



ITAR Amendment Expands License Exemption For Transfers By Or For The U.S. Government

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The Directorate of Defense Trade Controls (“DDTC”) issued a long-awaited revision to the ITAR license exemption at ITAR §126.4 for transfers by or for agencies of the U.S. Government. The amendment clarifies and expands the license exemption for use when parties are dealing with U.S. Government agencies in ITAR- related activities, and if used properly can provide significant benefits for government contracts firms.[\[1\]](#)

The original license exemption at §126.4, often referred to as the “by or for exemption,” was complex and difficult to use. For example, in its original form the exemption applied to only limited transactions with government agencies, such as temporary imports, temporary exports and defense services, and when all aspects of the transaction (export, carriage and delivery abroad) were “affected” by a U.S. Government agency or the export was covered under a “U.S. Government Bill of Lading.” The new amendment broadens the scope of the exemption and provides details on the terms and conditions of its use.

The revised exemption provides that a license is not required for certain transactions made by a U.S. Government department or agency or by persons acting on behalf of a U.S. Government department or agency if the transaction fits within the conditions of the exemption. Paragraph (a) of the exemption addresses when the exemption is available for transactions undertaken by a U.S. Government department or agency, and in certain instances by persons in a contractual relationship with a U.S. Government agency for certain types of export, reexport and retransfer transactions. Paragraph (b) of the exemption addresses when the exemption is available for transactions by private persons acting on behalf of a department or agency. Paragraphs (c), (d), (e) and (f) set out additional requirements applicable to transfers undertaken under the exemption.

The exemption has been expanded to cover exports, reexports, retransfers, temporary imports and the performance of defense services. In addition, the title of the exemption was revised from “shipments” to “transfers” to cover a wider number of types of transactions. The amendment was adopted following the issuance of a proposed rule and the submission of 17 public comments[\[2\]](#) According to the State Department release, the amendment was issued to further the objectives of the President’s Conventional Arms Transfer Policy.[\[3\]](#)

The exemption in §126.4 is for compliance with the ITAR only and does not relieve parties from obligations under other U.S. Government requirements.[\[4\]](#) For example, if a company’s transactions are subject to export control requirements under the Export Administration Regulations (“EAR”) rather

than ITAR, the exemption under ITAR §126.4 would not apply and the company will be required to obtain a license or identify a separate license exception under the EAR.

There are a number of conditions on the use of the exemption and companies should use care to confirm that such conditions are met if they wish to take advantage of the exemption. These include:

1. For exports to parties other than the U.S. Government made at the written direction of the U.S. Government or pursuant to an international agreement or arrangement as set forth in paragraph (b), the activity must be authorized for that department or agency under paragraphs (a)(1) through (a)(4) of the exemption;
2. For exports shipped other than by a U.S. diplomatic pouch or a U.S. Government aircraft, vehicle, or vessel, an Electronic Export Information (EEI) filing must be submitted to U.S. Customs and Border Protection using its electronic system(s) at the time of export, unless electronic submission of such information is unavailable, in which case U.S. Customs and Border Protection or the Department of Defense transmittal authority will issue instructions;
3. The exemption cannot be used in certain transactions that involve any of the “proscribed” countries identified in ITAR §126.1 (including products originating in or for export or reexport to countries, areas or persons);
4. In certain instances, changes in end-use or end-user of a defense article to any party or use not authorized under ITAR §126.4 requires approval by DDTC through a license or other authorization;[\[5\]](#)
5. The exemption in paragraph (a) does not apply when a U.S. Government department or agency acts as a “transmittal agent” on behalf of a private individual or firm, either as a convenience or in satisfaction of security requirements; and
6. Under ITAR §120.1(d), ITAR exemptions do not apply to transactions in which the exporter, any party to the export, any source or manufacturer, broker or other participant in the brokering activities, is generally “ineligible” as set forth in ITAR §120.1(c)(2), unless prior written authorization has been granted by DDTC.[\[6\]](#)

While the §126.4 exemption may reduce ITAR compliance requirements for government contractors, such firms nonetheless continue to have significant obligations under ITAR, including in transactions that do not fit within the terms and conditions of the exemption. These including the following:

- Registration. Registration with DDTC by parties engaged in manufacturing, exporting or temporarily importing defense articles or furnishing defense services under ITAR Part 122 or engaging in brokering activities under ITAR §129.3;
- Licenses For Transfer/ Disclosure of ITAR-Controlled Technical Data. Requirement to obtain licenses prior to transferring or disclosing ITAR-controlled technical data and software to foreign persons in the U.S. and overseas, including to employees of your own company, for transactions that do not fit within the conditions of the §126.4 exemption or other ITAR license exemptions;
- Technical Assistance Agreements. Requirement to obtain Technical Assistance Agreements (TAAs) authorized by the State Department for the performance of “defense services” related to ITAR-controlled items for transactions that do not fit within the conditions of the §126.4 exemption or other ITAR license exemptions;
- Data System Controls. Restrictions on permitting foreign nationals (including employees of your company) to have access to ITAR-controlled technical data and software in the company’s data

network;

