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DEPARTMENT OF STATE

22 CFR Parts 120 and 126

[Public Notice: 9602]

RIN: 1400-AD95

Amendment to the International Traffic in Arms Regulations: Tunisia, Eritrea, Somalia, the Democratic Republic of the Congo, Liberia, Côte d'Ivoire, Sri Lanka, Vietnam, and Other Changes

AGENCY: Department of State.

ACTION: Interim final rule.

SUMMARY: The Department of State is amending the International Traffic in Arms Regulations (ITAR) to designate Tunisia as a major non-NATO ally (MNNA); reorganize the content in several paragraphs to clarify the intent of the ITAR; update defense trade policy regarding Eritrea, Somalia, the Democratic Republic of the Congo, Liberia, and Côte d'Ivoire to reflect resolutions adopted by the United Nations Security Council; update defense trade policy regarding Sri Lanka to reflect the Consolidated Appropriations Act, 2016; and update defense trade policy regarding Vietnam to reflect a determination made by the Secretary of State.

DATES: The rule is effective on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. The Department of State will accept comments on this interim final rule until [INSERT DATE 30 DAYS after 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 – Section 126.1 Re-organization.”
- Internet: At www.regulations.gov, search for docket number DOS-2016-0059.

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.pmdtdc.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, U.S. Department of State, telephone (202) 663-2792, or e-mail *DDTCResponseTeam@state.gov*.
ATTN: Regulatory Change, ITAR Section 126.1 Update 2016.

SUPPLEMENTARY INFORMATION: In Presidential Determination No. 2015-09, on July 10, 2015, President Obama exercised his authority under § 517 of the Foreign Assistance Act of 1961 (FAA) to designate Tunisia as a MNNA for the purposes of the FAA and the Arms Export Control Act (AECA). The Department of State amends ITAR § 120.32 to reflect this change.

Paragraphs (a), (c), and (d) of § 126.1 of the ITAR are updated to enhance their clarity. The fundamental content of the aforementioned paragraphs is not changing, but is reorganized in this rule by subject matter. The lists of proscribed countries were previously in multiple paragraphs, but are now consolidated in paragraph (d). Provisions relevant to the rationale for defense trade sanctions, previously located in paragraphs (a), (c), and (d) are now consolidated in paragraph (c). Section 126.18 of the ITAR is

amended to maintain conformity with revised paragraph (d) of ITAR § 126.1.

Recent actions by the United Nations (UN), Congress, and the Executive require the Department to amend ITAR § 126.1 to reflect the change in policy towards individual nations identified in that section.

On October 23, 2015, the United Nations Security Council (UNSC) adopted United Nations Security Council Resolution (UNSCR) 2244, which reaffirmed the arms embargoes on Eritrea and Somalia. Exemptions from the arms embargo on Somalia are set forth in paragraphs 6 through 11 of UNSCR 2111 and paragraphs 2 through 9 of UNSCR 2142. Thus subparagraphs (1) and (2) of § 126.1 (m) of the ITAR have been revised to reflect this change, and subparagraphs (3) through (6) are added to reflect new exceptions for Somalia as enumerated in UNSCR 2111. The revised control text follows the language as published in the aforementioned UNSCRs.

Exemptions from the arms embargo on Eritrea are set forth in paragraphs 12 and 13 of UNSCR 2111; consequently, Eritrea will be moved to paragraph (h) of § 126.1. The revised control text follows the language as published in the aforementioned UNSCRs. The Department modifies paragraph (h) of ITAR § 126.1 accordingly.

On June 23, 2016, the UNSC adopted Resolution 2293, which expanded the exemptions from the arms embargo on the Democratic Republic of the Congo. Exemptions from the arms embargo are set forth in paragraph 3 of the UNSCR. The revised control text follows the language as published in the aforementioned UNSCR. The Department modifies paragraph (i) of ITAR § 126.1 accordingly.

