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means that provide security strength that is at least comparable to the minimum 128 bits of security strength achieved by the Advanced Encryption Standard (AES-128);

(iv) Not intentionally sent to a person in or stored in a country proscribed in §126.1 of this subchapter or the Russian Federation; and

NOTE TO PARAGRAPH (a)(5)(iv): Data in-transit via the internet is not deemed to be stored.

(v) Not sent from a country proscribed in §126.1 of this subchapter or the Russian Federation.

(b)(1) For purposes of this section, end-to-end encryption is defined as:

(i) The provision of cryptographic protection of data, such that the data is not in an unencrypted form, between an originator (or the originator's in-country security boundary) and an intended recipient (or the recipient's in-country security boundary); and

(ii) The means of decryption are not provided to any third party.

(2) The originator and the intended recipient may be the same person. The intended recipient must be the originator, a U.S. person in the United States, or a person otherwise authorized to receive the technical data, such as by a license or other approval pursuant to this subchapter.

(c) The ability to access technical data in encrypted form that satisfies the criteria set forth in paragraph (a)(5) of this section does not constitute the release or export of such technical data.

[84 FR 70892, Dec. 26, 2019]

§ 120.55 Access Information.

Access information is information that allows access to encrypted technical data subject to this subchapter in an unencrypted form. Examples include decryption keys, network access codes, and passwords.

[84 FR 70893, Dec. 26, 2019]

EFFECTIVE DATE NOTE: At 87 FR 16411, Mar. 23, 2022, part 120 was revised, effective Sept. 6, 2022. For the convenience of the user, the revised text is set forth as follows:

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AUTHORITY: 22 U.S.C. 2651a, 2752, 2753, 2776, 2778, 2779, 2779a., 2785, 2794, 2797; E.O. 13637, 78 FR 16129, 3 CFR, 2013 Comp., p. 223.

Subpart A—General Information

§ 120.1 General authorities.

(a) *Authority and delegation.* Section 38 of the Arms Export Control Act (22 U.S.C. 2778), as amended, authorizes the President to control the export and import of defense articles and defense services. The statutory authority of the President to promulgate regulations with respect to exports of defense articles and defense services is delegated to the Secretary of State by Executive Order 13637. This subchapter implements that authority, as well as other relevant authorities in the Arms Export Control Act (22 U.S.C. 2751 *et seq.*). The Secretary of State delegates the authority to administer the regulations in this subchapter to the Deputy Assistant Secretary of State for Defense Trade Controls, Bureau of Political-Military Affairs.

(b) *Authorized officials.* (1) All authorities administered by the Deputy Assistant Secretary of State for Defense Trade Controls pursuant to this subchapter may be exercised at any time by the Under Secretary of State for Arms Control and International Security or the Assistant Secretary of State for Political-Military Affairs.

(2) The Deputy Assistant Secretary of State for Defense Trade Controls supervises the Directorate of Defense Trade Controls, which is comprised of the following offices:

(i) The Office of Defense Trade Controls Licensing and the Director, Office of Defense Trade Controls Licensing, which have responsibilities related to licensing or other approvals of defense trade, including references under this part and parts 123, 124, 125, 126, 129, and 130 of this subchapter.

(ii) The Office of Defense Trade Controls Compliance and the Director, Office of Defense Trade Controls Compliance, which have responsibilities related to violations of

law or regulation and compliance therewith, including references contained in parts 122, 126, 127, 128, and 130 of this subchapter, and those portions under this part and part 129 of this subchapter pertaining to registration.

(iii) The Office of Defense Trade Controls Policy and the Director, Office of Defense Trade Controls Policy, which have responsibilities related to the general policies of defense trade, including references under this part and part 126 of this subchapter, and the commodity jurisdiction procedure under this part.

§ 120.2 Designation of defense articles and defense services.

The Arms Export Control Act (22 U.S.C. 2778(a) and 2794(7)) provides that the President shall designate the articles and defense services deemed to be defense articles and defense services for purposes of import or export controls. The President has delegated to the Secretary of State the authority to control the export and temporary import of defense articles and services. The items designated by the Secretary of State for purposes of export and temporary import control constitute the U.S. Munitions List (USML) specified in part 121 of this subchapter. Defense articles on the USML specified in part 121 of this subchapter that are also subject to permanent import control by the Attorney General on the U.S. Munitions Import List enumerated in 27 CFR part 447 are subject to temporary import controls administered by the Secretary of State. Designations of defense articles and defense services on the USML in part 121 of this subchapter are made by the Department of State with the concurrence of the Department of Defense. The scope of the USML shall be changed only by amendments made pursuant to section 38 of the Arms Export Control Act (22 U.S.C. 2778). For a designation or determination on whether a particular item is enumerated on the USML, *see* § 120.4.

§ 120.3 Policy on designating or determining defense articles and services on the U.S. Munitions List.

(a) For purposes of this subchapter, a specific article or service may be designated a defense article (*see* § 120.31) or defense service (*see* § 120.32) if it:

(1) Meets the criteria of a defense article or defense service on the U.S. Munitions List (USML) (part 121 of this subchapter); or

(2) Provides the equivalent performance capabilities of a defense article on the USML.

(b) For purposes of this subchapter, a specific article or service shall be determined in the future as a defense article or defense service if it provides a critical military or intelligence advantage such that it warrants control under this subchapter.

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NOTE 1 TO PARAGRAPHS (A) AND (B): An article or service determined in the future pursuant to this subchapter as a defense article or defense service, but not currently on the USML, will be placed in Category XXI of §121.1 of this subchapter until the appropriate category of the USML has been amended to provide the necessary entry.

(c) A specific article or service is not a defense article or defense service for purposes of this subchapter if it:

(1) Is determined to be under the jurisdiction of another department or agency of the U.S. Government (see §120.5) pursuant to a commodity jurisdiction determination (see §120.4) unless superseded by changes to the USML or by a subsequent commodity jurisdiction determination; or

(2) Meets one of the criteria of §120.41(b) when the article is used in or with a defense article and specially designed is used as a control criteria.

NOTE 2 TO §120.3: The intended use of the article or service after its export (*i.e.*, for a military or civilian purpose), by itself, is not a factor in determining whether the article or service is subject to the controls of this subchapter.

§ 120.4 Commodity jurisdiction.

(a) The commodity jurisdiction procedure is used with the U.S. Government if doubt exists as to whether an article or service is covered by the U.S. Munitions List (USML). It may also be used for consideration of a redesignation of an article or service currently covered by the USML. The Department must provide notice to Congress at least 30 days before any item is removed from the USML.

(b) The procedure for submitting a Commodity Jurisdiction Determination Request to the Directorate of Defense Trade Controls is set forth in §120.12.

§ 120.5 Relation to regulations of other agencies.

(a) *The Department of Justice, the U.S. Munitions Import List (USMIL), and permanent imports.* Defense articles and defense services covered by the U.S. Munitions List set forth in this subchapter are regulated by the Department of State (see also §120.2) for purposes of export, reexport, retransfer, and temporary import. The President has delegated the authority to control the permanent import of defense articles and services to the Attorney General. The defense articles and services controlled by the Secretary of State and the Attorney General collectively comprise the U.S. Munitions List under the Arms Export Control Act. As the Attorney General exercises independent delegated authority to designate defense articles and services for purposes of permanent import controls, the permanent import control list administered by the Department of Justice has been separately labeled the U.S.

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Munitions Import List (27 CFR part 447) to distinguish it from the list set out in this subchapter. In carrying out the functions delegated to the Attorney General pursuant to the Arms Export Control Act, the Attorney General shall be guided by the views of the Secretary of State on matters affecting world peace and the external security and foreign policy of the United States.

