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Export Controls and Service Contractors: Determining When and How to Obtain U.S. Government Authorization to Accomplish Your Objectives

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December 6, 2018

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Discussion Roadmap



- U.S. Export Controls and Trade Sanctions Overview
- Case Studies and Discussion
- Enforcement
- Compliance Program Essentials

- Reasons for U.S. Export Controls and Trade Sanctions
 - Advancement of Foreign Policy Goals
 - Restrict Exports of Goods and Technology that Could Contribute to the Military Potential of Adversaries
 - Prevent Proliferation of Weapons of Mass Destruction
 - Prevent Terrorism
 - Fulfill International Obligations
- Different Purposes Mean There is No Perfect Alignment between U.S. Regulatory Frameworks and There is Some Overlap

- U.S. Export Controls
 - Cover Any Item in U.S. Trade
 - U.S.-Origin Items Wherever Located (Jurisdiction Follows the Item or Technology Worldwide)
 - Exclusions include: Patents and Patents Applications; Artistic or Non-Technical Publications; and Technology in the Public Domain
 - Many High-Technology Items and Most Military Items, as well as Associated Technology Require U.S. Export Authorization Through a License or an Applicable Exemption
 - Trade Sanctions Focus on Financing, Commodities

Overview: Regulatory Frameworks



- **State Department, Directorate of Defense Trade Controls (“DDTC”):** Munitions (the International Traffic in Arms Regulations (“ITAR”)); Certain Trade Sanctions
- **Commerce Department, Bureau of Industry and Security (“BIS”):** “Dual-Use” Items (the Export Administration Regulations or “EAR”)
- **Treasury Department, Office of Foreign Assets Control (“OFAC”):** Trade Sanctions, Embargoes, Restrictions on Transfers to Certain End-Users, Terrorism, and Narcotics
- Other Agencies, including the **Department of Energy**

Overview: ITAR



- The ITAR regulates the export and temporary import, as well as the manufacture and brokering, of defense articles and technical data
- It also regulates defense services provided to foreign persons in connection with, among other things, the design, development, manufacture, use, maintenance, modification, repair, or destruction of defense articles
- Any person or company who intends to export, temporarily import, or re-export a defense article, defense service, or technical data must obtain prior approval from DDTC by submitting a license request to DDTC, unless a license exemption applies

Overview: ITAR



- The ITAR applies to goods, services software, and technology designed to kill people or provide a defense in a military setting (e.g., firearms, armored vehicles, personal body armor, etc.)
 - Items and Technology on the U.S. Munitions List (“USML”) at 22 C.F.R. § 121.1
- Intended use not relevant in determining whether an item is ITAR-controlled
 - Pencils sold to a foreign military do not become ITAR controlled
 - Tank exported to serve as a museum piece remains ITAR-controlled

Overview: ITAR



- It can be challenging to determine whether an article, technical data, or service is designated on the USML and thus ITAR-controlled
- The policy on designating or determining USML applicability is provided in 22 C.F.R. § 120.3
 - Meets the criteria of a defense article or defense service on the USML; or
 - Provides the equivalent performance capabilities of a defense article on the USML
 - A specific article or service shall be determined in the future as a defense article or service if it provides a critical military or intelligence advantage such that it warrants control under the ITAR subchapter
 - Meets one of the criteria of 22 C.F.R. § 120.41(b) (“Specially designed” for the ITAR) when the article is used in or with a defense article and specially designed is used as a control criteria

Overview: ITAR



- Provision of Defense Services (22 C.F.R. § 120.9) include:
 - The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;
 - The furnishing to foreign persons of any technical data controlled under the ITAR, whether in the United States or abroad; or
 - Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice

Overview: ITAR



- Defense Services
 - Providing guidance or training to someone for a defense article
 - Providing non-public design or development information or other “technical data” regarding a defense article to a third party
 - Can be based solely on public domain information where a U.S. person provides non-public “value-added” comments to public information
 - Does not require U.S. defense articles – providing guidance related to a foreign-made defense article would be enough
 - Most training of foreign militaries and military training (limited to training on defense articles under revised definition)
 - This area is subjective and open to interpretation

- What is Technical Data? (22 C.F.R. § 120.10)
 - Information, other than software which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation
 - Classified information relating to defense articles and defense services on the U.S. Munitions List and 600-series items (formerly controlled by the ITAR but now controlled by the Commerce Department on the Commerce Control List)
 - Information covered by an invention secrecy order
 - Software directly related to defense articles
 - Excludes:
 - Information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities or information in the public domain as defined in §120.11 of the ITAR; certain telemetry data excluded under USML Category XV(f), note 3
 - Basic marketing information on function or purpose or general system descriptions of defense articles

