Temporary Imports

Critical Points Regarding Temporary Imports for Repair

Appendices: (1) State/DDTC New Guidance on Unauthorized Temporary Imports of Defense Articles (Web posting dated 12-6-2009)
(2) ITAR § 123.4 Temporary import license exemptions

This explains procedures for using the American Goods Returned exemption (a.k.a. the Repair of Repairables exemption) ITAR § 123.4(a), plus Commerce Department temporary imports, plus the special Canadian exemption version from § 126.5(a). Note also the *permanent imports* section in Part IV, below. Finally, review AES filing requirements for every export, since they're often required, as delineated in Part V. [1]

I. Temporary Imports of Commercial Articles

These are governed by the Export Administration Regulations (EAR), in terms of licensing (or exceptions to licensing). Compared to ITAR shipments, this is little more than, figuratively, putting a stamp on the crate and shipping, as in most cases they are conducted under an exception called RPL. But there are a few points of importance to reduce your customs/duty exposure. The EAR is at http://www.access.gpo.gov/bis/index.html.

Inbound (i.e. receiving something for repair):

1. Your customer should be sure to ship as "American goods returned." The HTS number (the first 6 digits of the Schedule B number) for inbound items that are coming for repair or replacement, whether under warranty or not, is 980110.

2. The customer's shipping documents should say specifically something like "American goods returned" or "U.S.-origin goods being returned for repair or replacement." **The USHTS code 9801.00.1012 is specifically for this characterization, so it will help US Customs do the right thing if that HTS is also specified.** Note: the 6-digit HTS code is internationally agreed upon, but each participating country is allowed to tailor an additional 4 digits.

3. If this is not clear to Customs in your customer's documentation, you may be assessed duties on the whole shipment.

Outbound (i.e. returning the repaired item to your customer):

1. Your shipping documents, waybill, invoice or whatever should have a phrase like "U.S. goods repaired under warranty."

2. The value of the shipment for Customs purposes will be just the value of the repair or replacement.

[1] *No classified items may be temporarily imported under these license exemptions. Unclassified only.*

3. This procedure applies only to 2nd exports, i.e. if the part exited the U.S. before and duties were paid once.

4. **For the Schedule B number outbound, use 9801.10.0000.**

5. Classification. Make sure you use the correct ECCN. For your paperwork on these commercial shipments, and especially any AES (electronic SED system) filings you may make, the ECCN for commercial imports and exports could be EAR99, or for aircraft parts 9A991, and so on. Also in the AES filing, enter the Commerce Department export license number for the shipment, or if no license is required then NLR (no license required). Note that AES filings are required for commercial shipments valued at $2,500 or more.

6. For higher ECCN classification numbers that would normally require a license to export back to the customer, you may be able to use exception RPL, saving yourself the time and expense of securing a Commerce Department license. Check with me if in doubt.

7. Duties, tariffs and taxes may apply, whether you or your customer have agreed to pay them. You can look these up yourself at these Websites: http://dataweb.usitc.gov or http://www.export.gov/logistics/eg_main_018130.asp, or call 1-800-872-8723 and some very knowledgeable people will help you.

II. Temporary Imports of Defense Articles

Whereas the main goal in temporary commercial imports is to avoid duties, a principal goal of temporary imports to repair/replace defense articles is to avoid ITAR violations, which are all-too-easy to get, and are regarded disproportionately as serious by the State Department. The International Traffic in Arms Regulation (ITAR) is the governing regulation. See http://www.pmddtc.state.gov/regulations_laws/itar.html.

1. First, let's be clear that the export and the temporary import of all defense articles require either a State Department license or an exemption therefrom. For temporary imports, there is an exemption that applies to ***unclassified*** U.S.-origin goods.[2] It's from §123.4(a)(1) of the ITAR. [***No classified items allowed*** under this ITAR exemption!!]

2. You cannot enhance performance – no upgrades.

3. Use the USHTS code 9801.00.1012 for the inbound leg, and for the outbound leg, use the Schedule B number 9801.10.0000. This is the same as for commercial items.

