

Department of State Questions

1. Why do I need to get the U.S. Government's approval to export and import defense articles and defense services?

Because Section 38 of the Arms Exports Control Acts (AECA) authorizes the President of the United States to control the export and import of defense articles and defense services and to establish regulations for that purpose.

2. How do I obtain approval before I export or import defense articles and defense services?

The President delegated export control authority to the Office of Defense Trade Controls in the State Department's Bureau of Political-Military Affairs through the Secretary of State.

3. What are the penalties for violating the AECA?

The civil penalties are a fine up to \$500,00 per violation and up to five years in jail. The criminal penalties are a fine up to \$1 million per violation and up to ten years in jail. In addition, the violator can be debarred for a period of time from obtaining export licenses and possible debarment from receiving any U.S. Government contracts.

4. The civil penalty of up to \$500,000 per violation doesn't seem too bad.

It does when you consider that a single case may involve more than 100 alleged violations.

5. How does ODTC exercise its authority?

By administering the International Traffic in Arms Regulations (ITAR). These regulations are found in Section 22 of the Code of Federal Regulations (C.F.R.), Parts 120-130.

6. How do I know whether an article or service is controlled by the ITAR?

Defense articles are identified in Part 121.1 of the ITAR, known as the "U.S. Munitions List" (USML). Incidentally, the term "defense article" includes technical data recorded or stored in any physical form (such as on a computer disc or hard drive).

7. Who determines what items are on the USML?

The Department of State makes the determination, with the concurrence of the Department of Defense and in consultation with the Department of Commerce.

- 8.** If I have an item that is not on the munitions list, can I just go ahead and export it without a license?

Not necessarily. If the item has dual (military-civilian) use, it is on the "Commerce Control List" (CCL) and may be licensable by the Department of Commerce pursuant to the Export Administration Regulations (EAR).

- 9.** If I'm not sure what list my item is on, USML or CCL, how can I find out?

You can submit a request for a commodity jurisdiction (CJ) determination. The request should be addressed to Mr. William J. Lowell, Director, Office of Defense trade Controls.

- 10.** How long will it take to get an answer?

Commodity jurisdiction requests normally require processing times of 4 to 6 months, or even longer. So plan ahead.

- 11.** What are the USG's criteria for determination?

The USG considers whether the item was specifically designed, developed, configured, adapted or modified for military application; whether it has predominately civil applications; whether it has performance equivalent to an item used for civil applications; or has significant military or intelligence applicability such that ITAR control is necessary.

- 12.** What if it was designed for military use but my foreign customer only wants to use it for civilian applications?

The USG does not consider "intended use" to be a relevant factor in determining whether the item should be on the USML or CCL.

- 13.** What should I include in the package in order to obtain a commodity jurisdiction decision?

You need only identify the item (or service) and include a history of the product's design, development and use. Brochures, specifications and other documentation must be submitted in nine collated sets, plus a cover letter explaining the request. A Part 126.13 certification letter is not required.

- 14.** What if the item is software?

Then you will need to identify the language level in addition to providing a history of the software's design, development and use. In addition, you must comply with the "Department of Defense Guidelines for International Transfer of Software Documentation (including Source Code).

- 15.** What if there's an argument between State, Defense and Commerce over whether the item should be on the USML or the CCL? Who decides?

The Department of State.

- 16.** Does the State Department control all exports and imports of defense articles and defense services?

No. The Treasury Department controls the permanent import of USML items. Nuclear propulsion equipment and nuclear weapons are under the export control of the Department of Energy.

- 17.** I have an item that is on the U.S. Munitions List. Is that all I need to know about it for licensing purposes?

No. You should determine whether it is designated as Significant Military Equipment (SME). SME means defense articles for which special export controls are necessary because of their substantial military utility or capability.

- 18.** How can I tell if something is SME?

It's easy. Just take a look at the USML. All items preceded by an asterisk are SME. The term SME also includes all classified USML articles.

- 19.** What kinds of "special export controls" apply to SME?

In order to export SME to a foreign person you will need to obtain a signed DSP-83 from that entity providing assurances that it will not (a) re-transfer the SME to anyone not specified in your approved license application, not (b) allow the SME to be used for purposes other than those for which furnished, without the prior written approval of the U.S. Department of State.

