



Export controls and compliance: licensing and enforcement 2015

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Legal and regulatory framework

- Two (2) primary export regimes control the transfer of the majority of products, technology, data and services (outside of the agricultural arena):
 - Arms Export Control Act, 22 USCA §§ 2778, *et seq.* (“AECA”)
 - Controls “defense articles,” “defense services,” and related “technical data”
 - Implemented through the International Traffic in Arms Regulations, 22 CFR Parts 120-130 (“ITAR”)

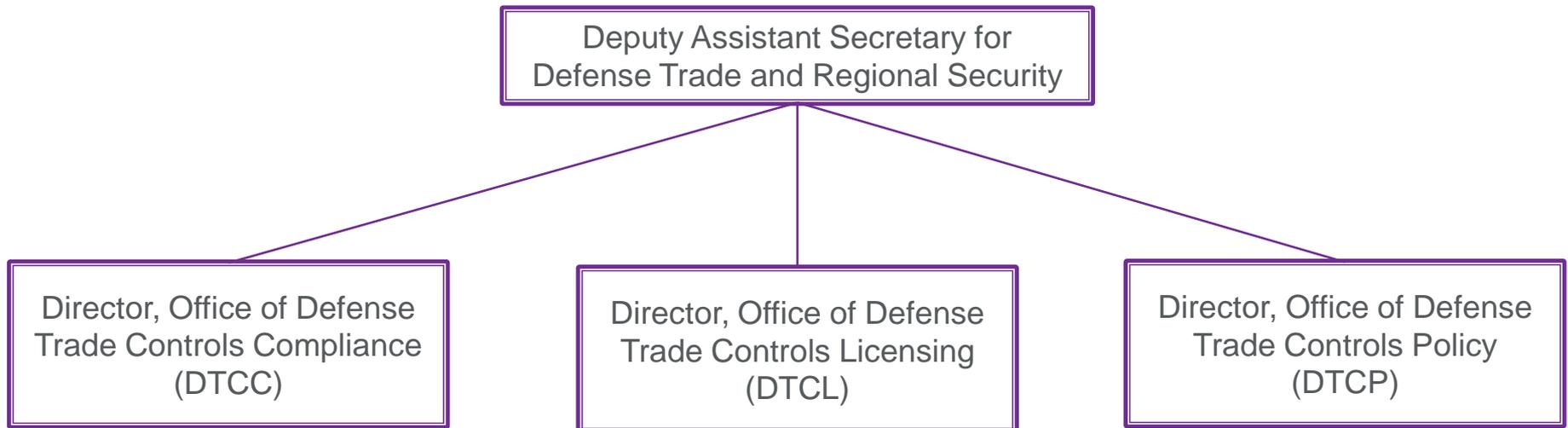


Legal and regulatory framework

- Arms Export Control Act, 22 USCA §§ 2778, *et seq.* (“AECA”)
 - Articles, data and services may be found on the US Munitions List, 22 CFR § 121.1 (“USML”)
 - Administered by the Department of State, Directorate of Defense Trade Controls (“DDTC”), in consultation with the Department of Defense and select agencies as needed
 - ITAR generally require registration, licensing, recordkeeping and reporting



Directorate of defense trade controls (DDTC)





Legal and regulatory framework

- Export Administration Act, 50 USCA § 2401, *et seq.* (“EAA”)
 - Implemented through the Export Administration Regulations, 15 CFR part 730, *et seq.* (“EAR”)
 - Administered by the Department of Commerce, Bureau of Industry and Security (“BIS”) in consultation with the Departments of State and Defense as needed



Legal and regulatory framework

- Export Administration Act, 50 USCA § 2401, *et seq.* (“EAA”)
 - Currently expired (with few exceptions)
 - Export Enforcement Act of 2007 and other statutory changes to enforcement
 - EAR remain effective through Executive Orders issued by the President through his emergency authority under the International Emergency Economic Powers Act, 50 USCA § 1701, *et seq.* (“IEEPA”)



Legal and regulatory framework

- Export Administration Act, 50 USCA § 2401, *et seq.* (“EAA”)
 - EAR control “dual-use” products, materials, equipment, software and technology (collectively “items”)
 - Items are included on the Commerce Control List, 15 CFR 774
 - EAR generally require licensing, recordkeeping and reporting
- Both export regimes include common terms, but define them differently, depending on context – Export Reform effort is seeking to reconcile these distinctions



