



SOCIETY FOR INTERNATIONAL AFFAIRS

Industry Best Practices and Lessons Learned

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Overview



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- **ITAR is complicated but can ensure compliance**
- **Key to compliance is to work closely with your customers, plan ahead and ensure communication**
- **Address some of the key issues:**
 - **Establish a strategic compliance plan**
 - **Define the scope of the program/export activity**
 - **Joint Development & Co-mingling of technology**
 - **Define all parties responsibilities**
 - **Create successful Agreements**
 - **Establish a Re-export process**



Establish Strategic Compliance Plan

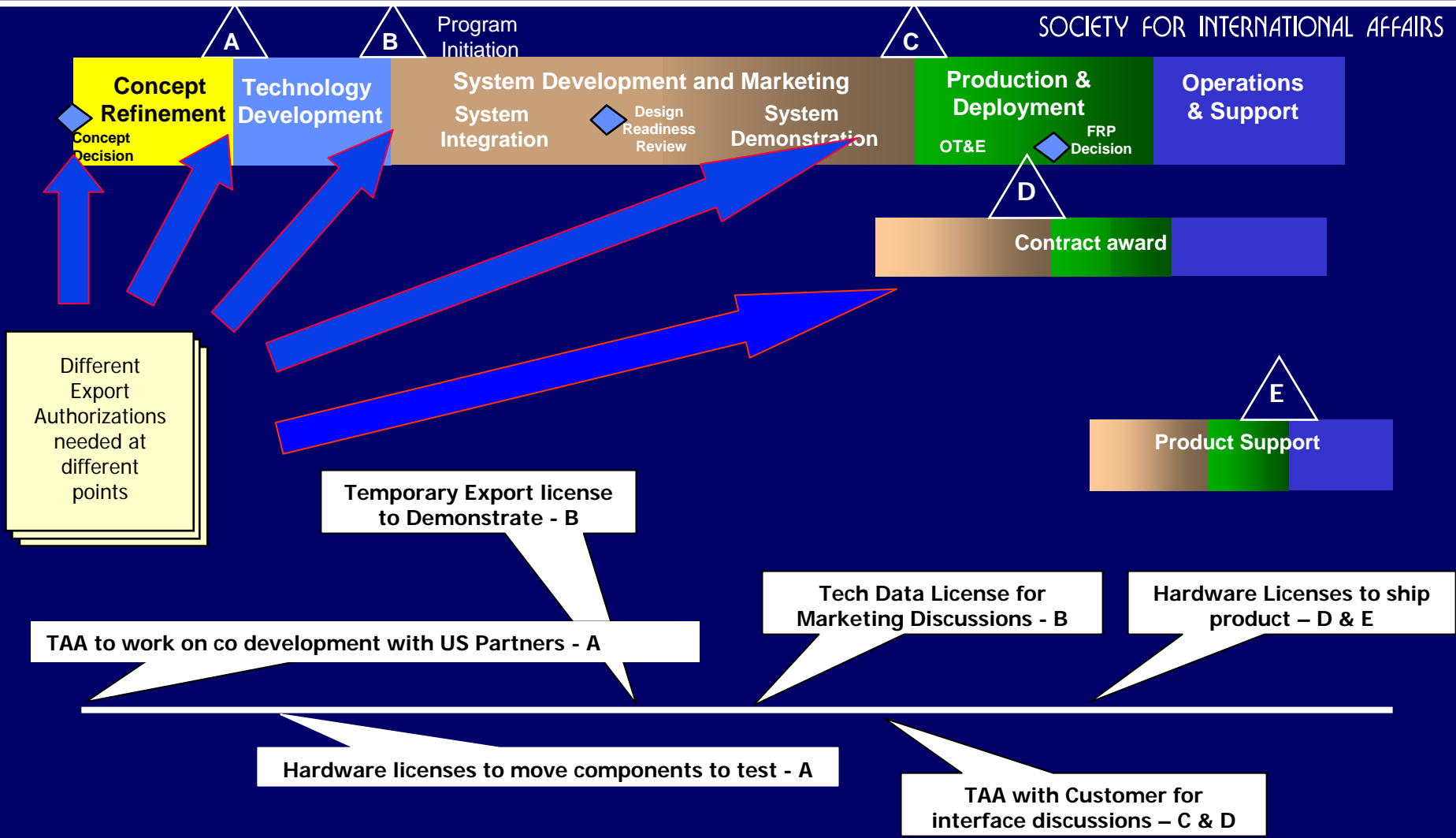


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- **What approvals will be needed when?**
 - Look for flexibility in licensing arrangements
- **What kind of International interface will occur?**
 - Tech data exchanges, hardware re-exports, dual nationals, subcontracting
- **Who will be involved?**
 - Identify all the parties, not just End-User and/or Customer
 - Identify Ultimate End-Users, Partners, Integrators, Subcontractors – US and Foreign, Translators, etc...
- **Ensure Communication**
 - Communicate w/program and stay abreast of changes
 - Communicate w/ US counterparts



Example Strategic Planning Chart





Joint Development



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- **Current defence practices encourage joint development and cooperative programs**
- Ensure program is designed to address the sharing of technology
- Identify activities that lead to co-mingling of technology
- May need to make arrangements to shop floor to ensure compliance
 - Separate room with storage for ITAR data
- Watch for transfer of Australian technology into US
 - E.g., storage of data in the US
 - Data that enters US is subject to US regulations



Co-mingling of Technology



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- **US re-export regulations apply to US technology, not to Australian technology**
