

ARTICLE

State and Commerce Propose Rules to Clarify and Harmonize U.S. Export Controls Regulations

June 1, 2015

On May 22, 2015, the Department of State's Directorate of Defense Trade Controls (DDTC) and the Department of Commerce's Bureau of Industry and Security (BIS) published proposed rules and an advanced notice of proposed rulemaking to amend the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR). These proposals primarily address three areas: (1) authorization from DDTC to export certain items subject to the EAR, (2) changes to the ITAR's license exemption for exports made to or on behalf of the U.S. government (USG), and (3) harmonization of the ITAR and EAR destination control statements.

Obtaining Authorization from DDTC to Export Certain Items Subject to the EAR

The President's Export Control Reform (ECR) Initiative has resulted in the transfer of many formerly ITAR-controlled items to the EAR's Commerce Control List (CCL). This shift in jurisdiction for parts and components of military systems has led to an increased incidence of "mixed shipments" – exports of both ITAR-controlled and EAR-controlled articles in the same shipment. To avoid the need for companies to obtain licenses from both DDTC and BIS for a single export transaction, the revised categories in the ITAR's U.S. Munitions List (USML) permit companies to export certain EAR-controlled items on a DDTC license when the items are used in or with ITAR-controlled defense articles.

Authors

John R. Shane
Partner
202.719.7222
jshane@wiley.law
Lori E. Scheetz
Partner
202.719.7419
lscheetz@wiley.law

Practice Areas

Export Controls and Economic Sanctions
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DDTC's proposed rule includes the following additional authorizations for exports of items subject to the EAR when those items are used in or with ITAR-controlled defense articles. [1] First, items subject to the EAR may be exported pursuant to an ITAR exemption as long as they are for use in or with defense articles authorized under a DDTC license or other approval, though such EAR-controlled items will remain subject to BIS's jurisdiction. Further, DDTC may authorize reexports or retransfers of EAR-controlled items if they are initially exported pursuant to a DDTC-issued license or approval and the items are for end-use in or with a defense article. Additionally, DDTC's proposed rule will allow the retransfer of technology subject to the EAR and authorized under a Technical Assistance Agreement (TAA) or Manufacturing License Agreement (MLA) to dual and third country national employees of foreign agreement signatories and approved sub-licensees, provided that the transfer is to dual or third country nationals who are bona fide regular employees, directly employed by a foreign signatory or approved sub-licensee; the individuals are nationals exclusively of countries that are members of NATO or the European Union, Australia, Japan, New Zealand, and Switzerland; their employer is a signatory to the agreement, or else has executed a Non-Disclosure Agreement; and the retransfer takes place completely within the physical territories of the countries listed above or the United States.

Changes to the ITAR's License Exemption for Exports Made to or on Behalf of the USG

The license exemption in section 126.4(a) of the ITAR, which authorizes certain exports of ITAR-controlled items by or for USG agencies, has been the subject of much controversy and differences in opinion with regard to its scope. The exemption currently permits "temporary exports" of ITAR-controlled items by or for a USG agency, despite the fact that practically speaking, it is difficult to "temporarily" export technical data (or defense services). DDTC's proposed rule will make a much-welcomed change by permitting permanent exports under section 126.4(a).

DDTC's proposed rule also includes additional substantive changes to the language in section 126.4(a), separating the authorizations into two categories. First, no license will be required for the export or temporary import of a defense article or performance of a defense service when made to a department or agency of the USG for official use. DDTC proposes adding language requiring that the export or temporary import of any defense articles be made to a regular employee or "contractor support personnel" of the USG. "Contractor support personnel" will include U.S. persons who provide administrative, managerial, scientific, or technical support under contract with a USG department or agency within a USG-owned or -operated facility or under the direct supervision (*i.e.*, control over the manner and means in which the contractor conducts day-to-day work activities as well as the contractor's access to defense articles) of a regular USG employee. Private security contractors will not be viewed as "contractor support personnel." Apart from the addition of contractor support personnel language, note that it is not entirely clear why "defense services" are included within this portion of the revised exemption, as defense services by definition are services provided to foreign persons, not U.S. persons. [2]

In addition, no license will be required for the export or temporary import of a defense article or the performance of a defense service when made by, or on behalf of, the USG for carrying out any foreign assistance, cooperative project, or sales program authorized by law and subject to control by the President by other means when certain conditions are met, including that the USG performs or directs all aspects of the

transaction or that the export is covered by a USG bill of lading. Despite the opportunity to explain and add color to the specific circumstances under which this portion of the exemption applies (or does not apply) to U.S. defense contractors performing training or other services for foreign partners, DDTC declined to do so.

Harmonizing ITAR and EAR Destination Control Statements

Both DDTC and BIS are aiming to harmonize the destination control statements required under the ITAR and the EAR, respectively, to reduce exporter confusion and paperwork, particularly for “mixed shipments.” The proposed rules come close to achieving this goal, although the proposed export clearance requirements still are not entirely uniform.

For example, DDTC’s proposed rule will require that the destination control statement appear as an integral part of the bill of lading, air waybill, or other shipping document, and the purchase documentation or invoice. The BIS rule, [3] on the other hand, will require that the destination be included as an integral part of the commercial invoice and contractual documentation (when such contractual document exists). Additionally, the DDTC rule will require that the bill of lading, air waybill, or other shipping document, and the purchase documentation or invoice also prominently feature the country of ultimate destination, end-user, and the license or other approval number or exemption citation pursuant to which the shipment is being made. BIS’s rule generally will not require exporters to include this information. It is worth noting, however, that BIS is contemplating adding the DDTC requirements (e.g., country of ultimate destination, license number / authorization symbol) to the EAR’s export clearance provisions and requiring that exporters include the Export Control Classification Number (ECCN) for all items on the CCL (as opposed to only “600 series” and 9x515 items) on export control documents. [4]

Industry members are encouraged to submit comments on the proposed rules and advanced notice of proposed rulemaking. DDTC and BIS appear to be most interested in comments regarding the clarity and efficiency of the proposed rules, as well as comments on whether the new rules would achieve a sufficiently high level of harmonization between the requirements of the two regulatory regimes. Comments should be submitted by July 6, 2015, and can be filed directly with the relevant agency or via the Federal eRulemaking Portal at <http://www.regulations.gov>.

[1] *Amendment to the International Traffic in Arms Regulations: Exports and Temporary Imports Made to or on Behalf of a Department or Agency of the U.S. Government; Procedures for Obtaining State Department Authorization to Export Items Subject to the Export Administration Regulations; Revision to the Destination Control Statement; and Other Changes*, 80 Fed. Reg. 29,565 (Dep’t State May 22, 2015) (proposed rule).

[2] 22 C.F.R. § 120.9(a).

[3] *Export Administration Regulations (EAR): Harmonization of the Destination Control Statements*, 80 Fed. Reg. 29,551 (Dep’t Commerce May 22, 2015) (proposed rule).

[4] *Additional Improvements and Harmonization of Export Clearance Provisions*, 80 Fed. Reg. 29,554 (Dep't Commerce May 22, 2015) (advanced notice of proposed rulemaking).