

ALERT

DDTC and BIS Ease Export Controls for Australia and the United Kingdom

May 8, 2024

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The U.S. Department of State's Directorate of Defense Trade Controls (DDTC) issued a proposed rule that would add a new license exemption in the International Traffic in Arms Regulations (ITAR) to reduce the licensing requirements for defense articles, defense services, and brokering activities between and among Australia, the United Kingdom (UK), and the United States. This proposed rule complements and comes on the heels of a recent interim final rule (IFR) issued by the U.S. Department of Commerce's Bureau of Industry and Security (BIS), which amended the Export Administration Regulations (EAR) to remove many licensing requirements for exports, reexports, and transfers (in-country) of commercial, dual-use, and less sensitive military and space items to or within Australia and the UK.

These rules – and similar measures taken by the Australian and UK governments – are meant to enhance security cooperation, collaboration, and technological innovation among the three countries and support the goals of the AUKUS trilateral security partnership. **Comments on the DDTC proposed rule are due by May 31, 2024. Comments on the BIS IFR are due by June 3, 2024.**

Proposed Changes to the ITAR

DDTC's proposed rule, which is not yet final or effective, would add an exemption to the ITAR, in 22 C.F.R. § 126.7, pursuant to which no license or other approval is required for (1) the export, reexport, retransfer, or temporary import of defense articles, (2) the performance of defense services, and (3) engagement in brokering

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activities among designated authorized users within Australia, the UK, and the United States, subject to recordkeeping requirements and certain limitations. DDTC also proposes adding an exemption to new Section 126.18(e) of the ITAR to allow certain dual nationals of Australia and the UK to receive eligible classified defense articles without a separate license from DDTC, which is designed to facilitate use of the new exemption in Section 126.7.

Notably, the proposed text appears to be more streamlined and user-friendly than the current treaty-based exemptions for Australia and the UK in Sections 126.16 and 126.17 of the ITAR, respectively. Nonetheless, both the transferor and the recipient must be authorized by DDTC to utilize the new exemption. As is the case generally with respect to ITAR exemptions, U.S.-based members must be registered with DDTC and not debarred under Section 127.7 of the ITAR. Entities in Australia and the UK would need to undergo an authorized user enrollment process in coordination with DDTC; DDTC proposes listing these eligible entities on its website. Additionally, the exemption is limited to transfers to or within Australia, the UK, or the United States and cannot be used for transfers that would require Congressional certification.

In a mechanism similar to that used for the ITAR's current Canadian, UK, and Australian exemptions, DDTC proposes creating a new Supplement No. 2 to Part 126 of the ITAR that will list more sensitive defense articles and defense services that would be *ineligible* for the exemption and still require a license from DDTC. DDTC has proposed that such excluded items will include Missile Technology Control Regime (MTCR) articles, certain ITAR-controlled source code and manufacturing know-how, cluster munitions, the F-22 aircraft and specially designed parts and components, and certain classified articles, among other items. The good news for industry is that, if no ITAR exemption applies, DDTC proposes adding a new expedited treatment policy to Section 126.15 of the ITAR for license applications wholly within or between Australia, the UK, Canada, and/or the United States that involve governments or corporate entities from these countries.

Easing of EAR Restrictions on Australia and the UK

The BIS IFR, which became effective on April 19, 2024, includes the following key changes that effectively put Australia and the UK nearly on par with Canada in terms of favorable licensing treatment under the EAR:

- The rule removed list-based license requirements for exports, reexports, and transfers (in-country) to Australia and the UK for national security column 1 (NS1), regional stability column 1 (RS1), and missile technology column 1 (MT1) reasons for control. As a result, the following items no longer require a license or applicable license exception, such as Strategic Trade Authorization (STA) in Section 740.20 of the EAR, to be provided to Australia and the UK:
 - "600 series" items, which are generally EAR-controlled military items that also are listed on the Wassenaar Arrangement Munitions List;
 - Items controlled under the EAR for missile technology reasons consistent with the MTCR Annex; and
 - Many Export Control Classification Number (ECCN) 9x515 satellite-related items, including most commercial satellites and related parts and components.

- Consistent with the removal of the RS1 licensing requirements, BIS also removed the special license requirement applicable to ECCN 0A919 items (certain military commodities located and produced outside the United States) destined for Australia or the UK.
- As with the current exception applicable to Canada, BIS's rule permits exports to Australia and the UK of "significant items" (SI), e., hot section technology for the development, production, or overhaul of commercial aircraft engines, components, and systems controlled under ECCN 9E003.a.1 through a.6, a.8, .h, .i, and .l, and related controls (see 15 C.F.R. § 742.14(a)).
- The rule also removed the special military end-use and end-user license requirements formerly applicable to Australia and the UK for certain cameras, systems, or related components described in Sections 744.9(a)(1)(i) and (a)(1)(iii) of the EAR, which generally covered commodities described in ECCNs 6A003.a.3, 6A003.a.4, or 6A003.a.6, and ECCNs 0A504, 6A002, 6A003, 6A993.a, or 8A002.d respectively.
- BIS also made several other minor changes to align the EAR's regulatory text with the new policies for Australia and the UK.

In the IFR, BIS did not remove license requirements to Australia or the UK for encryption items (EI) in Section 742.15(a)(1) of the EAR, which do not require a license for export to Canada, citing the broad availability of License Exceptions ENC and ACE. Further, firearms-related items and other Crime Control (CC) controlled items in ECCNs 0A501 (except 0A501.y); 0A502 for shotguns with a barrel length less than 18 inches (45.72 cm); 0A503; 0A504.i; 0A505.a and .x; 0A981; 0A982; 0A983; 0D501 (except software for commodities in ECCN 0A501.y or equipment in ECCN 0B501 for commodities in ECCN 0A501.y); 0D505 for software for commodities in ECCN 0A505.a and .x and equipment in ECCN 0B505.a .and .x; 0E501; 0E504; 0E505 for technology for development, production, operation, installation, maintenance, repair, overhaul, or refurbishing commodities in 0A505.a and .x, for equipment for those commodities in 0B505, and for software for that equipment and those commodities in 0D505; and 0E982 continue to require a license for export to Australia and the UK.

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