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DEPARTMENT OF STATE

22 CFR Parts 120, 123, 124, 125, and 126

[Public Notice: 9487]

RIN: 1400-AD70

International Traffic in Arms: Revisions to Definition of Export and Related Definitions

AGENCY: Department of State.

ACTION: Interim final rule.

SUMMARY: As part of the President's Export Control Reform (ECR) initiative, the Department of State amends the International Traffic in Arms Regulations (ITAR) to update the definitions of "export," and "reexport or retransfer" in order to continue the process of harmonizing the definitions with the corresponding terms in the Export Administration Regulations (EAR), to the extent appropriate. Additionally, the Department creates definitions of "release" and "retransfer" in order to clarify and support the interpretation of the revised definitions that are in this rulemaking. The Department creates new sections of the ITAR detailing the scope of licenses, unauthorized releases of controlled information and revises the section on "exports" of technical data to U.S. persons abroad. Finally, the Department

consolidates regulatory provisions on the treatment of foreign dual and third country national employees within one exemption.

DATES: The rule is effective on **[INSERT DATE 90 DAYS FROM DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. The Department of State will accept comments on this interim final rule until **[INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESSES: Interested parties may submit comments within 30 days of the date of publication by one of the following methods:

- E-mail: DDTCPublicComments@state.gov with the subject line, “ITAR Amendment – Final Revisions to Definitions.”
- Internet: At www.regulations.gov, search for this notice by using this rule’s RIN (1400-AD70).

Comments received after that date may be considered, but consideration cannot be assured. Those submitting comments should not include any personally identifying information they do not desire to be made public or information for which a claim of confidentiality is asserted because those comments and/or transmittal e-mails will be made available for public inspection and copying after the close of the comment period via the Directorate of Defense Trade Controls website at www.pmdtcc.state.gov.

Parties who wish to comment anonymously may do so by submitting their comments via www.regulations.gov, leaving the fields that would identify the commenter blank and including no identifying information in the comment itself. Comments submitted via www.regulations.gov are immediately available for public inspection.

FOR FURTHER INFORMATION CONTACT: Mr. C. Edward Peartree, Director, Office of Defense Trade Controls Policy, Department of State, telephone (202) 663-1282; e-mail DDTCResponseTeam@state.gov. ATTN: ITAR Amendment – Revisions to Definitions. The Department of State’s full retrospective plan can be accessed at <http://www.state.gov/documents/organization/181028.pdf>.

SUPPLEMENTARY INFORMATION: The Directorate of Defense Trade Controls (DDTC), U.S. Department of State, administers the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120 through 130). The items subject to the jurisdiction of the ITAR, *i.e.*, defense articles and defense services, are identified on the ITAR’s U.S. Munitions List (USML) (22 CFR 121.1). With few exceptions, items not subject to the export control jurisdiction of the ITAR are subject to the jurisdiction of the Export Administration Regulations (“EAR,” 15 CFR parts 730 through 774, which includes the Commerce Control List (CCL) in Supplement No. 1 to part

774), administered by the Bureau of Industry and Security (BIS), U.S. Department of Commerce. Both the ITAR and the EAR create license requirements for exports and reexports of controlled items. Items not subject to the ITAR or to the exclusive licensing jurisdiction of any other set of regulations are subject to the EAR.

BIS is concurrently publishing amendments (BIS companion rule) to definitions, including “export,” “reexport,” “release,” and “transfer (in-country)” in the EAR.

Changes in This Rule

The following changes are made to the ITAR with this interim final rule: (i) revisions to the definitions for “export” and “reexport or retransfer;” (ii) new definitions for “release” and “retransfer;” (iii) new sections of the ITAR detailing the scope of licenses, unauthorized releases of information; (iv) revisions to the section on “exports” of technical data to U.S. persons abroad; and (v) consolidates §§ 124.16 and 126.18 within one exemption.. The remaining definitions published in the June 3, 2015 proposed rule (80 FR 31525), will be the subject of separate rulemakings and the public comments on those definitions will be addressed therein.

The Department received several public comments that address the rule as a whole. These comments are addressed here. Comments on a

specific definition or other proposed change are addressed below in the relevant section of the rule.

