

or project, or cooperative project, not to exceed 10 years.

(4) Included among the criteria required for such authorizations are those set out in Part 124, e.g., §§124.7, 124.8 and 124.9, as well as §§125.4 (technical data exported in furtherance of an agreement) and 123.16 (hardware being included in an agreement). Provisions required will also take into account the congressional notification requirements in §§123.15 and 124.11 of the ITAR. Specifically, comprehensive congressional notifications corresponding to the comprehensive parameters for the major program or project or cooperative project should be possible, with additional notifications such as those required by law for changes in value or other significant modifications.

(5) All authorizations will be consistent with all other applicable requirements of the ITAR, including requirements for non-transfer and use assurances (see §§123.10 and 124.10), congressional notifications (e.g., §§123.15 and 124.11), and other documentation (e.g., §§123.9 and 126.13).

(6) Special auditing and reporting requirements will also be required for these authorizations. Exporters using special authorizations are required to establish an electronic system for keeping records of all defense articles, defense services and technical data exported and comply with all applicable requirements for submitting shipping or export information within the allotted time.

[65 FR 45285, July 21, 2000, as amended at 66 FR 35900, July 10, 2001]

## PART 127—VIOLATIONS AND PENALTIES

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AUTHORITY: Secs. 2, 38, and 42, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2791); E.O. 11958, 42 FR 4311, 3 CFR, 1977 Comp., p. 79; 22 U.S.C. 401; 22 U.S.C. 2658; 22 U.S.C. 2779a; 22 U.S.C. 2780.

SOURCE: 58 FR 39316, July 22, 1993, unless otherwise noted.

### § 127.1 Violations.

(a) It is unlawful:

(1) To export or attempt to export from the United States any defense article or technical data or to furnish any defense service for which a license or written approval is required by this subchapter without first obtaining the required license or written approval from the Office of Defense Trade Controls;

(2) To import or attempt to import any defense article whenever a license is required by this subchapter without first obtaining the required license or written approval from the Office of Defense Trade Controls;

(3) To conspire to export, import, re-export or cause to be exported, imported or reexported, any defense article or to furnish any defense service for which a license or written approval is required by this subchapter without first obtaining the required license or written approval from the Office of Defense Trade Controls; or

(4) To violate any of the terms or conditions of licenses or approvals granted pursuant to this subchapter.

(b) Any person who is granted a license or other approval under this subchapter is responsible for the acts of employees, agents, and all authorized persons to whom possession of the licensed defense article or technical data has been entrusted regarding the operation, use, possession, transportation, and handling of such defense article or technical data abroad. All persons abroad subject to U.S. jurisdiction who obtain temporary custody of a defense article exported from the United States or produced under an agreement described in part 124 of this subchapter, and irrespective of the number of intermediate transfers, are bound by the regulations of this subchapter in the

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same manner and to the same extent as the original owner or transferer.

(c) A person with knowledge that another person is then ineligible pursuant to §§120.1(c) of this subchapter or 126.7 of this chapter, is then subject to an order of debarment, or interim suspension, may not, directly or indirectly, in any manner or capacity, without prior disclosure of the facts to, and written authorization from, the Office of Defense Trade Controls:

(1) Apply for, obtain, or use any export control document as defined in §127.2(b) for such debarred, suspended, or ineligible person; or

(2) Order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance, or otherwise service or participate in any transaction which may involve any defense article or the furnishing of any defense service for which a license or approval is required by this subchapter for export, where such debarred, suspended, or ineligible person may obtain any benefit therefrom or have any direct or indirect interest therein.

(d) No person may willfully cause, or aid, abet, counsel, demand, induce, procure or permit the commission of any act prohibited by, or the omission of any act required by 22 U.S.C. 2778, 22 U.S.C. 2779, or any regulation, license, approval, or order issued thereunder.

### § 127.2 Misrepresentation and omission of facts.

(a) It is unlawful to use any export or temporary import control document containing a false statement or misrepresenting or omitting a material fact for the purpose of exporting any defense article or technical data or the furnishing of any defense service for which a license or approval is required by this subchapter. Any false statement, misrepresentation, or omission of material fact in an export or temporary import control document will be considered as made in a matter within the jurisdiction of a department or agency of the United States for the purposes of 18 U.S.C. 1001, 22 U.S.C. 2778 and 22 U.S.C. 2779.

