



## ITAR Guide for the Firearms Industry

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The U.S. firearms industry is regulated under the National Firearms Act, Gun Control Act and other federal and state firearms laws. However there is another important area of regulation that applies to the firearms industry as well - the International Traffic In Arms Regulations (ITAR). ITAR are the State Department controls that regulate defense products and services. Companies regulated under ITAR are subject to a number of requirements including registration, licensing, restrictions on transferring controlled technical data and performing defense services, among others. Following recent amendments, a second set of regulations - the Export Administration Regulations (EAR) - impose related requirements and must be considered alongside ITAR. Contrary to popular belief, these apply beyond export transactions to many domestic activities of U.S. firms, as well as many foreign firms that have contacts with the U.S.

The stakes are high - violations can result in civil and criminal penalties, including up to twenty years imprisonment for the company's owners and employees. In light of the serious nature these requirements, firearms companies should have a clear understanding of this area of the law[1]

### **A. Is My Company Subject To ITAR?**

*The U.S. Munitions List.* At the core of the ITAR is a list of products called the U.S. Munitions List (USML).[2] The USML contains a wide array of products as well as software and technical data. If a company's product, software or technical data are identified on the list, the company is subject to the ITAR requirements.

Firearms and ammunition are listed in a number of categories of the USML. For example, Category I - Firearms, Close Assault Weapons and Combat Shotguns - includes automatic, semi-automatic and non-automatic firearms to .50 caliber inclusive (12.7 mm), silencers, certain riflescopes and other firearms items, technical data and parts, components and attachments for the articles in this category. Category II - Guns and Armaments - includes guns over .50 caliber, other weapons, tooling and equipment, test and evaluation equipment, certain autoloading systems, parts, components and technical data. Category III - Ammunition/Ordinance - includes ammunition and ordinance for articles in Categories I and II, certain ammunition loading equipment, other equipment, tooling, certain components, parts,

accessories, attachments, equipment and technical data.

A complete list of the 21 Categories covered on the USML is attached below in Exhibit A. If a company's product is on the USML, the company is subject to a number of requirements in domestic and international activities, as more fully described below.

ITAR covers not just physical products, but software and technical data as well. Technical data is defined to include information required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of articles on the USML[3] If a company produces any of these items it is subject to ITAR.

ITAR also covers defense services. If an item is listed on the USML, the performance of services related to such item for foreign parties are also covered on the USML and subject to ITAR. This includes services involving the installation, design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of USML items. Even if a company does not manufacture a particular product that is listed on the USML, if it performs services related to such item the services may be covered under ITAR.

The USML covers not just end-products but also subsystems and certain firearms parts, components, accessories and attachments. Under the State Department's interpretative "See-Through Rule," if a part or component is subject to ITAR and used in a larger system, the entire larger system becomes subject to ITAR regulation. This creates significant complications for both U.S. and foreign companies that supply firearms components including second- and third-tier suppliers. Thus these controls reach far and wide within the industrial supply chain.

Registration Under ITAR Part 122. If a U.S. company manufactures, exports, temporarily imports or brokers an item on the USML or performs a "defense service" the company is required to register with DDTC under ITAR Part 122.[4] Note that registration is required even if a company only performs domestic manufacturing activities "exporting is not required to trigger the registration obligation.

On July 22, 2016, the State Department issued new policy guidance (the "Policy Guidance") regarding the requirement for gunsmiths and others involved in the firearms industry to register with the State Department under Part 122. According to the Policy Guidance, the following activities constitute "manufacturing" and parties that engage in such activities are required to register under ITAR §122.1:

- (a) Use of any special tooling or equipment upgrading in order to improve the capability of assembled or repaired firearms;
- (b) Modifications to a firearm that change round capacity;
- (c) The production of firearm parts (including, but not limited to, barrels, stocks, cylinders, breech mechanisms, triggers, silencers, or suppressors);

- (d) The systemized production of ammunition, including the automated loading or reloading of ammunition;
- (e) The machining or cutting of firearms, e.g., threading of muzzles or muzzle brake installation requiring machining, that results in an enhanced capability;
- (f) Rechambering firearms through machining, cutting, or drilling;
- (g) Chambering, cutting, or threading barrel blanks; and
- (h) Blueprinting firearms by machining the barrel.