(b) *The Department of Commerce and the Export Administration Regulations—(1) Export of items subject to the Export Administration Regulations by authority of the Department of Commerce.* The Department of Commerce regulates the export, reexport, and in-country transfer of items on the Commerce Control List and other items subject to its jurisdiction, as well as certain activities performed by U.S. persons, including those that may contribute to the proliferation of weapons of mass destruction, under the Export Administration Regulations (EAR) (15 CFR parts 730 through 774).

(2) *Export of items subject to the EAR by authority of the Department of State.* A license or other approval (*see* §120.57) from the Department of State granted in accordance with this subchapter may also authorize the export of items subject to the EAR (*see* §120.58). An exemption (*see* §120.57 and parts 123, 124, 125, and 126 of this subchapter) may only be used to export an item subject to the EAR that is for use in or with a defense article and is included in the same shipment as any defense article. Separate approval from the Department of Commerce is not required for these items. No exemption under this subchapter may be utilized to export an item subject to the EAR if not accompanied by a defense article. Those items subject to the EAR exported pursuant to a Department of State license or other approval would remain under the jurisdiction of the Department of Commerce for any subsequent transactions. The inclusion of items subject to the EAR on a Department of State license or other approval does not change the licensing jurisdiction of the items.

(c) *Nuclear related controls; Department of Energy and the Nuclear Regulatory Commission.* (1) The provisions of this subchapter do not apply to articles, technical data, or services in Category VI, Category XV, Category XVI, and Category XX of §121.1 of this subchapter to the extent that exports of such articles, technical data, or services are controlled by the Department of Energy or the Nuclear Regulatory Commission pursuant to the Atomic Energy Act of 1954 (AEA), as amended, and the Nuclear Non-Proliferation Act of 1978, as amended, or are government transfers authorized pursuant to these Acts. For Department of Commerce controls, see 15 CFR 742.3 and 744.2, administered pursuant to Section 309(c) of the Nuclear Nonproliferation Act of 1978, as amended (42 U.S.C.

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2139a(c)), and 15 CFR 744.5, which are not subject to this subchapter.

(2) The transfer of materials, including special nuclear materials, nuclear parts of nuclear weapons, or other, non-nuclear parts of nuclear weapons systems involving Restricted Data or of assistance involving any person directly or indirectly engaging in the production or use thereof is prohibited except as authorized by the AEA. The transfer of Restricted Data or such assistance is prohibited except as authorized by the AEA. The technical data or defense services relating to nuclear weapons, nuclear weapons systems or related defense purposes (and such data or services relating to applications of atomic energy for peaceful purposes, or related research and development) may constitute Restricted Data or such assistance, subject to the foregoing prohibition.

(3) A license for the export of a defense article, technical data, or the furnishing of a defense service relating to defense articles referred to in Category VI(e) or Category XX(b)(1) of §121.1 of this subchapter will not be granted unless the defense article, technical data, or defense service comes within the scope of an existing Agreement for Cooperation for Mutual Defense Purposes concluded pursuant to the AEA with the government of the country to which the defense article, technical data, or defense service is to be exported. Licenses may be granted in the absence of such an agreement only:

- (i) If the proposed export involves an article which is identical to that in use in an unclassified civilian nuclear power plant;
- (ii) If the proposed export has no relationship to naval nuclear propulsion; and
- (iii) If it is not for use in a naval propulsion plant.

§ 120.6 U.S. criminal statutes.

For purposes of this subchapter, the phrase *U.S. criminal statutes* comprises the following:

- (a) Section 38 of the Arms Export Control Act (22 U.S.C. 2778);
- (b) Section 1760 of the Export Control Reform Act of 2018 (50 U.S.C. 4819) or section 11 of the Export Administration Act of 1979 (50 U.S.C. 4610);
- (c) Section 793, 794, or 798 of title 18, United States Code (relating to espionage involving defense or classified information) or section 2332d, 2339A, 2339B, 2339C, or 2339D of such title (relating to financial transactions with the government of a country designated as a country supporting international terrorism, providing material support to terrorists or terrorist organizations, financing of terrorism, or receiving military-type training from a foreign terrorist organization);
- (d) Section 16 of the Trading with the Enemy Act (50 U.S.C. 4315);
- (e) Section 206 of the International Emergency Economic Powers Act (relating to foreign assets controls; 50 U.S.C. 1705);

(f) Section 30A of the Securities Exchange Act of 1934 (15 U.S.C. 78dd-1) or section 104 of the Foreign Corrupt Practices Act (15 U.S.C. 78dd-2 or 78dd-3);

(g) Chapter 105 of title 18, United States Code (relating to sabotage);

(h) Section 4(b) of the Internal Security Act of 1950 (relating to communication of classified information; 50 U.S.C. 783(a));

(i) Sections 57, 92, 101, 104, 222, 224, 225, or 226 of the Atomic Energy Act of 1954 (42 U.S.C. 2077, 2122, 2131, 2134, 2272, 2274, 2275, and 2276);

(j) Section 601 of the National Security Act of 1947 (relating to intelligence identities protection; 50 U.S.C. 421);

(k) Section 371 of title 18, United States Code (when it involves conspiracy to violate any of the statutes listed in this section);

(l) Sections 3, 4, 5, and 6 of the Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108-458 sections 6903-6906, relating to missile systems designed to destroy aircraft (18 U.S.C. 2332g), prohibitions governing atomic weapons (42 U.S.C. 2122), radiological dispersal services (18 U.S.C. 2332h), and variola virus (18 U.S.C. 175c);

(m) Sections 2779 and 2780 of title 22, United States Code (relating to fees of military sales agents and other payments, and transactions with countries supporting acts of international terrorism);

(n) Section 542 of title 18, United States Code (relating to the entry of goods by means of false statements), where the underlying offense involves a defense article, including technical data, or violations related to the Arms Export Control Act (AECA) or International Traffic in Arms Regulations (ITAR) in this subchapter;

(o) Section 545 of title 18, United States Code (relating to smuggling goods into the United States), where the underlying offense involves a defense article, including technical data, or violations related to the AECA or ITAR;

(p) Section 554 of title 18, United States Code (relating to smuggling goods from the United States), where the underlying offense involves a defense article, including technical data, or violations related to the AECA or ITAR; and

(q) Section 1001 of title 18, United States Code (relating to false statements or entries generally), Section 1831 of title 18, United States Code (relating to economic espionage), and Section 1832 of title 18, United States Code (relating to theft of trade secrets) where the underlying offense involves a defense article, including technical data, or violations related to the AECA or ITAR.

§ 120.7 Relations to other provisions of law.

(a) The provisions in this subchapter are in addition to, and are not in lieu of, any other provisions of law or regulations. The sale of firearms in the United States, for example,

remains subject to the provisions of the Gun Control Act of 1968 and regulations administered by the Department of Justice. The performance of defense services on behalf of foreign governments by retired military personnel continues to require consent pursuant to part 3a of this title. Persons who intend to export defense articles or furnish defense services should not assume that satisfying the requirements of this subchapter relieves one of other requirements of law.

(b) All determinations, authorizations, licenses, approvals of contracts and agreements, and other action issued, authorized, undertaken, or entered into by the Department of State pursuant to section 414 of the Mutual Security Act of 1954, as amended, or under the previous provisions of this subchapter, continue in full force and effect until or unless modified, revoked, or superseded by the Department of State.

§§ 120.8–120.9 [Reserved]

Subpart B—General Policies and Processes

§ 120.10 Introduction to the U.S. Munitions List.

(a) *The U.S. Munitions List.* The articles, services, and related technical data designated as defense articles or defense services pursuant to sections 38 and 47(7) of the Arms Export Control Act appear in part 121 of this subchapter and constitute the U.S. Munitions List (USML). Changes in designations are published in the FEDERAL REGISTER. Paragraphs (b) through (d) of this section describe or explain the elements of a USML category.