(b) For the purpose of this section, *export or temporary import control documents* include the following:

(1) An application for a permanent export or a temporary import license and supporting documents.

(2) Shipper's Export Declaration.

(3) Invoice.

(4) Declaration of destination.

(5) Delivery verification.

(6) Application for temporary export.

(7) Application for registration.

(8) Purchase order.

(9) Foreign import certificate.

(10) Bill-of-lading.

(11) Airway bill.

(12) Nontransfer and use certificate.

(13) Any other document used in the regulation or control of a defense article, defense service or technical data for which a license or approval is required by this subchapter.

### § 127.3 Penalties for violations.

Any person who willfully:

(a) Violates any provision of section 38 or section 39 of the Arms Export Control Act (22 U.S.C. 2778 and 2779), or any undertaking specifically required by part 124 of this subchapter; or

(b) In a registration, license application or report required by section 38 or section 39 of the Arms Export Control Act (22 U.S.C. 2278 and 2779) or by any rule or regulation issued under either section, makes any untrue statement of a material fact or omits a material fact required to be stated therein or necessary to make the statements therein not misleading, shall, upon conviction, be subject to a fine or imprisonment, or both, as prescribed by 22 U.S.C. 2778(c).

### § 127.4 Authority of U.S. Customs Service officers.

(a) U.S. Customs Service officers may take appropriate action to ensure observance of this subchapter as to the export or the attempted export of any defense article or technical data, including the inspection of loading or unloading of any vessel, vehicle, or aircraft. This applies whether the export is authorized by license or by written approval issued under this subchapter.

(b) U.S. Customs Service officers have the authority to investigate, detain or seize any export or attempted export of defense articles or technical data contrary to this subchapter.

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(c) Upon the presentation to a Customs Officer of a license or written approval authorizing the export of any defense article, the customs officer may require the production of other relevant documents and information relating to the proposed export. This includes an invoice, order, packing list, shipping document, correspondence, instructions, and the documents otherwise required by the U.S. Customs Service.

### § 127.5 Authority of the Defense Investigative Service.

In the case of exports involving classified technical data or defense articles, the Defense Investigative Service may take appropriate action to ensure compliance with the Department of Defense Industrial Security Manual. Upon a request to the Defense Investigative Service regarding the export of any classified defense article or technical data, the Defense Investigative Service official or a designated government transmittal authority may require the production of other relevant documents and information relating to the proposed export.

### § 127.6 Seizure and forfeiture in attempts at illegal exports.

(a) An attempt to export from the United States any defense articles in violation of the provisions of this subchapter constitutes an offense punishable under section 401 of title 22 of the United States Code. Whenever it is known or there is probable cause to believe that any defense article is intended to be or is being or has been exported or removed from the United States in violation of law, such article and any vessel, vehicle or aircraft involved in such attempt is subject to seizure, forfeiture and disposition as provided in section 401 of title 22 of the United States Code.

(b) Similarly, an attempt to violate any of the conditions under which a temporary export or temporary import license was issued pursuant to this subchapter or to violate the requirements of § 123.2 of this subchapter also constitutes an offense punishable under section 401 of title 22 of the United States Code, and such article, together with any vessel, vehicle or aircraft in-

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involved in any such attempt is subject to seizure, forfeiture, and disposition as provided in section 401 of title 22 of the United States Code.

### § 127.7 Debarment.

(a) In implementing section 38 of the Arms Export Control Act, the Assistant Secretary of State for Politico-Military Affairs may prohibit any person from participating directly or indirectly in the export of defense articles, including technical data or in the furnishing of defense services for which a license or approval is required by this subchapter for any of the reasons listed below. Any such prohibition is referred to as a debarment for purposes of this subchapter. The Assistant Secretary of State for Politico-Military Affairs shall determine the appropriate period of time for debarment, which shall generally be for a period of three years.

(b) Grounds. (1) The basis for a statutory debarment, as described in paragraph (c) of this section, is any conviction for violating the Arms Export Control Act (see § 127.3 of this subchapter) or any conspiracy to violate the Arms Export Control Act.

(2) The basis for administrative debarment, described in part 128 of this subchapter, is any violation of 22 U.S.C. 2778 or any rule or regulation issued thereunder when such a violation is of such a character as to provide a reasonable basis for the Office of Defense Trade Controls to believe that the violator cannot be relied upon to comply with the statute or these rules or regulations in the future, and when such violation is established in accordance with part 128 of this subchapter.

