



[Billing Code 4710-25]

DEPARTMENT OF STATE

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

RIN 1400-AC88

[Public Notice 9139]

Amendment to the International Traffic in Arms Regulations: Exports and Temporary Imports Made to or on Behalf of a Department or Agency of the U.S. Government; Procedures for Obtaining State Department Authorization to Export Items Subject to the Export Administration Regulations; Revision to the Destination Control Statement; and Other Changes

AGENCY: Department of State.

ACTION: Proposed Rule.

SUMMARY: As part of the President's Export Control Reform (ECR) effort, the Department of State is proposing to amend the International Traffic in Arms Regulations (ITAR) to: clarify regulations pertaining to the export of items subject to the Export Administration Regulations (EAR); revise the licensing exemption for exports made to or on behalf of an agency of the U.S. government; revise the destination control statement in ITAR §123.9 to harmonize the language with the EAR; and make several minor edits for clarity. The proposed revisions contained in this rule are part of the Department of State's retrospective plan under E.O. 13563.

DATES: The Department of State will accept comments on this proposed rule until [INSERT DATE 45 DAYS FROM DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Interested parties may submit comments by one of the following methods:

- E-mail: *DDTCPublicComments@state.gov* with the subject line, “ITAR Amendment – To or on behalf of”;
- Internet: At *www.regulations.gov*, search for this proposed rule by using this proposed rule’s RIN (1400-AC88).

Comments received after that date will be considered if feasible, 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) 663-2792; e-mail *DDTCPublicComments@state.gov*.

ATTN: ITAR Amendment – To or on behalf of. The Department of State’s full retrospective plan can be accessed at <http://www.state.gov/documents/organization/181028.pdf>.

SUPPLEMENTARY INFORMATION:

The Department proposes to make the following revisions in this rule:

Items subject to the EAR: This proposed rule adds clarifying language to various provisions of the ITAR pertaining to the export of items subject to the EAR pursuant to a Department of State authorization, when such exports are made in conjunction with items subject to the ITAR. These revisions include guidance on the use of licensing exemptions for export of such items, as well as clarification that items subject to the EAR are not considered defense articles, even when exported under a license or other approval (to include exemptions, *see* §120.20) issued by the Department of State.

Items exported to or on behalf of an agency of the U.S. government:

This proposed rule revises the licensing exemption language in ITAR §126.4 to clarify when exports may be made to or on behalf of an agency of the U.S. government without a license. Additionally, the scope of this exemption is expanded in that it will allow for permanent exports, rather than only temporary exports. The Department seeks comments from the public on whether the proposed revision adequately eliminates ambiguity as to when the exemption may be applied, and whether it creates any unintended compliance burden.

Revision to the Destination Control Statement: This proposed rule revises the destination control statement in ITAR §123.9 to harmonize its language with the EAR. This change is being made to facilitate the President's Export Control Reform initiative, which has transferred thousands of formerly ITAR-controlled defense article parts and components, along with other items, to the Commerce Control List in the EAR under the jurisdiction of the Department of Commerce.

This change in jurisdiction for many parts and components, along with other items, for military systems has increased the incidence of exporters shipping articles subject to both the ITAR and the EAR in the same shipment. Both regulations have a mandatory destination control statement that must be on the export control documents for shipments that include items subject to both sets of regulations. This has caused confusion to exporters as to which statement to include on mixed shipments, or whether to include both. Harmonizing these statements will ease the regulatory burden on exporters.

Procedures for Obtaining State Department Authorization to Export

Items Subject to the EAR: This proposed rule revises the ITAR in a number of places to clarify how parties may obtain authorization from the Department to export or retransfer items subject to the EAR. Section 120.5 is revised to clarify that items subject to the EAR may be authorized pursuant to an exemption with certain conditions. A new paragraph (d) is added to ITAR §123.9 to clarify the requirements for retransferring items subject to the EAR pursuant to a letter of General Correspondence. Section 124.16 is revised to clarify that the special retransfer authorization of this section may be used for items subject to the EAR with certain conditions.

Other changes in this rule: The Department proposes to make a number of minor edits to the ITAR that will address erroneous or outdated reporting requirements. This rule would remove the requirement to provide seven paper copies for various export license requests in §§124.7, 124.12, 124.14, 125.2, 125.7 and 126.9, which has not been necessary for many years due to the use of electronic license submissions, change the identification of the agency responsible for permanent import authorizations in §123.4 from the

Department of the Treasury to Department of Justice, and impose the Code of Federal Regulations paragraph structure on §124.8. Additionally, the Department proposes removing the pilot filing requirement found in §123.13, given that it does not take into account the practices of modern airport operations and is no longer necessary.