If you plan on having your foreign customer manufacture any item of SME under a Technical Assistance Agreement (TAA) or Manufacturing License Agreement (MLA), Congress must be notified before State can approve the TAA or MLA.

Before you can make a proposal to foreign person for the sale or manufacture of SME, you must obtain ODTC's approval if (a) the value of the item is \$14 million or more, (b) the item is to be sold to a country other than

NATO, Australia, Japan or New Zealand, and (c) the identical item has not been previously licensed for permanent export or approval for sale under the Foreign Military Sales program to any foreign country. If the item has been licensed previously for permanent export or approved for sale under FMS to any foreign country, you must notify ODTC at least 30 days prior to issuing a proposal. In each case (prior approval or prior notification), an approval license, TAA or MLA will be required in order to export any technical data as part of the proposal effort.

If the SME article has a nonrecurring cost of \$50 million or more, or a total production cost of \$200 million or more, it is categorized as Major Defense Equipment (MDE). Any export of MDE valued at \$14 million or more requires Congressional notification prior to receipt of export approval from the Department of State.

20. What is an export?

For ITAR purposes, the word “export” means:

- (a) sending or taking a defense article out the United States in any manner. It also means transferring registration, control or ownership to a foreign person of any aircraft, vessel or satellite covered by the U.S. Munitions List, either in the United States or abroad;
- (b) disclosing (orally or visually) or transferring in the United States any defense article to an embassy, any other part of a foreign government, or to a foreign person; or
- (c) performing a defense service on behalf of a foreign person, whether in the United States or abroad.

21. How do you define “United States” for ITAR purposes?

For ITAR purposes, “United States” means the several states, Puerto Rico, the District of Columbia, the Commonwealth of the Northern Mariana Islands, and any territory or possession over which the United States exercise any powers of administration, legislation, and jurisdiction.

22. What is a “foreign person”?

A “foreign person” is any natural person who (a) is not a lawful permanent resident of the United States as defined by 8 USC 1101(a)(20), has dual U.S.-foreign citizenship, or is not a “protected individual”, (b) any foreign corporation or other entity that is not incorporated to do business in the United States, and (c) international organizations, foreign governments and any part of a foreign government (e.g., foreign diplomatic missions).

23. What is a “U.S. persons”?

The term “U.S. person” encompasses lawful permanent residents of the United States; protected individuals as defined by 8 USC 1324b(a)(3); any corporation or other entity incorporated to do business in the United States; and any governmental (federal, state or local) entity.

24. Who can apply for export or temporary import licenses?

U.S. persons and foreign embassies in the United States are authorized to apply for such licenses.

25. What is the meaning of the term “defense service”?

“Defense service” means:

- (a) furnishing of assistance to foreign persons in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles, whether in the United States or abroad;
- (b) furnishing to foreign persons of any technical data controlled by the ITAR; and
- (c) military training of foreign units and forces, regular and irregular, whether in the United States or abroad, including by correspondence courses, and through media of all kinds, training aids, exercises and through the furnishing of military advise.

26. What do you mean by “technical data” means:

For ITAR purposes, the term “technical data” means:

- (a) information, other than software as defined in 22 CFR 120.10(4), which is required for design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles, including information in the form of blueprints, drawings, photographs, plans, instructions and documentation;
- (b) classified information relating to defense articles and defense services;
- (c) information covered by an invention secrecy order; and
- (d) software, as defined in 22 CFR 121.8(f), directly related to defense articles.

(Note that “technical data” does not include basic marketing information on function or purpose or general system descriptions of defense articles. Nor does it include information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or information in the public domain).

27. If I have some technical data that I'd like to place in the public domain, how can I do it?

By obtaining approval by the cognizant U.S. Government department or agency, or the DoD's Directorate for Freedom of Information and Security Review.

28. How can I tell if a piece of information is really technical data?

The information in question may be technical data if it:

- (a) contains quantitative information
- (b) is not found in the public domain, either in whole or in part
- (c) was generated by Independent R&D for military application
- (d) was generated under a DoD contract
- (e) is a genuine engineering scale drawing, not a "cartoon"
- (f) provides understanding of sensitive capabilities (e.g., stealth characteristics), or vulnerabilities (e.g., EMI problems);
- (g) provides meaningful insight in the areas of design or manufacturing
- (h) contains answers to questions involving "how to" and "why"
- (i) is extracted unabridged from technical documents directly relating to defense articles or defense services
- (j) goes beyond general scientific, mathematical or engineering principles commonly taught in universities
- (k) otherwise appears as though it might be technical data.

