. 1313 ("Importation and Exportation of Precursors and Essential Chemicals")
- Regulates the importation and exportation of precursors and essential chemicals, which are used in the manufacture of narcotics and other controlled substances

Drug Enforcement Administration (DEA) Violations

- Failure to submit Form 486 to DEA 15 days in advance of the importation of controlled chemicals or, for a regular importer or an exporter dealing with an established customer, by or on the date of importation. 21 CFR 1312/1321
- Failure to submit written notification to DEA of the intent to transfer or transship "listed chemicals" that exceed the threshold reporting requirements in 21 CFR 1310.04(f). Such notification (NOT on Form 486) must be given to DEA 15 days in advance of the proposed date the chemicals will transship or transfer through the U.S. 21 CFR 1313.31
- Failure to present Form 486 to Customs upon entry of DEA-controlled chemicals (21CFR 1314(c)) or upon exportation of such chemicals (21 CFR 1313.23).

**Bureau of Alcohol, Tobacco, Firearms
and Explosives (BATF or ATF)**

- Violations of ATF laws and regulations pertain to the permanent importation of regulated items and are seized under 19 USC 1595a(c)(2)(B). The underlying statutory authority is 22 USC 2778 and the ATF regulations at 27 CFR Part 478.
- The most common violations are: the failure of licensed importer to obtain an ATF Form 6 for the importation of a regulated article. 27 CFR Part 478.
- The failure of other licensees to obtain an ATF Form 6 for the importation of a regulated article. 27 CFR Part 478.
- NOTE: Temporary importation of ATF-regulated items, such as weapons and ammunition, are within the administrative and licensing jurisdiction of DDTC, Department of State.

**Department of Commerce - Bureau of
Industry Security (BIS)**

- Statutory provision: 50 U.S.C. 1701-1706
- Regulatory Violation: the Export Administration Regulations (EAR)- 15 CFR 730-774
 - Validated license and general license
 - COMMODITY CONTROL LIST(CCL): list of goods & technology subject to export controls

COMMERCE (BIS) VIOLATIONS

- Substantive Commerce Regulation- Failure to Obtain a Commerce License - Generally 15 CFR 736.1, 736.2
- Technical Commerce Violation - Failure to Cite License or Exemption in AES record - 15 CFR 758.2
- Part 786 pertains to export clearance

Violator's History

- Prior history of exporter, importer of record, or license holder will be considered for mitigation of seizure (or penalty).
 - CBP will determine who is the actual license applicant, if case involves licensable merchandise.
 - We consider violations that occurred within the past 3 years of the date of the current violation.
 - We consider, as priors, the same type of violation, i.e., involving the same agency's laws and regulations.
 - Corporate Divisions are considered separate entities for violation history.

Other Exodus Issues ...

- Constructive seizure vs. Physical Seizure – The CBP Port where violation occurred, in its discretion, may allow goods to be retained by exporter/importer until seizure case is processed.
- If a license determination is rendered by a licensing agency, e.g. DOS, and the exporter desires to contest the licensing determination, via the Commodity Jurisdiction (CJ) process, the exporter must submit its documentation directly to the licensing agency. CBP will hold the decision in the case in abeyance until the licensing agency renders its determination.

Who is the Violator?

- If exported or imported under a DOS license, it is the license applicant.
- If under a license exemption, it is the importer of record, or the exporter (USPPI), except when there is a routed transaction on export, in which case a foreign principal party in interest (FPPI) or U.S. freight forwarder/agent for the FPPI may be the violator. However, the party using the license exemption must be registered with DDTC.

19 USC 1627a(a): Stolen Conveyances/Parts

- An import, export, or attempted import or export of any self-propelled vehicle, vessel, aircraft, or part thereof, is prohibited if the conveyance or part has been stolen or has had the VIN # removed, obliterated or altered.
- Seizure under this statute
- Civil penalty not to exceed \$10,000- both seizure and penalty may be assessed

19 USC 1627a(b)

- Any person attempting to export a used self-propelled vehicle must present vehicle and title documentation before lading if vehicle is transported by vessel or air, and before export if vehicle is transported by rail, highway or under its own power.

Time Periods for Presentation

- Time periods for presentation of title documentation (See 19 CFR Part 192):
- By vessel or aircraft: vehicle AND documentation 72 hours prior to export
- By highway, rail or under its own power: documentation 72 hours prior to export; vehicle at time of exportation

Sanction

- \$500 penalty per vehicle assessed against the Exporter. Penalty may be assessed for each vehicle attempted to be exported or for a past exportation.
- Mitigation guidelines: Personal exportation: may be mitigated to amount between \$50 and \$250.
- Commercial exports: no less than \$250.

