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## **SPACE & PRIVATE ENTERPRISE: IS THE ENVIRONMENT RIPE FOR EXPANSION?**

### **Legal Panel**

#### **Remaining Compliant with the ITAR When Resolving Commercial Space Reinsurance Issues**

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The United States Department of State regulates “retransfers” of most U.S.-origin technical information related to (a) spacecraft, including commercial communications satellites, and rockets, and (b) systems or subsystems, components, parts, accessories, and associated equipment specifically designed or modified for such spacecraft or rockets. In essence, the State Department prohibits any non-U.S. entity authorized to possess certain such technical information from retransferring the information to anyone outside of the entity first without prior State Department approval. These retransfer restrictions can complicate and delay the resolution of reinsurance issues, particularly where the underwriters involved are not U.S. entities.

The following paper identifies the nature and scope of the State Department’s retransfer restrictions, and suggests ways in which underwriters can minimize the impact of the restrictions on the resolution of reinsurance issues while remaining in compliance with the retransfer restrictions. Minimizing the impact of the restrictions, in addition to aiding individual insurers and reinsurers, helps reduce the ITAR’s distortion of the space insurance market more generally.

#### ***The International Traffic in Arms Regulations Retransfer Provisions***

##### *Introduction*

The International Traffic in Arms Regulations (“ITAR”), 22 United States Code of Federal Regulations (“C.F.R.”) §§ 120 - 130, set forth the rules applicable to transfers and retransfers of the above technical information. The State Department’s Directorate of Defense Trade Controls (“DDTC”) promulgates, interprets, and enforces the ITAR.

ITAR jurisdiction is based upon the U.S. nexus to technical information (and hardware) that is transferred or retransferred, regardless of how many times the information or hardware is thereafter retransferred. Therefore, ITAR-controlled technical information in the possession of a foreign person anywhere in the world is subject to ITAR controls on

retransfer of such data regardless of how attenuated the foreign person's connection may be with the original U.S. exporter of the data.<sup>1</sup>

#### *The ITAR's Retransfer Provisions*

A "retransfer," known also as a "reexport," is "the transfer of defense articles or defense services to an end use, end user or destination not previously authorized." 22 C.F.R. § 120.19. Commercial spacecraft, rockets, and systems or subsystems, components, parts, accessories, and associated equipment specifically designed or modified for such spacecraft and rockets are "defense articles" through their inclusion on the United States Munitions List ("USML"), 22 C.F.R. § 121.1.

"Defense articles" include "technical data," 22 C.F.R. § 120.6, which is defined as: "[i]nformation . . . which is required for the design, development, production, manufacture, assembly, operations, repair, testing, maintenance or modification of defense articles." 22 C.F.R. § 120.10.<sup>2</sup>

Retransfer restrictions are contained in DDTC licenses and technical assistance agreements as well as in the ITAR itself. A condition of issuance of the standard DDTC license is, for example, that:

The prior written approval of the Department of State must be obtained before U.S. Munitions List articles exported from the U.S. under license or other approval may be resold, diverted, transferred, transshipped, reshipped, reexported to, or used in any country, or by any end-user, other than that described on the license or other approval as the country of ultimate destination or the ultimate end-user.

[www.pmdtdc.state.gov/dtrade.htm](http://www.pmdtdc.state.gov/dtrade.htm). Similarly, every technical assistance agreement ("TAA") contains the following clause:

The technical data or defense services exported from the United States in furtherance of this Agreement and any defense articles which may be produced or manufactured from such technical data or defense services may not be transferred to a person in a third country or to a national of a third country

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<sup>1</sup> "Foreign person," as defined at 22 C.F.R. § 120.16, and as used herein, is any natural person who is not a citizen or lawful permanent of the United States (nor certain refugees or asylees protected under U.S. law). Foreign person also includes 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 and foreign governments, including agencies or subdivisions thereof).

<sup>2</sup> "Defense service" is an ITAR term of art that means, as applicable to this paper, "[t]he furnishing of assistance . . . to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation . . . or use of defense articles. 22 C.F.R. § 120.9. It is generally, though not universally, accepted that foreign persons cannot provide "defense services." This paper focuses, therefore, upon technical data.

except as specifically authorized in this Agreement, unless the prior written approval of the Department of State has been obtained.