29. Is technical data the only kind of information controlled under the ITAR?

No. Information used in military training of foreign forces, for example, may not contain any technical data but is ITAR controlled nonetheless.

30. Can technical data be temporary exported?

No. All exports of technical data are considered to be permanent.

31. What is the meaning of the term "temporary import"?

"Temporary import" means bringing into the United States from a foreign country a defense articles that is to be returned to that country or is in transit to another country.

32. Can country "A" re-transfer to country "B" a defense article obtained from an U.S. company or person?

Yes, provided country "A" obtains in advance the written approval of the U.S. Department of State.

33. What is a “Technical Assistance Agreement” (TAA)?

A TAA is an agreement between an U.S. entity and a foreign person (government, industry, or individual) for the performance of a defense service or disclosure of technical data, including assistance and data relating to the assembly of defense articles.

34. What is a “Manufacturing License Agreement” (MLA)?

A MLA is an agreement granting a foreign person authorization to manufacture defense articles abroad, and which involves the export of manufacturing know-how and other technical data, defense articles, and/or performance of a defense service.

35. Which countries does the U.S. Government maintain an arms embargo?

The list of countries does change, therefore you should check with ODTIC to verify that a particular country has an arms embargo. The current embargoed countries include Afghanistan, Angola, Armenia, Azerbaijan, Burma, Belarus, China, Cuba, Cyprus, Haiti, India, Iran, Iraq, Liberia, Libya, North Korea, Pakistan, Rwanda, Somalia, Sudan, Syria, Tajikistan, Vietnam, Yemen, Federal Republic of Yugoslavia (Serbia and Montenegro), and Zaire.

36. A foreign embassy (a “foreign person” according to ITAR 120.16) in Washington D.C., applies for and receives a DSP-5 license to export five U.S.M.L. items to that country’s national police. Is the U.S. supplier required to obtain a DSP-5 license to transfer the devices to that embassy?

No. Since an approved export license (obtained by the foreign embassy) for export of the defense article to the country already exists, it is not necessary to obtain a license. Prior to initiating supply action, however, it should be a policy to verify that the export license, limitations, and provisos has been obtained.

37. Considering the following: You have an approved MLA with a foreign company to manufacture certain components of a system. Upon receipt and testing of the initial batch of these components, you find that several of them are defective and need to be returned to the foreign company for repair and return to the United States. What ITAR licensing exemption would you use for this purpose?

There is no suitable exemption available. You will need to apply for a DSP-73 temporary export license.

- 38.** (True or False) When preparing a TAA with a NATO agency, it is necessary for each of the foreign individuals who will have access to the technical assistance/technical data to become signatories to the agreement.

False. You need only to indicate in your letter of transmittal the nationalities of the foreign individuals who will have access to the technical assistance/technical data, and have each of them sign non-disclosure agreements with the NATO agency, with copies to be provided to your company.

- 39.** (True or False) All of the items on the Missile Technology Control Regime Annex (ITAR section 121.16) are on the USML and thus are under the export jurisdiction of the Department of State.

False. Some are controlled by the Department of Commerce on the CCL.

- 40.** You are under contract with a foreign Ministry of Defense to provide an item of ITAR-controlled equipment for which an export license is still pending. You receive a phone call from that country's embassy announcing that a Air Force general officer would like to visit your facility to view the equipment in question. Can you accommodate this visit request prior to receiving an approved export license?

No, you cannot.

- 41.** (True or False) Even after DoD's DFOISR office approves technical data for public release, it is still considered ITAR-controlled technical data because it is not yet entered the public domain before it may be exported without a license.

True. ITAR 120.11(7) applies

- 42.** For exports of technical data under 125.4(b)(13) exemption, exporters must maintain a record of all but one of the following:
- (a) Description of the data
 - (b) End-user
 - (c) Foreign consignee
 - (d) Date and time of export
 - (e) Method of transmission

The foreign consignee

- 43.** (True or False) A document that has been created from several other documents previously approved for public release by the DFOISR office may be exported under the 125.4(b)(13) exemption.