Overview: EAR



- The Export Administration Regulations (EAR) regulates exports, re-exports, and activities involving commercial products, including dual-use commercial items with military and non-military applications
 - Regulates items designed with commercial purpose but which can have military applications (e.g., computers, pathogens, civilian aircraft)
 - Covers both the goods and the technology (including services and data)
- The EAR also governs anti-boycott prohibitions, which require all US firms to refuse to participate in foreign boycotts not supported by the United States (primary application to the Arab League boycott of Israel)

Overview: EAR



- The EAR licensing regime encourages a balancing of competing interests (including foreign availability, commercial and research objectives, and national security concerns)
- If an item/data/service is subject to the EAR, it does not necessarily mean that a license will be required to conduct an export. The need for an export license depends on how the item/data/service is controlled on BIS's Commerce Control List (CCL), where the product is to be exported, and whether there is a restriction on the end-use or end-user
 - The EAR enumerates 18 different types of license exceptions with varying requirements

Overview: EAR



- There is no separate definition of “defense service” or “technical data” in the EAR
- Instead, the EAR defines “technology” as:
 - Information necessary for the “development,” “production,” “use,” operation, installation, maintenance, repair, overhaul, or refurbishing (or other terms specified in ECCNs on the CCL that control “technology”) of an item (15 C.F.R. Part 772)
 - Controlled technology relates to technology that is required for the “development”, “production”, or “use” of items on the Commerce Control List is controlled according to the provisions in each Category
 - Technology that is required for the “development”, “production”, or “use” of a controlled product remains controlled even when applicable to a product controlled at a lower level. (EAR General Technology Note)

- Risks for Transfers of Dual-Use Goods and Related Technologies:
 - Must identify the export classification prior to export or access by foreign nationals
 - Determine if a license is required by a particular destination
 - Determine if a license exemption is available
 - Some examples include: Shipments of Limited Value (LVS), Shipments to Group B Countries (GBS); Civil End-Users (CIV); Technology and Software Under Restriction (TSR) and Technology and Software Unrestricted (TSU); Temporary Imports, Exports, Re-export, and Transfers In-Country (TMP); and Strategic Trade Authorization (STA)

Overview: OFAC



OFAC Sanctions Map

Overview: OFAC



- OFAC implements a series of federal laws and regulatory regimes designed to impose economic sanctions/embargoes on:
 - Certain foreign countries or regions (e.g. Iran, Syria, Cuba, and Crimea);
 - The list of prohibited/embargoed/sanctioned countries changes constantly
 - Prohibited entities and persons (“Specially Designated Nationals” or “SDNs”); and
 - Programs for engaging in activities contrary to U.S. foreign policy or national security (e.g. narcotics traffickers)
- Currently, there are thirty different active sanctions programs administered by OFAC

Overview: OFAC



- Sanctions typically focus on the end-user or country rather than the technology involved
- While there is great variation in prohibitions under OFAC's various sanctions regimes, each generally includes a bar on U.S. persons engaging in any dealings with these countries or SDNs
 - This prohibition includes financial transactions and the exchange of services, among other things
- Persons subject to U.S. jurisdiction cannot do business with SDNs and cannot do business with any party owned 50% or more by an SDN
 - Under some sanctions regimes, U.S. persons cannot do business with a party controlled by an SDN, even if the ownership percentage is below 50%

Overview: OFAC



- The basis for U.S. jurisdiction is generally broad and includes:
 - U.S. citizens or U.S. permanent residents wherever located
 - Entities organized in the U.S.
 - Subsidiaries of entities organized in the U.S.
 - Foreign subsidiaries for some sanctions regimes (e.g., Iran, Cuba)
 - Most U.S. dollar denominated transactions (because they generally settle through the U.S. regardless of the intention of the parties)
 - U.S.-origin goods, technology, and software in more than *de minimis* amounts
 - Any routing of activities through the U.S. including IT and data processing
 - Incidental internet traffic is not sufficient for jurisdiction
 - Dedicated IT services in U.S. likely sufficient for jurisdiction
 - Use of U.S. email server might be sufficient
 - Any person who is physically present in the U.S.