22 C.F.R. § 124.8.

In addition to the foregoing, foreign persons sometimes are required to execute a DSP-83 “Nontransfer and Use Certificate.” 22 C.F.R. § 123.10. The DSP-83 form contains language similar to the foregoing, requiring the signatory to certify that:

Except as specifically authorized by prior written approval of the U.S. Department of State, we will not re-export, resell, or otherwise dispose of any of th[e] articles/data [identified on the form] (1) outside the country [identified on the form], or (2) to any other person.

The ITAR plainly states that it is unlawful for any person to reexport or retransfer, or attempt to reexport or retransfer, any U.S. origin technical data or defense article without first obtaining a license or written approval from DDTC. 22 C.F.R. § 127.1(a)(1). Though rare, the United States Government will impose penalties on wholly foreign companies for violating the ITAR’s retransfer controls. If the U.S. Government cannot obtain personal jurisdiction over a foreign person so as to enable the Government to assess a fine or impose a prison term, the Government can publish a Denial Order that prohibits all exporters and reexporters of ITAR-controlled technical data from conducting any activities with that person that are subject to the ITAR.

### ***ITAR Control of Commercial Spacecraft, Rockets, and Related Technical Data***

ITAR controls on the export of commercial satellites and related items are both broad and detailed. First, the USML, in Category XV(a), controls all spacecraft, including satellites used for communications, remote sensing, navigation, and research (as well as scientific, experimental, and multi-mission satellites). USML Category XV(e), in turn, controls all systems, subsystems, components, parts, accessories, attachments, and associated equipment specifically designed or modified for spacecraft<sup>3</sup>, including satellite fuel, ground support equipment, test equipment, payload adapter or interface hardware, replacement parts, and non-embedded solid propellant orbit transfer engines.<sup>4</sup> Controlled under USML Categories XV(b), (c), and (d), respectively, are: ground control stations for telemetry, tracking, and

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<sup>3</sup> Systems, components, parts, accessories, attachments, and associated equipment are all terms of art defined in 22 C.F.R. § 121.8.

<sup>4</sup> Category XV(e) does contain a limited “carve-out” for certain satellite components, which include: (1) space qualified travelling wave tubes, microwave solid state amplifiers, microwave assemblies, and travelling wave tube amplifiers operating at frequencies equal to or less than 31 GHz; (2) certain solar arrays; (3) space qualified tape and data recorders; (4) atomic frequency standards that are not space qualified; (5) space qualified telecommunications systems, equipment, and components not designed or modified for satellite uses, and technology required for the development or production of telecommunications equipment specifically designed for non-satellite uses; (6) certain space qualified focal plane arrays, and (7) space qualified LIDAR equipment. These components, unless specifically designed or modified for military application, are controlled under the United States Commerce Department’s Commodity Control List.

control of satellites, or employing certain cryptographic items; certain GPS receiving equipment; and certain radiation-hardened microelectronic circuits.

USML Category XV(f) controls all technical data (and defense services) directly related to the articles specified in Category XV(a) - (e). Category XV(f) also controls detailed design, development, manufacturing or production data for all spacecraft and specifically designed or modified components for all spacecraft systems. Such technical data is designated "Significant Military Equipment" ("SME") if it is directly related to the manufacture or production of any spacecraft.<sup>5</sup>

In addition, Category XV(f) controls all technical data, without exception, for all commercial launch support activities, such as technical data provided to a launch provider on form, fit, function, mass, electrical, mechanical, dynamic, environmental, telemetry, safety, facilities, launch pad access, and launch parameters, as well as interfaces for mating and parameters for launch."

Finally, ITAR controls apply to investigations and analyses of failed commercial satellite launches, as well as actual launches, and additional ITAR controls apply to the export of any satellite or related item or any defense service associated with the launch in, or by nationals of, any country that is not a NATO member or is not a major non-NATO ally of the U.S.

With respect to rockets themselves, USML Category IV(a) applies to all (a) rockets and launch vehicles, (b) apparatus, devices, and materials for the handling, control, activation, monitoring, detection, protection, discharge, or detonation of rockets and launch vehicles, (c) space launch vehicle powerplants, (d) certain ablative materials, and (e) components, parts, accessories, and associated equipment specifically designed or modified for any of the foregoing. Technical data relating to the above are also covered, and technical data directly related to the manufacture or production of the above that are designated SME are also considered SME.

