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Export Control and Technology Protection

SBIR/STTR Innovation Summit

Embracing Innovation, Science, and Technology to Outpace the Threat

Approved for Public Release
21-MDA-10783 (20 Apr 21)
• Export Control
  - International Trafficking in Arms Regulation (ITAR)
    – Control Export of high-priority defense articles and defense services for national security
  - Export Administration Regulation (EAR)
    – Control trade of all types: Lower-priority defense articles, dual use items, commercial products

• Technology Protection
  - Controlled Unclassified Information (CUI)
    – National Archives and Record Administration (NARA)
  - DISTRIBUTION STATEMENTS
    – Required on all Department of Defense technical documents
  - Cyber Security
    – National Institute of Standards and Technology (NIST) and
    – DFARS Clauses
• Export controls are U.S. laws and regulations that regulate and restrict the release of critical technologies, information, and services to foreign nationals, within and outside of the United States, and foreign countries for reasons of foreign policy and national security
  - Department of State
    – International Trafficking in Arms Regulation (ITAR)
      —Control Export of high-priority defense articles and defense services for national security
  - Department of Commerce
    – Export Administration Regulation (EAR) –
      —Control trade of all types: Lower-priority defense articles, dual use items, commercial products

Onus is upon each business to comply with export control laws and regulations
# Export Control Laws and Regulations

<table>
<thead>
<tr>
<th>Export Control</th>
<th>ITAR</th>
<th>EAR</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><strong>International Traffic in Arms Regulations</strong></td>
<td><strong>Export Administration Regulations</strong></td>
</tr>
<tr>
<td><strong>Laws</strong></td>
<td><em>Arms Export Control Act of 1976 (AECA)</em></td>
<td><em>Export Control Reform Act of 2018 (ECRA)</em></td>
</tr>
<tr>
<td><strong>Regulations</strong></td>
<td>22 CFR Chapter I Subchapter M (§§120 – 130)</td>
<td>15 CFR Chapter VII Subchapter C (§§730 – 774)</td>
</tr>
<tr>
<td><strong>Control Lists</strong></td>
<td><em>United States Munitions List (USML)</em> 22 CFR §121</td>
<td><em>Commerce Control List (CCL)</em> 15 CFR §774 Supplement No. 1</td>
</tr>
<tr>
<td><strong>Responsibility</strong></td>
<td>State Department Directorate of Defense Trade Controls (DDTC)</td>
<td>Commerce Department Bureau of Industry and Security (BIS)</td>
</tr>
<tr>
<td><strong>Link</strong></td>
<td><a href="https://www.pmddtc.state.gov/ddtc_public">https://www.pmddtc.state.gov/ddtc_public</a></td>
<td><a href="https://www.bis.doc.gov/">https://www.bis.doc.gov/</a></td>
</tr>
</tbody>
</table>
Other Export Applicable Regulations

• Office of Foreign Assets Control Regulations (OFAC)
• Foreign Trade Regulations (FTR)
• Nuclear Regulatory Commission (NRC)
• Department of Energy (DOE)
• Food and Drugs Administration (FDA)
• Drug Enforcement Agency (DEA)

Additional export control regulations apply to items not covered under ITAR and EAR i.e., Nuclear Technology and Materials
The U.S. Arms Export Control Act prohibits
- the export and temporary import of defense articles
  - items or technical data,
  — [includes providing technical data to foreign persons within the U.S.]
- the provision of defense services to foreign persons,
- and the brokering of defense articles or services by all persons in the United States and by U.S. persons wherever located,

unless approved in advance by a
- DDTC-issued export license, agreement, or
- Qualification for an ITAR exemption.

Defense article
- Defense article means any item or technical data designated by the United States Munitions List (USML)
  — “Defense article” includes technical data directly relating to items designated by the USML
Directorate of Defense Trade Controls (DDTC) registration required for any person in the USA who
- manufactures or exports defense articles,
- furnishes defense services to foreign persons, or
- brokers defense articles or services

Requires only one occasion of the foregoing
- A manufacturer who does not engage in exporting must nevertheless register

Registration requirement does not apply to persons who engage in the fabrication of articles solely for experimental or scientific purposes, including research and development
- Registration required by transition from R&D to actual production of the first product item
§ 121.1 United States Munitions List
of articles controlled by the ITAR, by Category

• I: Firearms and Related Articles
• II: Guns and Armament
• III: Ammunition and Ordnance
• IV: Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs and Mines
• V: Explosives … Propellants …
• VI: Surface Vessels of War …
• VII: Ground Vehicles
• VIII: Aircraft and Related Articles
• IX: Military Training Equipment …
• X: Personal Protective Equipment
• XI: Military Electronics
• XII: Fire Control, Range Finder, Optical and Guidance and Control Equipment
• XIII: Materials and Miscellaneous Articles
• XIV: Toxicological Agents …
• XV: Spacecraft …
• XVI: Nuclear Weapons …
• XVII: Classified Articles …
• XVIII: Directed Energy Weapons
• XIX: Gas Turbine Engines …
• XX: Submersible Vessels …
• XXI: Articles, Technical Data, and Defense Services Not Otherwise Enumerated

The underlined categories cover most, but not all, of MDA interests.