Several commenters replied to DDTC's request for public comments on the effective date described in the proposed rule, suggesting dates ranging from 60 to 180 days. Some commenters also requested that the rule be published as an interim final rule to allow additional public comments. The Department partially accepts these comments. The Department determined that the changes to definitions and additional definitions included in this rule can be implemented with minimal impact on the export control management systems. However, the Department agrees that additional public comment on all aspects of this rule may be beneficial. Therefore, the rule will be effective 90 days from publication, with a public comment period of 30 days to allow the Department to make any necessary improvements to the rule prior to it becoming effective.

One commenter suggested that the Department place all terms defined within the ITAR in quotations marks, as is done in the EAR. The Department does not accept this comment. The Department has determined that the addition of quotation marks will not enhance the readability of the ITAR.

Several commenters noted that the revised and new definitions in the proposed rule created layered definitions, where exporters must understand multiple definitions of words used within a definition. The Department recognizes that the new definitions require additional study of the new regulations.

One commenter suggested that the Department harmonize §126.1 with the list of restricted destinations under the EAR, specifically Crimea. The Department does not accept this comment. The imposition of a license requirement under the EAR is not the same as a presumption of denial for exports to a destination listed under §126.1. All defense articles require authorization from the Department for “export” or “reexport” to, or “retransfer” within, Ukraine and Russia, and all applications are processed consistent with U.S. government policy.

One commenter requested that the Department adopt an intra-company transfer exception, authorizing exports and reexports between company facilities in different destinations. This suggestion is outside the scope of the rulemaking and the Department does not accept the comment.

1. Export Definition Revised

The Department revises the definition of “export” in §120.17 to better align with the EAR’s revised definition of the term and to remove activities

associated with the further movement of a defense article or its “release” outside the United States, which now fall within the definition of “reexport” in §120.19 or “retransfer” in §120.51. The definition is revised to explicitly identify that §§ 126.16 and 126.17 (exemptions pursuant to the Australia and United Kingdom Defense Trade Cooperation Treaties) have their own definitions of “export,” which apply exclusively to those exemptions.

Although the wording of paragraph (a)(1) of this section has changed, the scope of the control is the same. Paragraph (a)(2) includes the control listed in the former paragraph (a)(4) (transfer of technical data to a foreign person). Paragraph (a)(3) includes the control listed in the former paragraph (a)(2) (transfer of registration, control, or ownership to a foreign person of an aircraft, vessel, or satellite). Paragraph (a)(4) includes the control listed in the former paragraph (a)(3) (transfer in the United States to foreign embassies). Paragraph (a)(5) maintains the control on performing a defense service. Paragraph (a)(6) is retained from the existing text to continue to advise exporters that the launch of a launch vehicle or payload does not constitute an export, but may involve a defense service. Paragraph (b) is added to clarify that disclosing technical data to a foreign person in the United States is deemed to be an “export” to all countries in which the foreign person holds or has held citizenship or holds permanent residency.

In response to public comments, the Department revised proposed paragraph (a)(4) to clarify that it is the “release” or transfer to an embassy or one of its agencies or subdivisions that is the activity of concern. This includes transfers to employees of an embassy or other foreign persons who will take the defense article to an embassy.

The Department also removed proposed paragraphs (a)(6) and (7). Proposed paragraph (a)(6) is no longer necessary, and the Department will address controls on encrypted technical data in a separate rulemaking. Proposed paragraph (a)(7) will also be addressed in a separate rulemaking, and until such time, the existing ITAR controls remain in place.

One commenter suggested that the Department adopt the definition of “export” that was in the EAR, which states “[e]xport means an actual shipment or transmission of items out of the United States,” and state that the other activities identified in §120.17 are “subject to the regulations in the same manner and with the same effect as an export.” The Department does not accept this comment. All of the activities identified in this section are an “export.”

Several commenters stated that the definition of “export” is too broad, as individuals may share information that they do not believe to be technical data and accidentally violate the ITAR. The Department does not accept this

comment. For information to be ITAR-controlled, it must be directly related to a defense article or specifically enumerated on the USML, and not satisfy one of the exclusions in §120.10(b).

One commenter suggested that the Department revise paragraphs (a)(1) and (2) so that (a)(1) includes only hardware exports and (a)(2) includes all technical data exports, whether to a foreign person in the United States or to someone in another country. The Department does not accept this comment. A major purpose of this rule is to harmonize the ITAR with the EAR, and the Department determined it would better align the definition of “export” by adopting the EAR’s framework of including one paragraph for an “export” that moves a defense article to another country, whether tangible or intangible, and another paragraph that addresses the “export” of technical data to foreign persons in the United States.