Overview: OFAC



- Trade Sanctions Risks to Keep in Mind
 - Dealings with prohibited countries
 - Dealings with prohibited persons (or entities owned or controlled by prohibited persons)
 - Unauthorized financial transfers

Case Studies: Overview



- How Export Control and Trade Sanctions Issues Might Arise:
 - Sending goods abroad (even on a temporary basis)
 - Provision of research or defense services to foreign persons, even at the request of the U.S. Government
 - Transfers of technical data (including software)
 - Dealings with subcontractors, payments of fees, and commissions
 - Brokering

Case Study No. 1



- U.S. company exported satellites to China for launch on a Chinese launch vehicle at a time when U.S. regulations permitted such launches
- Satellite launch failed and the Chinese launch service provider initiated an investigation
- U.S. manufacturer assisted in the investigation
- State Department determined a “defense service” occurred “even when all the information relied on in furnishing the defense service to a foreign power is in the public domain”
- U.S. company fined for transferring value-added engineering capabilities even though the information provided was available publicly

Implications for Service Providers



- When dealing with defense articles, foreign or U.S., U.S. exporter should not be lulled into complacency that the information about the article is in the public domain, is commonly taught in universities, etc.
- Focus on the value added being provided as a service provider
- Any services in defense articles provided abroad or to foreign nationals located anywhere, including in the U.S., should focus on whether assistance is provided in the “design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation demilitarization, destruction processing or use of defense articles”

Case Study No. 2



- U.S. organization seeks to send its personnel abroad for humanitarian work or military training work for a U.S. government contract
- Personnel protected with personal protective gear (body armor), communication devices (radios, phones), GPS and computers
- First, need to determine the export jurisdiction for export of products
 - Most high-grade body armor subject to the ITAR
 - Communications devices may be ITAR- or EAR-controlled
 - GPS equipment for ground-based use generally is subject to the EAR
 - Almost all computers are subject to the EAR
- Second, determine jurisdiction for the training provided (e.g., defense services? Subject to the EAR?)
- Generally, for ITAR exports the exporter must be registered and obtain a license or qualify for an exemption; EAR is more flexible for temporary exports, but licenses may be required for training

Temporary Exports of Personal Protective Gear, Equipment



- Exception under the ITAR §123.17 to permit U.S. persons to export temporarily from the United States without a license one set of body armor covered by USML Category X(a)(1), which may include one helmet covered by USML, or one set of chemical agent protective gear covered by USML Category XIV(f)(4). No registration required
 - Must declare the articles upon each departure from the U.S.
 - Must be exported with the individual's baggage or effects, whether accompanied or unaccompanied (but not mailed); and
 - Is for the person's exclusive use and not for reexport or other transfer of ownership
 - The person must declare an intention to return the article(s) to the United States at the end of tour, contract, or assignment for which the articles were temporarily exported

Temporary Exports of Personal Protective Gear, Equipment



- Exception for body armor not available for military grade radios
- Must be registered under the ITAR to obtain a temporary export license or otherwise qualify for a license exception for military radios
- Most EAR-controlled phones, GPS equipment and computer equipment may be exported without a license to most destinations worldwide except for embargoed countries/locations (Cuba, Crimea, Iran, North Korea, Syria, and for some equipment, Sudan)
- For sensitive equipment that otherwise would require a license, license exception TMP permits the temporary export abroad to all countries except E:1 countries (Iran, North Korea, Sudan and Syria) so long as the equipment is kept under one's effective control at all times
- Special rules may permit exports to Cuba under limited circumstances
- Determine license requirements for training (ITAR versus EAR)
- No registration requirement under the EAR

Case Study No. 3



- U.S. organization seeks to collaborate with party abroad. What do you need to check?
 - Destination (countries): Is the country subject to U.S. trade sanctions?
 - Crimea region of Ukraine, Cuba, North Korea, Iran, Syria
 - Special prohibitions under the ITAR (prohibited countries under § 126.1)
 - Special EAR provisions for certain technologies (e.g., Russia, China, Venezuela)
 - Parties/Persons: Is any party to the agreement on U.S. prohibited lists?
 - OFAC list, Bureau of Industry & Security, etc.
 - Is the signatory to the agreement or any individual in the transaction on a list?
 - Any parties to the transaction on a list (banks, freight forwarders, etc.)?
 - Contractual Restrictions
 - U.S. government contract restrictions on use of U.S. citizens, sourcing requirements, etc., bank financing restrictions, etc.
- Check for new designations occurring while the transaction is ongoing

Case Study No. 3



- Beware facilitating transactions from the U.S. or by U.S. persons for transactions legal in the local jurisdiction, but subject to U.S. controls
 - Long line of banking cases where OFAC imposed penalties for activities in the U.S. for facilitating transactions abroad that would be prohibited if entered into by a U.S. person directly
 - Make certain to have insight into the activities of a subsidiary or parent organization abroad
 - Ensure that an independent review is conducted before facilitating any transaction
- OFAC defines facilitation broadly to include the provision of assistance for certain efforts, activities, or transactions, including the provision of currency, financial instruments, securities, or any other transmission of value; purchasing, selling, transporting, swapping, brokering, financing, approving, or guaranteeing; the provision of other services of any kind; the provision of personnel; or the provision of software, technology, or goods of any kind