On May 25, 2016, the UNSC adopted Resolution 2288, which terminated the sanctions regime against Liberia, including restrictions on exports to Liberia of arms and related materiel. The Department reserves paragraph (o) to remove Liberia from ITAR § 126.1.

On April 28, 2016 the UNSC adopted Resolution 2283, which terminated the sanctions regime against Côte d'Ivoire, including restrictions on exports to Côte d'Ivoire of arms and related materiel. The Department reserves paragraph (q) to remove Côte d'Ivoire from ITAR § 126.1.

Licensing restrictions relating to Sri Lanka articulated in section 7044(e) of the Consolidated Appropriations Act, 2015, P.L. 113-235, and in previous appropriations acts, were not carried forward in section 7044(e) of the Consolidated Appropriations Act, 2016, P.L. 114-113. Therefore, the Department reserves paragraph (n) to remove Sri Lanka from ITAR § 126.1.

The Secretary of State lifted the ban on lethal weapons sales to Vietnam in May 2016. Accordingly, the Department reserves paragraph (l) and the associated note to remove Vietnam from ITAR § 126.1.

For more information, please visit the Directorate of Defense Trade Controls (DDTC) internet website at <https://www.pmddtc.state.gov/>.

REQUEST FOR COMMENTS

The Department invites public comment regarding the organization and clarity of paragraphs (a), (c), and (d) of ITAR § 126.1, as set forth in this rulemaking. Comments regarding the foreign policy of the United States as described herein are outside of the scope of this request.

REGULATORY ANALYSIS AND NOTICES

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 United States Government and that rules implementing this function are exempt from sections 553 (rulemaking) and 554 (adjudications) of the Administrative Procedure Act. Since this rule is exempt from 5 U.S.C. 553, the provisions of § 553(d) do not apply to this rulemaking. Therefore, this rule is effective upon publication. The Department also finds that, given the national security issues surrounding U.S. policy towards the aforementioned

countries, there is good cause for the effective date of this rule to be the date of publication, as provided by 5 U.S.C. 553(d)(3).

Regulatory Flexibility Act

Since this rule is exempt from the 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

The Department does not believe this rulemaking is a major rule within the definition of 5 U.S.C. 804.

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, the

Department has 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). These executive orders stress the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Department has determined that the benefits of this rulemaking outweigh any cost to the public, which the Department believes will be minimal. This rule has been designated a “significant regulatory action,” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget (OMB).

Executive Order 12988

The Department of State reviewed this rulemaking in light of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State 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, the requirements of Executive Order 13175 do not apply to this rulemaking.

Paperwork Reduction Act

This rule does not impose any new reporting or recordkeeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects in 22 CFR Parts 120 and 126

Arms and munitions, Exports.

Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, parts 120 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 120.32 is revised to read as follows:

§ 120.32 Major non-NATO ally.

Major non-NATO ally, as defined in section 644(q) of the Foreign Assistance Act of 1961 (22 U.S.C. 2403(q)), means a country that is designated in accordance with section 517 of the Foreign Assistance Act of 1961 (22 U.S.C. 2321k) as a major non-NATO ally for purposes of the Foreign Assistance Act of 1961 and the Arms Export Control Act (22 U.S.C. 2151 *et seq.* and 22 U.S.C. 2751 *et seq.*). The following countries are designated as major non-NATO allies: Afghanistan (*see* § 126.1(g) of this subchapter), Argentina, Australia, Bahrain, Egypt, Israel, Japan, Jordan, Kuwait, Morocco, New Zealand, Pakistan, the Philippines, Republic of Korea, Thailand, and Tunisia. Taiwan shall be treated as though it were designated a major non-NATO ally.

PART 126 – GENERAL POLICIES AND PROVISIONS

3. 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.

4. Section 126.1 is amended by
 - a. Revising paragraphs (a), (c), and (d);
 - b. Adding paragraph (h);
 - c. Revising paragraphs (i)(2) and (3):
 - d. Adding paragraph (i)(5):
 - e. Removing and reserving paragraph (l);
 - f. Revising paragraph (m); and
 - g. Removing and reserving paragraphs (n), (o), and (q).