19 U.S.C. 1646c

- Provisions of 19 U.S.C. 1646c require all persons exporting used vehicles by air and sea to present vehicle and documentation 72 hours prior to export. It does not contain a penalty sanction.

Bureau of Census - Foreign Trade Regulations (FTR) - 15 C.F.R. Part 30

- Mandates the timely filing of Electronic Export Information (EEI) in the Automated Export System (AES) or through AES Direct for all shipments where the export information is required.
- Civil penalties not to exceed \$10,000 per violation may be imposed for the failure to file EEI in AES, or the delayed (late) filing of EEI, the filing of false or misleading information in AES, or for other violations of the FTR.

Civil Penalties for Violations of the Foreign Trade Regulations (FTR)

- Issued by CBP pursuant to authority delegated to DHS/CBP by the Department of Commerce. Statutory basis for the penalty is 13 U.S.C. 304
- Civil Penalties may be issued to ANY and ALL culpable parties; therefore, multiple penalties may be issued for a single FTR violation. For example, the USPP1 may incur a penalty for late filing of EEI and the carrier may incur a penalty for accepting export merchandise without evidence of an AES record # or exemption statement from the USPP1.
- FTR penalties may be issued for FTR violations *occurring* on or after February 1, 2009.
- The issuance of a civil penalty does not preclude the issuance of other (non-FTR) penalties. CBP may, in certain cases, seize the goods AND issue an FTR penalty to the culpable parties.

FTR PENALTY MITIGATION SCHEME

- Note: Penalties are issued at the \$10,000 maximum amount, except for late filing violations. However, CBP may excuse the first FTR violation on the part of any party, provided that it has not received a written warning letter regarding a previous FTR violation, or it has not received informed compliance by the Census Bureau or CBP.
- I. Mitigation Scheme for Failure to File the EEI in AES:
 - 1st recorded offense in **3-year period**: \$750 to \$2,500
 - 2nd offense: \$1,000 to \$3,500
 - 3rd offense: \$1,500 to \$5,000
 - 4th and subsequent offenses: \$2,000 to \$10,000
 - Mitigated amount will take into consideration any aggravating or mitigating factors to the violation

- II. Mitigation scheme for late filing in AES- for this violation, the penalty is issued at \$1,100 per each day late, up to the \$10,000 maximum:
 - 1st recorded offense: \$250 per day up to \$1,500
 - 2nd offense : \$500 per day up to \$1,500
 - 3rd offense: \$750 per day up to \$3,500
 - 4th and subsequent offenses: \$1,000 per day up to the maximum of \$10,000.
- III. Mitigation scheme for other FTR violations, e.g., false information/incorrect info in AES; failure to cite license codes in AES; failure to provide carrier with proof of filing citations or exemption legends:
 - 1st recorded offense: \$500 to \$2,500
 - 2nd offense: \$750 to \$3,500
 - 3rd offense: \$1,000 to \$5,000
 - 4th and subsequent offenses: \$2,000 to \$10,000

▪ IV. Mitigation scheme for carrier violations – See 15 CFR Sections 30.45-47 for the carrier violations. Examples of violations are the failure of carrier to provide USPPI or authorized agent with changes to the date of export of the goods; failure to report the proof of filing citation on the carrier's manifest; when filing an incomplete manifest under bond, the failure to file the complete manifest within the prescribed time period after export (commonly referred to as carrier "late files"):

- 1st recorded offense: \$500 to \$2,500
- 2nd offense: \$750 to \$3,500;
- 3rd offense: \$1,000 to \$5,000;
- 4th and subsequent offenses: \$2,000 to \$10,000.

ACC Extras

Supplemental resources available on www.acc.com

Establishing an International Trade Compliance Program for Your Company.
Program Material. February 2007

<http://www.acc.com/legalresources/resource.cfm?show=20083>

How U.S. Border Security Immigration Measures Are Affecting International
Trade.

Program Material. April 2005

<http://www.acc.com/legalresources/resource.cfm?show=20425>

Export Compliance.

Quick Reference. March 2008

<http://www.acc.com/legalresources/resource.cfm?show=16468>

Please note, these additional resources are provided by the Association of Corporate
Counsel and not by the faculty of this session.