One commenter suggested that the changes to paragraph (a)(2), which define transfers to a foreign person in the United States as an “export,” and transfers to a foreign person outside the United States, but within one foreign country, as a “reexport” under §120.19(a)(2), would preclude a U.S. company from obtaining a DSP-5 to authorize their overseas foreign national employee to receive technical data. The Department does not accept this comment. The sending or taking of technical data out of the United

States to a foreign person employee will remain an “export” under paragraph (a)(1).

One commenter requested that the Department exclude software object code from paragraph (a)(2) so that the provision of ITAR-controlled object code to a foreign person is not an “export.” The Department does not accept this comment. Due to the sensitivity of items that remain defense articles following the revisions on the USML through ECR, retaining those items that provide the United States a critical military or intelligence advantage, ITAR control of the “release” of object code that is within the scope of the USML to foreign persons is appropriate.

Several commenters requested that the Department remove the portion of (a)(6) that addressed the provision of physical access to technical data. The Department has removed paragraph (a)(6). However, as described above for paragraph (a)(7), while the act of providing physical access does not constitute an “export,” any release of technical data to a foreign person is an “export,” “reexport,” or “retransfer” and will require authorization from the Department. If a foreign person views or accesses technical data as a result of being provided physical access, then an “export” requiring authorization will have occurred and the person who provided the foreign person with

physical access to the technical data is an exporter responsible for ITAR compliance.

A commenter suggested that the Department revise paragraph (b) to state that only the last country of citizenship or permanent residency will be considered for foreign persons, to harmonize with the EAR. The Department does not accept this comment. A main tenet of ECR is that the ITAR will have higher walls around fewer, more sensitive items, and this aspect of the control system is an example of the more stringent controls that the ITAR maintains.

One commenter noted that the preamble to the proposed rule and paragraph (b) are inconsistent because the preamble language was not limited to “releases” in the United States. The Department confirms that a disclosure to a foreign person in the United States is an “export,” while a “release” to a third-country foreign person abroad is a “reexport,” and a “release” to a foreign person within their own country is a “retransfer.” However, all such activities require authorization, and all citizenships held and any permanent residency status must be accounted for in the authorization.

One commenter requested the Department define permanent residency. The Department notes that permanent resident is defined at 8

USC Chapter 12, Immigration and Nationality, for the purpose of U.S. law. For the purpose of the ITAR related to third-country foreign persons in a foreign country, the Department generally considers the right to reside in the country indefinitely, be employed by an employer in the country, to make unlimited entry and exit to/from the country without a visa, and rights of voting or office holding in making a determination.

2. *Reexport Definition Revised*

The Department revises the definition of “reexport” in §120.19 to better align with the EAR’s revised definition and describe transfers of items subject to the jurisdiction of the ITAR between two foreign countries. The activities identified are the same as those in paragraphs (a)(1) through (3) of the revised definition of “export,” except that the shipment, “release,” or transfer is between two foreign countries or is to a third country national foreign person outside of the United States.

One commenter requested that the Department address the implications of §124.16 and §126.18 on the control in §120.19(a)(2). The Department notes that §120.19(a)(2) does not impose a new license requirement. However, the Department has determined that the authorization that may be requested for an agreement under §124.16 may be used for any

authorization from the Department. Therefore, §124.16 is converted into an exemption and moved to §126.18(d).

One commenter requested that the Department state that no “reexport” occurs if an item is moved from one foreign country to another either under the possession of the same end user or by being sent to the same end user. The Department does not accept this comment. Any movement of a defense article between two foreign countries is a “reexport” and requires an authorization. However, an “export” authorization may authorize further “reexport.”

3. Release Definition Added

The Department adds a definition of “release” in §120.50. This term is added to harmonize with the EAR, which has long used the term to cover activities that disclose information to foreign persons. “Release” includes the activities encompassed within the undefined term “disclose.” The activities that are captured include allowing a foreign person to inspect a defense article in a way that reveals technical data to the foreign person and oral or written exchanges of technical data with a foreign person. The adoption of the definition of “release” does not change the scope of activities that constitute an “export” and other controlled transactions under the ITAR. The word software was removed from the proposed definition of “release”

because the Department is not revising the definitions of defense article and technical data at this time, and as such, all ITAR controlled software remains technical data under §120.10.

