



Export Reform and Higher Education Contracts *for FDP*

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A Brief History of Export Reform

- President Obama convenes an interagency task force to reform export control regulations (August 2009)
- Task force develops a three phase plan
- EO 13558 Export Coordination Enforcement Center (E2C2) (November 2010)
- EO 13637 Administration of Export Control Reform (August 2013)
- Depts. of State and Commerce issue final rules (beginning April 16, 2013)



Export Reform Goals

- Focus resources on threats that matter most
- Increase interoperability with U.S. allies
- Strengthen U.S. defense industrial base by reducing incentives for foreign manufacturers to design out U.S. parts and components

The Four Singles

- Single List
- Single Information Technology (IT) System
- Single Primary Enforcement Coordination Agency
- Single Licensing Agency





Export Reform Implementation

- Three Phases

- Phase 1

- **Control List-** harmonize definitions to end jurisdictional conflicts
 - **Licensing-** streamline licensing processes
 - **Enforcement-** create Enforcement Fusion Center to synchronize and de-conflict enforcement
- Source: export.gov

- **IT-** create single USG single point of entry for exporters



Phase 1

- **Control List**

- Resolve jurisdictional conflicts: DoC and DoD concede only State has jurisdictional authority to determine what is or is not a defense article;
 - DoD 75 FR 18029 (Thursday, April 8, 2010)
 - DoC 75 FR 45052 (Monday August 2, 2010)
- Create Consolidated Export Screening List
http://export.gov/ecr/eg_main_023148.asp

Source: export.gov



Phase 1

- **Licensing**

- License exception Strategic Trade Authorization (STA) (EAR)
- Dual Nationals and Third Party Nationals (ITAR)

- **IT Systems**

- Decided on DoD system for single electronic licensing system

Source: export.gov

Phase 2

- **Control List-** restructure the two lists into identical tiered structures
- **Licensing-** complete transition to mirrored control list and implement licensing harmonization
- **Enforcement-** expand outreach and compliance
- **IT-** transition toward a single electronic licensing system

Source: export.gov

Phase 3

- **Control List-** merge the two lists into a single list
- **Licensing-** implement single licensing agency
- **Enforcement-** consolidate certain enforcement activities into a Primary Enforcement Coordination Agency
- **IT-**implement a single enterprise-wide IT system

Source: export.gov

What Regulations are being Reformed?

- ITAR definitions and US Munitions List (USML)
- EAR exceptions and Commerce Control List (CCL)
- DoD Defense Federal Acquisition Regulations (DFAR)
 - DFAR 252.204-7000 Disclosure of Information
 - DFAR 252.204-7012 Safeguarding Unclassified Controlled Technical Information
 - DFAR 252.225-7048 Export Controlled Items
 - DFAR 252.204-70XX Basic Safeguarding
- DoE Assistance to Foreign Atomic Energy Regulations (10 CFR 810)

Control List: The “Positive” USML

- Current USML is design intent based, CCL is performance specification based
- Proposed and final rules
 - make the USML more performance specification based, like the CCL, and
 - move many parts, components, and accessories from the USML to the CCL

What Regulations have been Reformed?

- Aircraft and gas turbines final rules (April 16, 2013; Effective date October 15, 2013; developmental items April 16, 2014)
 - Includes “specially designed” definition
 - Introduces “catch” and “release” criteria
 - Revises commodity jurisdiction process
 - Creates first Commerce “Munitions List” ECCNs
 - Explains transition from USML to CCL Munitions List

What Regulations have been Reformed?

- Spacecraft (including Satellites) interim final rules: State (May 13, 2014; Effective date November 10, 2014); Commerce (June 27, 2014)
 - Removes many satellites and related equipment from USML
- Final rules issued for Cats IV through X, XIII, XV, XVI, XIX

What Regulations have been Reformed?

- Military Electronics final rule (June 30, 2014, 2013; Effective date December 30, 2014; developmental items July 1, 2015)
 - Controls “equipment” and “systems”
 - No “catch all” category for components, parts, etc.
- Important definitions final rule (October 10, 2014) 120.45: Equipment, attachment, etc.