(c) *Statutory Debarment.* Section 38(g)(4) of the Arms Export Control Act prohibits the issuance of licenses to persons who have been convicted of violating the U.S. criminal statutes enumerated in § 120.27 of this subchapter. Discretionary authority to issue licenses is provided, but only if certain statutory requirements are met. It is the policy of the Department of State not to consider applications for licenses or requests for approvals involving any person who has been convicted of violating the Arms Export Control Act or convicted of conspiracy

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to violate that Act for a three year period following conviction. Such individuals shall be notified in writing that they are debarred pursuant to this policy. A list of persons who have been convicted of such offenses and debarred for this reason shall be published periodically in the FEDERAL REGISTER. Debarment in such cases is based solely upon the outcome of a criminal proceeding, conducted by a court of the United States, that established guilt beyond a reasonable doubt in accordance with due process. The procedures of part 128 of this subchapter are not applicable in such cases.

(d) *Appeals.* Any person who is ineligible pursuant to paragraph (c) of this section may appeal to the Under Secretary of State for International Security Affairs for reconsideration of the ineligibility determination. The procedures specified in §128.13 of this subchapter are applicable in such appeals.

### § 127.8 Interim suspension.

(a) The Director of the Office of Defense Trade Controls is authorized to order the interim suspension of any person when the Director believes that grounds for debarment (as defined in §127.6 of this part) exist and where and to the extent the Director finds that interim suspension is reasonably necessary to protect world peace or the security or foreign policy of the United States. The interim suspension orders prohibit that person from participating directly or indirectly in the export of any defense article or defense service for which a license or approval is required by this subchapter. The suspended person shall be notified in writing as provided in §127.6(c) of this part (statutory debarment) or §128.3 of this subchapter (administrative debarment), whichever is appropriate. In both cases, a copy of the interim suspension order will be served upon that person in the same manner as provided in §128.3 of this subchapter. The interim suspension order may be made immediately effective, without prior notice. The order will state the relevant facts, the grounds for issuance of the order, and describe the nature and duration of the interim suspension. No person may be suspended for a period exceeding 60 days unless proceedings

under §127.6(c) of this part or under part 128 of this subchapter, or criminal proceedings, are initiated before the expiration of that period.

(b) A motion or petition to vacate or modify an interim suspension order may be filed at any time with the Under Secretary of State for International Security Affairs. After a final decision is reached, the Director of the Office of Defense Trade Controls will issue an appropriate order disposing of the motion or petition and will promptly inform the respondent accordingly.

### § 127.9 Applicability of orders.

For the purpose of preventing evasion, orders of the Assistant Secretary of State for Politico-Military Affairs, debarring a person under §127.6 and orders of the Director, Office of Defense Trade Controls, suspending a person under §127.7 may be made applicable to any other person who may then or thereafter (during the term of the order) be related to the debarred person by affiliation, ownership, control, position of responsibility, or other commercial connection. Appropriate notice and opportunity to respond to charges will be given.

### § 127.10 Civil penalty.

(a) The Assistant Secretary of State for Political-Military Affairs, Department of State, is authorized to impose a civil penalty in an amount not to exceed that authorized by 22 U.S.C. 2778, 2779a and 2780 for each violation of 22 U.S.C. 2778, 2779a and 2780, or any regulation, order, license or approval issued thereunder. This civil penalty may be either in addition to, or in lieu of, any other liability or penalty which may be imposed.

(b) The Office of Defense Trade Controls may make:

(1) The payment of a civil penalty under this section or

(2) The completion of any administrative action pursuant to this part 127 or 128 of this subchapter a prior condition for the issuance, restoration, or continuing validity of any export license or other approval.

[58 FR 39316, July 22, 1993, as amended at 62 FR 67276, Dec. 24, 1997]

**§ 127.11 Past violations.**

(a) Pursuant to section 38 of the Arms Export Control Act, licenses or other approvals may not be granted to persons who have been convicted of violating any of the U.S. criminal statutes enumerated in § 120.27 of this subchapter or who are ineligible to receive any export licenses from any agency of the U.S. government, subject to a narrowly defined statutory exception. This provision establishes a presumption of denial for licenses or other approvals involving such persons. This presumption is applied by the Office of Defense Trade Controls to all persons convicted or deemed ineligible in this manner since the effective date of the Arms Export Control Act (Pub. L. 94-329; 90 Stat. 729) (June 30, 1976).