Several commenters requested that the Department revise (a)(1) by replacing inspection with examination or “close examination” and state that such inspection or examination must “actually reveal technical data or software” to the foreign person. The Department does not accept this comment. Inspection and examination are synonyms. Adding the modifier “close” may be appropriate in certain circumstances, but other defense articles may not require a close examination for the “release” of technical data to occur. The Department is confident that limiting the control to situations where a visual or other inspection “releases” technical data sets the appropriate scope of control. Additionally, the Department confirms that the information about the defense article must be technical data and not simply attributes, such as size or weight.

4. Retransfer Definition Added

The Department adds a definition of “retransfer” in §120.51. This interim final rule moves “retransfer” from the definition of “reexport” in §120.19, better describes the activities being regulated and harmonizes it with the EAR, which controls “exports,” “reexports,” and “transfers (in

country)” as discrete events. Under the definition adopted in this interim final rule, a “retransfer” occurs with a change of end use or end user within the same foreign territory. Certain activities may fit within the definition of “reexport” and “retransfer,” such as the disclosure of technical data to a third country national abroad. Authorizations to “reexport” or “retransfer” a defense article are generally issued through the General Correspondence process under §123.9(c), or by an exemption.

One commenter requested that the Department confirm that the new definition of “retransfer” – i.e., a change in end use or end user – means that authorizations will no longer be required for transfers to subcontractors or intermediate consignees within the same country. The Department does not accept this comment. Providing a defense article to a subcontractor, or any party not explicitly authorized, for additional processing or repair is a change in the end user and end use of the defense article. Such a “retransfer” requires authorization, even if the party is required to return the defense article to the transferor.

One commenter requested that the Department remove “change of end use” from the definition of “retransfer,” asserting that this is an expansion of the scope of activities controlled under the ITAR. The commenter alternatively requested that the Department confirm that the party

responsible for any violation due to change in end use is the ultimate consignee. The Department does not accept these comments. Change in end use is within the prior definition of reexport/retransfer that was in §120.19. An ultimate consignee may also contact the Department to obtain authorization for a change in end use under §123.9(c). If a violation does occur, the Department will assess responsibility pursuant to its civil enforcement authority based on the relative culpability of all of the parties to the transaction. (See, e.g., §127.1(c)).

5. *Exemption for the Export of Technical Data to or for U.S. Persons*

Abroad Revised

The Department revises §125.4(b)(9) to better harmonize controls on the “release” of controlled information to U.S. persons abroad and to update the provisions of this section. The most significant updates are that foreign persons authorized to receive technical data in the United States will be eligible to receive that same technical data abroad, when on temporary assignment on behalf of their employer, and that the exemption will now authorize a “reexport” or “retransfer” as well. The revisions also clarify that a person travelling abroad may use this exemption to “export” technical data for their own use abroad. In all events, the technical data must be secured while abroad to prevent unauthorized “release.”

In response to public comments, the Department includes the ability to use this exception to authorize “reexports” and “retransfers,” in addition to “exports.” The Department also revises the introductory text from the proposed text to clarify that the requirement that a person be travelling or on temporary assignment abroad only applies to foreign person employees, maintaining the current scope of the exemption for U.S. persons. Further, the Department removes the additional proposed recordkeeping requirement, as the Department has determined that the recordkeeping requirements in §123.26 applicable to all exemptions are sufficient.

One commenter noted that the data security provisions appear to be wholly within the control of the person abroad, and not the exporter, at least in instances where the exporter is not also the person abroad. The Department agrees that the person in possession of the technical data abroad will have the primary responsibility for ensuring that the technical data is adequately secured, consistent with paragraph (b)(9)(ii). As with all “exports,” however, the exporter is responsible for ITAR compliance and must, prior to using the exemption, be confident that the person abroad is aware of the requirement and will properly implement the necessary security.

One commenter requested that the Department remove the reference to “encryption of the technical data” from the security provision in subparagraph (ii). The Department partially accepts this comment. Subparagraph (ii) requires that sufficient security precautions be taken and has been revised to clarify that the list of security precautions is exemplary.

One commenter requested that the Department explicitly state that technical data stored on servers in the United States may be accessed by a U.S. person in a foreign country through a secure/encrypted connection, using this exemption. The Department confirms that a U.S. person or authorized foreign person may access technical data in the United States from abroad using a secure connection. This activity constitutes an “export” of the technical data because it is sent to the foreign country, even if only as a transient or temporary document in electronic storage, and such export may be authorized by this exemption.