DDTC has also advised in the Policy Guidance that registration may be required for other activities beyond manufacturing such as:

- (a) Assisting foreign persons in the design, development, and repair of firearms may constitute the export of a defense service (see 22 CFR § 120.9) and require ITAR registration with and authorization from DDTC; and
- (b) Exporting a firearm or any other item on the USML requires ITAR registration with and authorization from DDTC.

The new Policy Guidance reinforces DDTC's serious position on the importance of ITAR compliance for the firearms industry.

Other Obligations Under ITAR. In addition to the registration requirement, if a company's products, software, technical data or services are on the USML, ITAR imposes a number of other requirements:

- Transfer of Technical Data And Software to Foreign Nationals ? The company is prohibited from transferring software or technical data on the USML to foreign nationals, either in the US or abroad, without an export license, unless a license exemption applies. This applies even if the foreign national is an employee of the company that owns the technical data.
- Defense Services ? The company is prohibited from performing "defense services"[5] related to items on the USML for foreign parties, either in the US or abroad, without obtaining a State Department authorization called a Technical Assistance Agreement (?TAA?) unless an exemption applies;
- Export License ? The company is prohibited from exporting products listed on the USML in permanent or temporary export transactions without obtaining an export license unless a license exemption applies.
- Reexports/Retransfers - If an ITAR-controlled item is exported under a license, the foreign recipient is not permitted to reexport the item (ie, export the item to another foreign country) or retransfer the item (ie, transfer the item to another party or for a different end use in the same foreign country) unless the State Department has provided specific authorization for the reexport/retransfer.

- Temporary Imports ? The company is prohibited from importing defense items listed on the USML in temporary import transactions without obtaining a temporary import license;
- Recordkeeping Requirement ? The company is required to maintain records in accordance with the ITAR recordkeeping requirements set forth at 22 CFR §122.5;
- Brokering ? If companies perform activities to assist or facilitate the sale of ITAR-controlled items to non-US parties this is generally referred to as "brokering activity." Parties who engage in brokering activities are subject to numerous requirements including broker registration, the requirement to obtain advanced State Department authorization to perform brokering activities for certain products, reporting, recordkeeping and restrictions on engaging in brokering transactions involving the Section 126.1 Proscribed Countries? (See below).
- Reports For Payments of Sales Commission - Companies that pay sales commission, fees and/or political contributions in connection with the sale of ITAR-controlled products or services that meet the requirements of ITAR Part 130 are required to file reports with DDTC regarding such payments and comply with other requirements under ITAR Part 130.
- Transactions With Debarred Parties ? Persons who have been debarred or who are deemed "ineligible" under the provisions of ITAR §120.1(c)(2) are prohibited from entering into transactions regulated under ITAR. In addition, companies are prohibited from entering transactions regulated under ITAR if other parties involved in such transactions have been debarred or are otherwise ineligible under §120.1(c)(2).
- Products Manufactured Abroad Using ITAR-Controlled Items - If a foreign party uses an ITAR-controlled component in a product manufactured abroad, or manufactures a foreign product based upon ITAR-controlled technical data, the product manufactured abroad becomes ITAR-controlled. As such, the foreign party becomes subject to a number of ITAR requirements including that the company is not permitted to transfer the foreign produced item to any other parties unless DDTC provides specific authorization for such transfer.[6]
- §126.1 Proscribed Countries ? Companies are prohibited from (i) entering transactions regulated under ITAR involving countries listed in ITAR §126.1 (referred to as the "Section 126.1 Proscribed Countries?") without specific DDTC authorization (which is subject to a policy of denial); (ii) submitting marketing proposals or presentations to parties in the Section 126.1 Proscribed Countries without advanced authorization from DDTC; and (iii) engaging in brokering transactions with parties involving the Section 126.1 Proscribed Countries. In addition, if a person knows or has reason to know of a proposed, final or actual sale, export or other transfer of ITAR-controlled items involving the Section 126.1 Proscribed Countries they are required to immediately inform DDTC of such event.

More Than Just Exports. ITAR is far broader than just exports and regulates a wide variety of activities in purely domestic commercial activity, such as:

- The prohibition against transferring technical data or software subject to ITAR to foreign nationals in the United States;
- The prohibition against the performance of defense services for foreign parties in the United States;
- The requirement for U.S. companies to register with the State Department as a manufacturer of

USML items, even if they do not export any products;

- The requirement to comply with ITAR recordkeeping requirements;
- The requirement to obtain import authorization for the import of defense items;
- The prohibition against the transfer of USML products to representatives of foreign governments and military organizations (including NATO, United Nations, etc.) in the United States.