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EAR Summary

- The EAR include items that are:
  - Purely civilian,
  - With both civil and military, terrorism or potential Weapons of Mass Destruction related applications, and
  - Exclusively used for military applications but that do not warrant control under the International Traffic in Arms Regulations

- Any item sent from the United States to a foreign destination is an export
  - “Items” include commodities, software or technology
  - Release of technology or source code that is subject to the EAR to a foreign national in the United States is “deemed” to be an export to the home country of the foreign national under the EAR
• Category 0 - Nuclear Materials Facilities & Equipment [and Miscellaneous Items]
• Category 1 - Materials Chemicals Microorganisms and Toxins
• Category 2 - Materials Processing
• Category 3 - Electronics Design Development and Production
• Category 4 - Computers
• Category 5 Part 1 - Telecommunications
• Category 5 Part 2 - Information Security
• Category 6 - Sensors and Lasers
• Category 7 - Navigation and Avionics
• Category 8 - Marine
• Category 9 - Aerospace and Propulsion

The underlined categories cover most, but not all, of MDA interests.
§ 774 Supplement No. 1
Commerce Control List — Product Groups

- Each category is further subdivided into five Product Groups
  - Group A — Systems, Equipment and Components
  - Group B — Test, Inspection and Production Equipment
  - Group C — Material
  - Group D — Software
  - Group E — Technology

Sample Export Control Classification Number (ECCN) on CCL:

3A001 Electronic components and specially designed components therefor
Small Business’s need to understand the USML and CCL

- Recommend “self-classification”
  - Whether item is export controlled and
  - Whether the ITAR or the EAR applies
  - What USML or CCL category applies

Cases in doubt, seek official ruling

- State Department DDTC controls ITAR decisions
  - Commodity Jurisdiction process leads to DDTC review
- Commerce Department BIS controls EAR decisions
  - Commodity Classification (“CCATS”) Request leads to BIS review

MDA comments are only advisory, Not authorized to rule
Penalties for Export Violations

• General Overview
  - Generally, any person or entity that brokers, exports, or attempts to export a controlled item without prior authorization, or in violation of the terms of a license, are subject to penalties.
  - Violators may incur both criminal and civil penalties.

• ITAR Violations
  - The Arms Export Controls Act (AECA) and the International Traffic in Arms Regulation (ITAR) provide that willful violations of the defense controls can be fined up to $1,000,000 per violation, or ten years of imprisonment, or both.
  - In addition, the Secretary of State may assess civil penalties, which may not exceed $500,000 per violation. The civil penalties may be imposed either in addition to, or in lieu of, any other liability or penalty.

• EAR and Anti-Boycott Violations
  - Similar to the ITAR, violations of the Export Administration Regulation (EAR) are subject to both criminal and administrative penalties.
  - Fines for export violations, including anti-boycott violations, can reach up to $1,000,000 per violation in criminal cases, and $250,000 per violation in most administrative cases.
  - In addition, criminal violators may be sentenced to prison time up to 20 years and administrative penalties may include the denial of export privileges.
Protecting Information and Technology

• Controlled Unclassified Information (CUI)
  - For Official Use Only (FOUO) has been discontinued
• Distribution Statements
• Export Control Warning
• Cyber Security

Each business must protect CUI, export controlled technology, and cyber systems
Per E.O. 13556 of Nov 2010, the National Archives is the executive agent for the program to manage CUI

- Goal is openness and uniformity of Government-wide practice
  - …for identifying unclassified information throughout the executive branch that requires safeguarding…

National Archives

- “Marking Controlled Unclassified Information” v. 1.1, Dec 2016

Department of Defense

- DoDI 5200.48 “Controlled Unclassified Information” Mar 2020

- Controlled Unclassified Information Markings (training aids)
Marking CUI Documents
DoD Requirements