True. The exemption applies to “technical data” approved for public release, not “a document”.

- 44.** (True or False) Technical data pertaining to missile flight control technology that has been approved by DFOISR for public release can be exported to Iraq under the 125.4(b)(13) exemption.

True. ITAR 126.1(a) applies.

- 45.** The U.S. Munitions List comprises _____ categories?
(a) 15
(b) 18
(c) 21
(d) 23

21

- 46.** Requests that are limited to renewal of a previous license or export of spare parts require only ____ set(s) of any attachment and ____ copy(ies) of the previous license.

2 sets and 1 copy

- 47.** (True or False) A request for a license for the export of unclassified technical data related to a classified defense article should specify any classified technical data or material that subsequently will be required for export in the event of sale.

True.

- 48.** A DSP-61 license is needed for temporary import of unclassified defense article into the United States. For permanent re-export that item back to the same country, or to a third country, a DSP-5 would be required.

The DSP-61 is sufficient for temporary import and permanent re-export. ITAR 123.3 applies.

- 49.** ITAR section 123.4(a) states that “District Director of Customs 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 items (including any items manufactured abroad pursuant to U.S. Government approval)....

(True or False) In the above statement, the 4-year period begins on the date the item arrives in the United States.

- 50.** (True or False) An export license is not required for shipments between the United States and a foreign trade zone.

True. Foreign Trade Zones (and U.S. Customs bonded warehouses) are considered integral parts of the United States (for ITAR purposes). ITAR 123.6 applies.

- 51.** (True or False) Lawfully exported, non-SME, non-MTCR, U.S. origin components incorporated by a foreign company into a foreign defense article may be reexported or retransferred to the government of a NATO country, Australia or Japan without prior approval of ODTC.

True. IATR 123.9(e) applies.

- 52.** (True or False) There is no requirement to maintain a record of exemptions claimed for the export of unclassified technical data.

False. Records of each export must be maintained, including a description of the unclassified technical data, the name of the recipient end-user, the data and time of export, and the method of transmission.

- 53.** (True or False) A U.S. company can export temporarily unclassified parts, components, tools and test equipment to its overseas subsidiary (or facility owned or controlled by that company) if the component, part, etc., is to be used for manufacture, assembly, testing, production or modification.

True, provided no defense article exported under this exemption may be sold or transferred to a foreign person without ODTV approval. ITAR 123.16(b)(9) applies.

- 54.** Identify the countries associated with each of the following ITAR international country codes

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|--------|--------|
| (a) HR | (b) IZ |
| (c) LO | (d) MK |
| (e) EI | (f) AC |
| (g) CJ | (h) EZ |
| (i) TC | (j) VM |
| (k) DO | (l) WA |

- | | |
|--------------------|-----------------------|
| (a) Croatia | (b) Iraq |
| (c) Slovakia | (d) Macedonia |
| (e) Ireland | (f) Antigua & Barbuda |
| (g) Cayman Islands | (h) Czech Republic |
| (i) UAE | (j) Vietnam |
| (k) Dominica | (l) Namibia |

- 55.** (True or False) License application for permanent export of defense articles in furtherance of a Manufacturing License Agreement do not require purchase orders.

False

- 56.** (True or False) It is unlawful to import or attempt to import any defense article whenever a license is required by the ITAR without first obtaining approval from ODTC.

True. See ITAR 127.1(a)(2)

- 57.** (True or False) If a company obtains a license or other export (or import) approval from ODTC, that company is not responsible for the acts of employees, agents and all authorized persons to whom possession of the licensed defense article or technical has been entrusted regarding the operation, use, possession, transportation, and handling of the defense article or technical data abroad.

False. See ITAR 127.1(b)

- 58.** (True or False) A single willful violation of any of the terms and conditions of ODTC licenses or approvals carries a maximum penalty of:

- (a) Two years in jail
- (b) Five years in jail and a fine up to \$500,000
- (c) Ten years in jail and a fine up to \$500,000
- (d) Ten years in jail and a fine up to \$1,000,000

Ten years in jail and a fine up to \$1,000,000

- 59.** (True or False) Intermediate foreign consignees subject to U.S. jurisdiction are bound by the ITAR in the same manner and to the same extent as the original owner or transferer.