(b) *Composition of U.S. Munitions List categories.* USML categories are organized by paragraphs and subparagraphs identified alphanumerically. They usually start by enumerating or otherwise describing end-items, followed by major systems and equipment; parts, components, accessories, and attachments; and technical data and defense services directly related to the defense articles of that USML category.

(c) *Significant Military Equipment paragraphs in the USML.* All items described within a USML paragraph or subordinate paragraph that is preceded by an asterisk (*) are designated Significant Military Equipment (SME). Note that technical data directly related to the manufacture or production of a defense article designated as SME is also designated as SME.

(d) *Missile Technology Control Regime (MTCR) designation.* Annotation with the parenthetical (MT) at the end of a USML entry indicates those defense articles that are on the MTCR Annex.

§ 120.11 Order of review.

(a) *Control.* Articles are controlled on the U.S. Munitions List (USML) because they are either:

- (1) Enumerated in a category; or
- (2) Described in a catch-all paragraph that incorporates specially designed as a control parameter. In order to classify an item on the USML, begin with a review of the general characteristics of the item. This should guide you to the appropriate category, whereupon you should attempt to match the particular characteristics and functions of the article to a specific entry within that category.

(b) *Specially designed.* (1) If the entry includes the term specially designed, refer to § 120.41 to determine if the article qualifies for one or more of the exclusions articulated in § 120.41(b).

(2) An item described in multiple entries should be categorized according to an enumerated entry rather than a specially designed catch-all paragraph.

(c) *Integration of controlled items.* Defense articles described on the USML are controlled and remain subject to this subchapter following incorporation or integration into any item not described on the USML, unless specifically provided otherwise in this subchapter.

(d) *Other controls.* In all cases, articles not controlled on the USML may be subject to another U.S. Government regulatory agency (see § 120.5, and Supplement No. 4 to part 774 of the Export Administration Regulations (EAR) in title 15 of the CFR for guidance on classifying an item subject to the EAR).

§ 120.12 Commodity jurisdiction determination requests.

(a) Upon electronic submission of a Commodity Jurisdiction Determination Form (Form DS-4076), the Directorate of Defense Trade Controls (DDTC) shall provide a determination of whether a particular article or service is covered by the U.S. Munitions List in part 121 of this subchapter. The determination, consistent with §§ 120.2, 120.3, and 120.4, entails consultation among the Departments of State, Defense, Commerce, and other U.S. Government agencies and industry in appropriate cases. State, Defense, and Commerce will resolve commodity jurisdiction determination disputes in accordance with established procedures. State shall notify Defense and Commerce, and other U.S. Government agencies as appropriate, of the initiation and conclusion of each case.

(b) A determination that an article or service meets the criteria of a defense article or defense service, or provides the equivalent performance capabilities of a defense article on the U.S. Munitions List, is made on a case-by-case basis, taking into account:

- (1) The form and fit of the article;

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(2) The function and performance capability of the article; and

(3) Other applicant-provided information, to include a history of the product's design, development, and use, as well as specifications and any other relevant data as described in brochures and other related documents.

(c) A determination that an article or service has a critical military or intelligence advantage such that it warrants control under Category XXI of §121.1 of this subchapter is made, on a case-by-case basis, taking into account:

(1) The function and performance capability of the article; and

(2) The nature of controls imposed by other nations on such items (including the Wassenaar Arrangement and other multilateral controls).

(d) DDTC will provide a preliminary response within 10 working days of receipt of a complete request for commodity jurisdiction determination. If after 45 days DDTC has not provided a final commodity jurisdiction determination, the applicant may request in writing to the Director, Office of Defense Trade Controls Policy that this determination be given expedited processing.

(e) A person may appeal a commodity jurisdiction determination by submitting a written request for reconsideration to the Deputy Assistant Secretary of State for Defense Trade Controls. The Deputy Assistant Secretary's determination of the appeal will be provided, in writing, within 30 days of receipt of the appeal. If desired, an appeal of the Deputy Assistant Secretary's decision can then be made to the Assistant Secretary of State for Political-Military Affairs.

(f) Registration with DDTC as described in part 122 of this subchapter is not required prior to submission of a commodity jurisdiction determination request.

§ 120.13 Registration.

(a) Any person who engages in the United States in the business of manufacturing or exporting or temporarily importing defense articles, or furnishing defense services, is required to register with the Directorate of Defense Trade Controls as set forth in part 122 of this subchapter. For the purpose of this subchapter, engaging in such a business requires only one occasion of manufacturing or exporting or temporarily importing a defense article or furnishing a defense service. A manufacturer who does not engage in exporting must nevertheless register.

(b) Any U.S. person; foreign person located in the United States; or foreign person located outside the United States that is owned or controlled by a U.S. person, who engages in brokering activities is required to register with the Directorate of Defense Trade Controls as set forth in part 129 of this subchapter.

§ 120.14 Licenses and related authorizations.

(a) *Export, reexport, retransfer, or temporary import, of defense articles.* The approval of the Directorate of Defense Trade Controls (DDTC) must be requested and obtained before the export, reexport, retransfer, or temporary import of a defense article, unless an exemption under the provisions of this subchapter is applicable.

(b) *Furnishing defense services.* The approval of DDTC must be requested and obtained before a defense service may be furnished, unless an exemption under the provisions of this subchapter is applicable.

(c) *Brokering activities.* The approval of DDTC must be requested and obtained before engaging in the business of brokering activities for the defense articles described in §129.4(a) of this subchapter by a person who is required to register as a broker under part 129 of this subchapter, unless an exemption under the provisions of part 129 is applicable.

§ 120.15 Exemptions.

(a) Persons otherwise required to register with the Directorate of Defense Trade Controls in accordance with this subchapter must do so prior to utilization of an exemption.

(b) Exemptions provided in this subchapter may not be utilized for transactions in which the exporter, any party to the export, any source or manufacturer, broker or other participant in the brokering activities, is generally ineligible as set forth in §120.16, unless prior written authorization has been granted by the Directorate of Defense Trade Controls.

(c) Exemptions provided in this subchapter do not apply with respect to defense articles or defense services originating in or for export to any proscribed countries, areas, or persons identified in §126.1 of this subchapter, except as provided in §126.1.

(d) Each exemption provided in this subchapter is subject to limitation as described in the section or paragraph of this subchapter in which the exemption is prescribed.

(e) 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 record-keeping 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).

(f) To claim an exemption for the export of technical data under the provisions of this subchapter (e.g., §§ 125.4 and 125.5 of this subchapter), the exporter must certify that the proposed export is covered by a relevant section of this subchapter, to include the paragraph and applicable subordinate paragraph. Certifications consist of clearly marking the package or letter containing the technical data “22 CFR [insert ITAR exemption] applicable.” This certification must be made in written form and retained in the exporter’s files for a period of 5 years. For exports that are oral, visual, or electronic the exporter must also complete a written certification and retain it for a period of 5 years.

§ 120.16 Eligibility for approvals.

(a) A U.S. person may receive a license or other approval pursuant to this subchapter. A foreign person may not receive such a license or other approval, except as follows:

- (1) A foreign governmental entity in the U.S. may receive a license or other approval;
- (2) A foreign person may receive a reexport or retransfer approval; or
- (3) A foreign person may receive an approval for brokering activities.

(b) A request for a license or other approval by a U.S. person or by a person referred to in paragraphs (a)(1) and (3) of this section will be considered only if the applicant has registered with the Directorate of Defense Trade Controls pursuant to part 122 or 129 of this subchapter, as appropriate.