- Licenses For Export of ITAR-Controlled Products. Requirement to obtain export licenses prior to exporting ITAR-controlled defense articles for transactions that do not fit within the conditions of the §126.4 exemption or other ITAR license exemptions;
- Import Licenses. Requirement to obtain import licenses for the temporary import of ITAR-controlled items for transactions that do not fit within the conditions of the §126.4 exemption or other ITAR license exemptions;
- Reexports and Retransfers. Requirement to obtain DDTC authorization prior to reexporting or retransferring ITAR-controlled items in foreign countries;
- Foreign Manufactured Items Using ITAR-Controlled Components, Technical Data or Software. Requirement to obtain DDTC authorization for the reexport or retransfer of items manufactured abroad using ITAR-controlled products, technical data or software;
- ITAR Brokering Activities. Requirement to obtain State Department authorization for engaging in “brokering activities” related to ITAR-controlled items, including for defense articles manufactured overseas and for activities performed overseas by your company’s foreign subsidiaries; (parties engaged in “brokering activities” as defined in ITAR §129.2(b) are also subject to registration, reporting and recordkeeping requirements under ITAR Part 129.); and
- Reporting Requirements For Payment of Commissions, Fees and Contributions. Requirement to file reports with the State Department for certain payments of sales commissions, fees and/or political contributions in connection with the sale of ITAR-controlled products or services that meet the requirements of ITAR Part 130;
- Transactions With Debarred or “Ineligible” Parties. Restrictions on entering transactions involving ITAR-controlled items with persons who have been debarred or who are deemed “ineligible” under the provisions of ITAR §120.1(c)(2);^[7]
- Transactions Involving the §126.1 “Proscribed Countries.” Restrictions on entering transactions involving ITAR-controlled items with countries listed in ITAR §126.1 (referred to as the “§126.1 Proscribed Countries”);^[8] and
- ITAR Recordkeeping Requirements. Requirement to maintain records in accordance with the ITAR recordkeeping requirements at 22 CFR §122.5.

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^[1] See Department of State Final Rule: International Traffic In Arms Regulations: Transfers Made By or For A Department or Agency of the U.S. Government; Federal Register Vol. 84, No. 76, p. 16398, April 19, 2019.

^[2] See Department of State Proposed Rule at 80 FR 29565, May 22, 2015.

^[3] See <https://www.whitehouse.gov/presidential-actions/national-security-presidential-memorandum-regarding-u-s-conventional-arms-transfer-policy/>

^[4] Paragraph (a)(5) of the exemption provides that the exemption is for compliance with the ITAR only and does not constitute any other

U.S. Government approval that may be required prior to the transfer of a defense article, and does not satisfy other obligations of U.S. law or regulation, or applicable Government process, procedure, or practice, including the requirement that any export of an item listed on the MTCR Annex receive the case-by-case review called for in the MTCR Guidelines.

[5] ITAR §126.4(a)(7) provides that the requirement in paragraph (f) of the exemption does not apply to defense articles and services exported from the United States pursuant to paragraphs (a)(1) and (3) of §126.4, provided the defense articles and services are subject to the terms thereof.

[6] ITAR §120.1(c)(2) provides that persons who have been convicted of violating the U.S. criminal statutes enumerated in §120.27, who have been debarred pursuant to ITAR Parts 127 or 128, who are subject to indictment or are otherwise charged (e.g., charged by criminal information in lieu of indictment) with violating the U.S. criminal statutes enumerated in §120.27, who are ineligible to contract with or to receive a license or other form of authorization to import defense articles or defense services from any agency of the U.S. Government, who are ineligible to receive an export license or other approval from any other agency of the U.S. Government, or who are subject to a Department of State policy of denial, suspension, or revocation under ITAR §126.7(a), are generally ineligible to be involved in activities regulated under ITAR.

[7] ITAR §120.1(c)(2) provides as follows: Persons who have been convicted of violating the U.S. criminal statutes enumerated in §120.27, who have been debarred pursuant to part 127 or 128 of this subchapter, who are subject to indictment or are otherwise charged (e.g., charged by criminal information in lieu of indictment) with violating the U.S. criminal statutes enumerated in §120.27, who are ineligible to contract with or to receive a license or other form of authorization to import defense articles or defense services from any agency of the U.S. Government, who are ineligible to receive an export license or other approval from any other agency of the U.S. Government, or who are subject to a Department of State policy of denial, suspension, or revocation under §126.7(a) of this subchapter, are generally ineligible to be involved in activities regulated under the subchapter.

[8] In addition, if a person knows or has reason to know of a proposed, final or actual sale, export or other transfer of ITAR-controlled items involving the Section 126.1 Proscribed Countries they are required to immediately inform the Directorate of Defense Trade Controls of such event.

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