Obligations On Foreign Companies. ITAR requirements may also apply to foreign companies. For example, if a foreign company sells firearms products in the U.S. this activity will be regulated under ITAR. Similarly, if a foreign company receives an ITAR controlled item overseas, including hardware, technical data or software, it is prohibited from reexporting or retransferring such item unless the State Department has provided specific authorization (referred to as reexport or retransfer authorization). Also, as mentioned above, if an ITAR-controlled component is exported from the U.S. and incorporated into a foreign-manufactured product, under the "See-Through Rule" the entire foreign-made product becomes subject to ITAR regulation. Other ITAR requirements may also apply to foreign companies under ITAR.

License Exemptions For Firearms Industry. If a license or TAA is required for a particular transaction, license exemptions may be available. License exemptions that are particularly relevant for firearms or ammunition include: (i) ITAR §123.17(b) (certain non-automatic firearms covered under USML Category I(a) that were manufactured before 1898); (ii) ITAR §123.17(c) (temporary export of limited quantity of firearms and ammunition for personal use subject to conditions); (iii) ITAR §123.17(a) (certain parts and components of firearms listed in USML Category I(a) when the value does not exceed \$100); (iv) ITAR §123.18 (certain nonautomatic firearms and ammunition for personal use of members of US Armed Forces and civilian employees of the US Government); (v) ITAR §123.19 (certain shipments originating in Canadian or Mexican that incidentally transit the U.S. en route to a delivery point in the same country that originated the shipment); and (vi) ITAR §125.4(b)(6) (technical data related to firearms not in excess of .50 caliber and ammunition for such weapons, except detailed design, development, production or manufacturing information);[7] Companies should review the terms and limitations of any license exemption carefully to confirm that it can be applied to a particular factual situation.

It should be noted that license exemptions are subject to significant conditions and limitations and cannot be used in all instances ? parties are advised to check the applicable conditions prior to using a particular exemption. Conditions and limitations that frequently apply for certain ITAR exemptions include that the exemptions cannot be used: (i) for exports to ITAR §126.1 "Proscribed Countries," (ii) by exporters who are ineligible under ITAR §120.1(c), and (iii) for exports that require Congressional notification. In addition, the State Department states that exporters should be registered under ITAR in order to use most ITAR license exemptions and maintain records of their use of exemptions in particular transactions.

Penalties. Penalties for ITAR violations include civil and criminal penalties, including fines of up to \$1,000,000 per violation and up to 20 years imprisonment. Other sanctions include debarment and denial of export privileges. Penalties can be imposed on the company defendant as well as officers, directors and employees in their personal capacities.

## **B. Export Administration Regulations.**

The Export Administration Regulations (EAR) are administered by the U.S. Department of Commerce. The EAR were originally adopted to regulate commercial and dual use products. However, under a series of amendments known as Export Control Reform certain military products previously regulated under ITAR were transferred to the EAR and hence the EAR now covers certain military products as well. Consequently, firearms industry companies must be cognizant of both ITAR and EAR in their compliance activities.

Proposed Transfer of Regulatory Jurisdiction For Firearms Products Under ECR At the time of this writing, the majority of firearms and ammunition products are regulated under ITAR and only a small portion are regulated under the EAR. However, the State, Commerce and Defense Departments have considered transferring a large portion of firearms products that are currently listed on the USML to be regulated under the EAR by the Commerce Department under Export Control Reform (ECR). Once regulated under the EAR, firearms products will still be subject to many similar requirements as under ITAR including the requirement to obtain export licenses for export transactions, restrictions on the transfer of technology and software, restrictions on reexports and retransfers, etc., but under the jurisdiction of Commerce instead of State. Due to the political sensitivity surrounding the regulation of firearms products, it is unclear if these changes will be adopted and if so which firearms products will be covered. Readers reviewing this article after the date of publication should confirm if such amendments have occurred at the time of their review as certain of the provisions discussed in this article are subject to change.

CCL-Based Controls. The EAR contain a list of products called the Commerce Control List (CCL). If an item is listed on the CCL it may be subject to export licensing and other controls depending upon the country to which it will be exported and other factors (these requirements are referred to as the CCL-Based Controls).