### ***Relevant Forms of DDTC Export Authorizations***

In general, the two major forms of DDTC commercial satellite-related export authorizations are (a) licenses and (b) approved agreements. The most common forms of licenses used in connection with commercial satellites are the DSP-5, for the permanent export of satellite hardware or technical data, and the DSP-73 for the temporary export of satellite hardware. The most common form of agreement is the TAA, though on rare occasions a manufacturing license agreement may be used.

The purpose of the DSP-5 is, in essence, to permit an exporter to make a one-time export to end users specified on the DSP-5 of technical data relating to a satellite, rocket, or components thereof (or hardware, such as a satellite, rocket, or components thereof). The

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<sup>5</sup> The ITAR subjects items that are designated as SME to the strictest controls. The most important practical effect of the SME designation is that the exporter of an SME item or items must provide DDTC an executed DSP-83. The DSP-83 makes it easier for the United States to track and be able to sanction parties who reexport without prior DDTC Department approval.

foreign recipient is not required to execute a DSP-5, but will be required to provide the exporter a statement of end use and a DSP-83 for SME items, or both.<sup>6</sup>

A TAA permits an exporter to engage in a two-way exchange of technical data with one or more foreign licensees in the manner prescribed in the TAA. Unlike the DSP-5, foreign recipients of technical data under a TAA are required to execute a TAA following DDTC's approval of the TAA in order for the TAA to take effect.

Finally, a third form of DDTC authorization that is lesser known but useful in connection with resolving reinsurance issues is DDTC's approval of a foreign person's request to reexport technical data to another foreign person. Where there is a reinsurance issue between two foreign underwriters, for instance, and no U.S. person is a party to the dispute, one of the foreign parties can request authorization directly from DDTC to retransfer technical data (or hardware) to the other foreign party. No U.S. person needs to be involved, which would conversely be required in order to seek a DSP-5 or TAA from DDTC.

### ***ITAR Considerations With Reinsurance Issues***

When a technical issue arises regarding a commercial space-related reinsurance policy, it is critical to recognize at the earliest stages of addressing the issue that the ITAR is likely to impact resolution of the issue and to plan accordingly. The most significant impact of the ITAR is likely to be delay in resolving the issue.

An important first step an insurer and reinsurer will want to take is to determine whether there is information relevant to the reinsurance issue that is not ITAR-controlled. Information in the public domain, for instance, is not ITAR-controlled,<sup>7</sup> nor is information

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<sup>6</sup> Note, as discussed above, that the DSP-83 is certification, not a license. In certain circumstances, however, DSP-83's have been used to provide selected data under a DSP-5 license to certain foreign persons not named on the license. DSP-83's have been used in this manner, for instance, to provide insurance briefings and responses to underwriter questions regarding a satellite's anomalous performance. Use of a DSP-83 in this manner is not a substitute, in the resolution of reinsurance issues, for a reexport authorization discussed immediately below.

<sup>7</sup> The ITAR defines public domain, as relevant to this paper, as 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;
- \* \* \*
- (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;

22 C.F.R. § 120.11. In addition, though not stated in the ITAR, it is generally accepted that information that can be obtained from the internet is in the public domain, provided that the internet site that contains the information at issue can be accessed without restriction by any individual who desires to obtain or purchase the information.

concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities. Also, purely contractual terms and conditions rarely constitute technical data. Given the significant potential penalties for unlawful retransfer, analysis of whether certain information is not ITAR-controlled must be done with extreme care by one experienced in making such determinations.

If an insurer obtained technical data relevant to resolving a reinsurance issue under a TAA, the easiest way to obtain DDTC authorization necessary to resolve the issue is usually for the insurer to request that the U.S. person who initially obtained the TAA, and exported the data at issue, seek DDTC approval of an amendment to the TAA that (a) adds the reinsurer as a party to the TAA, and (b) seeks authorization for (i) the insurer to reexport to the reinsurer technical data received under the TAA, and (ii) the insurer and reinsurer to discuss such technical data amongst themselves. Of course, if the insurer and reinsurer are advised by counsel and/or have retained one or more technical experts in connection with the reinsurance issue, those parties likely must be added to the TAA as well, and authorization sought to permit the insurer and reinsurer, and respective counsel and experts, to discuss the technical data amongst themselves.