- Ensure that the US technology is not co-mingled with the Australian technology or know how
- Ensure that you do not incorporate US specifications or characteristics directly into the Australian documentation
- **However, if US specifications, technology, etc... are incorporated into the data, it is likely to be covered under US regulations**



Offshore Procurement



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- **124.13 allows for Offshore Procurement**
 - US Party obtains a DSP-5 to send technical data to the Australian Company
 - Data is used in the foreign manufacture of defense articles on a build to print basis
 - No additional technical know how or assistance
- **Permits release of data to subcontractors within the same country**
 - Subcontracts must contain the 124.13 language
 - Requires that data be destroyed or returned to US
 - Articles must be delivered to party in US



Developing Agreements to Meet Your Needs



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- Agreements are between at LEAST 2 parties
- Work with the US party to ensure Agreement is developed to address YOUR needs as well as theirs
- Ensure US Party understands your intentions
 - Sublicensing, Dual Nationals, 3rdCountry Nationals, Re-exports, Work in the US
- If the US party understands the full process they can address all of your needs in the original request
- Ensure that TAAs and MLAs are effective (scope and parties) and will stand the test of time



Various Types of Agreements



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- **Two Party Agreement**
 - US Party & Non-US Party
- **Two Party Agreements w/Non-Signatory US parties**
 - Agreement with additional US party that is not a signatory
- **Two Party Agreements w/Other Non-Signatory Non-US Entities**
 - Agreement with Non-US Subcontractors that are not signatories
- **Multiple Party Agreements (BEST CASE)**
 - Agreements where all parties share data with each other