One commenter requested that the Department include foreign subsidiaries and affiliates of U.S. companies in paragraph (b)(9), so long as the foreign subsidiary or affiliate is authorized to receive the technical data. The Department does not accept this comment. If an authorization exists that allows a foreign subsidiary or affiliate access to technical data, that authorization is an authorization to “export” that technical data to its

employees within the approved territory. If the employees are outside of approved territory, they are not authorized to receive the technical data.

One commenter requested that the Department clarify whether a party who followed DDTC guidance in direct conflict with the National Industrial Security Program Operating Manual (NISPOM), as provided by subparagraph (v), would be at risk of violating the NISPOM. The Department notes that the Secretary of State has the authority to impose different conditions on “exports” apart from those imposed by the Department of Defense, as noted in 71 FR 20534, 20535 (April 21, 2006), and that this paragraph is not being revised by the current rulemaking.

One commenter requested that the Department clarify whether a U.S. person sending or taking technical data overseas on an encrypted device for his personal use or use by another U.S. person is engaged in an “export.” As noted above, the Department will address the proposed §120.52(a)(4) in a separate rulemaking.

One commenter requested that the Department insert a note cross-referencing to §120.52 for other options for sending information to persons abroad. As noted above, the Department will address the proposed §120.52 in a separate rulemaking.

One commenter stated that this section implies that technical data sent to a foreign country in compliance with the proposed §120.52(a)(4) is an “export.” As noted above, the Department will address the proposed §120.52 in a separate rulemaking.

6. Scope of License Added

The Department adds §123.28 and §124.1(e) to clarify the scope of a license, in the absence of a proviso, and to state that authorizations are granted based on the information provided by the applicant. This means that while providing false information to the U.S. government as part of the application process for the “export,” “reexport,” or “retransfer” of a defense article or the performance of a defense service is a violation of the ITAR (see §127.2(a)), the Department may also deny, revoke, suspend, or amend the license under §126.7(a) as a result of the false information.

One commenter suggested that the Department not adopt these sections, as an exporter could identify a defense article, end user, or end use in the supporting documentation for a license application that the Department did not intend to authorize in the license itself. The Department does not accept this comment. The Department reviews all information submitted by an applicant and includes provisos to condition the scope of the

authorization to the defense articles, parties, and end uses that are intended to be authorized.

Request for Comments

The Department invites public comment on any of the definitions set forth in this rulemaking.

Regulatory Findings

Administrative Procedure Act.

The Department of State is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the U. S. government and that rules implementing this function are exempt from sections 553 (rulemaking) and 554 (adjudications) of the Administrative Procedure Act (APA). Although the Department is of the opinion that this rulemaking is exempt from the rulemaking provisions of the APA, the Department is publishing this rule with a 30-day provision for public comment and without prejudice to its determination that controlling the import and export of defense articles and defense services is a foreign affairs function.

Regulatory Flexibility Act.

Since the Department is of the opinion that this rulemaking is exempt from the rulemaking provisions of 5 U.S.C. 553, there is no requirement for an analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This rulemaking does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996.

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (the “Act”), a major rule is a rule that the Administrator of the OMB Office of Information and Regulatory Affairs finds has resulted or is likely to result in: 1) An annual effect on the economy of \$100,000,000 or more; 2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or 3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based

enterprises to compete with foreign-based enterprises in domestic and foreign markets.

The Department does not believe this rulemaking will have an annual effect on the economy of \$100,000,000 or more, nor will it result in a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions, or have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and foreign markets. The proposed means of solving the issue of data protection are both familiar to and extensively used by the affected public in protecting sensitive information.

Executive Orders 12372 and 13132.

This rulemaking will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rulemaking does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing

Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this rulemaking.

Executive Orders 12866 and 13563.

Executive Orders 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). The executive orders stress the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rulemaking has been designated a “significant regulatory action,” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rulemaking has been reviewed by the Office of Management and Budget (OMB).

Executive Order 12988.

The Department of State has reviewed the rulemaking in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175.

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs

on Indian tribal governments, and will not preempt tribal law. Accordingly, Executive Order 13175 does not apply to this rulemaking.

Paperwork Reduction Act.

This rulemaking does not impose any new reporting or recordkeeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35; however, the Department of State seeks public comment on any unforeseen potential for increased burden.

List of Subjects

22 CFR 120 and 125

Arms and munitions, Classified information, Exports.