(c) Persons who have been convicted of violating the U.S. criminal statutes enumerated in § 120.6, who have been debarred pursuant to part 127 or 128 of this subchapter, who are subject to indictment or are otherwise charged (e.g., charged by criminal information in lieu of indictment) with violating the U.S. criminal statutes enumerated in § 120.6, who are ineligible to contract with or to receive a license or other form of authorization to import defense articles or defense services from any agency of the U.S. Government, who are ineligible to receive an export license or other approval from any other agency of the U.S. Government, or who are subject to a publicly announced Department of State policy of denial, suspension, or revocation under § 120.18(a), are generally ineligible to be involved in activities regulated under this subchapter.

§ 120.17 End-use monitoring.

(a) Pursuant to section 40A of the Arms Export Control Act (22 U.S.C. 2785) and related delegations of authority, the Department of State is required to establish a monitoring program in order to improve accountability with respect to defense articles and defense services, sold, leased, or exported under Department of State licenses or other approvals under section 38 of the Arms Export Control Act and this subchapter.

(b) All exports of defense articles, technical data, services, and brokering activities made pursuant to this subchapter are subject to end-use monitoring by the Department of State through the Blue Lantern program.

§ 120.18 Denial, revocation, suspension, or amendment of licenses and other approvals.

(a) *Policy.* Licenses or approvals shall be denied or revoked whenever required by any statute of the United States. Any application for an export license or other approval under this subchapter may be disapproved, and any license or other approval or exemption granted under this subchapter may be revoked, suspended, or amended without prior notice whenever:

- (1) The Department of State deems such action to be in furtherance of world peace, the national security or the foreign policy of the United States, or is otherwise advisable; or
- (2) The Department of State believes that 22 U.S.C. 2778, any regulation contained in this subchapter, or the terms of any U.S. Government export authorization (including the terms of a manufacturing license or technical assistance agreement, or export authorization granted pursuant to the Export Administration Regulations in 15 CFR parts 730 through 774) has been violated by any party to the export or other person having significant interest in the transaction; or
- (3) An applicant is the subject of a criminal complaint, other criminal charge (e.g., an information), or indictment for a violation of any of the U.S. criminal statutes enumerated in § 120.6; or
- (4) An applicant or any party to the export or the agreement has been convicted of violating any of the U.S. criminal statutes enumerated in § 120.6; or
- (5) An applicant is ineligible to contract with, or to receive a license or other authorization to import defense articles or defense services from, any agency of the U.S. Government; or
- (6) An applicant, any party to the export or agreement, any source or manufacturer of the defense article or defense service or any person who has a significant interest in the transaction has been debarred, suspended, or otherwise is ineligible to receive an export license or other authorization from any

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agency of the U.S. Government (e.g., pursuant to an order denying export privileges issued by the Department of Commerce under 15 CFR part 766 or by the Department of State under part 127 or 128 of this subchapter); or

(7) An applicant has failed to include any of the information or documentation expressly required to support a license application, exemption, or other request for approval under this subchapter, or as required in the instructions in the applicable Department of State form or has failed to provide notice or information as required under this subchapter; or

(8) An applicant is subject to sanctions under other relevant U.S. laws (e.g., the Missile Technology Controls title of the National Defense Authorization Act for FY 1991 (Pub. L. 101-510); the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (Pub. L. 102-182); or the Iran-Iraq Arms Non-Proliferation Act of 1992 (Pub. L. 102-484)); or

(9) Any person involved in the transaction has been the subject of an unfavorable finding of an end-use monitoring check as described in §120.17.

(b) *Notification.* The Directorate of Defense Trade Controls will notify applicants or licensees or other appropriate U.S. persons of actions taken pursuant to paragraph (a) of this section. The reasons for the action will be stated as specifically as security and foreign policy considerations permit.

(c) *Reconsideration.* If a written request for reconsideration of an adverse decision is made within 30 days after a person has been informed of the decision, the U.S. person will be accorded an opportunity to present additional information. The case will then be reviewed by the Directorate of Defense Trade Controls.

(d) *Reconsideration of certain applications.* Applications for licenses or other requests for approval denied for repeated failure to provide information or documentation expressly required will normally not be reconsidered during the 30 day period following denial. They will be reconsidered after this period only after a final decision is made on whether the applicant will be subject to an administrative penalty imposed pursuant to this subchapter. Any request for reconsideration shall be accompanied by a letter explaining the steps that have been taken to correct the failure and to ensure compliance with the requirements of this subchapter.

§ 120.19 Violations and penalties.

(a) Part 127 of this subchapter specifies conduct that constitutes a violation of the Arms Export Control Act (AECA) and/or the International Traffic in Arms Regulations in this subchapter and the sanctions that may be imposed for such violations.

(b) The Department strongly encourages the disclosure of information to the Directorate of Defense Trade Controls by persons that believe they may have violated any export control provision of the AECA, or any regulation in this subchapter, order, license, or other authorization issued under the authority of the AECA.

§ 120.20 Administrative procedures.

The Arms Export Control Act (AECA) authorizes the President to control the import and export of defense articles and services in furtherance of world peace and the security and foreign policy of the United States. Pursuant to delegated authorities, the Secretary of State is authorized to make decisions on whether license applications or other written requests for approval shall be granted, or whether exemptions may be used. The Secretary of State is also authorized to revoke, suspend, or amend licenses or other written approvals whenever such action is deemed to be advisable. The administration of the AECA is a foreign affairs function encompassed within the meaning of the military and foreign affairs exclusion of the Administrative Procedure Act and is thereby expressly exempt from various provisions of that Act. Because the exercising of the foreign affairs function, including the decisions required to implement the AECA, is highly discretionary, it is excluded from review under the Administrative Procedure Act.

§ 120.21 Disclosure of information.

(a) *Freedom of information.* Subchapter R of this title contains regulations on the availability to the public of information and records of the Department of State. The provisions of subchapter R apply to such disclosures by the Directorate of Defense Trade Controls.

(b) *Determinations required by law.* Section 38(e) of the Arms Export Control Act (AECA) (22 U.S.C. 2778(e)) provides that information obtained for the purpose of consideration of, or concerning, license applications shall be withheld from public disclosure unless the release of such information is determined by the Secretary of State to be in the national interest. Section 38(e) of the AECA further provides that the names of countries and types and quantities of defense articles for which licenses are issued under this section shall not be withheld from public disclosure unless certain determinations are made that the release of such information would be contrary to the national interest. Such determinations required by section 38(e) shall be made by the Assistant Secretary of State for Political-Military Affairs.

(c) *Information required under part 130 of this subchapter.* Part 130 contains specific provisions on the disclosure of information described in that part.

(d) *National interest determinations.* In accordance with section 38(e) of the AECA, the Secretary of State has determined that the following disclosures are in the national interest of the United States:

(1) Furnishing information to foreign governments for law enforcement or regulatory purposes; and

(2) Furnishing information to foreign governments and other agencies of the U.S. Government in the context of multilateral or bilateral export regimes (e.g., the Missile Technology Control Regime, the Australia Group, and Wassenaar Arrangement).

§ 120.22 Advisory opinions and related authorizations.

(a) *Preliminary authorization determinations.* A person may request information from the Directorate of Defense Trade Controls (DDTC) as to whether it would likely grant a license or other approval for a particular defense article or defense service to a particular country. Such information from DDTC is issued on a case-by-case basis and applies only to the particular matters presented to DDTC. These opinions are not binding on the Department of State and may not be used in future matters before the Department. A request for an advisory opinion must be made in writing and must outline in detail the equipment, its usage, the security classification (if any) of the articles or related technical data, and the country or countries involved.

(b) *Related authorizations.* DDTC may, as appropriate, in accordance with the procedures set forth in paragraph (a) of this section, provide export authorization, subject to all other relevant requirements of this subchapter, both for transactions that have been the subject of advisory opinions requested by prospective U.S. exporters, or for the Directorate's own initiatives. Such initiatives may cover pilot programs, or specifically anticipated circumstances for which the Directorate considers special authorizations appropriate.