Legal and regulatory framework

- Key Concepts :
 - “Specially Designed”
 - Export reexport and retransfer
 - Foreign person
 - Technical data
 - Public domain and publicly available



Legal and regulatory framework

- Preliminary key to determining the application of the export laws and regulations is **classification**:
The correct identification and determination of whether and where the items, data, articles or services are included on the USML or the CCL.
- This concept remains relevant under export reform in both order of reference and specially designed analyses



International traffic in arms regulations

22 CFR PARTS 120-130

FRAMEWORK

- Key sections
- National security and foreign policy
- Extraterritorial reach
- Challenged constitutionally – no successful challenges other than encryption
- Defense Distributed v. U.S. Department of State (*W.D. Tex. 2015*) – Preliminary Injunction Denied
- Requirements



Export administration regulations 15 CFR PARTS 730-774

- Key sections
- National security, foreign policy and short supply
- Broad, yet focused on dual-use items and defense items
- Multilaterally focused
- More detailed CCL
- Classification
- Licenses



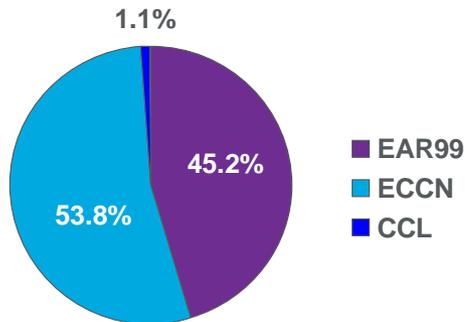
Commerce classifications

- Jurisdiction remains an issue
- Determining characteristics that subject items to the EAR
- Grandfathering of jurisdiction and licenses
- CCL and “600-series”
- Export reform was/is designed to provide more details
 - Liability protection
 - ITAR Sections
 - Note CJ decisions
 - Depends on the definition of “detailed”



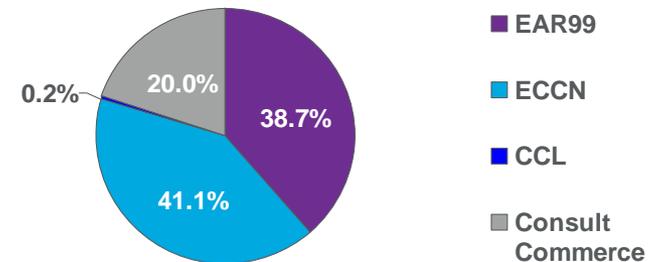
Export jurisdictional breakdown of commerce controlled items

2010



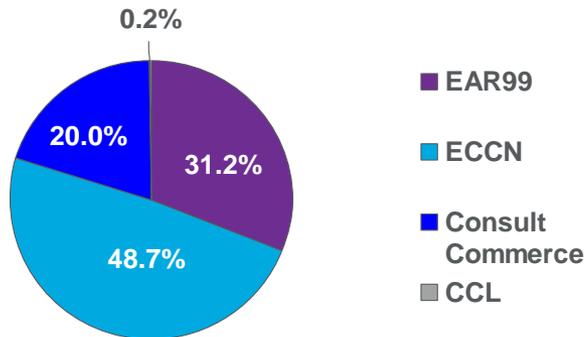
Total: 93

2011



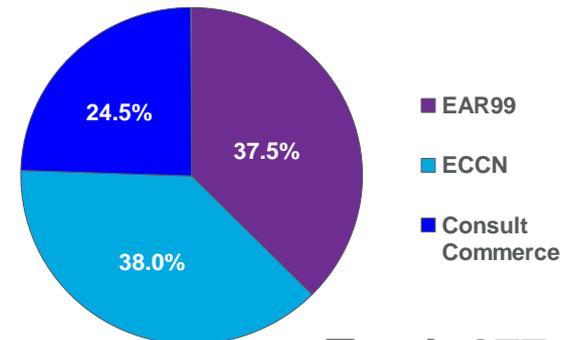
Total: 659

2012



Total: 660

2013



Total: 277



Commerce classifications

- Commerce recognizes self-classification — but note liability that applies
- CCATS process is similar to the CJ process but is not a jurisdictional determination
 - CCATS applies only if item is on Commerce list
 - Considerations include
 - Technical characteristics
 - Patent information
 - Application
- Like CJ determinations, CCATS decisions are valid only to the extent that the information included in the request is accurate
 - Question concerning “accuracy” — see *Falmouth Scientific, Inc.*
 - Circumstances where CCATS are strategically helpful



