I. PURPOSE

The U.S. Government regulates exports in order to foster a world free from the dangers of war, to prioritize the rule of law over the use of force, and to achieve international adjustments peacefully.\(^1\)

The most relevant U.S. export controls are grouped into three sets of federal regulations:

1. The International Traffic in Arms Regulations (ITAR) (State Department)
2. The Office of Foreign Assets Control (OFAC) regulations (Treasury Department)
3. The Export Administration Regulations (EAR) (Commerce Department)

The OFAC regulations and the EAR are outside the scope of this memo, which focuses on ITAR.\(^2\) Through ITAR, the government limits the export of potentially dangerous articles and data, including items on the U.S. Munitions List (USML), to nations working against the United States.\(^3\)

II. HISTORY

In 1968, Congress passed The Foreign Military Sales Act in order to consolidate and revise legislation relating to certain military exports.\(^4\) Eight years later, Congress amended the act with the passage of the International Security Assistance and Arms Export Control Act of 1976 (AECA).\(^5\) This act, along with its implementing regulations (ITAR), authorized the president to implement controls on exporting and importing materials and services used in national defense or warfare.\(^6\) In 1977, President Gerald Ford issued Executive Order 11,958,\(^7\) delegating authority to implement these export and import controls to

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\(^1\) 22 U.S.C. § 2751 (2016).
\(^3\) See 22 U.S.C. § 2778(a)(1)-(3) (setting forth guidance for presidential control of exports and imports of defense articles and services). See generally 22 C.F.R. pts. 120-130 (setting forth provisions of ITAR).
\(^6\) See 22 C.F.R. § 120.1 (outlining presidential authority to control the export and import of defense articles). See generally U.S.C. §§ 2751-2799aa (setting forth the requirements of the AECA).
the U.S. Departments of State, Defense, the Treasury, and Justice. With this authority, the U.S. Department of State (State Department) developed ITAR under the Directorate of Defense Trade Controls (Directorate). The AECA has been amended multiple times; for example, in February 2016, the United States–Jordan Defense Cooperation Act of 2015 was added to “improve defense cooperation” between Jordan and the United States. In 2016, the State Department passed regulations that revised part of the USML to more precisely describe articles that warrant control under ITAR. ITAR has been modified many times over the years and continues to change as U.S.–foreign relations evolve.

III. APPLICABILITY TO BYU–HAWAII

Any person (i.e., person, corporation, organization, etc.) that imports, exports, or manufactures defense articles and services must comply with ITAR. Defense articles are items or technical data listed on the USML. Defense services include providing assistance (e.g., training) or controlled technical data (e.g., software) to foreign persons. Guns, training equipment, protective gear, and military electronics are among the categories of defense articles and services.

Information considered part of the public domain (i.e., published information generally available to the public) is exempt from ITAR. Fundamental research (i.e., shared scientific and engineering research conducted at a university) is part of the public domain and is not regulated through ITAR. However, if a university accepts restrictions related to publishing technical information or if its research is government-funded and falls under specific protections, the information is not considered fundamental.

