



## **ITAR Exemption Compliance**

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# OVERVIEW

- Compliance from the beginning
- Eligibility
- Proactive Measures
- Record Keeping
- Electronic Export Information (EEI) filings
- Audits
- Take Aways



# BEGINNING WITH COMPLIANCE

- Exemptions are part of the strategic support you provide your business
- Exemptions remove the exporter from the requirement to apply to the Department of State for a license (seems obvious)
- Exemptions do not remove the exporter from the rest of the requirements in the ITAR
- Making a determination of eligibility begins with the same basics that apply to all licenses:
  - Registration with State
  - Product/Data or Service is on the USML\*
  - Exclusion of proscribed destinations or denied parties
  - Accurate understanding of the parties and countries in the transaction
  - An authorization (license or exemption) is required prior to export



# BEGINNING WITH COMPLIANCE

- Authority to determine the eligibility for an exemption
  - Determining eligibility for an exemption requires the same exacting standard as applying for and managing a license
  - If you make an error in determining the eligibility, the result is a disclosure
    - Self-determination makes the exemption usage more risky than relying on a DDTC issued license
    - Strongly recommend locating the authority with an Empowered Official
  - Who is determining the eligibility of the exemption in your company?
  - Who is executing the exemption?
  - Delegate the authority in writing with a clearly defined scope
  - You must obtain written direction from the DOD for exemptions found at §125.4(b)(1), §125.4(c), §125.5, and §126.4(c); USG bill of lading or official use for §126.4(a),



## ELIGIBILITY

- Tools available for determining eligibility to use an exemption for an export/import transaction
  - Exemptions and their requirements are not all located in the same Parts of the ITAR; keep reading
  - Read closely: Some of the language is “and”; some of the language is “or”
  - Read with a cipher: X’s mean “not eligible” for Canadian and Treaty exemptions
  - Read definitions such as “public domain”, “organizational level maintenance”, and “regular employee”
  - Read for the future: Some of the requirements, such as §123.22(b)(3)(iii), do not yet have a mechanism in place to be fulfilled
  - Read the SIA handbook on exemptions to assist with your determination



## ELIGIBILITY

Now that you are well read, how do you mitigate the risk associated with using an exemption?

- Meet **ALL** of the exemption criteria
  - Not just the first line
  - Not just the first paragraph
- Make sure the exemption is for the correct product type
  - SIA Exemption handbook has a Quick Reference Chart of each exemption by hardware, technical data, defense service, and classified/unclassified
  - Relatively few exemptions apply to all product types
- Transactions involving Significant Military Equipment (SME) or Missile Technology Control Regime (MTCR) items are rarely authorized by an exemption; review closely



# ELIGIBILITY

- Do not make assumptions about eligibility criteria
  - If the item must be U.S. origin, verify that it was manufactured in the U.S. or manufactured abroad pursuant to USG approval
  - If hardware or data must have been previously exported or authorized prior to your transaction, obtain those documents
- Once you have met the basic requirements and determined that your transaction is eligible, document it
- There is still a myriad of requirements to meet for various exemptions
  - Certifications
  - DSP-83
  - NISPOM requirements
  - Statement on CBP Form 7501 or 4457 (or others)
  - Destination Control Statements
  - EEI filing
  - Reports
  - Recordkeeping



# PROACTIVE MEASURES

- Exemption eligibility is not simple
- Prior to export under an exemption, consider tracking all the criteria and requirements in a checklist
- Avoid rework and store all your eligibility determination documentation in one place like a export management system or specific network folder
  - Convenient place for follow-on record keeping
- Lean out the risks by writing and following procedures and instructions
- Challenge any third party that compromises your exemption eligibility