Export administration regulations 15 CFR PARTS 730-774

- Export reform created 600-Series
 - Category on the CCL to accept USML items being transferred to Commerce as part of Export Reform
 - Includes defense articles that the Government states “no longer warrant control” on the USML
 - Question of Commerce’s statutory authority to control defense articles — consider the scope of IEEPA
 - Subject to license exceptions in the EAR
 - Transfers from the USML to the CCL are not intended to be any more restrictive than the USML — inconsistencies exist



Export administration regulations

15 CFR PARTS 730-774

- Licenses
 - License Elements
 - Who?
 - What?
 - Where?
 - When?
 - Why?
 - How?
 - License options
 - Commerce is overwhelmed due to transition
 - Requiring more detail; longer license time



Export administration regulations

15 CFR PARTS 730-774

- Licenses
 - Ten (10) General Prohibitions
 - One (1) through three (3) -- license exceptions apply
 - Four (4) through ten (10) -- license exceptions generally do not apply
- License process
 - BIS - 748 - P
 - SNAP - R
 - Document support
 - Timeline
 - Review



Export administration regulations

15 CFR PARTS 730-774

- License process
 - Outcomes:
 - Approval
 - Approval with provisos
 - Denial
 - Return without Action (“RWA”)
- License exceptions
 - Self-executed
 - Claimed by exporter
 - Essential to invoke at time of export



Export administration regulations 15 CFR PARTS 730-774

- License appeal process
 - 15 CFR §756
 - Anyone “directly and adversely affected” by an administrative action may appeal
 - Generally not subject to judicial review, but challenges have been raised
 - May escalate to the Under Secretary for Industry and Security



Export administration regulations

15 CFR PARTS 730-774

- License exceptions — key issues
 - False statements
 - Elements of the exception must all be satisfied to be invoked
 - Recordkeeping is critical
- License exceptions that apply to the 600-series
 - GOV (§ 740.11)
 - LVS (§ 740.3)
 - TSU (§ 740.13)
 - STA (§ 740.20)



Export administration regulations

15 CFR PARTS 730-774

- License Exception STA
 - ECCN must authorize the use of STA
 - Applies to the 600-series — 36 countries
 - Commerce outlined the process for all items and additional requirements for 600-series
 - For all items subject to the EAR:
 - Provide the consignee or end user with the appropriate ECCN
 - Obtain consignee/end user statement that includes the following:
 - Consignee/end user is aware that items are to be shipped under STA
 - Consignee/end user has been given ECCN by the exporter
 - No subsequent use of License Exception APR (a) or (b) shipments
 - Consignee/end user agrees not to ship or transfer in violation of the EAR
 - Consignee/end user agrees to provide documents to USG upon request
 - Companies are finding STA compliance difficult and non-U.S. companies unwillingness to participate



Export administration regulations 15 CFR PARTS 730-774

- Additional requirements for STA exports of 600-series items
 - Limited to:
 - Ultimate end use by the US Government or government of a Country Group A:5 destination (36 countries currently)
 - For return to the US
 - If the US Government has authorized its use
 - Foreign party must have been on a previously approved State or Commerce license
 - Consignee/end user must agree to end use checks and end user restrictions



Export administration regulations

15 CFR PARTS 730-774

- Screening – know your customer
 - Purpose
 - Methodology
 - Lists
 - Records
 - Timing
 - Entities/Persons covered
- Antiboycott
 - 15 CFR §760
 - Reporting is critical
 - Timing and substance
 - Scope



Export administration regulations 15 CFR PARTS 730-774

- Recordkeeping
 - Mandatory
 - 15 CFR §762
 - Specific records identified
 - § 762.2
 - § 762.3
 - Essential for licenses and *critical* for license exceptions