Certain firearms products are listed on the CCL and subject to requirements under the Export Administration Regulations (EAR) administered by the US Department of Commerce. These include (i) certain non-combat shotguns with a barrel length of 18 inches or longer; (ii) certain BB, pellet, and muzzle loading (black powder) firearms; (iii) certain riflescopes and sighting devices that are not manufactured to military specifications; (iv) certain accessories and attachments (e.g., belts, slings, aftermarket rubber grips, cleaning kits) for firearms that do not enhance the usefulness, effectiveness, or capabilities of the firearm, components and parts (but note however that many firearms parts, components and accessories are listed on the USML). Companies should review their products to determine if they are listed on the CCL or the USML. The determination of whether an item is listed on the CCL or USML is a complex process that depends in great part on the technical description and specifications of the product and parties should use care in making these determinations. If a company is unsure of the export jurisdiction or classification of a product it can submit a commodity jurisdiction request to the State Department to determine if an item is subject to ITAR and a classification (CCATS) request to the Commerce Department to determine the product's classification under the EAR.

The requirements under the CCL-Based Controls are similar to many of the requirements under ITAR, including the requirements to obtain export licenses for the export of certain products, restrictions on the transfer of controlled technology and software (including transfers to foreign nationals in the United States or overseas), restrictions on reexports of U.S.-origin products and the incorporation of U.S. components into items manufactured abroad that contain above a *de minimis*[8] level of US content, and restrictions on the performance of services related to weapons of mass destruction and other restricted activities.

As with ITAR, the EAR applies not just to physical products but also technology and software as well. The term "technology" is defined broadly at 15 CFR Part 772 to include "specific information necessary for the development, production, or use of a product." Thus if technology or software is on the CCL, there may be restrictions on exporting such items out of the U.S. and disclosing such items to foreign nationals in the U.S.

Other Export Requirements Under the EAR. In addition to the CCL-Based Controls, the EAR contain a number of additional requirements that apply to all export and reexport transactions that are subject to the EAR, even if the item in question is not listed on the CCL. These requirements include the prohibition against undertaking exports and reexports to certain embargoed countries[9] to certain restricted parties[10] and for use in certain prohibited end-uses.[11]

Penalties For Violations. Penalties for violations of EAR are similar to ITAR, i.e., civil and criminal penalties including monetary fines of up to \$1,000,000 per violation and up to 20 years imprisonment.

Due to the significant overlap of the requirements under ITAR and EAR, it is advised that firearms industry companies review the applicability of both of these sets of regulations to their business on a simultaneous basis. We would be pleased to provide a copy of our Export Classification Checklist to readers for assistance in determining the export jurisdiction and classification of their products and assessing requirements for their business operations.

### **C. Compliance Strategies For Firearms Companies.**

Due to the complexity of this area of the law, a company cannot simply rely on good intentions to avoid violations. There are a number of steps that companies commonly take to reduce the risk of violation, including the following:

(1) Identify ITAR Requirements That Apply To Company. The first step is to review the company's business activities to determine the ITAR and EAR requirements that apply to the company. This process involves a careful review of a company's products, services, customers and business activities, and comparison of its products and services to the categories of the USML and the CCL. Based upon this review the company can identify the activities that it performs that are subject to regulation and the requirements that apply.

(2) ITAR Compliance Program. An ITAR Compliance Program is a company-wide program for implementing ITAR requirements in the company's day-to-day operations. This includes: (i) the

appointment of a company employee to be in charge of ITAR compliance; (ii) establishing written policies and procedures for your employees to follow in performing activities that are subject to ITAR and EAR; (iii) conducting ITAR compliance training for key employees; (iv) determining the export jurisdiction/classification of the company's products; (v) adopting a procedure for screening for prohibited parties, prohibited countries and prohibited end-users; (vi) conducting periodic internal compliance audits; and (vii) adopting a procedure for compliance with the ITAR and EAR recordkeeping requirements.

If a company is found to have an ITAR violation, prosecutors, enforcement agents and the courts will often reduce or "mitigate" penalties for companies which have adopted compliance programs, and in some cases impose no penalties at all.

