
Proposed Changes to ITAR Rules May Have Broad Impact; Initial Comments Due Jan. 25

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The U.S. Department of State's Directorate of Defense Trade Controls (DDTC) recently proposed significant changes to the export licensing exemptions and brokering rules under the U.S. International Traffic in Arms Regulations (ITAR). The proposals would modify licensing exemptions for hand-carried data, Foreign Military Sales (FMS) shipments, and exports in support of government activities. They would also impose additional compliance requirements on the brokering of defense articles. Public comments on the FMS and hand-carried data proposals are due by January 25, 2010.

Hand-Carry and FMS Exemptions: DDTC published proposals in the Federal Register to revise both the hand-carried data and FMS exemptions provided in ITAR §§ 125.4(b)(9) and 126.6. The proposals include:

- an update to the § 126.6 license exemption for U.S. Government export programs, such as the FMS program, that expands the transport options for exports under the exemption and shifts certain compliance requirements from the exporter to the Government; and
- an amendment to the § 125.4(b)(9) exemption for intra-company exports, to clarify that the exemption covers exports of technical data carried by U.S. persons traveling overseas, such as on laptops or in luggage. DDTC had previously issued conflicting guidance on whether this exemption could be used for so-called "hand-carried" exports of technical data.

As noted above, companies must submit their comment on these proposals by January 25, 2010.

Government Support Exemption: DDTC proposed significant changes to the § 126.4(a) exemption for exports in support of government activities. That exemption has previously been interpreted to allow U.S. entities to export defense articles and defense services if the exports are required by a U.S. Government contract and are for use by the U.S. Government or support an authorized U.S. foreign assistance program. The proposed revision splits the current exemption into eight separate exemptions. Together the proposed exemptions expand the scope of exports authorized under the exemption, and confirm that con-

tractors may use the exemption in certain circumstances. The proposal may limit defense services exports under the exemption, however.

Brokering: Having discussed significant revisions to the brokering regulations for several years now, DDTC informally issued new draft brokering rules late last fall. The draft rules would replace the existing brokering regulations. Taken as a whole, the proposed changes would likely subject many more U.S. and foreign companies to registration and prior approval obligations. The proposal includes the following significant changes:

- The current brokering regulations treat U.S. companies (and foreign companies subject to U.S. jurisdiction) as brokers if they facilitate defense-related transactions for a third party. The proposed rules removes the requirement for a third party beneficiary, and could require companies to register as brokers even when they act on their own behalf.
- The existing regulations have been interpreted to require brokering registration and prior approval only for transactions not otherwise authorized by DDTC. The proposed regulations could require foreign parties to obtain brokering registration and approval for re-exports of defense articles even if their activities were already authorized by an existing license.
- The current rule requiring brokers to provide prior notice of certain brokering transactions would be replaced by an expanded requirement for prior approval from DDTC.
- Where the current registration and brokering rules only require registrants to identify when they are owned or controlled by foreign persons, the proposed rules would require detailed explanations of foreign ownership or control from all registrants, including brokers, manufacturers and exporters.
- Among other reasons for control, the proposed brokering rules state that foreign companies would be required to register as brokers if they deal in U.S.-origin defense articles or defense services or transact in foreign defense articles or defense services on behalf of a U.S. person.
- The proposed regulations would allow foreign companies to register under a U.S. affiliate's broker registration if the foreign company agrees to submit to ITAR jurisdiction.

The Government support exemption and brokering proposals were announced in draft form without a specific date for public comment, and are available at <http://www.pmdtc.state.gov/FRN.html> and <http://www.pmdtc.state.gov/DTAG/index.html>. The proposals likely will have official comment periods in the next few months, however. U.S. and foreign companies involved in ITAR-controlled activities would be well advised to determine how the proposed rules could affect their business and compliance activities. Companies that anticipate significant impacts from these changes may want to consider providing feedback to DDTC.

If you have questions about this alert, please contact the authors below.

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