

ALERT

DDTC Makes Long-Awaited Clarification to the ITAR 126.4 Exemption

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Today, in a much-welcomed change that should benefit U.S. government contractors working with foreign partners, the U.S. Department of State's Directorate of Defense Trade Controls (DDTC) amended the exemption in Section 126.4 of the International Traffic in Arms Regulations (ITAR), which permits transfers made by or for a department or agency of the U.S. government without the need to obtain an export license.

The ITAR control exports of defense articles (including technical data) and defense services and require authorization for all exports, including those to foreign government partners or other foreign persons at the direction of the U.S. government. The prior exemption language—including its applicability to contractors providing such data or services to foreign military or other foreign government personnel in the United States or abroad at the direction of the U.S. government—has been the subject of much controversy and differences in opinion. Indeed, previously, the exemption only permitted “temporary” exports of ITAR-controlled items by or for the U.S. government, despite the fact that, practically speaking, it is difficult to “temporarily” export ITAR-controlled technical data or defense services.

The revised exemption removes the temporal restriction and includes separate authorizations for exports by a U.S. government department or agency (Section 126.4(a)) and exports by an individual or company on behalf of the department or agency (Section 126.4(b)). The latter directly applies to U.S. government contractors exporting ITAR-controlled items for the U.S. government to a department or agency of the U.S. government or to another entity. This authorization is key, as it allows government contractors to provide ITAR-controlled

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Practice Areas

International Trade

hardware, defense services, and technical data to foreign partners without an export license under the following circumstances:

- The export or performance of a defense service must be at the written direction of the U.S. government department or agency or pursuant to an international agreement or arrangement; and
- The export or defense services must be for one of the authorized activities summarized below.
 - For official use by a department or agency of the U.S. government, including certain contracted entities;
 - For carrying out a cooperative project, program, or other activity in furtherance of a binding international agreement to which the United States or any agency thereof is a party or an arrangement with international partners authorized by Title 10 or 22 of the United States Code or pertinent National Defense Authorization Act provisions;
 - For carrying out any foreign assistance or sales program authorized by law and subject to control by the President by other means; or
 - For any other security cooperation programs and activities of the U.S. Department of Defense (DOD) authorized by law and subject to control by the President by other means (*i.e.*, any program, activity, or interaction of the DOD with the security establishment of a foreign country to build and develop allied and friendly security capabilities for self-defense and multinational operations, provide the armed forces with access to the foreign country during peacetime or a contingency operation, or build relationships that promote specific U.S. security interests).

While it is still not clear how this exemption will play out in practice (*i.e.*, what constitutes “written direction” and how willing will the U.S. government be in aiding exporters to confirm whether the exports fall within one of the authorized activities described above), the revisions published today are a positive development that should eliminate some regulatory burdens on contractors engaging in international exchanges for the U.S. government.

Wiley Rein has unparalleled export control and national security experience. Should you have any questions regarding the updated ITAR exemption, please do not hesitate to contact one of the attorneys listed on this alert.