4. The items must go back to the same entity listed on the import documents.

5. This is critically important*: on the way inbound, your customer should properly cite "22 CFR 123.4(a)(1)" as the authority to import,* using the appropriate Customs form

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[2] *The 123.4(a)(1) repair exemption also applies to "items manufactured abroad pursuant to U.S. Government approval".*

(see below). **When clearing your goods through Customs, your Customs broker or freight-forwarder must insure that he cites this in the entry document.** Otherwise this exemption may not be used. Here is a quote from the ITAR:

> *(1) At the time of temporary import—*
>
> *(i) File and annotate the applicable U.S. Customs and Border Protection document (e.g., Form CF 3461, 7512, 7501, 7523 or 3311) to read: "This shipment is being imported in accordance with and under the authority of 22 CFR 123.4(a) (identify subsection)," and*
>
> *(ii) Include, on the invoice or other appropriate documentation, a complete list and description of the defense article(s) being imported, including quantity and U.S. dollar value*

6. Put another way, if a defense article arrives for repair without proper import credentials, you cannot ship it back to the customer without applying for and securing a permanent export license (DSP-5) from the State Department.

7. **ITAR Violation?** This is a bit of a slippery concept, but the above-described event, where your overseas customer returns a defense article for repair without the correct forms & notations being used during import to the U.S. – that is, if FedEx just delivers an unannounced parcel to you containing a defense article – State/DDTC has traditionally considered this an ITAR violation **for which the receiving U.S. company must take responsibility and file a formal Voluntary Disclosure to DDTC**. While *permanent* imports of defense articles do not require an ITAR license at all, *temporary* imports (which repairs by definition are) cannot be made without a license (DSP-61) or a perfected 123.4(a)(1) exemption. So not only can you *not* return the imperfectly-imported item to the shipper without a license, you are actually considered the responsible party to an ITAR violation.

> ***Note:*** *On 12-06-2009, State/DDTC relaxed their view of this situation, but only slightly. Now they still consider the U.S. receiving party to be in violation, but if you investigate and can demonstrate that it happened through no fault of your own, then you can forego filing the Voluntary Disclosure and just apply for a DSP-5 to export the item, if you explain everything in that DSP-5 application. [See the last page of this document for DDTC's new policy.]*

III. Temporary Imports of Defense Articles from Canada

1. Repairs of defense articles inbound from Canada are covered by a different part of the ITAR, namely §126.5(a).

2. The ITAR rule governing Canadian temporary import from Canada is this:

> *"...the temporary import and return to Canada without a license of any unclassified defense articles (see §120.6 of this subchapter) that originate in Canada for temporary use in the United States and return to Canada…."*

There is really no more to it than that. There is not even a requirement to use certain forms (e.g., Form CF 3461, 7512, 7501, 7523 or 3311), such as is required for §123.4 temporary imports from countries other than Canada. So the only real procedural requirements come from outside §126.5 altogether, i.e. the shipping label verbiage required by ITAR 123.9 (b). AES entry and record-keeping rules still apply.

3. **Exemption Exceptions.** Note the long list of exceptions-to-the-rule that are ***not*** eligible for the Canadian exemption, found in § 126.5(b)(1)-(21)

4. **Shipment Label "Placard".** There is a minimum phrase that must be placed on the paperwork for all outbound (export) shipments. We recommend you put it on the invoice, bill of lading, air waybill, etc. for all exports of defense articles, including the return leg of a §126.5(a) temporary import from Canada.

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

5. **Exceptions.**

   a. Defense articles inbound temporarily from Canada, **repaired**, then outbound to third country: Get a DSP-61 temporary import license from DTC (see §123.3).

   b. Defense articles inbound temporarily from Canada, **improved or upgraded**, then outbound to third country: (i) import using §123.4(b) to make the improvement and (ii) export using a new DSP-5. Note: §123.4(b) is **not** for the permanent import of goods. Also, read the "requirements" in §123.4(c).

6. **Temporary Exports of Defense Articles to Canada**

   a. Defense articles sent to Canada temporarily for repair, tradeshow, demo, etc. likewise do not require a license, with the same cautions that apply to temporary imports *from* Canada. As always, AES filing and record-keeping rules apply.

   b. Cite § 126.5**(b)** instead of the § 126.5(a) we used for temp *imports* from Canada.

   c. Note the long list of exceptions-to-the-rule that are ***not*** eligible for the Canadian exemption, found in § 126.5(b)(1)-(21)

IV. Permanent Imports of Defense Articles

Permanent imports require no State Department license. (See §120.5) In fact, State/ITAR has no jurisdiction over permanent imports of defense articles.