22 CFR 123

Arms and munitions, Exports, Reporting and recordkeeping requirements.

22 CFR Part 124

Arms and munitions, Exports, Technical assistance.

22 CFR 126

Arms and munitions, Exports.

Accordingly, for the reasons set forth above, title 22, chapter I, subchapter M, parts 120, 123, 124, 125, and 126 are amended as follows:

PART 120 – PURPOSE AND DEFINITIONS

1. The authority citation for part 120 continues to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2794; 22 U.S.C. 2651a; Pub. L. 105–261, 112 Stat. 1920; Pub. L. 111–266; Section 1261, Pub. L. 112-239; E.O. 13637, 78 FR 16129.

2. Section 120.17 is revised to read as follows:

§ 120.17 Export.

(a) Except as set forth in §126.16 or §126.17, *export* means:

(1) An actual shipment or transmission out of the United States, including the sending or taking of a defense article out of the United States in any manner;

(2) Releasing or otherwise transferring technical data to a foreign person in the United States (a “deemed export”);

(3) Transferring registration, control, or ownership of any aircraft, vessel, or satellite subject to the ITAR by a U.S. person to a foreign person;

(4) Releasing or otherwise transferring a defense article to an embassy or to any of its agencies or subdivisions, such as a diplomatic mission or consulate, in the United States;

(5) Performing a defense service on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad; or

(6) A launch vehicle or payload shall not, by reason of the launching of such vehicle, be considered an export for purposes of this subchapter. However, for certain limited purposes (see §126.1 of this subchapter), the controls of this subchapter may apply to any sale, transfer or proposal to sell or transfer defense articles or defense services.

(b) Any release in the United States of technical data to a foreign person is deemed to be an export to all countries in which the foreign person has held or holds citizenship or holds permanent residency.

3. Section 120.19 is revised to read as follows:

§ 120.19 Reexport.

(a) *Reexport* means:

(1) An actual shipment or transmission of a defense article from one foreign country to another foreign country, including the sending or taking of a defense article to or from such countries in any manner;

(2) Releasing or otherwise transferring technical data to a foreign person who is a citizen or permanent resident of a country other than the foreign country where the release or transfer takes place (a “deemed reexport”); or

(3) Transferring registration, control, or ownership of any aircraft, vessel, or satellite subject to the ITAR between foreign persons.

(b) Any release outside the United States of technical data to a foreign person is deemed to be a reexport to all countries in which the foreign person has held or holds citizenship or holds permanent residency.

4. Section 120.50 is added to read as follows:

§ 120.50 Release.

(a) Technical data is released through:

(1) Visual or other inspection by foreign persons of a defense article that reveals technical data to a foreign person; or

(2) Oral or written exchanges with foreign persons of technical data in the United States or abroad.

(b) [Reserved]

5. Section 120.51 is added to read as follows:

§ 120.51 Retransfer.

A retransfer is a change in end use or end user of a defense article within the same foreign country.

PART 123 – LICENSES FOR THE EXPORT AND TEMPORARY IMPORT OF DEFENSE ARTICLES

6. The authority citation for part 123 continues to read as follows:

Authority: Secs. 2, 38, and 71, 90, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2753; 22 U.S.C. 2651a; 22 U.S.C. 2776; Pub. L. 105-261,

112 Stat. 1920; Sec. 1205(a), Pub. L. 107-228; Section 1261, Pub. L. 112-239; E.O. 13637, 78 FR 16129.

7. Section 123.28 is added to read as follows:

§ 123.28 Scope of a license.

Unless limited by a condition set out in a license, the export, reexport, retransfer, or temporary import authorized by a license is for the item(s), end-use(s), and parties described in the license application and any letters of explanation. DDTC grants licenses in reliance on representations the applicant made in or submitted in connection with the license application, letters of explanation, and other documents submitted.

PART 124—AGREEMENTS, OFF-SHORE PROCUREMENT, AND OTHER DEFENSE SERVICES

8. The authority citation for part 124 continues to read as follows:

Authority: Secs. 2, 38, and 71, 90, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2651a; 22 U.S.C. 2776; Section 1514, Pub. L. 105-261; Pub. L. 111-266; Section 1261, Pub. L. 112-239; E.O. 13637, 78 FR 16129.

9. Section 124.1 is amended by adding paragraph (e) to read as follows:

§ 124.1 Manufacturing license agreements and technical assistance agreements.