The revisions and additions read as follows:

§ 126.1 Prohibited exports, imports, and sales to or from certain countries

(a) *General.* It is the policy of the United States to deny licenses and other approvals for exports and imports of defense articles and defense services, destined for or originating in certain countries. The exemptions provided in this subchapter, except §§ 123.17, 126.4, and 126.6 of this subchapter, or when the recipient is a U.S. government department or agency, do not apply with respect to defense articles or defense services originating in or for

export to any proscribed countries, areas, or persons. (See § 129.7 of this subchapter, which imposes restrictions on brokering activities similar to those in this section).

* * * * *

(c) Identification in § 126.1 of the ITAR may derive from:

(1) *Exports and sales prohibited by United Nations Security Council sanctions measures.* Whenever the United Nations Security Council mandates sanctions measures, all transactions that are prohibited by the aforementioned measures and involve U.S. persons (see § 120.15 of this subchapter) inside or outside of the United States, or any person in the United States, and defense articles or defense services described on the United States Munitions List (22 CFR part 121), irrespective of origin, are prohibited under the ITAR for the duration of the sanction, unless the Department of State publishes a notice in the *Federal Register* specifying different measures.

(2) *Terrorism.* Exports or temporary imports of defense articles or defense services to countries that the Secretary of State has determined to be State Sponsors of Terrorism are prohibited under the ITAR. These countries have repeatedly provided support for acts of international terrorism, which is contrary to the foreign policy of the United States and thus subject to the

policy specified in paragraph (a) of this section and the requirements of section 40 of the Arms Export Control Act (22 U.S.C. 2780) and the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 (22 U.S.C. 4801). Exports to countries that the Secretary of State has determined and certified to Congress, pursuant to section 40A of the Arms Export Control Act (22 U.S.C. 2781) and Executive Order 13637, are not cooperating fully with United States antiterrorism efforts are subject to the policy specified in paragraph (a) of this section. The Secretary of State makes such determinations and certifications annually.

(3) *Arms embargoes and sanctions.* The policy specified in paragraph (a) of this section applies to countries subject to a United States arms embargo or sanctions regime, such as those described in the Foreign Assistance Act of 1961 (22 U.S.C. 2151 *et seq.*), the International Religious Freedom Act of 1998 (22 U.S.C. 6401 *et seq.*), or the Child Soldiers Prevention Act of 2008 (22 U.S.C. 2370c–2370c-2), or whenever an export of defense articles or defense services would not otherwise be in furtherance of world peace and the security and foreign policy of the United States.

(d) *Countries subject to certain prohibitions:*

(1) For defense articles and defense services, the following countries have a policy of denial:

COUNTRY
Belarus
Burma
China
Cuba
Iran
North Korea
Syria
Venezuela

(2) For defense articles and defense services, a policy of denial applies to the following countries except as specified in the associated paragraphs below:

COUNTRY	COUNTRY SPECIFIC PARAGRAPH LOCATION
Afghanistan	See also paragraph (g) of this section
Central African Republic	See also paragraph (u) of this section
Cyprus	See also paragraph (r) of this section
Democratic Republic of Congo	See also paragraph (i) of this section
Eritrea	See also paragraph (h) of this section
Haiti	See also paragraph (j) of this section
Iraq	See also paragraph (f) of this section
Lebanon	See also paragraph (t) of this section
Libya	See also paragraph (k) of this section
Somalia	See also paragraph (m) of this section
Sudan	See also paragraph (v) of this section
Zimbabwe	See also paragraph (s) of this section

* * * * *

(h) *Eritrea*. It is the policy of the United States to deny licenses or other approvals for exports or imports of defense articles and defense services

destined for or originating in Eritrea, except that a license or other approval may be issued, on a case-by-case basis, for:

(1) Non-lethal military equipment intended solely for humanitarian or protective use, as approved in advance by the relevant committee of the Security Council; or

(2) Personal protective clothing, including flak jackets and military helmets, temporarily exported to Eritrea by United Nations personnel, representatives of the media, humanitarian and development workers, and associated personnel for their personal use only.