(b) *Policy.* An exception to the policy of the Department of State to deny applications for licenses or other approvals that involve persons described in paragraph (a) of this section shall not be considered unless there are extraordinary circumstances surrounding the conviction or ineligibility to export, and only if the applicant demonstrates, to the satisfaction of the Bureau of Politico-Military Affairs, that the applicant has taken appropriate steps to mitigate any law enforcement and other legitimate concerns, and to deal with the causes that resulted in the conviction, ineligibility, or debarment. Any person described in paragraph (a) of this section who wishes to request consideration of any application must explain, in a letter to the Director, Office of Defense Trade Controls, the reasons why the application should be considered. If the Bureau of Politico-Military Affairs concludes that the application and written explanation have sufficient merit, it shall consult with the Office of the Legal Adviser and the Department of the Treasury regarding law enforcement concerns, and may also request the views of other departments, including the Department of Justice. If the Office of Defense Trade Controls does grant the license or other approval, subsequent applications from the same person need not repeat the information previously provided but should instead refer to the favorable decision.

(c) *Debarred persons.* Persons debarred pursuant to § 127.6(c) (statutory debarment) may not utilize the procedures provided by this section while the debarment is in force. Such persons may utilize only the procedures provided by § 127.7(d) of this part.

**§ 127.12 Voluntary disclosures.**

(a) *General policy.* The Department strongly encourages the disclosure of information to the Office of Defense Trade Controls by persons, firms or any organization that believe they may have violated any export control provision of the Arms Export Control Act, or any regulations, order, license, or other authorization issued under the Arms Export Control Act. Voluntary self-disclosure may be considered a mitigating factor in determining the administrative penalties, if any, that should be imposed by the Department. Failure to report such violation(s) may result in circumstances detrimental to U.S. national security and foreign policy interests.

(b) *Limitations.* (1) The provisions of this section apply only when information is provided to the Office of Defense Trade Controls for its review in determining whether to take administrative action under part 128 of this subchapter concerning violation(s) of the export control provisions of the Arms Export Control Act and these regulations.

(2) The provisions of this section apply only when information is received by the Office of Defense Trade Controls for review prior to such time that either the Department of State or any other agency, bureau or department of the United States Government obtains knowledge of either the same or substantially similar information from another source and commenced an investigation or inquiry that involves that information, and that is intended to determine whether the Arms Export Control Act or these regulations, or any other license, order or other authorization issued under the Arms Export Control Act has been violated.

(3) It is possible that the activity in question—despite voluntary disclosure—might merit penalties, administrative actions, sanctions, or referrals

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to the Department of Justice for consideration as to whether criminal prosecution is warranted. In the latter case, the Office of Defense Trade Controls will notify the Department of Justice of the voluntary nature of the disclosure although the Department of Justice is not required to give that fact any weight. The Office of Defense Trade Controls has the sole discretion to consider whether "voluntary disclosure," in context with other relevant information in a particular case, should be a mitigating factor in determining what, if any, administrative action will be imposed. Some of the mitigating factors the Office of Defense Trade Controls may consider are:

(i) Whether the transaction would have been authorized had proper application been made;

(ii) Why the violation(s) occurred;

(iii) The degree of cooperation with the ensuing investigation;

(iv) Whether the person or firm has instituted or improved an internal compliance program to reduce the likelihood of future violation(s);

(v) Whether the person making the disclosure did so with the full knowledge and authorization of the firm's senior management. (If not, then a firm will not be deemed to have made a disclosure as covered in this section.)

(4) The provisions of this section do not, nor should they be relied on, to create, confer, or grant any rights, benefits, privileges, or protection enforceable at law or in equity by any person, business, or entity in any civil, criminal, administrative, or other matter.

(c) *Notification.* (1) Any person or firm wanting to disclose information that constitutes a voluntary self-disclosure should, in the manner outlined below, initially notify the Office of Defense Trade Controls as soon as possible after violation(s) are discovered and then conduct a thorough review of all export-related transactions where violation(s) are suspected.