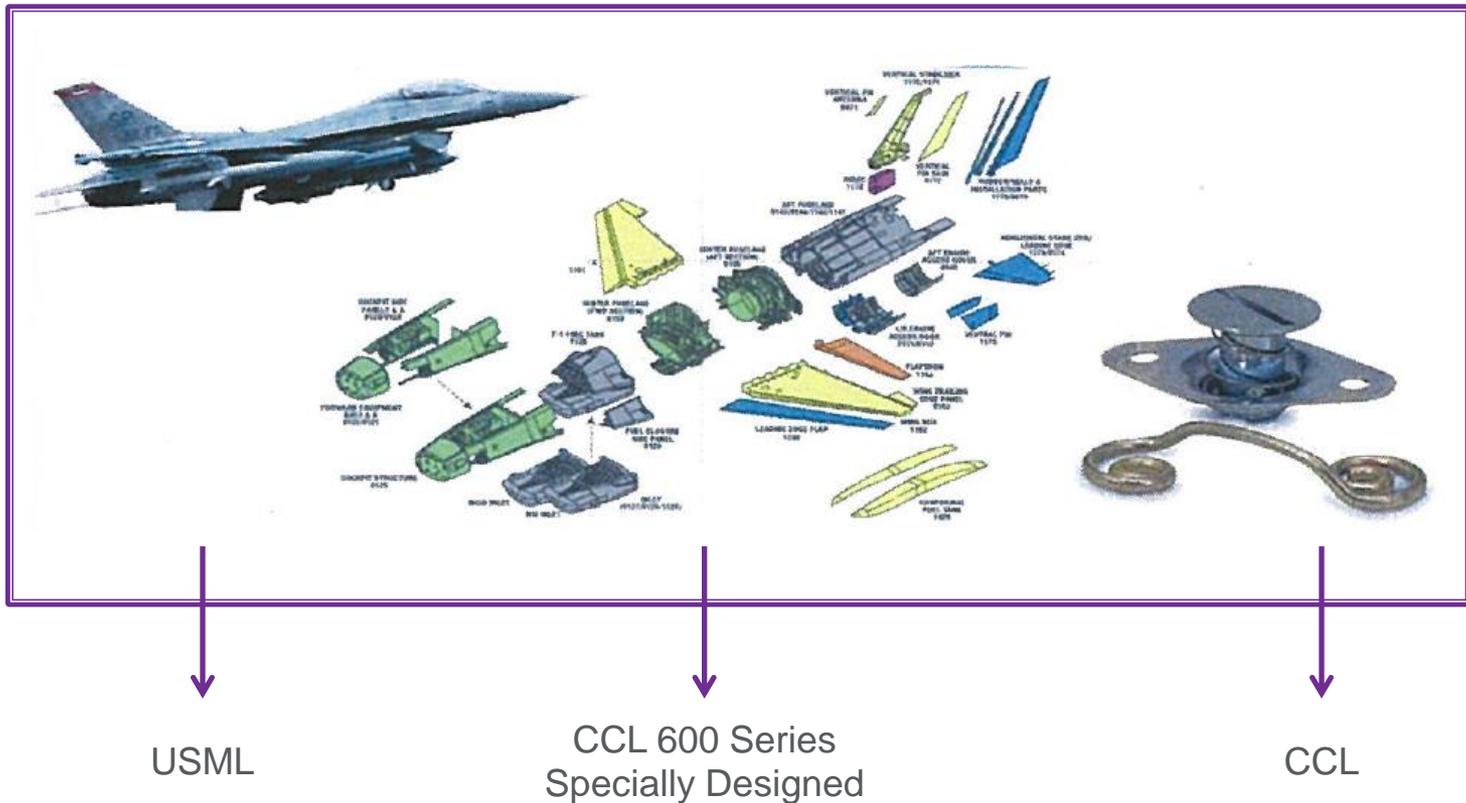


International traffic in arms regulations 22 CFR PARTS 120-130

- Classification
 - United States Munitions List, 22 CFR § 121.1
 - Covers end items, systems, subsystems, parts, components, assemblies, software, hardware, related data and related services
 - Questions regarding “materials”
 - Governed by § 120.3 as redefined, effective October 15, 2013
 - New “specially designed” analysis in § 120.41



New U.S. export controls - new classification challenges due to multiple jurisdictions





International traffic in arms regulations 22 CFR PARTS 120-130

- Policy for designating defense articles
 - Updated § 120.3
 - Change in focus
 - Old Test: Designed, developed, configured, adapted or modified for a military application; Does not have predominant civil applications; and Does not have performance equivalent to those of an article or service used for civil applications
 - New “tests”
 - “Meets the criteria” of an item on the USML; or
 - “Provides the equivalent performance capabilities” of an item on the USML