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12 See 22 C.F.R. § 126.1 (2017) (outlining specific nations that are under prohibitions).
13 Id. § 120.14 (defining “person”).
14 See id. § 122.1(a) (requiring registration with the Directorate for manufacturing, exporting, or temporarily importing or furnishing defense articles and services); id. § 123.1(a)-(b) (requiring registration and licensing for exporting and temporarily importing defense articles); id. § 124.1(a) (requiring Directorate approval before furnishing defense services); id. § 129.3(a) (requiring persons to register and pay a fee for brokering activities).
15 Id. § 120.6 (defining “defense article”). Technical data is (a) information other than software, which is required for the design, manufacture, testing, etc. of defense articles; (b) classified information relating to items on the USML as well as other items controlled by the Commerce Control List; (c) information covered by an invention secrecy order; or (d) software. Id. § 120.10(a).
16 Id. § 120.9(a) (defining “defense services”). Technical data includes software related to defense articles, information used for design, production, etc. of defense articles, and classified information related to USML items. Id. § 120.10(a). Defense services (e.g., training) are similar to “deemed exports” under the EAR, which contain a provision stating that “the release of technology [. . .] through such means as demonstration or oral briefing” is considered to be a “deemed export.” 15 C.F.R. § 730.5(c) (setting forth the scope of “exports” under the EAR).
17 See 22 C.F.R. § 121.1 (listing items on the USML).
18 Id. § 125.1(a); see id. § 120.11(a) (defining “public domain”).
19 Id. § 120.11(a)(8) (defining “fundamental research”).
research and is still regulated under ITAR. An institution of higher learning may disclose unclassified technical data to a foreign full-time employee as long as the employee resides in the United States and is not a national of a country that falls under ITAR export prohibitions (e.g., Iraq or North Korea), and as long as the institution informs the employee in writing that technical data may not be transferred to other foreign persons without prior Directorate approval. (Notably, while some disclosures of unclassified technical data to foreign full-time employees may be permissible under ITAR, they might not be permissible under the EAR.) Other exemptions are specific to U.S. relations with foreign nations.

BYU–Hawaii is an organization that may export, import, or manufacture defense articles and services, and as such, must adhere to ITAR for articles listed on the USML, including all information that does not fall under the public domain. Fundamental research on BYU–Hawaii campus is generally considered part of the public domain and is not regulated; however, if BYU–Hawaii engages in munition-based research and accepts restrictions for publishing scientific and technical information or if a group at BYU–Hawaii engages in government-funded research under specific information protection controls, that information is not considered fundamental research and may be regulated by ITAR.

IV. REQUIREMENTS

ITAR mandates that organizations meet certain registration, licensing, recordkeeping, and other requirements as outlined in this section. All ITAR requirements hinge upon the USML.

A. The United States Munitions List

The USML includes, but is not limited to, the following categories of defense articles and services:

1. Firearms, close assault weapons, and combat shotguns

20 Id. § 120.11(a)(8)(i)-(ii).
21 Id. § 125.4(b)(10)(i)-(iii). Countries that fall under ITAR export prohibitions include Afghanistan, Central African Republic, Cote d’Ivoire, Cuba, Cyprus, Democratic Republic of Congo, Eritrea, Haiti, Iran, Iraq, Lebanon, Liberia, Libya, North Korea, the Republic of the Sudan, Somalia, Sri Lanka, Syria, Vietnam, and Zimbabwe. Id. § 126.1(c)(1)-(11), (d), (g), (j), (l), (n), (r), (s), (u).
22 See 15 C.F.R. § 732.4(b) (outlining steps regarding license exceptions under the EAR).
23 See 22 C.F.R. § 126.3 (allowing authorized exceptions for defense trade controls); id. § 126.4 (outlining license exemptions for certain shipments by or for U.S. government agencies that are conducting official business); id. § 126.5 (outlining certain license exemptions for activities between the United States and Canada); id. § 126.6 (outlining certain license exemptions based on how the article or technical data is handled); id. § 126.16 (outlining Defense Trade Cooperation Treaty exemptions between the United States and Australia); id. § 126.17 (outlining Defense Trade Cooperation Treaty exemptions between the United States and the United Kingdom); id. § 126.18 (outlining exemptions regarding intra-company, intra-organization, and intra-governmental transfers to employees who are dual nationals or third-country nationals).
24 See id. § 122.1(a) (requiring registration with the Directorate for manufacturing, exporting, or temporarily importing or furnishing defense articles and services); id. § 123.1(a)-(b) (requiring registration and licensing for exporting and temporarily importing defense articles); id. § 124.1(a) (requiring Directorate approval before furnishing of defense services); id. § 129.3(a) (requiring persons to register and pay a fee for brokering activities).
25 See id. § 124.1(a) (providing a licensing exemption for information in the public domain); id. § 125.1(a) (providing an export exemption for information in the public domain).
26 Id. § 120.11(a)(8)(i)-(ii). Certain items that would normally be subject to EAR are not subject to it if those items are part of the USML or if they are subject to the AECA. 15 C.F.R. § 734.3(b).
27 22 C.F.R. § 121.1.
2. Explosives and energetic materials, propellants, incendiary agents, and their constituents
3. Aircraft, spacecraft, and associated equipment
4. Military training equipment and training
5. Personal protective equipment
6. Military electronics
7. Fire control, range finder, optical, and guidance and control equipment
8. Toxicological agents (including chemical agents, biological agents, and associated equipment)