(c) *Interpretations of the International Traffic in Arms Regulations in this subchapter.* Any person may request an interpretation of the requirements set forth in this subchapter in the form of an advisory opinion. A request for an advisory opinion must be made in writing. Any response to an advisory opinion provided by DDTC pursuant to this paragraph (c) shall not be an authorization to export and shall not bind the Department to grant or deny any such authorization.

§ 120.23 Organizations and arrangements.

(a) *North Atlantic Treaty Organization.* North Atlantic Treaty Organization (NATO) refers to the organization of member states that are parties to the North Atlantic Treaty, which members include: Albania, Belgium, Bulgaria, Canada, Croatia, Czech Re-

public, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, the Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, the United Kingdom, the United States, and any state not included here that has deposited an instrument of accession in accordance with Article 10 of the North Atlantic Treaty.

(b) *Major non-NATO ally.* (1) Major non-NATO ally, as defined in section 644(q) of the Foreign Assistance Act of 1961 (22 U.S.C. 2403(q)), means a country that is designated in accordance with section 517 of the Foreign Assistance Act of 1961 (22 U.S.C. 2321k) as a major non-NATO ally for purposes of the Foreign Assistance Act of 1961 and the Arms Export Control Act (22 U.S.C. 2151 *et seq.* and 22 U.S.C. 2751 *et seq.*).

(2) The following countries are designated as major non-NATO allies: Afghanistan (see § 126.1(g) of this subchapter), Argentina, Australia, Bahrain, Brazil, Egypt, Israel, Japan, Jordan, Kuwait, Morocco, New Zealand, Pakistan, the Philippines, the Republic of Korea, Thailand, and Tunisia. Taiwan shall be treated as though it were designated a major non-NATO ally.

(c) *Wassenaar Arrangement.* (1) The Wassenaar Arrangement refers to the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies among the United States, Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, India, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, the Republic of Korea, Romania, the Russian Federation, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom, established on 12 July 1996, to promote transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies.

(2) The term Wassenaar Munitions List (WAML) refers to the list of military items for which all participants have agreed to maintain national export controls.

(d) *Missile Technology Control Regime—(1) Regime.* Missile Technology Control Regime (MTCR) refers to the policy statement among the United States, the United Kingdom, the Federal Republic of Germany, France, Italy, Canada, and Japan, announced on April 16, 1987, to restrict sensitive missile-relevant transfers based on the MTCR Annex, and any amendments thereto.

(2) *MTCR Annex.* The term MTCR Annex refers to the MTCR Guidelines and the Equipment, Software and Technology Annex of the MTCR, and any amendments thereto.

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(3) *List of all items on the MTCR Annex.* MTCR Annex items specified in the U.S. Munitions List shall be annotated by the parenthetical (MT) at the end of each applicable paragraph.

(e) *Defense Trade Cooperation Treaty between the United States and Australia.* Defense Trade Cooperation Treaty between the United States and Australia refers to the Treaty between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation, done at Sydney, September 5, 2007. For additional information on making exports pursuant to this treaty, see §126.16 of this subchapter.

(f) *Australia Implementing Arrangement.* Australia Implementing Arrangement refers to the Implementing Arrangement Pursuant to the Treaty between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation, done at Washington, March 14, 2008, as it may be amended.

(g) *Defense Trade Cooperation Treaty between the United States and the United Kingdom.* Defense Trade Cooperation Treaty between the United States and the United Kingdom refers to the Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation, done at Washington and London, June 21 and 26, 2007. For additional information on making exports pursuant to this treaty, see §126.17 of this subchapter.

(h) *United Kingdom Implementing Arrangement.* United Kingdom Implementing Arrangement refers to the Implementing Arrangement Pursuant to the Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade Cooperation, done at Washington, February 14, 2008, as it may be amended.

§§ 120.24–120.29 [Reserved]

Subpart C—Definitions

§ 120.30 Directorate of Defense Trade Controls.

Directorate of Defense Trade Controls, Bureau of Political-Military Affairs, Department of State, Washington, DC 20522–0112.

§ 120.31 Defense article.

(a) *Defense article* means any item or technical data designated in §121.1 of this subchapter and includes:

(1) Technical data recorded or stored in any physical form, models, mockups or other items that reveal technical data directly relating to items designated in §121.1 of this subchapter; and

(2) Forgings, castings, and other unfinished products, such as extrusions and machined bodies, that have reached a stage in manufacturing where they are clearly identifiable by mechanical properties, material composition, geometry, or function as defense articles.

(b) It does not include basic marketing information on function or purpose or general system descriptions.

(c) The policy described in §120.3 is applicable to designations of additional items.

§ 120.32 Defense service.

(a) *Defense service* means:

(1) The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing, or use of defense articles;

(2) The furnishing to foreign persons of any technical data controlled under this subchapter, whether in the United States or abroad; or

(3) Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice.

(b) [Reserved]

§ 120.33 Technical data.

(a) *Technical data* means for purposes of this subchapter:

(1) Information, other than software as defined in §120.40(g), which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions, or documentation;

(2) Classified information relating to defense articles and defense services on the U.S. Munitions List and 600-series items controlled by the Commerce Control List;

(3) Information covered by an invention secrecy order; or

(4) Software (see §120.40(g)) directly related to defense articles.

(b) The definition in paragraph (a) of this section does not include information concerning general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities, or information in the public domain as defined in §120.34 or telemetry data as defined in note 3 to Category XV(f) of §121.1 of this subchapter. It also does not include basic marketing information on function or purpose or

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general system descriptions of defense articles.

§ 120.34 Public domain.

(a) *Public domain* means information which is published and which is generally accessible or available to the public:

(1) Through sales at newsstands and bookstores;

(2) Through subscriptions which are available without restriction to any individual who desires to obtain or purchase the published information;

(3) Through second class mailing privileges granted by the U.S. Government;

(4) At libraries open to the public or from which the public can obtain documents;

(5) Through patents available at any patent office;

(6) Through unlimited distribution at a conference, meeting, seminar, trade show, or exhibition, generally accessible to the public, in the United States;

(7) Through public release (*i.e.*, unlimited distribution) in any form (*e.g.*, not necessarily in published form) after approval by the cognizant U.S. Government department or agency (see also §125.4(b)(13) of this subchapter); or

(8) Through fundamental research in science and engineering at accredited institutions of higher learning in the U.S. where the resulting information is ordinarily published and shared broadly in the scientific community. Fundamental research is defined to mean basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community, as distinguished from research the results of which are restricted for proprietary reasons or specific U.S. Government access and dissemination controls. University research will not be considered fundamental research if:

(i) The University or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity; or

(ii) The research is funded by the U.S. Government and specific access and dissemination controls protecting information resulting from the research are applicable.

(b) [Reserved]

§ 120.35 [Reserved]

§ 120.36 Significant military equipment.

(a) *Significant military equipment* means articles for which special export controls are warranted because of their capacity for substantial military utility or capability.

(b) Significant military equipment includes:

(1) Items in §121.1 of this subchapter that are preceded by an asterisk; and

(2) All classified articles enumerated in §121.1 of this subchapter.

§ 120.37 Major defense equipment.

Major defense equipment, pursuant to section 47(6) of the Arms Export Control Act (22 U.S.C. 2794(6)), means any item of significant military equipment on the U.S. Munitions List having a nonrecurring research and development cost of more than \$50,000,000 or a total production cost of more than \$200,000,000.

§ 120.38 Classified.

Classified means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant thereto or equivalent, or to the corresponding classification rules of another government or international organization.