- U.S. Export Controls and Trade Sanctions Penalties for Noncompliance
 - **State Department (ITAR)**
 - Criminal violations up to \$1,000,000 per violation, up to 20 years' imprisonment
 - Civil penalties: seizure and forfeiture of articles and any vessel, aircraft, or vehicle involved in attempted violation, revocation of exporting privileges, fines of up to slightly over \$1.3 million per violation (depending on inflation rate)
 - **Commerce Department (EAR)**
 - Criminal violations: up to \$1,000,000 or up to five times the value of the export, whichever is greater per violation (range depends on applicable law), up to 20 years' imprisonment
 - Civil penalties: loss of export privileges, fines up to slightly over \$295,000 per violation (depending on inflation rate)
 - **Treasury Department (OFAC)**
 - Criminal violations: up to \$1,000,000 per violation, up to 20 years imprisonment
 - Civil penalties: fines up to slightly over \$1.4 million (depending on applicable law and inflation rate) per violation
 - Additional penalties may be warranted for violations under specific sanctions laws

- Practical Implications in Dealing with Potential Enforcement Measures
 - Significant Time and Costs Associated with Defense
 - Disruption of Work Flows
 - Hold orders and suspension of activities
 - Time devoted to investigation and document reviews as opposed to handling business needs
 - Engagement of Outside Counsel
 - Document collections and review
 - Interviews of Employees (by outside counsel and potentially government)
 - Required Reporting and Advocacy
 - Meetings with government
 - Drafting disclosures/written reports
 - Corrective Actions
 - Risk that Teaming Agreement Partner or Competitor Will Report Transaction to the U.S. Government and Thus Shut-down Transaction During Investigation

- How to Prevent Compliance Problems
 - Identify defense services and technical data, brokering activities, training, etc.
 - Apply for licenses in a timely manner (license approvals can take 1-6 months)
 - Implement an export control and trade sanctions policies and procedures compliance plan
 - Training for all personnel with international exposure
 - Provide compliance resources

- How to Prevent Compliance Problems Continued
 - Review License Provisos and Limitations Carefully
 - Provisos place limits on what can be done under licenses
 - Limitations can include limitations on what disassembly, repair, and maintenance can be performed and who can perform it
 - Provisos also impose requirements on exporters, such as:
 - Requirements to report when exports are completed or if exported items do not reach their intended destinations for some reason
 - Any activity taken under a license must be specifically authorized within the four corners of the license document

- Best Practice Guidance for Compliance Programs Include:
 - Top-down messaging to all employees on the importance of and commitment to compliance with export control regulations (i.e., written policy or mission statement by senior management that provides compliance with export control regulations is a high priority)
 - A high-level officer/employee with adequate background, training, and authority to be responsible for ensuring export controls compliance (i.e., Export Control Compliance Officer “ECCO”)
 - Potential support from Export Control Administrators
 - Appointment of Empowered Official/central person responsible for export compliance
 - Regular general awareness training sessions, including lessons on “red flags”, should be required for all employees

- Continued Best Practice Guidance for Compliance Programs Include:
 - Written export compliance policies and procedures should be established and shared with all relevant employees
 - These policies and procedures should be tailored to the relevant business as opposed to “off the shelf”
 - Procedures should include processes for due diligence and obtaining written representations from forwarding agents and customers verifying the end-user and end-uses
 - Procedures should also include regularly scheduled self-assessments of compliance with export control regulations and trade sanctions, as well as benchmarking against industry best practices
 - Engagement of outside counsel or consultant from time-to-time to assess export compliance program and provide suggestions for improvement

Questions & Discussion



Speakers



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Mr. Barker’s practice focuses on national security matters including export controls and trade sanctions administered by the Office of Foreign Assets Control at the US Department of the Treasury (OFAC), and compliance with the Foreign Corrupt Practices Act (FCPA). He helps companies and institutions establish compliance plans, obtain export authorizations, and provides representation in enforcement proceedings. Mr. Barker came to the firm from the US Department of State, where he served as the Deputy Assistant Secretary for Nonproliferation Controls and, prior to that, as Deputy Assistant Secretary for Export Controls.



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Ms. Fitzpatrick advises and represents clients in a wide variety of litigation, national security and international matters. She has particular experience conducting internal investigations and advising companies on export enforcement and other international law enforcement issues. She also represents clients in civil antitrust matters and false claims/qui tam actions. Prior to law school, Ms. Fitzpatrick worked as a paralegal-specialist and treaty analyst in the Office of the Legal Adviser at the US Department of State and was member of the US Delegation to the New START (Strategic Arms Reduction Treaty) negotiations.