

## **EAR & ITAR Technical Data Definition Harmonization**

### **The Task**

The International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR) control the export of technical data as defined under their respective regulatory controls. DTAG was requested to:

- Review the existing technical data definitions in the ITAR and EAR and the control language applied to technical data in each regulation
- Recommend draft language to harmonize the definition and controls

### **Analysis**

The DTAG working group compared and assessed the definition of technical data as currently written under the ITAR and EAR. The goal included attempting to harmonize the definitions and to recommend more concise language defining more specifically what data constitutes export controlled “technical data” under each regulation. The working group determined there are core control differences between the ITAR and EAR that make a word-for-word harmonization of the definitions impractical without a large restructure of one or both of the regulations.

The DTAG also believes there is a need for harmonization and clarification in light of the President’s export reform initiative as it relates to any current USML items that may transfer to a new “600-series” CCL controlled item. All technologies required to produce or use a “600-series” item would also transfer to the CCL; hence, the need for a more harmonized definition of technical under the ITAR and EAR.

The EAR focuses on three fundamental terms that define export controlled “technical data;” that which is required for “production,” “development” and/or “use” data. Additionally, there are differences in the control language within the control lists. The Commerce Control List (CCL) only controls key technologies as specifically enumerated under an Export Control Classification Number (ECCN) where the ITAR controls ALL data directly related to the defense articles enumerated in a specific USML category.

The EAR includes a “General Technology Note” (Supplement No. 2 to Part 744) that refers to the export of technology that is “required” for “development,” “production” or “use.” The EAR also defines “required” (EAR Part 722) to only include a “portion of technology which is peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics or functions.” To clarify the EAR provides the following example to the General Technology Note:

“Assume product “X” is controlled if it operates at or above 400 MHz and is not controlled if it operates below 400 MHz. If production technologies “A”, “B”, and “C” allow production at no more than 399 MHz, then technologies “A”, “B”, and “C” are not “required” to produce the controlled product “X”. If technologies “A”, “B”, “C”, “D”, and “E” are used together, a manufacturer can produce product “X” that operates at or above 400 MHz. In this example, technologies “D” and “E”

are “required” to make the controlled product and are themselves controlled under the General Technology Note.”

Thus under the EAR, certain technologies used to produce a controlled item (i.e., technologies “A”, “B”, & “C” from the example) do not fall under the definition of “technology required” and are thus not controlled. However, one could interpret the current ITAR definition would control technologies “A”, “B”, “C” if directly related to a defense article. Technical data controlled under the ITAR is more broadly defined.

The ITAR defines technical data under Section 120.10 – which includes a broad definition with the exception of certain information concerning general scientific, mathematical or engineering principles taught in schools, colleges, universities or information otherwise in the public domain. Furthermore, each USML category controls technical as that which is defined in ITAR Section 120.10 “directly related to the defense article enumerated” in the subject category.

The DTAG working group decided to propose a change to the ITAR definition of technical data that’s intended to standardize and harmonize the basic construct of the definitions under the ITAR and EAR.

The DTAG new proposed ITAR definition of technical data follows the framework of the definition of technology defined in the EAR but continues to include certain key terms currently in the ITAR definition (e.g., design, development, production, manufacture, assembly, maintenance, repair, & testing). However, the working group eliminated the term “modification” as the DTAG believes technical data related to “modifications” would be captured by other elements of the new proposed definition.

The proposed definition also introduces a reserved category in paragraph (b)(4) to address encrypted information (see note 1). A key element of the new proposed ITAR definition is that it specifically controls technical data that is “required and unique” to an ITAR controlled item. Technical data that is common to a non-USML item would not be controlled under the ITAR. This will be especially critical after implementation of ECR to ensure that technical data related to 600 series CCL component parts of USML items are controlled under the EAR and not the ITAR.

*Note 1: Data that is encrypted or encoded information contains a form of the original plaintext that is unreadable by a human or computer without the key to decrypt the data. Therefore, encrypted or encoded information may not meet the definition of technical data provided it remains encrypted and the receiver is not provided with the decryption tool. If the encrypted or encoded information is decrypted by the receiver it remains controlled under the ITAR as it is readable plaintext. (More to address pending additional DTAG analysis)*

Note2: Consider tasking the DTAG with reviewing whether the definition of “ Software” should identified as a separate subcategory within the USML and controlled at various levels similar to the EAR (e.g., object code vs. source code).

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## Proposed ITAR Definition

a. *Technical data*, for purposes of this subchapter, is:

1) Information required and unique for the development, production and use of defense articles not subject to the CCL;

- a) *Development* includes information for all stages prior to serial production, such as: **design, development**, 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.
- b) *Production* includes information for all production stages, such as: product engineering, **production, manufacture**, integration, **assembly** (to include mounting), inspection, testing, quality assurance.
- c) *Use* includes information required for operation, installation (including on-site installation), **maintenance, repair, testing**, overhaul, or refurbishing

2) Classified Information related to defense articles and defense services;

3) Information covered by an invention secrecy order;

4) Software as defined in §121.8(f) of this subchapter required for development, production and use of defense articles.

b. This definition excludes:

- 1) Information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities; and
- 2) Information in the public domain as defined in §120.11; and
- 3) Basic marketing information on function, purpose or general system descriptions of defense articles; and
- 4) (Reserved)