However, these may require an International Import Certificate (Form BIS–645P/ATF–4522/DSP–53). Or in the case of firearms, the Import Certificate is the ATF FORM 6 PART I (5330.3A). These are filled out by the U.S. exporter, countersigned by the

appropriate USG agency (Commerce BIS, ATF or State DDTC), and sent to the foreign party who is exporting to the U.S. It's important to understand that these are not U.S. import licenses. In a strict sense, it is not the USG that is requiring them; it is the foreign government that needs them as part of your foreign customer's package for them to get their own export license to export to America.

V. AES System Entries on Exports

When is the AES information required? On *all* ITAR shipments, all *licensable* Commerce shipments, plus some others.

An AES record must be filed for exports of physical goods valued at more than $2,500 [3] per commodity classification code (OR **ANY** VALUE WHEN CCL OR USML LICENSE IS REQUIRED), when shipped as follows:

- From U.S. to foreign countries,
- Between the U.S. and Puerto Rico,
- From Puerto Rico to foreign countries,
- From Puerto Rico to U.S. Virgin Islands,
- From the U.S. to the U.S. Virgin Islands, and
- Licensable commodities (regardless of value).

The AES filing must be made *only after* any related export license is lodged with Customs. Making an AES filing before the related license is lodged with Customs is a violation – a technical one that has resulted in Customs seizures in the past.

A separate rule applies to lead times depending on the method of shipment. The following are the minimum lead times:

- Vessel – 24 hours prior to departure from U.S. port where cargo is laden
- Air & Courier – 2 hours prior to departure from U.S.
- Rail – 2 hours prior to arrival at the border
- Truck – 1 hour prior to crossing the border
- Mail/Other – 2 hours prior to exportation

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[3] *Also applies to EAR99 goods.*

VI. Recordkeeping

1. **Documentation & Other Requirements.** Generally speaking, use of an exemption means that you don't need to apply for a license; however, it does **not** mean you don't need to make and keep records. The recordkeeping rules of thumb are that:

   a. For each commercial or ITAR export (including the outbound segments of temporary imports or temporary exports), you must be able to document the (i) end-use and (ii) end-user, including address.

   b. Addresses for foreign parties to the transaction cannot be a P.O. Box.

   c. A description of the equipment replaced, repaired or serviced;

   d. The type of repair or service;

   e. Certification of the destruction or return of equipment replaced;

   f. Location of the equipment replaced, repaired or serviced;

   g. The name and address of who received the items for replacement, repair or service;

   h. Quantity of items shipped; and

   i. Country of ultimate destination.

2. **Retention.** Both the ITAR and the EAR have a base retention period of 5 years after the expiration of the related license or exemption shipment. Curiously enough, the statute of limitations for related violations of law is also 5 years. For all licenses except for Agreements such as TAAs and MLAs, the maximum valid period for the license is 48 months. Therefore 9 years (4 + 5) is a good rule of thumb for all records.

3. **Reporting Requirements.** There are also some reporting requirement associated with some of these exemption/exception exports, but that's outside scope of this paper.

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APPENDIX 1

[DDTC Improper Temp Imports new policy posted on the Web as of 11-25-2009]

State/DDTC New Guidance on Unauthorized Temporary Imports of Defense Articles

Temporary Import Violations

Temporary imports of defense articles require the recipient to obtain a DSP-61 (Temporary Import License) or to claim the exemption under 22 CFR 123.4. In order for the temporary import exemption to be claimed at the time of re-export, the article being returned must have been declared at the time of import on the appropriate U.S. Customs and Border Protection document.

The Directorate of Defense Trade Controls (DDTC) has seen an increase in the number of instances where a foreign person temporarily returns a defense article for repair or replacement without authorization to a U.S. person without the U.S person's prior knowledge. In this situation, the U.S. person is unable to coordinate the return and obtain the requisite DSP-61 license or claim the regulatory exemptions under § 123.4(a)(1) of the International Traffic in Arms Regulations (ITAR) (22 C.F.R. Parts 120-130).