§ 120.39 Foreign defense article or defense service.

Foreign defense article or defense service means any article or service described on the U.S. Munitions List of non-U.S. origin. Unless otherwise provided in this subchapter, the terms defense article and defense service refer to both U.S. and foreign origin defense articles and defense services described on the U.S. Munitions List. A defense article or defense service is determined exclusively in accordance with the Arms Export Control Act and this subchapter, regardless of any designation (either affirming or contrary) that may be attributed to the same article or service by any foreign government or international organization.

§ 120.40 Compositional terms.

(a) *Commodity* means any article, material, or supply, except technology/technical data or software.

(b) An *end-item* is a system, equipment, or an assembled article ready for its intended use. Only ammunition or fuel or other energy source is required to place it in an operating state.

(c) A *component* is an item that is useful only when used in conjunction with an end-item:

(1) A *major component* includes any assembled element that forms a portion of an end-item without which the end-item is inoperable; and

(2) A *minor component* includes any assembled element of a major component.

(d) *Accessories and attachments* are associated articles for any component, equipment, system, or end-item, and which are not necessary for its operation, but which enhance its usefulness or effectiveness.

(e) A *part* is any single unassembled element of a major or a minor component, accessory, or attachment which is not normally subject to disassembly without the destruction or the impairment of designed use.

(f) *Firmware* and any related unique support tools (such as computers, linkers, editors, test case generators, diagnostic checkers, library of functions, and system test diagnostics) directly related to equipment or systems covered under any category of the U.S. Munitions List are considered as part of the end-item or component. Firmware includes but is not limited to circuits into which software has been programmed.

(g) *Software* includes but is not limited to the system functional design, logic flow, algorithms, application programs, operating systems, and support software for design, implementation, test, operation, diagnosis, and repair. A person who intends to export only software should, unless it is specifically enumerated in §121.1 of this subchapter (e.g., USML Category XIII(b)), apply for a technical data license pursuant to part 125 of this subchapter.

(h) A *system* is a combination of parts, components, accessories, attachments, firmware, software, equipment, or end-items that operate together to perform a function.

NOTE 1 TO PARAGRAPH (H): The industrial standards established by the International Council on Systems Engineering (INCOSE), National Aeronautics and Space Administration (NASA), and International Organization for Standardization (ISO) provide examples for when commodities and software operate together to perform a function as a system.

(i) *Equipment* is a combination of parts, components, accessories, attachments, firmware, or software that operate together to perform a function of, as, or for an end-item or system. Equipment may be a subset of an end-item based on the characteristics of the equipment. Equipment that meets the definition of an end-item in paragraph (b) of this section is an end-item. Equipment that does not meet the definition of an end-item is a component, accessory, attachment, firmware, or software.

§ 120.41 Specially designed.

(a) Except for commodities or software described in paragraph (b) of this section, 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 (USML) paragraph in §121.1 of this subchapter; or

NOTE 1 TO PARAGRAPH (A)(1): An example of a commodity that as a result of development has properties peculiarly responsible for achieving or exceeding the controlled performance levels, functions, or characteristics in a USML category would be a swimmer delivery vehicle specially designed to dock with a submarine to provide submerged transport for swimmers or divers from submarines.

(2) Is a part, component, accessory, attachment, or software for use in or with a defense article.

(b) For purposes of this subchapter, a part, component, accessory, attachment, or software is not specially designed 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;

(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 USML;

(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 USML and also commodities not on the USML; or

(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).

NOTE 2 TO PARAGRAPH (B): For a defense article not to be specially designed on the basis of paragraph (b)(4) or (5) of this section, documents contemporaneous with its development, in their totality, must establish the elements of paragraph (b)(4) or (5). Such documents may include concept design information, marketing plans, declarations in patent applications, or contracts. Absent such documents, the commodity may not be excluded from being specially designed by either paragraph (b)(4) or (5).

NOTE 3 TO PARAGRAPH (B): For the purpose of paragraphs (b)(4) and (5) of this section, “knowledge” includes not only the positive knowledge a circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence. Such awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person’s willful avoidance of facts.

§ 120.42 Form, fit, function, performance capability, equivalent, enumerated, and catch-all control.

(a) *Form*. The form of a commodity is defined by its configuration (including the geometrically measured configuration), material, and material properties that uniquely characterize it. For software, the form means the design, logic flow, and algorithms.

(b) *Fit*. The fit of a commodity is defined by its ability to physically interface or connect with or become an integral part of another commodity. For software, the fit is defined by its ability to interface or connect with a defense article.

(c) *Function*. The function of a commodity is the action or actions it is designed to perform. For software, the function means the action or actions the software performs directly related to a defense article or as a standalone application.

(d) *Performance capability*. Performance capability is the measure of a commodity's effectiveness to perform a designated function in a given environment (e.g., measured in terms of speed, durability, reliability, pressure, accuracy, efficiency). For software, performance capability means the measure of the software's effectiveness to perform a designated function.

(e) *Equivalent*. With respect to a commodity, equivalent means its form has been modified solely for fit purposes.

(f) *Enumerated*. Enumerated refers to any item designated on the U.S. Munitions List or item on the Commerce Control List and not in a catch-all control.

(g) *Catch-all control*. A catch-all control is one that does not refer to specific types of parts, components, accessories, or attachments, but rather controls unspecified parts, components, accessories, or attachments only if they were specially designed for an enumerated item.

§ 120.43 Development, production, and related terms; Basic and applied research.

(a) *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, and layouts. Development includes modification of an existing design.

(b)(1) *Production* means all production stages, such as product engineering, manufacture, integration, assembly (mounting), inspection, testing, and quality assurance. This includes serial production where commodities have passed production readiness testing (*i.e.*, an approved, standardized design ready for large scale production) and have been or are being produced on an assembly line for multiple commodities using the approved, standardized design.

(2) Commodities in production that are subsequently subject to development activities, such as those that would result in enhancements or improvements only in the reliability or maintainability of the commodity (e.g., an increased mean time between failure), including those pertaining to quality improvements, cost reductions, or feature enhancements, remain in production.

However, any new models or versions of such commodities developed from such efforts that change the basic performance or capability of the commodity are in development until and unless they enter into production.

(c) *Design methodology* includes the underlying engineering methods and design philosophy utilized (*i.e.*, information that explains the rationale for a particular design decision, engineering feature, or performance requirement); engineering experience (e.g., lessons learned); and the rationale and associated databases (e.g., design allowables, factors of safety, component life predictions, failure analysis criteria) that establish the operational requirements (e.g., performance, mechanical, electrical, electronic, reliability and maintainability) of a defense article. (Final analytical results and the initial conditions and parameters may be provided.)

(d) *Engineering analysis* includes the analytical methods and tools used to design or evaluate a defense article's performance against the operational requirements. Analytical methods and tools include the development and/or use of mockups, computer models and simulations, and test facilities. (Final analytical results and the initial conditions and parameters may be provided.)

(e) *Manufacturing know-how* includes information that provides detailed manufacturing processes and techniques needed to translate a detailed design into a qualified, finished defense article. (Information may be provided in a build-to-print package that is necessary in order to produce an acceptable defense article.)

(f) *Build-to-print* means that a foreign consignee can produce a defense article from engineering drawings without any technical assistance from a U.S. exporter. This transaction is based strictly on a hands-off approach since the foreign consignee is understood to have the inherent capability to produce the defense article and only lacks the necessary drawings. Supporting documentation (e.g., acceptance criteria, object code software for numerically controlled machines) may be released on an as-required basis (*i.e.*, must have) such that the foreign consignee would not be able to produce an acceptable defense article without this additional supporting documentation. Build-to-print does not include the release of any information which discloses design methodology, engineering analysis, detailed process information or manufacturing know-how. Documentation which is not absolutely necessary to permit manufacture of an acceptable defense article (*i.e.* nice to have) is not considered within the boundaries of a build-to-print data package.