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 §§553 (rulemaking) and 554 (adjudications) of the Administrative Procedure Act (APA). Although the Department is of the opinion that this rule is exempt from the rulemaking provisions of the APA, the Department is publishing this rule with a 45-day provision for public comment and without prejudice to its determination that controlling the import and export of defense services is a foreign affairs function.

Regulatory Flexibility Act

Since the Department of State is of the opinion that this proposed 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 proposed 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 as defined in 5 U.S.C. 804.

Executive Orders 12372 and 13132

This proposed 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 proposed 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 proposed 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. These rules have been designated “significant regulatory actions,” although not economically significant, under Executive Order 12866. Accordingly, this proposed rule has been reviewed by the Office of Management and Budget (OMB).

Executive Order 12988

The Department of State has reviewed this proposed 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 has determined that this proposed 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 provisions of Executive Order 13175 do not apply to this proposed 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. This rule removes provisions that previously required the applicant to provide seven additional copies for various export license requests. The Department believes that there will be little or no practical burden reduction since the use of electronic methods of filing has made the requirement for “seven copies” obsolete.

The following information collections are affected by this rulemaking:

1. Application/License for Permanent Export of Unclassified Defense Articles and Related Unclassified Technical Data, OMB Control No. 1405-0003;
2. Application/License for Temporary Import of Unclassified Defense Articles, OMB Control No. 1405-0013;
3. Application/License for the Permanent/Temporary Export or Temporary Import of Classified Defense Articles and Classified Technical Data, OMB Control No. 1405-0022;

4. Application/License for Temporary Export of Unclassified Defense Articles, OMB Control No. 1405-0023;
5. Application for Amendment to License for Export or Import of Classified or Unclassified Defense Articles and Related Technical Data OMB Control No. 1405-0092;
6. Request for Approval of Manufacturing License Agreements, Technical Assistance Agreements, and Other Agreements, OMB Control No. 1405-0093;
7. Request to Change End User, End Use and/or Destination of Hardware, OMB Control No. 1405-00173; and
8. Request for Advisory Opinion, OMB Control No. 1405-0174.

The Department is requesting public comment on its estimate that there will be little or no change in the burdens associated with these information collections as a result of this rulemaking.

DATE: Comments will be accepted until [insert date 60 days from publication in the Federal Register]

ADDRESSES: Interested parties may submit comments within 60 days of the date of publication by one of the following methods:

- E-mail: DDTCPublicComments@state.gov, with the subject line “AC88 PRA Burden Reduction”;
- Internet: At www.regulations.gov; please search for this proposed rule by using this proposed rule’s RIN (1400-AC88) and indicate that you are commenting on the paperwork burden change in any (or all) of the eight information collections identified above.

List of Subjects

22 CFR Parts 120 and 125

Arms and munitions, Classified information, Exports.

22 CFR Part 123

Arms and munitions, Exports, Reporting and recordkeeping requirements.

22 CFR Part 124

Arms and munitions, Exports, Technical assistance.

22 CFR Part 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 proposed to be 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 120.5 is amended by revising the section heading and paragraph (b) to read as follows:

§ 120.5 Relation to regulations of other agencies; export of items subject to the EAR.

* * * * *

(b) A license or other approval (*see* §120.20) from the Department of State granted in accordance with this subchapter may also authorize the export of items subject to the EAR (*see* §120.42). Items subject to the EAR may be exported pursuant to an exemption (*see* parts 124, 125, and 126 of this subchapter), provided the items subject to the EAR are for use in or with defense articles authorized under a license or other approval. Separate

approval from the Department of Commerce is not required for these items when approved for export under a Department of State license or other approval. Those items subject to the EAR exported pursuant to a Department of State license or other approval would remain under the jurisdiction of the Department of Commerce for any subsequent transactions. The inclusion of items subject to the EAR on a Department of State license or other approval does not change the licensing jurisdiction of the items. (See §123.1(b) of this subchapter for guidance on identifying items subject to the EAR in a license application to the Department of State.)

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

3. The authority citation for part 123 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. 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.

4. Section 123.4 is amended by revising paragraph (a)(4) to read as follows:

§ 123.4 Temporary import license exemptions.

(a) * * *

(4) Has been rejected for permanent import by the Department of Justice and is being returned to the country from which it was shipped; or

* * * * *

5. Section 123.9 is amended by revising paragraphs (b)(1) and (2), and adding paragraph (d) to read as follows:

§ 123.9 Country of ultimate destination and approval of reexports or retransfers.