DDTC has established new guidance regarding these unauthorized temporary imports and the subsequent exports to return the items. When this situation occurs, the U.S. person should investigate the nature and cause of the violation and determine if the U.S. person had any responsibility for the violation.

If the U.S. person determines they did not have any responsibility for the violation, then in lieu of submitting a separate Voluntary Disclosure in accordance with ITAR §127.12, the U.S. person can submit a DSP-5 license application to return the defense article to the foreign person. A transmittal letter, signed by the Empowered Official, must be submitted with the application, explaining the reasons why the applicant does not believe they have any responsibility for the violation and the steps taken to make this determination; the identities and addresses of all persons known or suspected to be involved in the activities giving rise to the unauthorized temporary import; and any measures taken to prevent a reoccurrence.

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APPENDIX 2

§ 123.4 Temporary import license exemptions.

(a) Port Directors of U.S. Customs and Border Protection shall permit the temporary import (and subsequent export) without a license, for a period of up to 4 years, of unclassified U.S.-origin defense items (including any items manufactured abroad pursuant to U.S. Government approval) if the item temporarily imported:

(1) Is serviced (e.g., inspection, testing, calibration or repair, including overhaul, reconditioning and one-to-one replacement of any defective items, parts or components, but excluding any modifications, enhancement, upgrade or other form of alteration or improvement that changes the basic performance of the item), and is subsequently returned to the country from which it was imported. Shipment may be made by the U.S. importer or a foreign government representative of the country from which the goods were imported; or

(2) Is to be enhanced, upgraded or incorporated into another item which has already been authorized by the Directorate of Defense Trade Controls for permanent export; or

(3) Is imported for the purpose of exhibition, demonstration or marketing in the United States and is subsequently returned to the country from which it was imported; or

(4) Has been rejected for permanent import by the Department of the Treasury and is being returned to the country from which it was shipped; or

(5) Is approved for such import under the U.S. Foreign Military Sales (FMS) program pursuant to an executed U.S. Department of Defense Letter of Offer and Acceptance (LOA).

NOTE: These Exceptions do not apply to shipments that transit the U.S. to or from Canada (see §123.19 and §126.5 of this subchapter for exceptions).

(b) Port Directors of U.S. Customs and Border Protection shall permit the temporary import (but not the subsequent export) without a license of unclassified defense articles that are to be incorporated into another article, or modified, enhanced, upgraded, altered, improved or serviced in any other manner that changes the basic performance or productivity of the article prior to being returned to the country from which they were shipped or prior to being shipped to a third country. A DSP–5 is required for the reexport of such unclassified defense articles after incorporation into another article, modification, enhancement, upgrading, alteration or improvement.

(c) *Requirements.* To use an exemption under §123.4 (a) or (b), the following criteria must be met:

(1) The importer must meet the eligibility requirements set forth in §120.1(b) of this subchapter;

(2) At the time of export, the ultimate consignee named on the Shipper's Export Declaration (SED) must be the same as the foreign consignee or end-user of record named at the time of import; and

(3) As stated in §126.1 of this subchapter, the temporary import must not be from or on behalf of a proscribed country listed in that section unless an exception has been granted in accordance with §126.3 of this subchapter.

(d) *Procedures.* To the satisfaction of the Port Director of U.S. Customs and Border Protection, the importer and export must comply with the following procedures:

(1) At the time of temporary import—

(i) File and annotate the applicable U.S. Customs and Border Protection document (e.g., Form CF 3461, 7512, 7501, 7523 or 3311) to read: ―This shipment is being imported in accordance with and under the authority of 22 CFR 123.4(a) (identify subsection),‖ and

(ii) Include, on the invoice or other appropriate documentation, a complete list and description of the defense article(s) being imported, including quantity and U.S. dollar value; and

(2) At the time of export, in accordance with the U.S. Customs and Border Protection procedures, the Directorate of Defense Trade Controls (DDTC) registered and eligible exporter, or an agent acting on the filer's behalf, must electronically file the export information using the Automated Export System (AES), and identify 22 CFR 123.4 as the authority for the export and provide, as requested by U.S. Customs and Border Protection, the entry document number or a copy of the U.S. Customs and Border Protection document under which the article was imported.

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