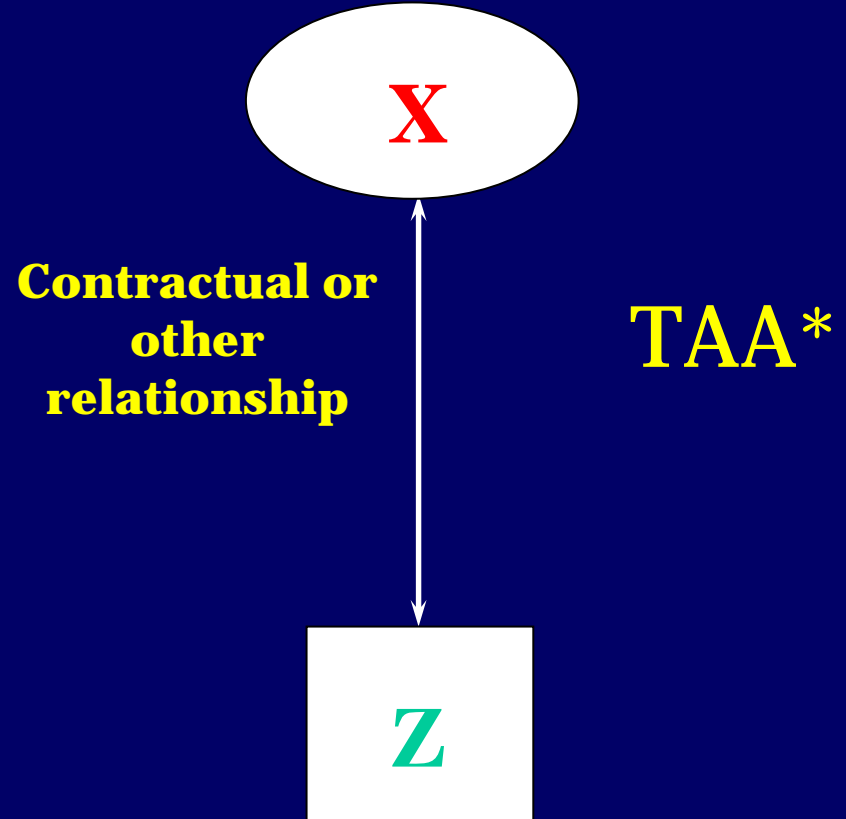
Two Party Agreement



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- **Example**

- **X is parent/prime (US)**
- **Z is sub (Australia)**



- Parties must execute Agreement
 - U.S. party **MUST BE** registered
 - Statement of Work (SOW) consistent with activities

*** Other licenses typically do not permit ongoing exchanges that are desired or necessary**

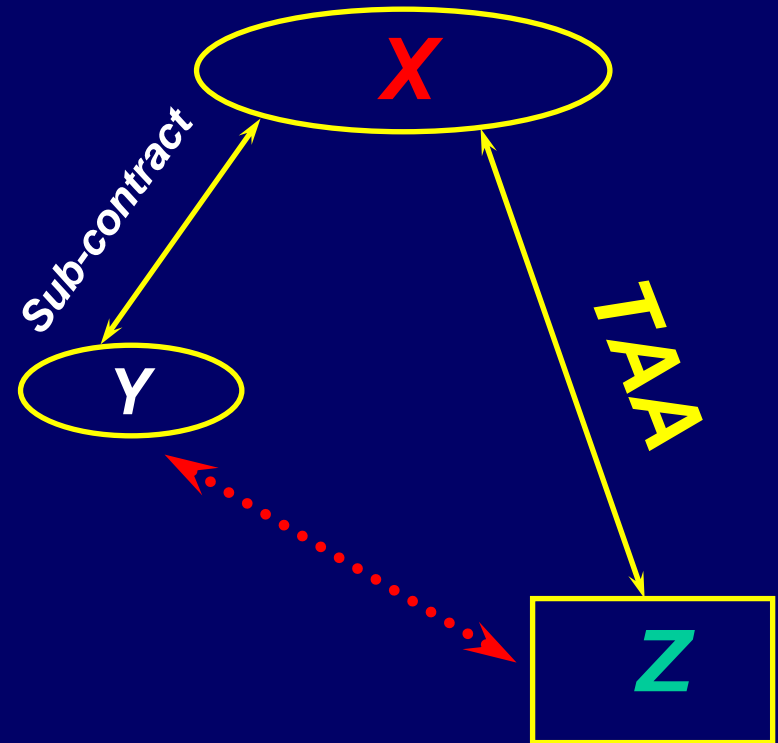


Two Party Agreements with a Non-Signatory US Party



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- Example of Two Party Agreement
 - X is U.S. Applicant (U.S.)
 - Y is U.S. Sub-Contractor (U.S.)
 - Z is Non-U.S. Licensee (Australia)
- Information transfer only along solid lines
 - Y MAY NOT directly interact with Z (Australia)
 - No technical data transfer or technical exchanges