International traffic in arms regulations 22 CFR PARTS 120-130

- Policy for designating defense articles
 - Future items will be subject to the ITAR “if [they] provide a critical military or intelligence capability such that it warrants control under” [the ITAR]
 - Is specially designed (if specially designed is control criteria in the specific subcategory (*i.e.* parts and components “specially designed “for use with defense articles))
 - Catch and release concept

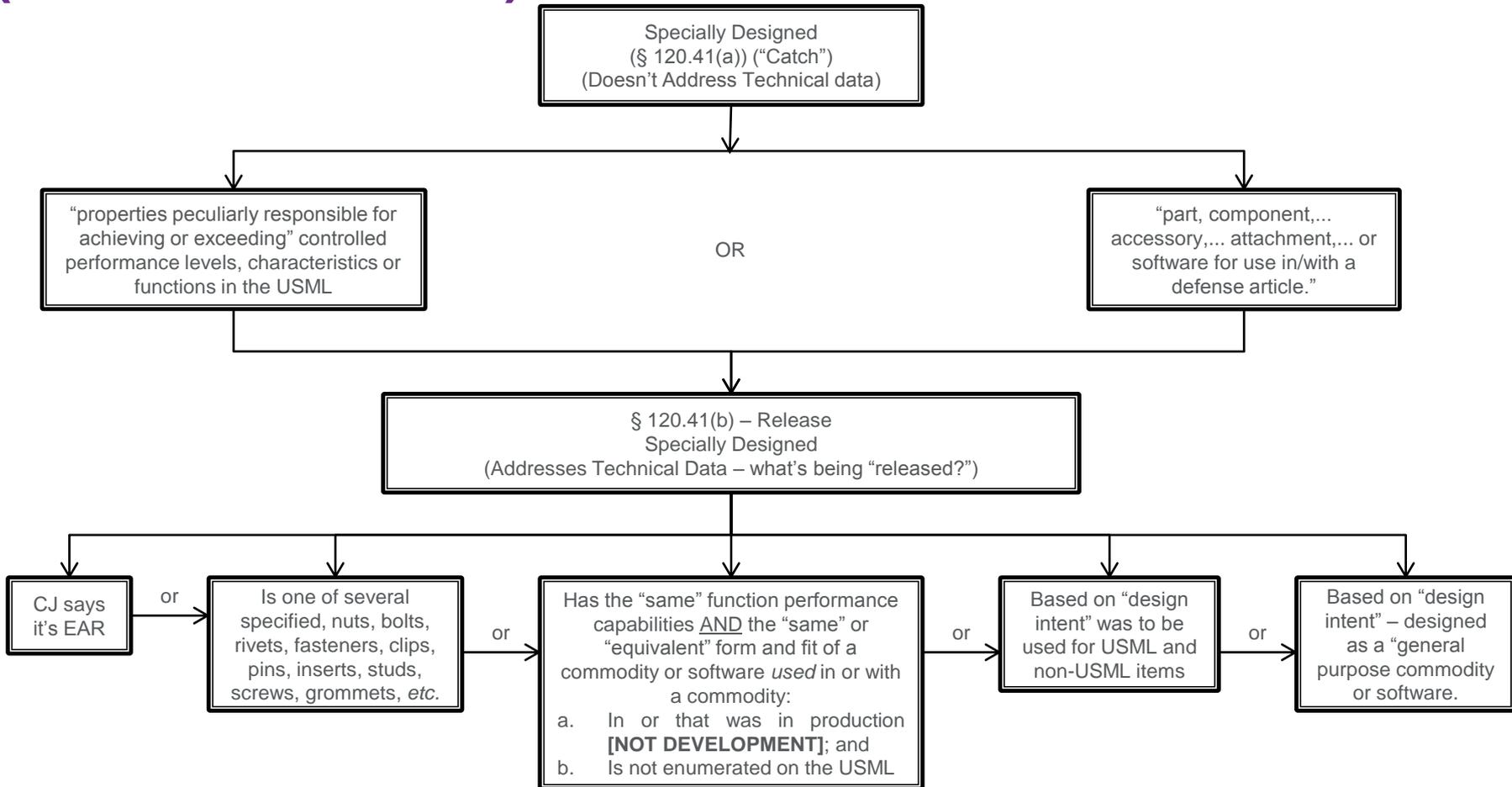


International traffic in arms regulations 22 CFR PARTS 120-130

- Policy for designating defense articles
 - Updated § 120.3
 - Now includes a statement informing as to what is *not* subject to the ITAR (120.3 (c))
 - A CJ decision, unless superceded by changes to the USML or a subsequent CJ determination; or
 - Meets the “release” tests in § 120.4 (“specially designed”)
 - Standards keep export jurisdiction an open issue unless the item is subject to the EAR
 - Establishes new presumptions



