

State Department Proposes New ITAR Exemptions

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As part of the ongoing export control reform effort, the U.S. Department of State's Directorate of Defense Trade Controls (DDTC) recently published in the *Federal Register* two proposed rules that would effectively ease exports of certain military items.

DDTC is the agency responsible for implementing the International Traffic in Arms Regulations (ITAR),^[1] which control the export of items captured on the U.S. Munitions List (USML), including all defense articles, military-related technical data and defense services. In general and with certain narrow exemptions included in the ITAR, a license is required to permanently or temporarily export or to temporarily import USML items (including parts and components for USML items) to or from any destination outside the United States. Unless an exemption is applicable, this licensing requirement applies even where items are exported in support of U.S. Government contracts (e.g., items exported to support U.S. troops in Iraq, Kuwait or Afghanistan) or for the personal use of the exporter (e.g., body armor and helmets).

The recently published proposed rules are the most recent in a line of several Obama Administration initiatives intended to promote exports of U.S. products and to more effectively target U.S. export controls to those products and technologies that the U.S. Government considers to be most sensitive. Expanding upon a similar, recently adopted exemption for certain temporary exports of body armor, one proposed rule would add an exemption from licensing for the temporary export of chemical protective gear.^[2] A second proposed rule would lessen the licensing burden for exports of replacement parts and components, allowing U.S. companies to more efficiently repair end-items that were previously exported under a license.^[3]

Practice Areas

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As these are proposed rules, they are not yet effective, and should not yet be relied upon to export ITAR-controlled items. Indeed, following a comment period, the Department of State may decide to implement the proposed rules as written, revise the rules to incorporate any comments received, or shelve the proposed rules entirely. These proposed rules are summarized below.

Proposed Exemption for Temporary Export of Chemical Protective Gear

Category XIV(f)(4) of the USML captures all equipment for individual protection against certain chemical agents and precursors, including nerve agents, mustard gas and Agent Orange. Equipment covered in this category can include such items as protective suits and other military protective clothing and gas masks. According to the *Federal Register* notice, because "U.S. individuals are traveling to hazardous areas in foreign countries where they need to wear body armor or chemical agent protective gear for personal safety," State is proposing to add an exemption from licensing for temporary exports of such chemical protective gear. Specifically, the license exemption would authorize the temporary export by an individual of one set of chemical agent protective gear for his or her personal use.

As with most ITAR license exemptions, the proposed exemption would include a number of terms and conditions. For example, the exemption would not be available for countries identified in section 126.1 of the ITAR as subject to an arms embargo or a restrictive licensing policy. The exemption would be available for exports to Iraq and Afghanistan, which both remain prohibited 126.1 countries, subject to certain additional conditions. Nor may the gear be exported to a country where the importation of such gear would be in violation of that country's laws.

Further, to be eligible for the exemption, the export must be for the individual's exclusive use, and the gear must be returned to the United States. The gear may not be provided to any foreign persons while abroad. Moreover, if the gear is lost, the proposed rule would require the exporter to submit a voluntary disclosure to the Office of Defense Trade Controls Compliance. Such a report would also need to be filed in the event the gear is used and disposed of abroad.

As with the aforementioned body armor exemption, the chemical agent protective gear exemption would impose certain additional technical requirements. In particular, the exporter would need to submit a declaration through the Census Bureau's Automated Export System, and the gear would need to be inspected by a U.S. Customs and Border Protection officer at the time of export. Additionally, the gear must be exported with the individual's baggage or effects, whether accompanied or unaccompanied. The gear would not be permitted to be mailed.

Limited though it is, the proposed exemption could prove valuable to individual U.S. exporters. Although, as with the body armor exemption, the exemption could be of limited utility to companies with employees already stationed overseas. That is, companies with established overseas operations would still be required to obtain DDTC licensing authorization in order to export chemical agent protective gear to their employees abroad. In this regard, the exemption could ultimately be unworkable for presumably the intended audience: U.S. government contractors.

Proposed Parts and Components Rule

As noted above, currently, a license is generally required to export parts and components of items listed on the USML, even in instances in which such parts and components are intended to be incorporated into end-items that were previously exported under a DDTC license. In such cases, the parts and components licensing requirements are duplicative, as DDTC has already approved of the export of controlled items to the applicable end user.

On March 15, DDTC issued a proposed rule to solve this problem. The proposed license exemption would authorize the export of replacement parts and components for the repair of U.S.-supplied end-items abroad that were previously exported under a license. The exemption would only apply to exporters specifically identified in a previous license application, and would not apply if the replacement parts or components provide an upgrade to the capabilities of the original end-item. Further, the proposed rule would limit the value and frequency of any such exports to normal logistical repair/replacement operations. In addition, the value of the replacement shipments plus the value of the original export shipment must not exceed the threshold for congressional notification.

In the same *Federal Register* notice, DDTC proposed certain limited revisions to the "see through" rule. Specifically, where DDTC controls exports and reexports of munitions items, commercial and dual-use items are controlled by the Department of Commerce's Bureau of Industry and Security (BIS) under the Export Administration Regulations (EAR), which impose substantially less restrictive controls than the ITAR. At present, commercial end-items that incorporate ITAR-controlled parts or components are generally considered to be ITAR-controlled. For example, certain commercial adhesives and other similar substances used in consumer electronics incorporate trace amounts of materials that may also be used in rocket fuel. Technically, and while the export control agencies have informally exercised flexibility in such cases, under the "see through" rule, such adhesives or similar substances would be ITAR-controlled.

Under the proposed rule, subject to certain conditions, a DDTC license would no longer be required for the export or reexport of ITAR-controlled parts or components incorporated in EAR-controlled end-items. To qualify for the proposed provision, the end-item must be rendered inoperable by the removal of the defense article. Further, no technical data for development or production may be transferred with the defense article. Additionally, the incorporation of the defense article must not relate to a military application.

[1] 22 C.F.R. § 120, *et seq.*

[2] "International Traffic in Arms Regulations: Exemption for Temporary Export of Chemical Agent Protective Gear," 76 Fed. Reg. 16,353 (Mar. 23, 2011).

[3] "Amendment to the International Traffic in Arms Regulations: Replacement Parts/Components and Incorporated Articles," 76 Fed. Reg. 13,928 (Mar. 15, 2011).