This list includes any technical data that relates to these categories, especially information relating to the production of any of these articles.²⁸

B. Prohibited Activities

Organizations may not export, import, sell, or engage in brokering activities with defense materials to or from nations that may be antagonistic or dangerous to the United States or to countries under a United Nations embargo.²⁹ Such countries include those with whom the United States has a policy against importing or exporting arms, countries under U.S. arms embargoes, and countries officially linked to terrorism.³⁰ In certain narrow circumstances, the United States may approve military equipment exports (e.g., non-lethal items or items meant for U.S. military or U.N. peacekeeping use) to specific countries.³¹

C. Registration

Any organization that plans to manufacture, export, or temporarily import items on the USML or to furnish defense services must register with the Directorate.³² Some persons may be exempt from registration requirements if they produce only unclassified technical data, if their activities are licensed under the Atomic Energy Act of 1954, or if they manufacture such items only for experimental or scientific purposes.³³ Those who register must submit a registration statement, pay an annual fee, and notify the Directorate within five days of any changes in information.³⁴

D. Licensing

Any organization that exports or temporarily imports defense articles, including technical data and classified exports, must apply to the Directorate for, and maintain, required licenses.³⁵ Persons may be exempt from licensing requirements if they only temporarily import unclassified U.S.-origin defense items for a period of up to four years.³⁶ Additionally, certain exports, including packing cases and defense article models, may be exempt from licensing requirements.³⁷ Organizations must submit

²⁸ See id. pt. 121 (setting forth the full USML).
²⁹ See id. § 126.1(a)-(v) (listing countries toward whom the United States has export restrictions).
³⁰ See id. § 126.1(c)-(v) (listing specific countries and corresponding export prohibitions).
³¹ See id. § 126.1(f), (i), (k), (l), (o), (q), (u), (v) (providing for exceptions to import, export, and sale prohibitions).
³² Id. §§ 122.1(a), 123.1(a); see also id. § 120.1(c) (stating that requests for licensees will be considered only if the applicant has registered with the Directorate).
³³ Id. § 122.1(b)(1)-(4).
³⁴ Id. § 122.2-122.4.
³⁵ Id. § 123.1(a)-(b).
³⁶ Id. § 123.4(a). A license is not needed if the item (a) is serviced and returned to the country from which it was imported, (b) is to be enhanced into an item previously authorized by the Directorate for permanent export, (c) is imported for display and returned, (d) has been rejected by the Treasury for permanent import, or (e) is approved for import under the U.S. Foreign Military Sales program. Id.
³⁷ See id. § 123.16 (outlining exemptions of general applicability under licensing requirements).
electronic applications for unclassified exports and temporary imports; they must submit hardcopy applications for classified exports and temporary imports.\(^{38}\)

Every application for a license requires a letter signed by a responsible official stating whether

1. the applicant or the organization’s leaders are the subject of an indictment or have ever been charged or convicted of violating any U.S. criminal statute outlined in ITAR;
2. the applicant or the organization’s leaders are ineligible to contract with, or to receive approval to temporarily import or export defense articles or services from, any U.S. government agency;
3. anyone involved in exporting has been convicted of violating any U.S. criminal statute outlined in ITAR or is ineligible to contract with, or to receive approval to temporarily import or export defense articles or services from, any U.S. government agency,\(^{39}\) and
4. the natural person signing the request for approval is a U.S. citizen or national, has been lawfully admitted to the United States for permanent residence, or is an official of a foreign government entity in the United States.\(^{40}\)