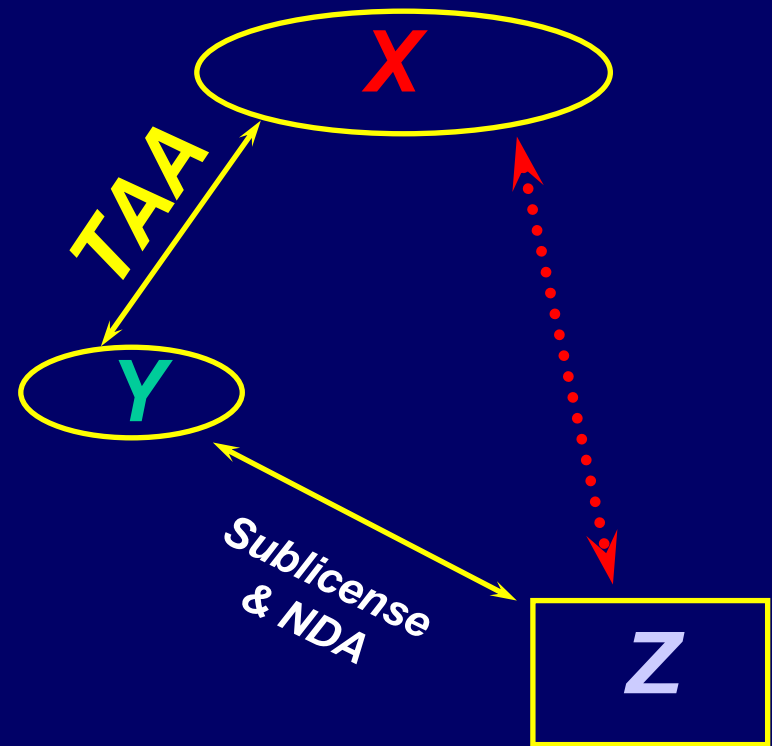


Two Party Agreements With Other Non-Signatory (Foreign Entities)



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- Example of Two Party Agreement
 - X is U.S. Applicant (US)
 - Y is Non-U.S. Licensee (Australia)
 - Z is Non-U.S. Sub-Contractor to Y (Australia)
- Information transfer only along solid lines
 - X (US) MAY NOT interact directly with Z (Australia)
 - Z (Aus) must be listed on Agreement
 - No technical data transfer or technical exchanges

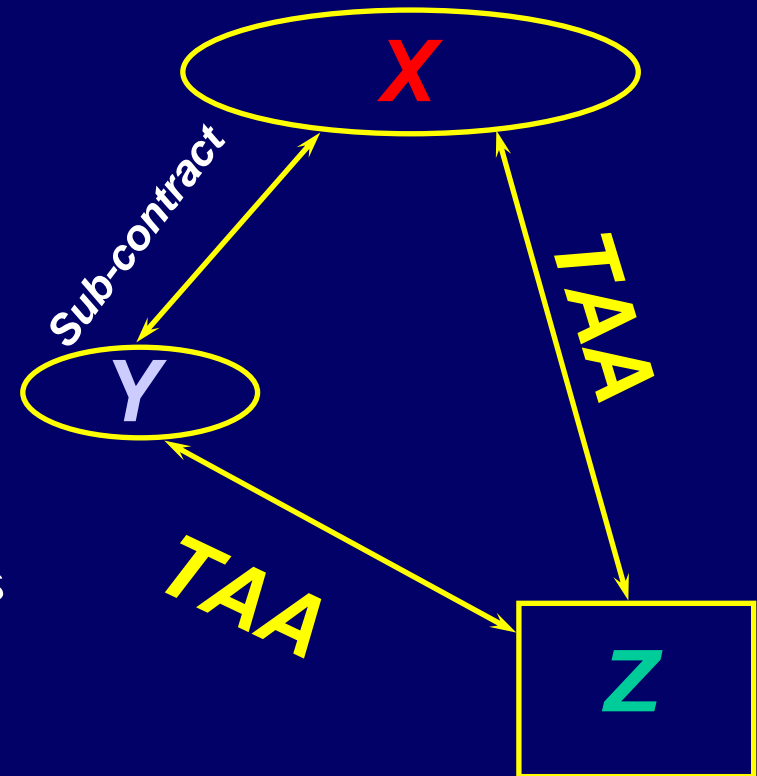


Multiple Party Agreements (BEST CASE)



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- Example of Three Party Agreement
 - X is prime (U.S.)
 - Y is sub (U.S.)
 - Z is Non-U.S. licensee (Australia)
- ALL Parties Sign Agreement
- Information transfer along solid lines
 - Information transfer allowed between all parties within the scope of TAA