§ 120.41 specially designed (catch and release)





International traffic in arms regulations 22 CFR PARTS 120-130

- Classification
 - Jurisdictional Determinations
 - Commodity Jurisdiction CJ (§ 120.4)
 - Self — classifications
 - Manufacturer determination



International traffic in arms regulations 22 CFR PARTS 120-130

- Classification
 - End Use Questions
 - Under export reform end use is now more relevant; new rules to move away from focus on design intent
 - End use under old classification rule was not relevant to determining whether an item was ITAR- controlled



International traffic in arms regulations

22 CFR PARTS 120-130

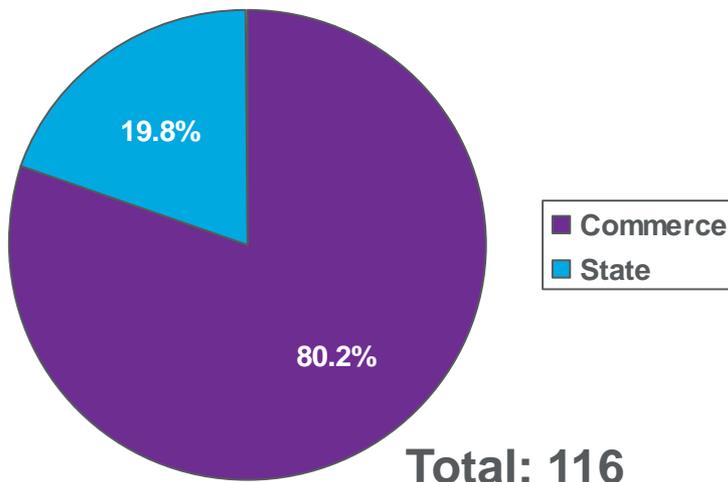
- Commodity Jurisdiction Classification
 - Process under § 120.4 to determine if a defense article or service is on the USML
 - State Department is the only agency empowered to
 - Updated — effective October 15, 2013
 - Changes the process in § 120.4(d) to comport with the revised § 120.3
 - Defines “performance capability” for software: “the measure of a software’s effectiveness to perform a designated function.”
 - Electronic submission
 - Registration not required
 - Documentary support required



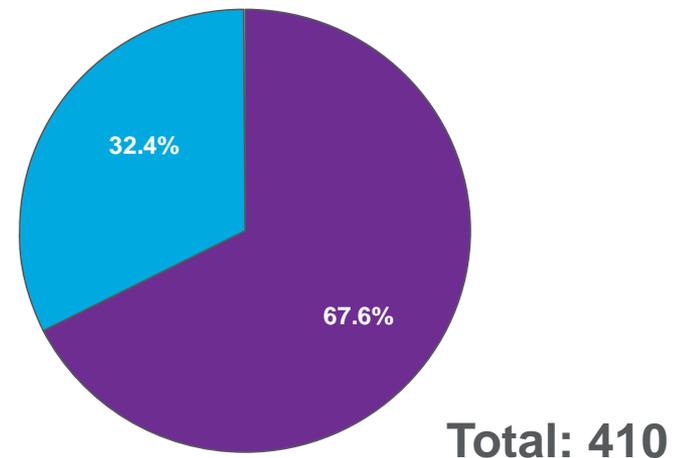
CJ export jurisdiction breakdown for select years

- Impact of Export Reform
 - More CJ's
 - More state determinations?