(g) *Build/design-to-specification* means that a foreign consignee can design and produce a defense article from requirement specifications without any technical assistance from the U.S. exporter. This transaction is based

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strictly on a hands-off approach since the foreign consignee is understood to have the inherent capability to both design and produce the defense article and only lacks the necessary requirement information.

(h) *Basic research* means a systemic study directed toward greater knowledge or understanding of the fundamental aspects of phenomena and observable facts without specific applications towards processes or products in mind. It does not include applied research.

(i) *Applied research* means a systemic study to gain knowledge or understanding necessary to determine the means by which a recognized and specific need may be met. It is a systematic application of knowledge toward the production of useful materials, devices, and systems or methods, including design, development, and improvement of prototypes and new processes to meet specific requirements.

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§ 120.45 Maintenance levels.

(a) *Organizational-level maintenance* (or basic-level maintenance) is the first level of maintenance that can be performed on-equipment (directly on the defense article or support equipment) without specialized training. It consists of repairing, inspecting, servicing, calibrating, lubricating, or adjusting equipment, as well as replacing minor parts, components, assemblies, and line-replaceable spares or units. This includes modifications, enhancements, or upgrades that would result in improving only the reliability or maintainability of the commodity (e.g., an increased mean time between failure) and does not enhance the basic performance or capability of the defense article.

(b) *Intermediate-level maintenance* is second-level maintenance performed off-equipment (on removed parts, components, or equipment) at or by designated maintenance shops or centers, tenders, or field teams. It may consist of calibrating, repairing, testing, or replacing damaged or unserviceable parts, components, or assemblies. This includes modifications, enhancements, or upgrades that would result in improving only the reliability or maintainability of the commodity (e.g., an increased mean time between failure) and does not enhance the basic performance or capability of the defense article.

(c) *Depot-level maintenance* is third-level maintenance performed on- or off-equipment at or by a major repair facility, shipyard, or field team, each with necessary equipment and personnel of requisite technical skill. It consists of providing evaluation or repair beyond unit or organization capability. This maintenance consists of inspecting, testing, calibrating, repairing, overhauling, refurbishing, reconditioning, and one-to-one replacing of any defective parts, components,

or assemblies. This includes modifications, enhancements, or upgrades that would result in improving only the reliability or maintainability of the commodity (e.g., an increased mean time between failure) and does not enhance the basic performance or capability of the defense article.

§§ 120.46–120.49 [Reserved]

§ 120.50 Export.

(a) *Export*, except as set forth in § 120.54 or § 126.16 or § 126.17 of this subchapter, means:

(1) An actual shipment or transmission out of the United States, including the sending or taking of a defense article out of the United States in any manner;

(2) Releasing or otherwise transferring technical data to a foreign person in the United States (a deemed export);

(3) Transferring registration, control, or ownership of any aircraft, vessel, or satellite subject to this subchapter by a U.S. person to a foreign person;

(4) Releasing or otherwise transferring a defense article to an embassy or to any of its agencies or subdivisions, such as a diplomatic mission or consulate, in the United States;

(5) Performing a defense service on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad; or

(6) The release of previously encrypted technical data as described in § 120.56(a)(3) and (4).

(b) Any release in the United States of technical data to a foreign person is deemed to be an export to all countries in which the foreign person has held or holds citizenship or holds permanent residency.

§ 120.51 Reexport.

(a) *Reexport*, except as set forth in § 120.54 or § 126.16 or § 126.17 of this subchapter, means:

(1) An actual shipment or transmission of a defense article from one foreign country to another foreign country, including the sending or taking of a defense article to or from such countries in any manner;

(2) Releasing or otherwise transferring technical data to a foreign person who is a citizen or permanent resident of a country other than the foreign country where the release or transfer takes place (a deemed reexport); or

(3) Transferring registration, control, or ownership of any aircraft, vessel, or satellite subject to this subchapter between foreign persons.

(b) Any release outside the United States of technical data to a foreign person is deemed to be a reexport to all countries in which the foreign person has held or holds citizenship or holds permanent residency.

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§ 120.52 Retransfer.

(a) *Retransfer*, except as set forth in § 120.54 or § 126.16 or § 126.17 of this subchapter, means:

(1) A change in end-use or end-user, or a temporary transfer to a third party, of a defense article within the same foreign country; or

(2) A release of technical data to a foreign person who is a citizen or permanent resident of the country where the release or transfer takes place.

(b) [Reserved]

§ 120.53 Temporary import.

(a) *Temporary import*, except as set forth in § 120.54, means bringing into the United States from a foreign country any defense article that is:

(1) To be returned to the country from which it was shipped or taken; or

(2) Any defense article that is in transit to another foreign destination.

(b) Temporary import includes withdrawal of a defense article from a customs bonded warehouse or foreign trade zone for the purpose of returning it to the country of origin or country from which it was shipped or for shipment to another foreign destination.

(c) Permanent imports are regulated by the Attorney General under the direction of the Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives (see 27 CFR parts 447, 478, 479, and 555).

§ 120.54 Activities that are not exports, reexports, retransfers, or temporary imports.

(a) The following activities are not exports, reexports, retransfers, or temporary imports:

(1) Launching a spacecraft, launch vehicle, payload, or other item into space;

(2) Transmitting or otherwise transferring technical data to a U.S. person in the United States from a person in the United States;

(3) Transmitting or otherwise transferring within the same foreign country technical data between or among only U.S. persons, so long as the transmission or transfer does not result in a release to a foreign person or transfer to a person prohibited from receiving the technical data;

(4) Shipping, moving, or transferring defense articles between or among the United States as defined in § 120.60;

(5) Sending, taking, or storing technical data that is:

(i) Unclassified;

(ii) Secured using end-to-end encryption;

(iii) Secured using cryptographic modules (hardware or software) compliant with the Federal Information Processing Standards Publication 140-2 (FIPS 140-2) or its successors, supplemented by software implementation, cryptographic key management and other procedures and controls that are in accordance with guidance provided in current

U.S. National Institute for Standards and Technology (NIST) publications, or by other cryptographic means that provide security strength that is at least comparable to the minimum 128 bits of security strength achieved by the Advanced Encryption Standard (AES-128); and

(iv) Not intentionally sent to a person in or stored in a country proscribed in § 126.1 of this subchapter or the Russian Federation; and

NOTE 1 TO PARAGRAPH (A)(5)(IV): Data in-transit via the internet is not deemed to be stored.

(v) Not sent from a country proscribed in § 126.1 of this subchapter or the Russian Federation.

(b)(1) For purposes of this section, end-to-end encryption is defined as:

(i) The provision of cryptographic protection of data, such that the data is not in an unencrypted form, between an originator (or the originator's in-country security boundary) and an intended recipient (or the recipient's in-country security boundary); and

(ii) The means of decryption are not provided to any third party.

(2) The originator and the intended recipient may be the same person. The intended recipient must be the originator, a U.S. person in the United States, or a person otherwise authorized to receive the technical data, such as by a license or other approval pursuant to this subchapter.

(c) The ability to access technical data in encrypted form that satisfies the criteria set forth in paragraph (a)(5) of this section does not constitute the release or export of such technical data.

§ 120.55 Access information.

Access information is information that allows access to encrypted technical data subject to this subchapter in an unencrypted form. Examples include decryption keys, network access codes, and passwords.

§ 120.56 Release.