In this era of heightened ITAR scrutiny, many U.S. persons who hold a valid TAA that could be amended in the foregoing manner are unwilling to do so. A stated concern is that the U.S. person who has the TAA has no relationship with the insurer, reinsurer, and respective counsel and experts. Thus, because a TAA applicant is technically liable for any violation a party to its TAA commits, 22 C.F.R. 127.1(a)(6), the applicant may simply refuse to seek to amend its TAA.

If the TAA applicant is unwilling to seek to amend the TAA or if the insurer obtained relevant technical data pursuant to a DSP-5 license, the insurer will likely wish to submit to DDTC a request for reexport authorization.

There presently is no DDTC form to request reexport authorization, though the elements of such requests are identified at 22 C.F.R. § 123.9(c).<sup>8</sup> Good reexport requests take the form of a letter on the requester's letterhead and provide (a) background for the request, (b) the license or TAA number under which the technical data proposed to be retransferred was originally authorized for export from the U.S., (c) a description of the U.S.-origin technical data proposed to be retransferred and its quantity, value and USML subcategory, (d) the identity of the proposed new end-users of the technical data, and (e) a description the proposed new end-use of the technical data.

A good reexport request should also identify any software or hardware that the retransferor proposes to reexport and any consignees or intermediate consignees involved in the retransfer. End-use statements from the new end-users should be attached to the request, as well as DSP-83's if applicable. Depending upon the sensitivity of the technical data proposed to be retransferred, a reexport request may also include a statement that all

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<sup>8</sup> DDTC has proposed a form to be used for reexport requests for hardware only in connection with DDTC's electronic licensing system, D-TRADE. The form, however, is not yet available for use. [www.pmdtc.state.gov/Request.htm](http://www.pmdtc.state.gov/Request.htm). Whenever the new form is introduced, the U.S. exporter of the technical data will be required to make the reexport request unless the U.S. exporter is no longer in business or is unknown. [www.pmdtc.state.gov/docs/Instructions%20DS-6004.pdf](http://www.pmdtc.state.gov/docs/Instructions%20DS-6004.pdf).

technical data to be retransferred will be marked with an ITAR legend, and that only hard copies of technical data will be transferred. Finally, the request should state that the new end-users will discuss the technical data to be retransferred with the retransferor and amongst themselves. (The ITAR requires submission of a purchase order that underlies a reexport request. But this requirement is usually not relevant to resolution of a reinsurance dispute, which should be explained.)

DDTC treats reexport requests as DDTC “General Correspondence,” in contrast to license applications or proposed agreements for which DDTC approval is sought. In practice, reexport requests are handled almost identically to license applications.

At present, approval of a well-prepared space-related reexport request takes three to four months. Most of the approval time is taken up in a technical review of the request by the Defense Technology Security Administration (“DTSA”), upon which DDTC relies for technical guidance.

### ***Other Considerations***

DDTC/DTSA imposes provisos on every TAA, and most licenses and reexport authorizations that involve sensitive technical data (or sensitive ITAR-controlled hardware). The most important potential proviso for purposes of this paper is the common proviso that requires that, prior to retransfer of technical data, DTSA review the technical data or the retransferor provide DTSA proof that DTSA previously reviewed the technical data. If the proposed retransferor attaches all technical data that it wishes to retransfer, this proviso will likely not be a condition of approval. In some cases, however, it is not possible to know in advance what precise documents will be relevant as opposed to categories of documents.

In addition to the foregoing proviso, DDTC may require a retransferor to provide written consent to the retransfer of the entity that generated any proprietary data proposed to be retransferred. DDTC has also, on occasion, rejected outright a proposed TAA or reexport authorization that does not include such approval as part of the proposed TAA/request for reauthorization. DDTC lacks authority to impose this requirement. However, no one to date has challenged DDTC’s imposition of this requirement in U.S. federal court.

### ***Conclusion***

The ITAR makes resolution of a commercial space-related reinsurance issue more complicated and time-consuming than resolution of a reinsurance issue that does not implicate the ITAR. However, with careful planning and patience the ITAR should not preclude resolution of any such issue.