2010



2013





International traffic in arms regulations

22 CFR PARTS 120-130

- Requirements
 - Registration
 - §122 and §129
 - Exporters, manufacturers, brokers
 - Some exemptions – *e.g.*, § 122.1(b)
 - Records
 - One (1) – year period of validity
 - Empowered official
 - § 120.25
 - Legally defined
 - Essential – statutorily driven



International traffic in arms regulations

22 CFR PARTS 120-130

- Requirements
 - Empowered official
 - Qualifications
 - Scope of authority
 - Knowledge of export laws and regulations
 - Liability
 - Personal
 - Corporate



International traffic in arms regulations 22 CFR PARTS 120-130

- Licensing
 - Types of activities
 - Permanent export — DSP-5
 - Temporary export — DSP-73
 - Temporary import — DSP-61
 - Defense services — TAA/MLA



International traffic in arms regulations

22 CFR PARTS 120-130

- Licensing
 - Forms and electronic process
 - Documentary support
 - Timing
 - Analysis
 - “License versus Exemption”
 - Valuation
 - “Tangibles”
 - “Intangibles”
 - “License versus Agreement”



International traffic in arms regulations 22 CFR PARTS 120-130

- Agreements
 - Types
 - Technical Assistance Agreements
 - Manufacturing License Agreements
 - Warehouse and Distribution Agreements
 - Covers technical data and defense services
 - Broad scope



International traffic in arms regulations

22 CFR PARTS 120-130

- Agreements
 - Elements
 - Comparable to license elements
 - Parties' signatures still required
 - Recordkeeping
 - Reporting
 - Validity Period
 - Valuation
 - Scope
 - Certification
 - Management and administration is key
 - Electronic process and timing



International traffic in arms regulations

22 CFR PARTS 120-130

- Exemptions
 - Included throughout the ITAR
 - Designed to permit activity once the exemption elements are satisfied
 - Self-executed by exporter
 - All elements must be met to invoke an exemption
 - No retroactive exemption use — exemptions must be invoked at the time the activity occurs or else not valid
 - Mandatory recordkeeping
 - § 123.26
 - § 122.5



International traffic in arms regulations 22 CFR PARTS 120-130

- Exemptions
 - Examples— for technical data and/or defense services
 - § 125.4(b)
 - § 126.3
 - § 126.4
 - § 126.5
 - § 126.6
 - § 126.18



International traffic in arms regulations

22 CFR PARTS 120-130

- Brokering
 - Fundamentally changed, effective October 25, 2013
 - Updated definitions and scope of coverage
 - New Definitions
 - Broker - § 129.2(a)
 - Brokering activities - § 129.2(b)
 - Registration
 - Licensing
 - Reports
 - Took most foreign entity actions out of the definition



International traffic in arms regulations 22 CFR PARTS 120-130

- Part 130
 - Payment of fees and commissions
 - Broadly defined
 - Tied to Part 129
 - Relationship to activities that raise issues under the Foreign Corrupt Practices Act
 - Enforcement — *e.g.*, *BAE PLC Consent Agreement* and its Deferred Prosecution Agreement



International traffic in arms regulations

22 CFR PARTS 120-130

- Recordkeeping
 - Mandatory
 - New Standards:
 - “Legibility”
 - “Readability”
 - How are records kept?
 - Calculating 5-year periods
 - Transitioned items
 - Licensed items not subject to the ITAR — dual licensing
 - Merger and acquisition scenarios



ITAR and EAR violations

- Violations
 - Types
 - Reach — domestic and extraterritorial
 - Standards — “strict liability” in a civil context
 - Sanctions
 - Not to exceed \$500,000 or \$1,000,000 (depending on civil or criminal)
 - Suspension
 - Debarment
 - Exclusion from practice before the agency
 - Forfeiture
- Enforcement



ITAR and EAR violations

- Enforcement Trends and Issues
 - Types of violations
 - Unauthorized exports
 - False statements
 - Material omissions
 - Misclassifications
 - Accuracy in submissions
 - Systemic Compliance problems
 - Impact of export reform on enforcements
 - Greater focus on “individuals” as opposed to companies
 - Creates conflicts between employees and employers



ITAR and EAR violations

- Impact of export reform on enforcement
 - Raises the need for separate counsel for employees
 - Affects who conducts internal investigations
 - Places new requirements on Empowered Officials
 - Focus by Commerce more narrowly — Iran and denied parties



ITAR and EAR violations

- Cases
 - State
 - *Investigation of Lesmeister (2013)*
 - *Investigation of Lavery (1999/2006)*
 - *In re Meggitt-USA, Inc. (2013)*
 - *In re Aeroflex (2013)*
 - *In re Raytheon (2013)*
 - *In re Esterline (2014)*
 - *In re Intersil (2014)*