• “CUI” prominently shown top and bottom of each page and back cover
• “CUI Designation Indicator” box lower right of cover or first page
• Common CUI Categories
  - CTI = Controlled Technical Information
  - PROPIN = Proprietary Information
  - EXPT = Export Controlled
  - EXPTR = Export Controlled Research
• Email handling
  - Encrypt all MDA CUI
    – Exception: email within “mda.mil”
• Additional guidance, see DoD “Controlled Unclassified Information Markings”
Distribution Statements
Required on all DoD Technical Documents

- Guiding DoD/USD(R&E) Issuances for technical documents
  - Withholding of Unclassified Technical Data From Public Disclosure
    - Governing regulations provided in DoD Directive 5230.25
      (November 1984, with Change 2, October 15, 2018)
  - Distribution Statements on Technical Documents
    - Marking guidance provided in DoD Instruction 5230.24
      (August 2012, with Change 3, October 15, 2018)

- Distribution statements;
  - A: Public release; unlimited distribution
  - B: U.S. Government Agencies only*
  - C: U.S. Government Agencies and their contractors*
  - D: Department of Defense and U.S. DoD contractors*
  - E: Distribution authorized to DoD Components only*
  - F: Further dissemination only as directed by controlling DoD office or higher DoD authority

*Additional distribution at the discretion of the controlling DoD office

Use in addition to required CUI and Export Control markings
• All information developed with MDA funding has limited distribution
  - Contract Clause H-8 requires MDA Security and Policy review before public release
  - ITAR and EAR: “Fundamental Research” does not include any work where sponsor requires publication pre-approval

• MDA Public Release Process
  - MDA DIRECTIVE 5400.03 (July 2014) – currently under revision
  - Submit via Technical Monitor for coordination within MDA
    – 30 day minimum require for review
  - Applies to abstracts, presentations, publications, web page items, etc.
Export Control Marking

• **5230.24 directs all technical documents containing export-controlled technical data shall be marked**

  “WARNING - This document contains technical data whose export is restricted by the Arms Export Control Act (Title 22, U.S.C., Sec 2751, et seq.) or the Export Administration Act of 1979, as amended, Title 50, U.S.C., App. 2401 et seq. Violations of these export laws are subject to severe criminal penalties. Disseminate in accordance with provisions of DoD Directive 5230.25.”

• Mark subsequent pages:

  “Use or disclosure of data contained on this page is subject to the restrictions on the title page of this document”

• **Export controlled material is CUI**

  - Requires CUI page marking and CUI Designation Indicator box
  - Use “EXPTR” for most export controlled SBIR/STTR research
  - Requires Distribution Statement on technical documents
  - Never publically released

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Network Requirements for CUI

• NIST Special Publication (SP) 800–171
  - Applies to protecting Controlled Unclassified Information in non-federal information systems and organizations

• DFARS 252.204-7012
  - Safeguarding Covered Defense Information and Cyber Incident Reporting

• In progress: Cybersecurity Maturity Model Certification (CMMC) framework

For NIST publications see: https://csrc.nist.gov/publications
Summary

• Information Protection Important to National Security
  - Controlled Unclassified Information (CUI)
  - Export Controlled Technology and Software
  - Distribution Statements
  - Public Release Process

• Significant Statutory Penalties
  - Enforcement levees monetary and criminal penalties associated with violations

• Business’s are Responsible for Protecting National Security and Control of Sensitive Information
Backup
Resources

• Federal Register Code of Federal Regulations (CFR)
  - ITAR in Title 22: Foreign Relations
  - USML (United States Munitions List)
  - EAR in Title 15: Commerce and Foreign Trade
  - CCL (Commerce Control List)
Cheat Sheet for Distribution Statements

Building Compliant Distribution Statements


Enclosure 4: DISTRIBUTION STATEMENTS FOR USE ON TECHNICAL DOCUMENTS provides guidance for constructing and using DoD approved distribution statements and their accompanying reasons.

Paragraph 1a. Requires: "The wording of the distribution statements specified by this instruction may not be modified to accommodate additional distribution, such as distribution to foreign governments. Such release is outside the scope of secondary DoD distribution." Other markings may be also used.

Paragraph 1b. Shows the format: Distribution Statements B, C, D, and E are expressed in a standard format comprising four components presented in the following order:

1. Authorized Audience or Who Can Access
2. Reason for Control or Why/Reason*
3. Date of Determination
4. Controlling Office or Releasing Authority

*More than one reason may apply and may be used in a distribution statement.

Anatomy of a Distribution Statement

1. Distribution authorized to U.S. Government Agencies only; Proprietary Information
2. Continued

3. 15 Apr 05. Other requests for this document shall be referred to AFRL/VSSE, 3550 Aberdeen Ave. SE, Kirtland AFB, NM 87117-5776.

- Use listed distribution reasons as written
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