(a) *Release*. Technical data is released through:

(1) Visual or other inspection by foreign persons of a defense article that reveals technical data to a foreign person;

(2) Oral or written exchanges with foreign persons of technical data in the United States or abroad;

(3) The use of access information to cause or enable a foreign person, including yourself, to access, view, or possess unencrypted technical data; or

(4) The use of access information to cause technical data outside of the United States to be in unencrypted form.

(b) *Provision of access information*. Authorization for a release of technical data to a foreign person is required to provide access information to that foreign person, if that

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access information can cause or enable access, viewing, or possession of the unencrypted technical data.

§ 120.57 Authorization types.

(a) *License* means a document bearing the word “license” issued by the Deputy Assistant Secretary of State for Defense Trade Controls, or authorized designee, that permits the export, reexport, retransfer, temporary import, or brokering of a specific defense article or defense service controlled by this subchapter.

(b) *Other approval* means a document, other than a license, issued by the Deputy Assistant Secretary of State for Defense Trade Controls, or authorized designee, that approves an activity regulated by this subchapter (e.g., approvals for brokering activities or retransfer authorizations), or the use of an exemption to the license requirements as described in this subchapter.

(c) *Exemption* means a provision of this subchapter that authorizes the export, reexport, retransfer, temporary import, or brokering of a specific defense article or defense service without a license or other written authorization.

(d) *Manufacturing license agreement* means an agreement (e.g., contract), approved by the Directorate of Defense Trade Controls (DDTC), whereby a U.S. person grants a foreign person an authorization to manufacture defense articles abroad and which involves or contemplates:

(1) The export of technical data or defense articles or the performance of a defense service; or

(2) The use by the foreign person of technical data or defense articles previously exported by the U.S. person.

(e) *Technical assistance agreement* means an agreement (e.g., contract), approved by DDTC, for the performance of a defense service(s) or the disclosure of technical data, as opposed to an agreement granting a right or license to manufacture defense articles. Assembly of defense articles is included under this section, provided production rights or manufacturing know-how are not conveyed. Should such rights be transferred, paragraph (d) of this section is applicable.

(f) *Distribution agreement* means an agreement (e.g., a contract), approved by DDTC, to establish a warehouse or distribution point abroad for defense articles exported from the United States for subsequent distribution to entities in an approved sales territory.

§ 120.58 Subject to the Export Administration Regulations (EAR).

Items *subject to the EAR* are those items listed on the Commerce Control List in part 774 of the Export Administration Regulations (EAR) and all other items that meet the definition of that term in accordance

with § 734.3 of the EAR. The EAR is found at 15 CFR parts 730 through 774.

§ 120.59 [Reserved]

§ 120.60 United States.

United States, when used in the geographical sense, includes the several states, the Commonwealth of Puerto Rico, the insular possessions of the United States, the District of Columbia, the Commonwealth of the Northern Mariana Islands, any territory or possession of the United States, and any territory or possession over which the United States exercises any powers of administration, legislation, and jurisdiction.

§ 120.61 Person.

Person means a natural person as well as a corporation, business association, partnership, society, trust, or any other entity, organization or group, including governmental entities. If a provision in this subchapter does not refer exclusively to a foreign person or U.S. person, then it refers to both.

§ 120.62 U.S. person.

U.S. person means a person who is a lawful permanent resident as defined by 8 U.S.C. 1101(a)(20) or who is a protected individual as defined by 8 U.S.C. 1324b(a)(3). It also means any corporation, business association, partnership, society, trust, or any other entity, organization, or group that is incorporated to do business in the United States. It also includes any governmental (Federal, state, or local) entity. It does not include any foreign person as defined in § 120.63.

§ 120.63 Foreign person.

Foreign person means any natural person who is not a lawful permanent resident as defined by 8 U.S.C. 1101(a)(20) or who is not a protected individual as defined by 8 U.S.C. 1324b(a)(3). It also means any foreign corporation, business association, partnership, trust, society, or any other entity or group that is not incorporated or organized to do business in the United States, as well as international organizations, foreign governments, and any agency or subdivision of foreign governments (e.g., diplomatic missions).

§ 120.64 Regular employee.

(a) *Regular employee* means:

(1) An individual permanently and directly employed by the company; or

(2) An individual in a long term contractual relationship with the company where the individual works at the company's facilities, works under the company's direction and control, works full time and exclusively for the company, and executes nondisclosure certifications for the company, and where the staffing agency that has seconded the individual has no role in the work the individual performs (other than providing that

individual for that work) and the staffing agency would not have access to any controlled technology (other than where specifically authorized by a license).

(b) [Reserved]

§ 120.65 Foreign ownership and foreign control.

(a) *Foreign ownership* means more than 50 percent of the outstanding voting securities of the firm are owned by one or more foreign persons.

(b) *Foreign control* means one or more foreign persons have the authority or ability to establish or direct the general policies or day-to-day operations of the firm. Foreign control is presumed to exist where foreign persons own 25 percent or more of the outstanding voting securities unless one U.S. person controls an equal or larger percentage.

§ 120.66 Affiliate.

(a) *Affiliate* (of a registrant) means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such registrant.

(b) For purposes of this section, “control” means having the authority or ability to establish or direct the general policies or day-to-day operations of the firm. Control is rebuttably presumed to exist where there is ownership of 25 percent or more of the outstanding voting securities if no other person controls an equal or larger percentage.

§ 120.67 Empowered official.

(a) *Empowered official* means a U.S. person who:

(1) Is directly employed by the applicant or a subsidiary in a position having authority for policy or management within the applicant organization; and

(2) Is legally empowered in writing by the applicant to sign license applications or other requests for approval on behalf of the applicant; and

(3) Understands the provisions and requirements of the various export control statutes and regulations, and the criminal liability, civil liability, and administrative penalties for violating the Arms Export Control Act and the International Traffic in Arms Regulations in this subchapter; and

(4) Has the independent authority to:

(i) Inquire into any aspect of a proposed export, temporary import, or brokering activity by the applicant;

(ii) Verify the legality of the transaction and the accuracy of the information to be submitted; and

(iii) Refuse to sign any license application or other request for approval without prejudice or other adverse recourse.

(b) For the purposes of a broker who is a foreign person, the empowered official may

be a foreign person who otherwise meets the criteria for an empowered official in paragraph (a) of this section.

§ 120.68 Party to the export.

(a) *Party to the export* means:

(1) The chief executive officer, president, vice-presidents, other senior officers and officials (e.g., comptroller, treasurer, general counsel), and any member of the board of directors of the applicant;

(2) The freight forwarders or designated exporting agent of the applicant; and

(3) Any consignee or end-user of any item to be exported.

(b) [Reserved]

§ 120.69 Port Directors.

Port Directors means the U.S. Customs and Border Protection Port Directors at the U.S. Customs and Border Protection Ports of Entry (other than the port of New York, New York where their title is the Area Directors).

PART 121—THE UNITED STATES MUNITIONS LIST

ENUMERATION OF ARTICLES

Sec.

121.0 United States Munitions List description and definitions.

121.1 The United States Munitions List.

121.2–121.15 [Reserved]

121.16 Missile Technology Control Regime Annex.

AUTHORITY: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2651a; Pub. L. 105–261, 112 Stat. 1920; Section 1261, Pub. L. 112–239; E.O. 13637, 78 FR 16129.

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AUTHORITY: 22 U.S.C. 2752, 2778, 2797; 22 U.S.C. 2651a; Sec. 1514, Pub. L. 105–261, 112 Stat. 2175; E.O. 13637, 78 FR 16129, 3 CFR, 2013 Comp., p. 223.

SOURCE: 58 FR 39287, July 22, 1993, unless otherwise noted.

ENUMERATION OF ARTICLES

§ 121.0 United States Munitions List description and definitions.

(a) For a description of the U.S. Munitions List and its designations, including the use of asterisks and the parenthetical “(MT)”, see § 120.10 of this subchapter.