Re-export Authorization Agreements (TAA & MLA)



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- **Re-exporting under an Agreement (State-ITAR)**
 - Can be written to cover re-exports and re-transfers
 - Ensure Agreement identifies the Sublicensing Territory
 - Obtain required Non-Disclosure Agreements (NDAs) with sub-licensee prior to re-export/re-transfer
 - Ensure you understand limitations of the agreement approval
 - Flow down required clauses in to sub-licensee
 - Flow down necessary clauses on your re-exports of hardware (MLA) **See 124.9(a)(6)**
 - Must appear on contract, invoice or other documentation
- **Agreements can be amended to permit re-exports or re-transfers**



Amendments to TAAs/MLAs



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- **Agreements typically last for 10 years**
 - Programs and requirements change over time
- **Monitor Agreements throughout the program**
- **Agreements can be easily amended**
 - E.g., scope, parties, and value
- **Provide the US party with updates regarding changes to process or parties**
 - US party does not always “see” the changes
 - e.g., new subcontractors, new employees, test houses, etc...



Re-export - Warehouse & Distribution Agreements (WDA)



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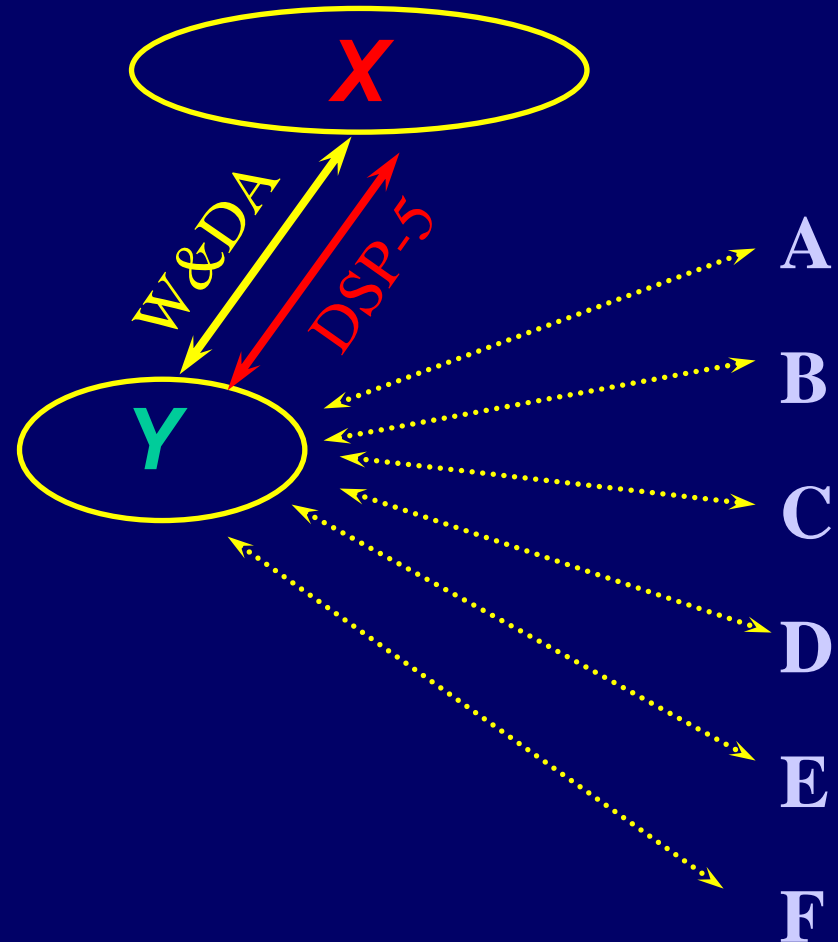
- **Permits a foreign party to inventory and distribute US defense articles within an approved territory**
 - Helpful in manufacturing & repair operations where you may not know exactly where each part is going before it arrives whether temporary or permanent
 - Ensures US Approval covers the necessary territory (actual approval may be for less than what was requested)
 - Requires annual report of sales or transfers (See 124.14(c)(6))
 - Foreign party must provide destination control language when they re-export (See 124.14(c)(7))
 - DSP-5 License may still be required to export under the Agreement – read provisos closely
- **Current practice is NOT to approve SME or MDE**

Warehouse and Distribution Agreements



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- Agreement is between US party and foreign party who will distribute product
 - US Party = X
 - Australian Party = Y
- Product moves from X to Y via a DSP-5
- Y may then re-export or re-transfer product to A, B, C, D, E, F provided they are within the approved territory
- Agreement may be amended to expand territory if needed





Who May Apply For Re-transfer/Re-exports?