Control List:

The Commerce “Munitions” List

- Creates two new series of ECCNs (500 spacecraft & 600 Commerce Munitions) containing items not “specially designed” by a USML “catch-all” or technical data control paragraph, but are defense article parts, components, and accessories;
- Changes to EAR concept of use for 500 & 600 series

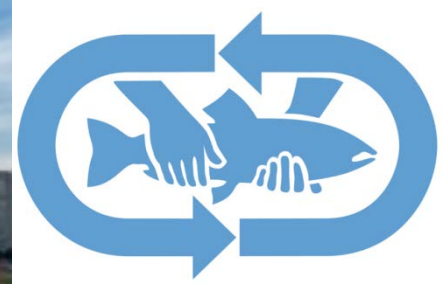
Control List:

The Commerce “Munitions” List

- Series 500& 600 ECCNs subject to military end use embargoes (Country Group D:5)
- ECCN 9Y018 rolled into 600 series
- Creates new .x and .y software and technology categories

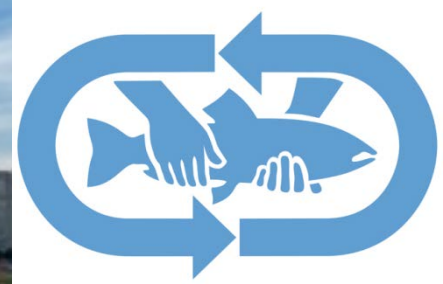
Some New Concepts and Definitions...

- “Catch” and “Release”
- “Specially Designed”
- “Enumerated”
- “Catch all”
- “Developmental”
- “Effective date”
- “Commodity jurisdiction”
- “Defense services”



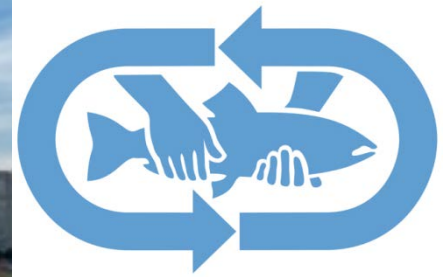
“Catch” and “Release”

- A concept that allows that even though a commodity or software may be “**caught**” as a defense article in a relevant USML control paragraph, the parts, components, accessories, attachments or software may be “**released**” to the EAR through the provisions of the new clause 120.41 Specially Designed;
- Items “**released**” to the CCL may appear on the new CCL “Munition” List’s 600 series.



“Catch”

- § 120.41 Specially designed.
 - (a) A **commodity** or **software** is specially designed if it:
 - (1) As a result of development, has properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions described in the relevant U.S. Munitions List paragraph; or
 - (2) Is a part, component , accessory, attachment, or software for use in or with a defense article.

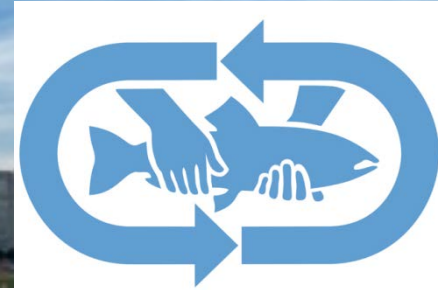


“Release”

(b) A **part, component, accessory, attachment, or software** is not specially designed by a U.S. Munitions List “catch-all” or technical data control paragraph if it:

(1) Is subject to the EAR pursuant to a commodity jurisdiction determination;

(2) Is, regardless of form or fit, a fastener (e.g., screws, bolts, nuts, nut plates, studs, inserts, clips, rivets, pins), washer, spacer, insulator, grommet, bushing, spring, wire, or solder;



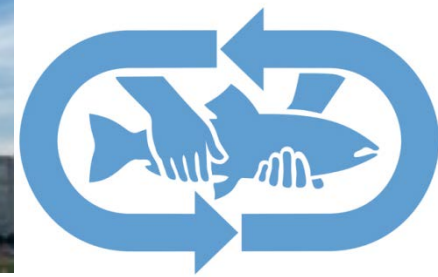
“Release”

(b) A part, component, accessory, attachment, or software is not specially designed by a U.S. Munitions List “catch-all” or technical data control paragraph if it:

(3) Has the same function, performance capabilities, and the same or “equivalent” form and fit as a commodity or software used in or with a commodity that:

(i) Is or was in production (i.e., not in development); and

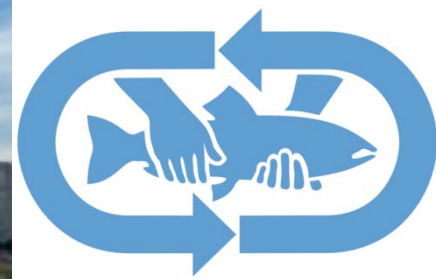
(ii) Is not enumerated on the U.S. Munitions List;



“Release”

(b) A part, component, accessory, attachment, or software is not specially designed by a U.S. Munitions List “catch-all” or technical data control paragraph if it:

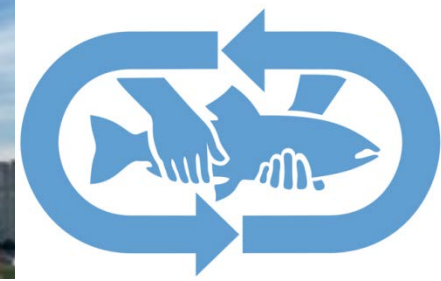
(4) Was or is being developed with knowledge that it is or would be for use in or with both defense articles enumerated on the U.S. Munitions List and also commodities not on the U.S. Munitions List; or



“Release”

(b) A part, component, accessory, attachment, or software is not specially designed by a U.S. Munitions List “catch-all” or technical data control paragraph if it:

(5) Was or is being developed as a general purpose commodity or software, i.e., with no knowledge for use in or with a particular commodity (e.g., a F/A–18 or HMMWV) or type of commodity (e.g., an aircraft or machine tool).