* * * * *

(e) Unless limited by a condition set out in an agreement, the export, reexport, retransfer, or temporary import authorized by a license is for the item(s), end-use(s), and parties described in the agreement, license, and any letters of explanation. DDTC approves agreements and grants licenses in reliance on representations the applicant made in or submitted in connection with the agreement, letters of explanation, and other documents submitted.

§ 124.8 [Amended]

10. Section 124.8 is amended by removing “§§124.16 and 126.18” and adding “§126.18” in its place in paragraph (5).

§ 124.12 [Amended]

11. Section 124.12 is amended by removing paragraph (a)(10).

§ 124.16 [Removed and Reserved]

12. Section 124.16 is removed and reserved.

**PART 125 – LICENSES FOR THE EXPORT OF TECHNICAL DATA
AND CLASSIFIED DEFENSE ARTICLES**

13. The authority citation for part 125 continues to read as follows:

Authority: Secs. 2 and 38, 90, 90 Stat. 744 (22 U.S.C. 2752, 2778); 22 U.S.C. 2651a; E.O. 13637, 78 FR 16129.

14. Section 125.4 is amended by revising paragraph (b)(9) to read as follows:

§ 125.4 Exemptions of general applicability.

* * * * *

(b) * * *

(9) Technical data, including classified information, regardless of media or format, exported, reexported, or retransferred by or to a U.S. person, or a foreign person employee of a U.S. person travelling or on temporary assignment abroad, subject to the following restrictions:

(i) Foreign persons may only export, reexport, retransfer, or receive such technical data as they are authorized to receive through a separate license or other approval.

(ii) The technical data exported, reexported, or retransferred under this authorization may only be possessed or used by a U.S. person or authorized foreign person. Sufficient security precautions must be taken to prevent the unauthorized release of the technical data. Such security precautions may include encryption of the technical data; the use of secure network connections, such as virtual private networks; the use of passwords or other access restrictions on the electronic device or media on which the technical

data is stored; and the use of firewalls and other network security measures to prevent unauthorized access.

(iii) The individual is an employee of the U.S. government or is directly employed by a U.S. person and not by a foreign subsidiary.

(iv) Technical data authorized under this exception may not be used for foreign production purposes or for defense services unless authorized through a license or other separate approval.

(v) Classified information is sent or taken outside the United States in accordance with the requirements of the Department of Defense National Industrial Security Program Operating Manual (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case such guidance must be followed).

* * * * *

PART 126 – GENERAL POLICIES AND PROVISIONS

15. The authority citation for part 126 continues to read as follows:

Authority: Secs. 2, 38, 40, 42, and 71, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2780, 2791, and 2797); 22 U.S.C. 2651a; 22 U.S.C. 287c; E.O. 12918, 59 FR 28205; 3 CFR, 1994 Comp., p. 899; Sec. 1225, Pub. L. 108-375; Sec. 7089, Pub. L. 111-117; Pub. L. 111-266; Sections 7045 and 7046, Pub. L. 112-74; E.O. 13637, 78 FR 16129.

16. Section 126.18 is amended by removing “§124.16” in paragraph (a) and adding “paragraph (d) of this section” in its place, and adding paragraph (d).

The addition reads as follows:

§ 126.18 Exemptions regarding intra-company, intra-organization, and intra-governmental transfers to employees who are dual nationals or third-country nationals.

* * * * *

(d) Notwithstanding any other provisions of this subchapter, no approval is needed from the Directorate of Defense Trade Controls (DDTC) for the reexport of unclassified defense articles or defense services to individuals who are dual national or third-country national employees of a foreign business entity, foreign governmental entity, or international organization, that is an authorized end-user, foreign signatory, or consignee (including approved sub-licensees) for those defense articles or defense services, when such individuals are:

- (1) Bona fide regular employees directly employed by the foreign business entity, foreign governmental entity, or international organization;
- (2) Nationals exclusively of countries that are members of NATO, the European Union, Australia, Japan, New Zealand, or Switzerland;

- (3) Within the physical territories of the countries listed in paragraph (d)(2) of this section or the United States during the reexport;
- (4) Signatory to a Non-Disclosure Agreement, unless their employer is a signatory or sublicensee to an agreement under §124.1 authorizing those defense articles or defense services; and
- (5) Not the recipient of any permanent transfer of hardware.

Dated: May 23, 2016.

Rose E. Gottemoeller,

Under Secretary,

Arms Control and International Security,

Department of State.

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