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- **Either U.S. Or foreign person may apply 123.9(c)**
- Registration not required for foreign person
- Written request to PM/DTCL Licensing – No fax/email
- Agreements must be amended
- Information requirements
 - Original Export Authorization
 - Description/quantity/value
 - Identification of new end use and/or new user
- Support documentation from foreign parties
- DSP-83 and/or Congressional Notification may apply
- **Need written approval from DTCL prior to transfer**



Re-export Exemption 123.9(e)



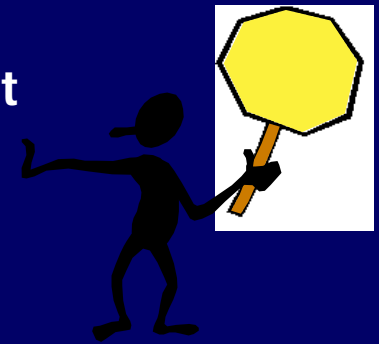
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Exemption

- Allows re-export of items to a government of NATO, Australia or Japan IF all the requirements are met

Caution

- US Origin components - Previously authorized for export
- No MTCR, SME or MDE over \$14 million
- Not for contract greater than \$50 million



Follow-Up

- Written notification must be filed within 30 days of re-export;
 - Ask US party to provide you sample language and address
 - Provide US party with a copy of the notification provided to State
 - Will need to provide documentation to show that item actually went to an eligible party



Re-export Compliance



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- **What if you do not know the Jurisdiction?**
- Ask your US Supplier/Party to provide you with the information
- Require US parties to identify jurisdiction of products (contractually)
- If you are uncertain - examine the paperwork you originally received with the item:
 - Compare Destination Control Statements (See next slide)
 - Look for reference to State Department License Numbers (e.g., 795438, T059812, or C083746) or export exemption citations beginning with 22 CFR (e.g., 22 CFR 126.4)
 - Look for reference to Commerce Department License Numbers (e.g., D023240) or Exceptions such as NLR, TMP, GBS, CIV, or reference to ECCN numbers such as 9A001 and EAR 99



US Destination Control Statements



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- **State Department:**

- “These commodities are authorized by the U.S. Government for export only to [country of ultimate destination] for use by [end-user]. They may not be transferred, transshipped on a non-continuous voyage, or otherwise be disposed of in any other country, either in their original form or after being incorporated into other end-items, without the prior written approval of the U.S. Department of State.”

- **Commerce Department:**

- “These commodities, technology or software were exported from the United States in accordance with the Export Administration Regulations. Diversion contrary to U.S. law prohibited.”



Re-export Summary



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- **Inform US Supplier/Partner of Re-export/Retransfer Intentions**
 - Provide US party with a full description of the proposed re-export path
- Provide US party with the Answers to the “Five Ws”
 - Who, What, Where, When & Why
- Clarify in writing who has responsibility for obtaining DTC Re-export Approval
- Review the 123.9 Re-export request required elements
- Mark US controlled data or hardware in your facilities with prohibition against unauthorized Re-export/Retransfer
- Obtain copy of Re-export authorization obtained on your behalf
- Ask US party to provide clear information about the specific parties, countries, articles and limitations that have been authorized for Re-export
- Must have a purchase order from buyer to support request



Steps for Compliance



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- Ensure you understand export jurisdiction of product of technology
- Coordinate your activity with your US Counterparts
- Ensure US party is informed of ALL parties to the transaction
- Work with US Party to establish Licensing Strategy **early** in program
- Use Re-export exemption when applicable – but follow up with proper paperwork
- Work with US parties to obtain re-export authorization when needed
- If there is a violation, inform US party





Questions



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