ITAR and EAR violations

- Cases
 - Commerce
 - *Timothy Gormly*
 - *PPG Industries, PPG Paints, Hickcox, Combs, Wang*
 - *Manoj Bhayana*
 - *Sirchie Acquisition Company, LLC*
 - *Falmouth Scientific, Inc.*
 - *University of Massachusetts - Lowell*



Key terms and definitions

ITAR	EAR
<p><u>Technical Data:</u></p> <p>"(a)(1) Information,..., 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."</p> <p>"(a)(2) Classified information relating to defense articles and defense services and 600 — series items controlled by the Commerce Control List;"</p> <p>"(a)(3) Information covered by an invention secrecy order:"</p> <p>"(a)(4) Software as defined in § 121.8(f) of this subchapter directly related to defense articles;..."</p> <p>22 CFR § 120.10(a)(1)</p>	<p><u>Technology:</u> "Specific information necessary for the "development," "production," or "use" of a product. The information takes the form of "technical data" or "technical assistance." 15 CFR § 772, p. 33</p> <p><u>Technical Assistance:</u> "May take forms such as instruction, skills training, working knowledge, consulting services. ...[M]ay involve transfer of "technical data." 15 CFR § 772, p. 33</p> <p><u>Technical Data:</u> "May take forms such as blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals and instructions written or recorded on other media or devices such as disk, tape, read-only memories." 15 CFR § 772, p. 33</p>



Key terms and definitions

ITAR	EAR
<p><u>Technical Data Exclusion</u></p> <p>(b)The definition in paragraph (a) of this subsection does not include information concerning general scientific, mathematical or engineering principles commonly taught in schools, college and universities or information in the public domain as defined in § 120.11. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.”</p> <p>Effective October 15, 2013</p> <p>22 CFR § 120.10(b)</p>	



Key terms and definitions

ITAR	EAR
<p>Public Domain: “[I]nformation which is published and which is generally accessible or available to the public:</p> <p>“(a)(1) Through sales at newsstands and bookstores;”</p> <p>“(a)(4) At Libraries open to the public or from which the public can obtain documents;”</p> <p>“(a)[5] Through patents available at any patent office;”</p> <p>“(a)(6) Through unlimited distribution at a conference, meeting, seminar, trade show or exhibition generally accessible to the public, in the United States;”</p> <p>“(a)(7) Through public release <i>i.e.</i>, unlimited distribution) in any form (<i>e.g.</i>, not necessarily in published form) after approval by the cognizant U.S. Government department or agency...;”</p>	<p>Published information: Information is ‘published’ when it becomes generally accessible to the interested public in any form, ...:</p> <p>(1) “Publication in periodicals, books, print, electronic, or any other media available for general distribution to any member of the public or to a community of persons interested in the subject matter, such as those in a scientific or engineering discipline, either free or at a price that does not exceed the cost of reproduction and distribution...;”</p> <p>(2) “Ready availability at libraries open to the public or at university libraries...;”</p> <p>(3) “Patents and open (published) patent applications available at any patent office; and”</p> <p>(4) “Release at an open conference, meeting, seminar, trade show, or other open gathering.”</p> <p>15 CFR § 734.7 (a)(1)-(4)</p>



Key terms and definitions

ITAR	EAR
<p>“(a)(8) Through fundamental research in science and engineering at accredited institutions of higher learning in the U.S. where the resulting information is ordinarily published and shared broadly in the scientific community. Fundamental research is...distinguished from research the results of which are restricted for proprietary reasons or specific U.S. Government access and dissemination controls.”</p> <p>22 CFR § 120.11(a)(1) and (a)(4)-(8)</p>	<p><u>Publicly Available:</u> “Information that is generally accessible to the interested public in any form and, therefore, not subject to the EAR.” 15 CFR §§ 732 and 772, p. 27</p> <p><u>Publicly Available Technology and Software:</u> “Technology and software that are already published or will be published; arise during, or result from fundamental research; are educational; or are included in certain patent applications.” 15 CFR § 772, p. 27; see also 15 CFR § 734.3(b)(3)</p>



QUESTIONS??



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Thank you

The logo for Dentons, featuring the word "DENTONS" in white, uppercase letters inside a purple arrow-shaped box pointing to the right.

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