(i) * * *

(2) Defense articles and defense services intended solely for the support of or use by the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) or the African Union-Regional Task Force;

(3) Protective clothing, including flak jackets and military helmets, temporarily exported to the Democratic Republic of the Congo by United Nations personnel, representatives of the media, and humanitarian and development workers and associated personnel, for their personal use only;

* * * * *

(5) Defense articles and defense services as approved by the relevant committee of the Security Council.

* * * * *

(l) [Reserved]

(m) *Somalia*. It is the policy of the United States to deny licenses or other approvals for exports or imports of defense articles and defense services destined for or originating in Somalia, except that a license or other approval may be issued, on a case-by-case basis, for:

(1) Defense articles and defense services intended solely for the support of or use by the following:

(i) The African Union Mission in Somalia (AMISOM);

(ii) United Nations personnel, including the United Nations Assistance Mission in Somalia (UNSOM);

(iii) AMISOM's strategic partners, operating solely under the African Union (AU) Strategic Concept of January 5, 2012 (or subsequent AU strategic concepts), and in cooperation and coordination with AMISOM; or

(iv) The European Union Training Mission (EUTM) in Somalia.

(2) Defense articles and defense services intended solely for the development of the Security Forces of the Federal Government of Somalia, to provide security for the Somali people, notified to the relevant committee

of the Security Council at least five days in advance, except in relation to deliveries of the following articles, the supply of which needs to be approved in advance by the relevant committee of the Security Council:

- (i) Surface to air missiles, including Man-Portable Air-Defense Systems (MANPADS);
 - (ii) Guns, howitzers, and cannons with a caliber greater than 12.7 mm, and ammunition and components specially designed for these (this does not include shoulder fired anti-tank rocket launchers such as RPGs or LAWs, rifle grenades, or grenade launchers);
 - (iii) Mortars with a caliber greater than 82 mm;
 - (iv) Anti-tank guided weapons, including Anti-tank Guided Missiles (ATGMs) and ammunition and components specially designed for these items;
 - (v) Charges and devices intended for military use containing energetic material; mines, and related materiel; and
 - (vi) Weapon sights with a night vision capability.
- (3) Defense articles and defense services supplied by United Nations member states or international, regional, or subregional organizations intended solely for the purposes of helping develop Somali security sector institutions, other than the Security Forces of the Federal Government of

Somalia, and in the absence of a negative decision by the relevant committee of the Security Council within five working days of receiving a notification of any such assistance from the supplying State, international, regional or subregional organization;

(4) Defense articles for the sole use by United Nations member states or international, regional, or subregional organizations undertaking measures to suppress acts of piracy and armed robbery at sea off the coast of Somalia, upon the request of the Federal Government of Somalia for which it has notified the Secretary-General, and provided that any measures undertaken shall be consistent with applicable international humanitarian and human rights laws;

(5) Personal protective clothing, including flak jackets and military helmets, temporarily exported to Somalia by United Nations personnel, representatives of the media, humanitarian or development workers, or associated personnel for their personal use only; or

(6) Supplies of non-lethal defense articles intended solely for humanitarian or protective use, notified to the relevant committee of the Security Council five days in advance for its information only, by the supplying State, international, regional, or subregional organization.

(n)-(o) [Reserved]

* * * * *

(q) [Reserved]

* * * * *

5. Section 126.18 is amended by revising the fourth sentence of paragraph (c)(2) to read as follows:

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

* * * * *

(c) * * *

(2) * * * Although nationality does not, in and of itself, prohibit access to defense articles, an employee who has substantive contacts with persons from countries listed in § 126.1(d)(1) shall be presumed to raise a risk of diversion, unless DDTC determines otherwise. * * *

Rose E. Gottemoeller,

Under Secretary,
Arms Control and International Security,
Department of State.