

## COURSE 12, TUTORIAL 1

# INTRODUCTION TO ITAR AND THE MUNITIONS LIST

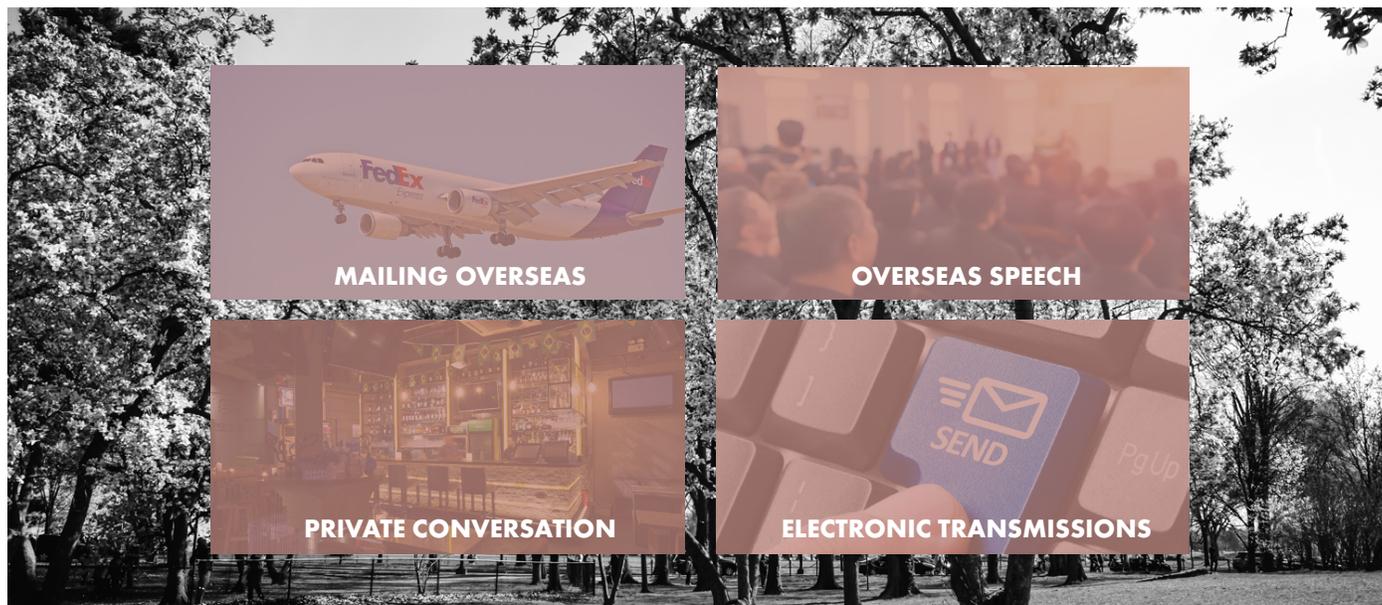


Let me set the stage for this series of Tutorials on International Traffic in Arms Regulations or ITAR. You are developing a valuable product or technology for which you have strong legal rights. You're getting ready to roll these out commercially and you've heard that there may be some legal requirements that apply— ITAR and Export Administration Regulations (EAR). More importantly, you've heard that these rules have civil and criminal sanctions, up to 20 years imprisonment if you get it wrong. All of a sudden, you're very interested in how this will apply to your company. That's what we're going to address in this course. I'll describe the pertinent areas of the law, and provide you the game plan for operating properly under these laws. There's one important note - You'll sometimes hear people refer to these as the export control laws. However, in many cases these laws apply to purely domestic activities as well. For example, your company may be required to register under ITAR or there may be restrictions on transferring controlled technology to foreign nationals in the U.S. Even if you are not involved in any export activities, if you are operating in the Defense area or with U.S. Munitions List (USML) items, these laws will most likely apply. This is a theme that I will be coming back to throughout the course.

### THREE IMPORTANT EXPORT CONTROL LAWS

There's actually three areas of export control laws. 1) The International Traffic in Arms Regulations or ITAR, which is administered by the State Department. These apply to military products. 2) The Export Administration Regulations or EAR, administered by the Commerce Department. These apply to commercial products that have some use in the military or intelligence area. And 3) the U.S. Sanctions Laws, administered by the Treasury Department's Office of Foreign Assets Control. We're only going to focus in this series on ITAR and the EAR, but I just wanted you to know that these are out there.





Methods of exporting that can get you in trouble

So let's start with the ITAR. ITAR stands for International Traffic in Arms Regulations. These are administered by the Directorate of Defense Trade Controls within the State Department. The goal behind these is to regulate defense products. In addition to State, the Department of Defense is also heavily involved in these regulations - DTSA, the Defense Technology Security Administration, and other program offices in DoD. In fact, if you send a case over to the State Department under ITAR, they will almost immediately send it out to the DoD. So this is basically regulation by or in conjunction with the Department of Defense.

### U.S. MUNITIONS LIST (USML)

The first cornerstone concept under ITAR: ITAR contains a list of products called the U. S. Munitions List (USML)<sup>1</sup> If your product is on this list, it is subject to these controls. This is a key concept. If your product is on the list, everything else flows from this. If you look down the list, you will see that the majority of headings- a lot of the items in the beginning of the list are truly defense items: firearms, guns, explosives, naval vessels. But, if you look farther down the list, you will see that the categories start to overlap with commercial items - training, electronics, chemicals, satellites. So it is sometimes difficult to determine if your product is on the list or not - but I'll show you how to sort through this.