The applicant must also include in the letter all necessary contact information for consignors and freight forwarders involved in the transaction.\(^{41}\)

E. Agreement and Approval

If an organization plans to furnish defense services, it must first submit a proposed agreement to the Directorate and receive Directorate approval.\(^{42}\)

F. Brokers

Persons involved in brokering activities must register with and receive approval from the Directorate, pay a registration fee, and be issued a license.\(^{43}\) A broker is any U.S. or foreign person that engages in “the business of brokering activities” (i.e., any action taken on behalf of another in order to facilitate the manufacture, export, import, etc. of defense articles and services).\(^{44}\)

G. Recordkeeping

If the organization physically exports data that falls under one of the exceptions to ITAR (including data considered part of the public domain), it must document and certify this exception by marking the letter or package with “22 C.F.R. [ITAR exception] applicable” and naming the applicable section of the regulations offering the exception.\(^{45}\) A written certification is also required in the case of oral, visual, or electronic exports.\(^{46}\) The organization must maintain a copy of this certification for five years\(^ {47}\) and

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38 Id. § 123.1(a).
39 See id. § 126.7(e) (defining “party to the export”).
40 Id. § 126.13(a)(1)-(4).
41 Id. § 126.13(b).
42 Id. § 124.1(a).
43 Id. §§ 129.1(a), 129.3(a), 129.4(a).
44 Id. § 129.2(a) (defining “broker”); id. § 129.2(b) (defining “brokering activities”). An “action” may include, but is not limited to, financing or transporting defense articles and services and soliciting or negotiating in the purchase, sale, transfer, loan, or lease of a defense article or service. Id. § 129.2(b)(1).
45 Id. § 125.6(a) (defining “brokering activities”). An “action” may include, but is not limited to, financing or transporting defense articles and services and soliciting or negotiating in the purchase, sale, transfer, loan, or lease of a defense article or service. Id. § 125.6(b).
46 Id. § 125.6(a) (identifying ITAR provisions that outline exemptions for exporting technical data).
47 Id. § 125.6(a)-(b).
report export information electronically to the U.S. Customs and Border Protection through the Automated Export System or directly to the Directorate.\textsuperscript{48}

V. PENALTIES

Persons who willfully violate any provision of the AECA or ITAR or who make any untrue statements or omit facts in a registration, license application, or report will be subject to a fine of up to $1 million or imprisonment for up to twenty years, or both.\textsuperscript{49}

VI. COMPLIANCE CALENDAR

Persons involved in brokering activities must provide an annual report of their activities to the Directorate.\textsuperscript{50}

VII. RELATED MEMOS

Export Controls—Export Administration Regulations (EAR) (Regulations concerning the exportation of US originated items, including some information, requiring licenses and prohibiting certain end-uses and end-users.)

Export Controls—Office of Foreign Assets Control (OFAC) Regulations (Regulations enforcing economic trade sanctions against certain foreign countries and individuals that pose a threat to the United States.)

VIII. STAYING UP-TO-DATE

The following websites provide valuable information regarding this law and its applicability.

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<tr>
<td>DDTC Licensing</td>
<td>Directorate information on licensing, including downloadable forms (e.g., the Application for Temporary Export of Unclassified Defense Articles)</td>
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<td>Automated Export System Technical Information</td>
<td>U.S. Customs and Border Protection webpage describing the AES and providing information for electronic filing of export information</td>
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\textsuperscript{48} Id. § 123.22(a).
\textsuperscript{49} 22 U.S.C. § 2778(c) (2016); 22 C.F.R. § 127.3(a)-(b).
\textsuperscript{50} 22 C.F.R. § 129.10(a).