* * * * *

(b) * * *

(1) The exporter must incorporate the following information as an integral part of the bill of lading, air waybill, or other shipping document, and the purchase documentation or invoice whenever defense articles are to be exported, retransferred, or reexported pursuant to a license or other approval under this subchapter:

(i) The country of ultimate destination;

(ii) The end-user;

(iii) The license or other approval number or exemption citation; and

(iv) The following statement: “These items are controlled and authorized by the U.S. government for export only to the country of ultimate destination for use by the end-user herein identified. They may not be resold, transferred, or otherwise be disposed of, to any other country or to any person other than the authorized end-user or consignee(s), either in their original form or after being incorporated into other items, without first obtaining approval from the U.S. government or as otherwise authorized by U.S. law and regulations.”

(2) When exporting items subject to the EAR (see §§120.42 and 123.1(b) of this subchapter) pursuant to a Department of State license or other approval, the U.S. exporter must also provide the end-user and consignees with the appropriate EAR classification information for each item exported pursuant to a U.S. Munitions List “(x)” paragraph. This includes the Export Control Classification Number (ECCN) or EAR99 designation.

* * * * *

(d) The Directorate of Defense Trade Controls may authorize reexport or retransfer of an item subject to the EAR provided that:

(1) The item was initially exported, reexported or transferred pursuant to a Department of State license or other approval;

(2) The item is for end-use in or with a defense article; and,

(3) All requirements of paragraph (c) of this section are satisfied for the item subject to the EAR, as well as for the associated defense article.

* * * * *

6. Revise § 123.13 to read as follows:

§ 123.13 Domestic aircraft shipments via a foreign country.

A license is not required for the shipment by air of a defense article from one location in the United States to another location in the United States via a foreign country.

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

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

Authority: Sec. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2651a; 22 U.S.C. 2776; Pub. L. 105–261; Section 1261, Pub. L. 112-239; E.O. 13637, 78 FR 16129.

8. Section 124.7 is amended by designating the introductory text as paragraph (a), adding and reserving paragraph (b), and revising paragraph (a)(1) to read as follows:

§ 124.7 Information required in all manufacturing license agreements and technical assistance agreements.

(a) * * *

(1) The agreement must describe the defense article to be manufactured and all defense articles to be exported, including any test and support equipment or advanced materials. They should be described by military nomenclature, contract number, National Stock Number, nameplate data, or other specific information. Only defense articles listed in the agreement will be eligible for export under the exemption in §123.16(b)(1) of this subchapter.

* * *

(b) [Reserved]

9. Section 124.8 is amended by designating the introductory text as paragraph (a) and adding and reserving paragraph (b), as follows:

§ 124.8 Clauses required both in manufacturing license agreements and technical assistance agreements.

* * * * *

(b) [Reserved]

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10. Section 124.12 is amended by revising the introductory text of paragraph (a) to read as follows:

§ 124.12 Required information in letters of transmittal.

(a) An application for the approval of a manufacturing license or technical assistance agreement with a foreign person must be accompanied by an explanatory letter. The explanatory letter shall contain:

* * * * *

11. Section 124.14 is amended by revising the introductory text of paragraph (e) to read as follows:

§ 124.14 Exports to warehouses or distribution points outside the United States.

* * * * *

(e) *Transmittal letters.* Requests for approval of warehousing and distribution agreements with foreign persons must be made by letter. The letter shall contain:

* * * * *

12. Section 124.16 is revised to read as follows:

§ 124.16 Special retransfer authorizations for unclassified defense articles and defense services to member states of NATO and the European Union, Australia, Japan, New Zealand, and Switzerland.

(a) The provisions of §124.8(a)(5) notwithstanding, the Department may approve access to unclassified defense articles and items subject to the EAR (*see* §120.42 of this subchapter) exported in furtherance of or produced as a result of a TAA/MLA, retransfer of technical data and defense services, and retransfer of technology subject to the EAR and authorized under a TAA/MLA, to individuals who are dual national or third-country national employees of the foreign signatory or its approved sub-licensees, provided that:

- (1) The transfer is to dual nationals or third-country nationals who are bona fide regular employees, directly employed by the foreign signatory or approved sub-licensees;
- (2) The individuals are exclusively of countries that are members of NATO, the European Union, Australia, Japan, New Zealand, and Switzerland;
- (3) Their employer is a signatory to the agreement or has executed a Non-Disclosure Agreement; and
- (4) The retransfer takes place completely within the physical territories of the countries listed in paragraph (a)(2) of this section or the United States.

(b) Permanent retransfer of hardware is not authorized pursuant to paragraph (a) of this section.

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

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

Authority: Secs. 2 and 38, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. 2752, 2778); 22 U.S.C. 2651a; E.O. 13637, 78 FR 16129.