<sup>1</sup> [https://www.pmdtcc.state.gov/regulations\\_laws/documents/official\\_itar/ITAR\\_Part\\_121.pdf](https://www.pmdtcc.state.gov/regulations_laws/documents/official_itar/ITAR_Part_121.pdf)

Another cornerstone concept is that ITAR controls apply not just to physical products, but also to software and technical data, as well. So, if an item is on the list - such as a navigational device - the software used to run that device is also on the list, and the technical data related to the device is on the list. Technical data refers to drawings, algorithms, manuals, any information on the design, manufacture, or use of the item. So, if the product is on the list, then the electronic files are on the list, the specification sheets, the technical manuals – are all on the Munitions List and subject to ITAR. These items are subject to the same sets of controls under ITAR as physical products.

### WHAT IS CONSIDERED THE EXPORT OF SOFTWARE AND TECHNICAL DATA?

So how does someone export software and technical data? The State Department has a very broad definition of how one exports these items. If you send it abroad, that's an export – so if you take the disk with the data in it, put it in a FedEx package and send it to London, you've just exported technical data. If you go abroad and release it – that's an export. If you are giving a speech at a business conference in Rotterdam, and you're addressing foreign nationals, that's the export of technical data. Or even in a private conversation with a foreign national, over a drink in a bar at your hotel in Shanghai – that's the export of technical data. Electronic transmissions to foreign nationals – if you send an email, or a fax, or a phone call with a foreign national – that's the export of technical data.



What confuses folks the most is, if you disclose technical data to a foreign national in the United States, that's also considered the export of technical data. It's an export to that person's home country. This is called the **"Deemed Export Rule"**.

There's a case in California called the SunTech Microwave Case. This is the first criminal indictment and conviction under the Deemed Export Rule. A company in California was developing technology in its lab. The items were subject to export restrictions. The company hired a foreign national from China to work in the lab during the summer, and they didn't get an export license for disclosing that technical data to that Chinese individual. They were indicted and convicted. It's a very serious issue.

### **WHAT IS A FOREIGN NATIONAL?**

What exactly is a foreign national? Under the export laws – if a foreign person is in the US and has permanent resident alien status – a green card, they are treated as if they are a US citizen under the export laws. If you don't have a green card – if you are on a visa, you are treated as a foreign person. So someone who is here on an H1B visa, a business visa, a student visa, or no visa is treated as a foreign person.

### **SERVICES**

Another cornerstone concept is services. If an item is on the munitions list, performing services for a foreign party related to that item is also on the list and subject to these controls. Installation services, troubleshooting services, warranty repair services. If you're performing these services for a foreign person, related to the USML item, it's controlled. Engineering services, retrofitting services, consulting services, et cetera. We're going to talk more about defense services.

Here are some examples of items on the US Munitions List (this of course is not a complete list of all items) military electronics and computers, military communication systems, certain flight control systems, UAVs, military navigational systems, certain personal protective equipment and gear, etc. Usually we recommend that everyone involved in SBIR contracts or dealing with the defense industry review the U.S. Munitions List, to see if their products or services are on the list.

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The 21 categories of articles on the USML are:

1. Firearms, Close Assault Weapons and Combat Shotguns
2. Guns and Armament
3. Ammunition/Ordnance
4. Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs, and Mines
5. Explosives and Energetic Materials, Propellants, Incen-

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

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### **WHAT ABOUT PARTS AND COMPONENTS?**

Parts and components is a very important concept. In many cases if an item is on the Munitions List, parts and components that are specially designed for that item are also on the list and subject to ITAR. I'll repeat that – If an end item is on the Munitions List, in many cases parts and components that are specially designed for that item are also on the list and subject to ITAR. Also, in some cases if the end item is on the list, the parts and components may be listed on the Commerce Control List and regulated under the Export Administration Regulations instead. There's been some recent amendments to the export laws called the Export Control Reform, that I'm going to talk about in a little bit.

The list that I showed you at the beginning, the 21 categories of the Munitions List, that's not the entire list – that's just the table of contents, that's just the end items. So, for example, Category 6 is naval vessels, so a naval destroyer is on the list. But the USML also includes many of the parts, components, accessories, and subsystems that are specially designed for that naval destroyer. So it's not just a ship that's on the list, there are certain electronics, communications gear, certain computer systems and software, and many subcomponents of these items that are included on the list. And, as I mentioned some of these parts and components may have been transferred to Commerce under the Export Administration Regulations, but they're still regulated – I'm going to explain how that works, as we proceed.



### **ARE SERVICES REGULATED TOO?**

I mentioned that services are regulated previously. If you're performing services related to a defense USML item for a foreign party, that's regulated. In addition, other services are also regulated, such as military training. If you're performing military training for foreign persons, that's on the list. Also, providing military advice to foreign parties is on the list and subject to ITAR.

If you ask someone at the State Department, "Is my product on the Munitions List or not?" One of the first questions they will ask is, "Was the product developed with U.S. government funding? Was it developed with US DoD funding, or with other government agency funding or contracts?" If it was – particu-

larly under DoD contracts – there's a strong possibility it will be on the Munitions List. It's not 100 percent certain. Not everything developed with DoD funding is on the list. We can't say that everything with DoD funding is on the list, but, there's a strong possibility that it will be. So, this is a particularly important point for SBIR contracts. You need to check to see if the product or technology developed under your contract is ITAR-controlled. Your SBIR contract – may say if it's ITAR-controlled, or not. But it's important to note that if your contract is silent, if it doesn't address ITAR, that does not mean that the product is not subject to ITAR; it may very well be. So, you can't just go by reference in the SBIR documents. You really need to do your own analysis for this.

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