(2) Notification of violation(s) must be in writing and should include the following information:

(i) A precise description of the nature and extent of the violation(s) (e.g., an unauthorized shipment, doing business with a party denied U.S. export privileges, etc.);

(ii) The exact circumstances surrounding the violation(s) (a thorough explanation of why, when, where, and how the violation(s) occurred);

(iii) The complete identities and addresses of all individuals and organizations, whether foreign or domestic, involved in the activities giving rise to the violation(s);

(iv) Export license numbers, if applicable;

(v) U.S. Munitions List category and subcategory, product descriptions, quantities, and characteristics of the commodities or technical data involved;

(vi) A description of any corrective actions already undertaken;

(vii) The name and address of the person(s) making the disclosure and a point of contact, if different, should further information be needed.

(3) Factors to be considered include, for example, whether the violation(s) were intentional or inadvertent; the degree to which the person or firm responsible for the violation(s) making the disclosure was familiar with the laws and regulations; and whether the violator was the subject of prior administrative or criminal action under the AECA. In addition to immediately providing written notification, persons, firms, companies and organizations are strongly urged to conduct a thorough review of all export-related transactions where possible violation(s) are suspected.

(d) *Documentation.* (1) The written disclosure should be accompanied by copies of those documents that substantiate it. Where appropriate, the documentation should include, but is not limited to:

(i) Licensing documents (e.g., license applications, export licenses and end-user statements);

(ii) Shipping documents (e.g., shipper's export declarations, airway bills and bills of lading);

(iii) Any other relevant documents must be retained by the person making the disclosure until the Office of Defense Trade Controls requests them or until a final decision on the disclosed information has been made.

(e) *Certification.* A certification must be submitted stating that all of the representations made in connection

with the voluntary self-disclosure are true and correct to the best of that person's knowledge and belief. Certifications made by a firm, corporation or any other organization should be executed by someone with the authority to do so.

(f) *Oral presentations.* It is generally not necessary to augment the written presentation with an oral presentation. However, if the person making the disclosure believes a meeting is desirable, a request for one should be included with the written presentation.

(g) Voluntary disclosures should be sent to:

Compliance Analysis Division, PM/DTC, SA-6, room 200, Office of Defense Trade Controls, Bureau of Politico-Military Affairs, U.S. Department of State, Washington, DC 20522-0602.

## PART 128—ADMINISTRATIVE PROCEDURES

Sec.

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**AUTHORITY:** Secs. 2, 38, 40, 42, and 71, Arms Export Control Act. 90 Stat. 744 (22 U.S.C. 2752, 2778, 2780, 2791, and 2797); E.O. 11958, 42 FR 4311; 22 U.S.C. 2658; E.O. 12291, 46 FR 1981.

**SOURCE:** 58 FR 39320, July 22, 1993, unless otherwise noted.

### § 128.1 Exclusion of functions from the Administrative Procedure Act.

The Arms Export Control Act authorizes the President to control the import and export of defense articles and services in furtherance of world peace and the security and foreign pol-

icy of the United States. It authorizes the Secretary of State to make decisions on whether license applications or other written requests for approval shall be granted, or whether exemptions may be used. It also authorizes the Secretary of State to revoke, suspend or amend licenses or other written approvals whenever the Secretary deems such action to be advisable. The administration of the Arms Export Control Act 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 Arms Export Control Act, is highly discretionary, it is excluded from review under the Administrative Procedure Act.

[61 FR 48831, Sept. 17, 1996]

### § 128.2 Administrative Law Judge.

The Administrative Law Judge referred to in this part is an Administrative Law Judge appointed by the Department of State or of the Department of Commerce, as provided in 15 CFR 788.2. The Administrative Law Judge is authorized to exercise the powers and perform the duties provided for in §§ 127.7, 127.8, and 128.3 through 128.16 of this subchapter.

[61 FR 48831, Sept. 17, 1996]

### § 128.3 Institution of Administrative Proceedings.

(a) *Charging letters.* The Director, Office of Defense Trade Controls, with the concurrence of the Office of the Legal Adviser, Department of State, may initiate proceedings to impose debarment or civil penalties in accordance with § 127.7 or § 127.10 of this subchapter respectively. Administrative proceedings shall be initiated by means of a charging letter. The charging letter will state the essential facts constituting the alleged violation and refer to the regulatory or other provisions involved. It will give notice to the respondent to answer the charges within 30 days, as provided in § 128.5(a), and indicate that a failure to answer will be