Exemption § 125.4(b)(2) – Technical Data in Furtherance of TAA or MLA		
Technical data, including classified information, in furtherance of a manufacturing license agreement or technical assistance agreement approved by the Department of State under Part 124 of this subchapter, and which meet the requirements of 124.3 of this subchapter.		
CRITERIA		
Is the country identified in 126.1?	Yes	No
Is the person/persons identified in 120.1(c)?	Yes	No
Is this export for the use of foreign production purposes or for purposes of establishing offshore procurement or to produce defense articles offshore (see 124.13), except as authorized under 125.4(c)?	Yes	No
Is this export a defense service? (See Additional Note)	Yes	No
If YES to any question above, this exemption is not applicable.		
Is this export technical assistance?	Y Yes	N No
If YES, prior approval from DTDC is required.		
TAA or MLA Number:	Duration	



# RECORD KEEPING

- §123.26

Any person engaging in any export, reexport, transfer, or retransfer of a defense article or defense service pursuant to an exemption must maintain records of each such export, reexport, transfer, or retransfer. The records shall, to the extent applicable to the transaction and consistent with the requirements of § 123.22 of this subchapter, include the following information: A description of the defense article, including technical data, or defense service; the name and address of the end-user and other available contact information (e.g., telephone number and electronic mail address); the name of the natural person responsible for the transaction; the stated end-use of the defense article or defense service; the date of the transaction; the Electronic Export Information (EEI) Internal Transaction Number (ITN); and the method of transmission. The person using or acting in reliance upon the exemption shall also comply with any additional recordkeeping requirements enumerated in the text of the regulations concerning such exemption (e.g., requirements specific to the Defense Trade Cooperation Treaties in § 126.16 and § 126.17 of this subchapter).



# RECORD KEEPING

- Don't overlook this!
- Recordkeeping is mandated at §122.5 and §123.26
- §122.5 applies to anyone who is registered with the DDTC and requires 5 years of record retention from the expiration of approval or date of transaction
  - Broad requirement
  - "...must maintain records concerning the manufacture, acquisition and disposition (to include copies of all documentation on exports using exemptions...."
- §123.26 is a more narrow and specific set of requirements for the retention of 6 to 7 data points on each export under an exemption
  - Description of the defense article, including technical data, or defense service
  - Name and address of the end-user and other available contact information
  - Name of the natural person responsible for the transaction
  - Stated end-use of the defense article or defense service
  - Date of the transaction
  - EEI (ITN)
  - Method of Transmission



**EEI**

- Always file an EEI prior to a shipping hardware under an ITAR exemption, including hand carries
  - *Any shipment subject to the ITAR, but exempt from license requirements, except as noted by the ITAR – 15 CFR 30.2(a)(1)(iv)(C); 22 CFR 123.22(a).*
- None of the usual FTR exemptions apply for hardware
- Technical data shipments are exempt from filing EEI under 15 CFR 30.37(u) and 22 CFR 123.22(b)(3)(iii)
- Meet the filing deadlines (8 hours for truck/air; 24 hours for sea/rail)
- Include the Internal Transaction Number (ITN) on the Commercial Invoice as well as the Destination Control Statement and ITAR exemption



# AUDITS

- Internal audits are recommended by DDTC and DTCC in the Compliance Program Guidelines
- Auditing is an exercise in looking at the absence and presence of processes/documents/information to determine if the transaction is compliant with the regulations
- Regardless of the type of internal review conducted (spot checks, quarterly, one exemption, all exemption usage, program, site), document the review. Audit the effectiveness of the procedures.
- Always follow up on recommendations and findings in the review
- Share lessons learned with other parts of the business
- Where possible, involve an unrelated export professional in the review activity



## TAKE AWAYS

- Risks associated with self-determining exemption eligibility can be mitigated
  - Take your time when determining if an exemption applies to your transaction; read
  - Clearly understand all the products, parties and countries involved in the transaction
    - Keep your product classifications up to date
    - Build relationships with functions involved in the export process
    - Provide clear delegation of responsibility/authority for exemption usage
  - Document your determination, save your work, keep records, conduct audits and reviews



**QUESTIONS?**

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