(3) *Export Compliance Audit*. In many instances it is valuable to conduct an export compliance audit or similar internal review of the company's past business activities to assess if its activities were in compliance with ITAR and EAR requirements and identify any past violations that may have occurred. This can be valuable in identifying any weaknesses in the company's compliance practices and for "cleaning up" any past violations. This review can be conducted by a company compliance officer or an outside compliance expert and undertaken in conjunction with the adoption of an ITAR Compliance Program. If problems are found there a number of ways to deal with these including submitting a voluntary disclosure to the agency involved. If the review is conducted by or under the direction of the company's legal counsel, this increases the likelihood that the results will be subject to the attorney client privilege and protected from disclosure in response to a subpoena in the event there is an investigation. A compliance audit is an excellent way for the company to identify any compliance problems that it has in advance and deal with them before a government agency does.

Taken together, these steps provide a valuable structure and process for a company to undertake a serious effort to protect against ITAR violations. They also provide a firm foundation for a company's defense in the event any violations occur in the future.

Note: This article contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not intended and should not be construed as legal advice. Additional ITAR articles are available at ITAR Articles.

## **EXHIBIT A**

### **THE US MUNITIONS LIST**

- Category 1: Firearms, Close Assault Weapons and Combat Shotguns
- Category 2: Guns and Armament
- Category 3: Ammunition/Ordinance
- Category 4: Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs, and Mines
- Category 5: Explosives and Energetic Materials, Propellants, Incendiary Agents and Their Constituents



- Category 6: Surface Vessels of War and Special Naval Equipment
- Category 7: Ground Vehicles
- Category 8: Aircraft and Related Articles
- Category 9: Military Training Equipment and Training
- Category 10: Personal Protective Equipment
- Category 11: Military Electronics
- Category 12: Fire Control, Range Finder, Optical and Guidance and Control Equipment
- Category 13: Materials and Miscellaneous Articles
- Category 14: Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment
- Category 15: Spacecraft and Related Articles
- Category 16: Nuclear Weapons and Related Articles
- Category 17: Classified Articles, Technical Data and Defense Services Not Otherwise Enumerated
- Category 18: Directed Energy Weapons
- Category 19: Gas Turbine Engines and Associated Equipment
- Category 20: Submersible Vessels and Related Articles
- Category 21: Articles, Technical Data, and Defense Services Not Otherwise Enumerated

[1] Note: At the time of this writing the State, Commerce and Defense Departments have considered transferring the regulation of certain firearms and ammunition products from ITAR to the EAR. However it is not certain if such transfer will occur or if it does when this will occur and which items will be affected. See Section B below for a further discussion of this issue.

[2] The USML can be found at <http://www.ecfr.gov/cgi-bin/text-idx?SID=86008bdf1fb2e79cc5df41a180750a&node=22:1.0.1.13.58&rgn=div5>

[3] Information is not considered controlled technical data if it is in the public domain as defined under ITAR §120.11 or is basic marketing information on function or purpose or general system descriptions of defense articles as set forth in ITAR §120.10.

[4] A number of exemptions from registration are set forth at 22 CFR §122.1(b). It should be noted, however, that even if a party is exempt from the registration requirement under §122.1, it may still be subject to the other requirements under ITAR.

[5] The term "Defense Service" is defined in ITAR §120.9 as follows:  
(a) *Defense service* means: (1) 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; (2) The furnishing to foreign persons of any technical data controlled under this subchapter (see §120.10), whether in the United States or abroad; or (3) 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. (See also §124.1.)

[6] In addition, if a US company grants a foreign party an authorization to manufacture defense articles abroad which involve the use of ITAR-controlled technical data, the parties are typically required to execute a Manufacturing License Agreement ("MLA") which has been authorized by DDTC and comply with other ITAR requirements. Also, agreements between U.S. companies and foreign companies for the warehousing and distribution of defense articles overseas (referred to as Warehousing and Distribution Agreements) must be approved in advanced by the Directorate of Defense Trade Controls ("DDTC").

[7] Note that the exemption under ITAR §125.4(b)(6) cannot be used for purposes of establishing offshore procurement arrangements or producing defense articles offshore (see §124.13), except as authorized under §125.4(c). The exemption also cannot be used for exports to proscribed destinations under ITAR §126.1 or for persons considered generally ineligible under ITAR §120.1(c).

[8] This term is defined at 15 CFR §734.4.

[9] See 15 CFR Part 746.

[10] See 15 CFR Part 744.

[11] See 15 CFR Part 744.

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## **Related Services**

- Firearms Industry
- International Trade and Business
- ITAR, Export Controls and Economic Sanctions