“Catch” and “Release”

Note to paragraph (b): The term “**enumerated**” refers to any article on the USML or CCL and not in a “catch all” paragraph.

A “**catch all**” paragraph is one that does not refer to specific types of parts, components, accessories, or attachments, but rather controls if they were specially designed for an enumerated item.

For the purposes of the U.S. Munitions List a “**catch all**” paragraph includes the phrases “and specially designed parts, components therefor” or “(parts, components, accessories, attachments, and associated equipment) specially designed for/to/with.”



“Developmental” Munitions

- Many “developmental” commodities (e.g.; aircraft), and specially designed parts, etc. may not be munitions:
 - If funded by the Department of Defense *and “identified in the relevant Department of Defense contract or other funding authorization as being developed for both civil and military applications.”*
- Some categories don’t have this option-that was intentional- DDTTC wants control whether developmental or not

“Developmental” Munitions

- Caution: does **not** apply to defense articles enumerated on the USML- whether in production or development.
- Doesn't apply if your item has/is a “mission system” “enumerated” on the USML



“Developmental” Munitions

- Implications:

- “[O]ther funding authorization”: appears to apply to subcontracts under a DoD-funded prime, as well as grants and cooperative agreements
- Any commodities created or modified under a DoD funded award (even grants) could be deemed to be defense articles if the funding authorization does not include language identifying any commodities, parts, etc. as being developed for civil and military applications

Applies only to DoD only, not any other agency passing money through DoD as a contracting agent



“Development” Definition

- § 120.41 Specially designed.“ Note 2 to paragraph (b)(3): For the purpose of this definition, “development” is related to all stages prior to serial production, such as: design, design research, design analyses, design concepts, assembly and testing of prototypes, pilot production schemes, design data, process of transforming design data into a product, configuration design, integration design, layouts.”

“Effective Date”

- Many categories have two effective dates:
 - “Production” items: 180 days after issuance of rule
 - “Development” items: One year after issuance of final rule
- *Example: Cat XI:*
 - *Rule issued: July 1, 2014*
 - *Effective date (items in production): December 30, 2014;*
 - *Effective date (developmental items): July 1, 2015 (see. Note 3 to Cat XI (a)(7))*

What does this mean for university contracting?

- For “Catch and release” and “Developmental” items:
 - Document! Document! Document!
- If it’s DoD funded:
 - In proposals and awards, may wish to include contractual terms regarding any commodities being developed for civil and military applications; or
 - Get a commodity jurisdiction determination

What does this mean for university contracting?

- For “Catch and release” and “Developmental” items:
 - No definition of “developmental”
 - Oral guidance at COGR: don’t need the “developmental” language in FRE awards, hardware not considered “developmental”

A wide-angle photograph of the Virginia Tech campus, showing a large, multi-story building with a prominent tower in the center, surrounded by trees with autumn foliage under a blue sky with light clouds.

Concept of “Use” in the EAR

“Use”. (All categories and General Technology Note)--Operation, installation (including on-site installation), maintenance (checking), repair, overhaul **and** refurbishing.

Does **NOT** appear in the new 500 or 600 series

“Defense service” (cont.)

78 FR 31444 (May 24, 2013)

- Includes assistance by formal or informal instruction is limited to tactical employment of a defense article

Simply providing education to a foreign military may no longer be a “defense service”

New DFARS clauses together with ECR present new contracting challenges

- 252.204-7000 Disclosure of information
- 252.204-7012 Safeguarding Unclassified Controlled Technical Data
- 252.225-7048 Export controlled items
- 252.204-70XX Basic Safeguarding of Contractor Information Systems

252.204-7000

252.204-7000 DISCLOSURE OF INFORMATION (AUG 2013)

(a) The Contractor shall not release to anyone outside the Contractor's organization any unclassified information, regardless of medium (e.g., film, tape, document), pertaining to any part of this contract or any program related to this contract, unless—

(1) The Contracting Officer has given prior written approval;

(2) The information is otherwise in the public domain before the date of release; or

252.204-7000

252.204-7000 DISCLOSURE OF INFORMATION (AUG 2013)

(a) The Contractor shall not release to anyone outside the Contractor's organization any unclassified information, regardless of medium (e.g., film, tape, document), pertaining to any part of this contract or any program related to this contract, unless—

(3) The information results from or arises during the performance of a project that has been scoped and negotiated by the contracting activity with the contractor and research performer and determined in writing by the contracting officer to be fundamental research in accordance with National Security Decision Directive 189, National Policy on the Transfer of Scientific, Technical and Engineering Information, in effect on the date of contract award and the USD (AT&L) memoranda on Fundamental Research, dated May 24, 2010, and on Contracted Fundamental Research, dated June 26, 2008, (available at DFARS [PGI 204.4 \(DFARS/PGI view\)](#))).