14. Section 125.2 is amended by revising paragraph (a) to read as follows:

§ 125.2 Exports of unclassified technical data.

(a) *License.* A license (DSP-5) is required for the export of unclassified technical data unless the export is exempt from the licensing requirements of this subchapter. In the case of a plant visit, details of the proposed discussions must be transmitted to the Directorate of Defense Trade Controls for an appraisal of the technical data.

* * * * *

15. Section 125.7 is amended by revising paragraph (b) to read as follows:

§ 125.7 Procedures for the export of classified technical data and other classified defense articles.

* * * * *

(b) An application for the export of classified technical data or other classified defense articles must be accompanied by a completed Form DSP-83 (see §123.10 of this subchapter). All classified materials accompanying an application must be transmitted to the Directorate of Defense Trade Controls in accordance with the procedures contained in the Department of

Defense National Industrial Security Program Operating Manual (unless such requirements are inconsistent with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed).

PART 126—GENERAL POLICIES AND PROVISIONS

16. 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; Section 7045, Pub. L. 112-74; Section 7046, Pub. L. 112-74; E.O. 13637, 78 FR 16129.

17. Section 126.4 is revised to read as follows:

§126.4 Exports and temporary imports made to or on behalf of a department or agency of the U.S. government.

(a) A license is not required for the export or temporary import of a defense article or the performance of a defense service, when made:

(1) To a department or agency of the U.S. government for official use.

Defense articles exported or temporarily imported under this provision may only be provided to a regular employee or contractor support personnel of the U.S. government;

Note 1 to paragraph (a): Contractor support personnel means those U.S. persons who provide administrative, managerial, scientific or technical support under contract with a U.S. government department or agency within a U.S. government owned or operated facility or under the direct supervision of a regular U.S. government employee (*e.g.*, Federally Funded Research

and Development Center or Systems Engineering and Technical Assistance contractors). For purposes of this section, private security contractors are not considered contractor support personnel, and “direct supervision” refers to the control over the manner and means in which contractor support personnel conduct their day-to-day work activities as well as control over the contractor’s access to defense articles authorized under this paragraph.

Note 2 to paragraph (a): Any retransfer, reexport, disposal, or change in end-user of a defense article exported pursuant to this section must be performed in accordance with §123.9 of this subchapter.

(2)(i) By, or on behalf of, a department or agency of the U.S. government for carrying out any foreign assistance, cooperative project, or sales program authorized by law and subject to control by the President by other means, provided:

(A) Items subject to the EAR and controlled for missile technology (MT) reasons (*see* §742.5 of the EAR (15 CFR 742.5) are not authorized for export under this subsection; and

(B) The United States government performs or directs all aspects of the transaction (export, carriage, and delivery abroad) or the export is covered by a U.S. government Bill of Lading.

(ii) This section does not authorize a U.S. government agency to act as a transmittal agent on behalf of a private individual or firm, either as a convenience or in satisfaction of security requirements.

Note to paragraph (a)(2): Approval of a foreign assistance, cooperative project, or sales program authorizing a U.S. government department and agency to permanently export a defense article described on the Missile Technology Control Regime Annex should be reviewed by the Missile

Technology Export Committee, unless authorized by statutory authority providing export authority notwithstanding the Arms Export Control Act.

(b) This section does not authorize any department or agency of the U.S. government to make any export that is otherwise prohibited by virtue of other administrative provisions or by any statute.

(c) An Electronic Export Information (EEI) filing, required under §123.22 of this subchapter, and a written statement by the exporter certifying that these requirements have been met must be presented at the time of export to the appropriate Port Directors of U.S. Customs and Border Protection or Department of Defense transmittal authority. For any export made pursuant to paragraph (a)(1) of this section, the shipment documents (bill of lading, airway bill, or other transportation documents) must include the following statement:

“For official use by [insert U.S. government department or agency]. Property will not enter the trade of the country to which it is shipped. No export license required per CFR Title 22, section 126.4. U.S. government point of contact: [insert name and telephone number]”.

18. Section 126.9 is amended by revising paragraph (a) to read as follows:

§ 126.9 Advisory opinions and related authorizations.

(a) *Advisory opinion.* A person may request information from the Directorate of Defense Trade Controls on whether it would likely grant a license or other approval for a particular defense article or defense service to a particular country. Such information from the Directorate of Defense Trade Controls is issued on a case-by-case basis and applies only to the particular matters presented to the Directorate of Defense Trade Controls. These opinions are not binding on the Department of State and may not be used in future

matters before the Department. A request for an advisory opinion must be made in writing and must outline in detail the equipment, its usage, the security classification (if any) of the articles or related technical data, and the country or countries involved.

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

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