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CLIENT ALERT

DDTC Issues Proposed Rule for AUKUS Exemption and Related ITAR Changes

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On May 1, 2024, the U.S. Department of State's Directorate of Defense Trade Controls (DDTC) published a [proposed rule](#) to amend the International Traffic in Arms Regulations (ITAR) to create a licensing exemption and make other related changes for the trilateral security partnership between Australia, the United Kingdom, and the United States (AUKUS). The AUKUS partnership involves providing Australia with nuclear-powered attack submarines and sharing other sensitive technologies. DDTC is accepting public comments on the proposed rule until May 31.

In addition to the exemption, the proposed rule would amend the ITAR by implementing a new expedited license review process for exports to Australia, the United Kingdom, and Canada. DDTC also proposes to expand the scope of the licensing exemption within ITAR § 126.18 to permit the transfer of classified defense articles (including classified technical data) to certain Australian and United Kingdom citizens who are dual nationals of another country.

This article summarizes the three proposed changes in this rulemaking.

New ITAR § 126.7 Licensing Exemption

The Arms Export Control Act (AECA), the ITAR's enabling statute, was amended by Congress in December 2023 to require a licensing exemption for AUKUS. Before that exemption can take effect, the State Department must certify that Australia and the United Kingdom have export control systems comparable to those of the United States. The State Department did not provide that certification within the first required window, which passed on April 20, but it expects to do so in the next 120-day window.

In anticipation of that certification, DDTC published the proposed rule that would create a licensing exemption for AUKUS within ITAR § 126.7. That exemption would permit, without a license or other approval, "the export, reexport, retransfer, or temporary import of defense articles, the performance of defense services, or engagement in brokering activities as described in part 129 of this subchapter, between or among authorized users of this exemption, subject to the requirements and limitations in paragraph (b) of this section." And the exemption has up to eight requirements and limitations.

The proposed exemption's three most notable requirements and limitations are:

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- The exemption does not apply to defense articles and defense services identified in Supplement No. 2 to Part 126. DDTC says that these limitations are statutorily imposed or permitted “because 1) they are exempted from eligibility by statute, including AECA section 38(j)(1)(C)(ii), or 2) are specifically exempted by either the UK, Australia, or the United States, per AECA section 38(l)(4)(A).”
- The transferor and recipient must be (1) U.S. persons registered with DDTC and not debarred under ITAR § 127.7 or (2) authorized users identified on DDTC’s website. As DDTC explains, “Australia and the United Kingdom’s members will undergo an authorized user enrollment process, in coordination with DDTC, and those members will be listed through the DDTC website.” Notably, the AECA mandates that such authorized persons require approval by (1) the Secretary of State and (2) the Ministry of Defense, the Ministry of Foreign Affairs, or other similar authorities within those countries.
- The transfer’s value cannot exceed the amounts specified in ITAR § 123.15, and the transfer cannot involve manufacturing significant military equipment as specified in ITAR § 124.11. As DDTC notes, the AECA requires Congressional certification for such transfers.

The proposed exemption’s other limitations and requirements concern limiting the transfer territory where transfers can take place to only the AUKUS countries, the transferor maintaining certain records and information about each transfer made under the exemption, the transfer otherwise meeting the requirements of the ITAR, including that transferors must comply with the retransfer/reexport requirements of ITAR § 123.9(b), and imposing additional requirements for classified transfers.

New Expedited Licensing Process

As the proposed exemption will not apply to all transactions, DDTC also proposes to amend ITAR § 126.15 to expedite certain requests involving the export of defense articles and defense services to Australia, the United Kingdom, and Canada. Significantly, this expedited process sets forth mandatory deadlines for DDTC to approve, return without action, or deny the license request. The deadlines are 30 days if the request relates to a government-to-government agreement or 45 days for all other applications. There are limitations to the expedited process: The deadlines do not apply to license requests requiring Congressional certification, and the expedited process does not apply if an ITAR licensing exemption is available. Section 1344 of the National Defense Authorization Act (NDAA) for Fiscal Year 2024 mandates this expedited licensing process.

Associated Revisions to ITAR § 126.18

Finally, DDTC proposes to amend ITAR § 126.18 to permit certain citizens of Australia and the United Kingdom who are dual nationals of another country to receive classified

defense articles (including classified technical data). This exemption would require that such persons are authorized users or regular employees of an authorized user under the proposed licensing exemption in ITAR § 126.7, hold a specified security clearance, and are within the physical territory of Australia, the United Kingdom, or the United States, or they must be a member of the armed forces of those countries acting in their official capacity.

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With the unique experience of writing and heavily influencing U.S. export control laws, companies turn to Christopher Stagg as their go-to counsel for practical and strategic advice. In addition, he is often engaged as the export controls and ITAR lawyer of “last resort” for enforcement defense and to reverse adverse government actions, and he has the rare distinction of successfully litigating export control issues in federal court. He also serves as the co-chair of the American Bar Association’s export controls and economic sanctions committee.

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