True. See ITAR 127.1(b)

- 60.** (True or False) If company A is ineligible to export a defense article it manufacturers, by reason of debarment or interim suspension, or because it is not registered with ODTC, that company can enlist the assistance of eligible company B to handle the export of its product.

False (unless ODTC has been informed of all the facts surrounding the proposed transaction and has issued written approval).

- 61.** (True or False) In the case of exports in willful violation of the Arms Export Control Act, only the unlawfully exported defense articles are subject to seizure, forfeiture and disposition.

False. Any vessel, vehicle, or aircraft involved in such an unlawful attempt is also subject to seizure, forfeiture and disposition (see ITAR 127.6(a)).

- 62.** Name two forms of debarment.

Administrative and Statutory.

- 63.** Under what circumstances might the Director, ODTC, choose to order the interim suspension: of a company from receiving export licenses and other authorizations?

When the Director, ODTC, believes that grounds for debarment exist, and that interim suspension is reasonably necessary to protect world peace or the security or foreign policy of the United States (see ITAR 127.8(a)).

- 64.** (True or False) timely voluntary disclosure of a potential violation of the Arms Export Control Act will ensure that no adverse action will be taken by ODTC.

False. Timely voluntary disclosure may, however, be a mitigating factor in ODTC's decision regarding the level of administrative penalties to be imposed, if any. The ITAR (127.12(b)(3)) states that "It is possible that the activity in question despite voluntary disclosure might merit penalties, administrative actions, sanctions, or referrals to the Department of Justice for consideration as to whether criminal prosecution is warranted. IN the latter case, ODTC will notify the Department of Justice of the voluntary nature of the disclosure although the DOJ is not required to give that fact any weight. ODTC has the sole discretion to consider whether "voluntary disclosure", in context with other relevant information in a particular case, should be a mitigating factor in determining what, if any administrative action will be imposed.

- 65.** Which of the following is not included within USML Category XIII, Auxiliary Military Equipment?

- (a) SCUBA equipment
- (b) Reactive armor
- (c) Particle beam and electromagnetic pulse devices
- (d) Body Armor
- (e) Military cryptanalytic systems

Body Armor

- 66.** (True or False) Exports of unclassified technical data under the 125.4(b)(1) exemption (written request or directive from DoD) require a record of the initial export only.

False. According to ITAR 123.26, "When an exemption is claimed for the export of unclassified technical data, the exporter must maintain a record of each such export. The business record should include the following information: A description of the unclassified technical data, the name of the recipient end-user, the date and time of the export, and the method of transmission.

- 67.** (True or False) Technical Assistance Agreements are not required for training of NATO, Australia and Japan in basic operation & maintenance of defense articles lawfully exported to them or for maintenance training or performance of maintenance, including export of technical data.

True, provided that:

- (a) For unclassified U.S. origin defense articles only
- (b) Export does not require congressional notification
- (c) No improvement in performance capability
- (d) Unclassified technical data only
- (e) No software documentation on design or details of computer software, source code, design methodology, engineering analysis, or manufacturing know-how.
- (f) Does not apply to items covered by the Missile Technology Control Regime, and numerous other USML categories (see ITAR 124.2(c)(5)).

- 68.** (True or False) Classified technical data relating to a newly developed 10mm chain gun can be exported without a license.

True. ITAR 125.4(b)(6) applies.

- 69.** Give the definition of Major Defense Equipment. Why is this definition important?

Major Defense Equipment is any item of Significant Military Equipment (SME) have a nonrecurring Research, Development, Test & Evaluation (RDT&E) cost of more than \$50 million or a total production cost of more than \$200 million. The definition of MDE is important because the threshold for congressional notification for sales of MDE is only \$14 million, in contrast to \$50 million for other defense articles and defense services.

- 70.** (True or False) Commodity Jurisdiction determinations are issued by the Department of Commerce.

False. Commodity jurisdiction determinations are made by ODTC following consultation with the Department of Commerce, the Department of Defense, and other appropriate U.S. Government agency (see ITAR 120.4).

- 71.** (True or False) A company must be registered with ODTC prior to submitting a request for a commodity jurisdiction determination.

False. However, if it is determined by ODTC that the item in question is on the U.S. Munitions List, the company receiving such a determination must register with ODTC.