(b) Requests for approval under paragraph (a)(1) shall identify the specific information to be released, the medium to be used, and the purpose for the release. The Contractor shall submit its request to the Contracting Officer at least 10 business days before the proposed date for release.

(c) The Contractor agrees to include a similar requirement, including this paragraph (c), in each subcontract under this contract. Subcontractors shall submit requests for authorization to release through the prime contractor to the Contracting Officer.

What does this mean for university contracting?

- Three players must “scope”, “negotiate”, and “determine in writing” fundamental research in a contract
 - Contracting Activity
 - Contractor
 - Research Performer

What does this mean for university contracting?

- Statements of work should be clearly worded to indicate civil applications at the time of proposal
- Fundamental research should be (where applicable) indicated at proposal
- DoD contracts must state fundamental research (Sept 19, 2014 [PGI 204.4](#) ([DFARS/PGI view](#))).

What does this mean for university contracting?

- [PGI 204.4 \(DFARS/PGI view\)](#).
- “(2) Fundamental research project determination.
- (i) Projects being scoped as fundamental research may include the entire contract effort or a specified portion of the statement of work, and must be documented in the written determination and in the contract.
- (ii) The determination of fundamental research shall occur when the project is added to the statement of work, either prior to award or during a contract modification that modified the statement of work.

252.204-7012 Safeguarding Controlled Technical Information

- Mandatory clause in all DoD contracts and subcontracts at any tier
- Establishes minimum safeguarding criteria for “Controlled Technical Information” (CTI). *51 active controls*
- CTI Safeguarding and 72-hour cyber intrusion reporting requirements are very demanding



252.204-7012

- Controlled technical information means technical information with military or space application that is subject to controls on the access, use, reproduction, modification, performance, display, release, disclosure, or dissemination.



252.204-7012

- 7012 clause is a default clause. According to DoD, it does not disturb fundamental research or affect “information lawfully placed in the public domain” (78 FR 69377 Nov 18, 2013). *However you need to take steps to ensure DoD contracts are clearly marked fundamental research.*
 - Follow new 7000 Disclosure of Information Clause
 - Get deliverables assigned Distribution A: Approved for Public Release, Unlimited Distribution



252.204-7012

- According to DoD, 7012-related security expenses may not be billed directly. It is expected that these costs will be recovered through indirect charges
- According to DoD, the clause will not be applied retroactively to contracts, but can be added through contract mods

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Case study 1

- University receives a DoD contract award with the DFAR 7000, 7012, and DFAR 7048 clauses
- What should you do?



Case study 2

- University receives a DoD contract award with the DFAR 7012 clause, no DFAR 7000 or DFAR 7048 clauses; CLIN deliverables are marked with Distribution Statement (A)

- What should you do?



Case study 3

- University receives a DoD contract award with the DFAR 7012 clause, the DFAR 7000 clause and the DFAR 7048 clause; CLIN deliverables are marked with Distribution Statement (B)

- What should you do?



Case study 4

- University has a NSF sponsored cubesat project involving installing a magnetometer to a foreign (S. Korean) satellite.
- Is the project ITAR-controlled?
- Is the magnetometer controlled on the Commerce Munitions List?

Department of Energy Export Reform

- Attempts to align Assistance to Foreign Atomic Energy Activities Regulations (AFAEAR) to other export regimes
- Creates deemed export provisions
- Replaces term “public information with “publicly available information”, “publicly available technology”, and “fundamental research”, all of which are outside of the scope of the AFAEAR

What Remains to be Done?

- Final Defense service” definition
- Remainder of ITAR Categories and corresponding EAR 600 series
- Harmonized definitions: “technical data”, “publicly available” & “public domain”, “fundamental research”

On the Horizon...

- CUI Categories and subcategories
- Contract clause with safeguarding requirements for CUI
- Safeguarding standards NIST Special Pub 800-171 Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations



Resources

- Export.gov
 - <http://export.gov/ecr/index.asp>
- BIS Export Decision Tree Tool
 - <http://www.bis.doc.gov/index.php/decision-tree-tools>
- DDTC Export Decision Tree Tool
 - http://www.pmddtc.state.gov/licensing/decision_tools.html
- DoE Proposed Decision Tree 78 FR 46834 (August 2, 2013)
- Commodity Jurisdiction Final Determinations List
 - http://www.pmddtc.state.gov/commodity_jurisdiction/determination.html