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DEPARTMENT OF STATE

22 CFR Parts 120, 122, 124, 125, and 126

[Public Notice: 9136]

RIN 1400-AD79

**Amendment to the International Traffic in Arms Regulations:
Registration and Licensing of U.S. Persons Employed by Foreign
Persons, and Other Changes**

AGENCY: Department of State.

ACTION: Proposed rule.

SUMMARY: The Department of State proposes to amend the International Traffic in Arms Regulations (ITAR) to clarify requirements for the licensing and registration of U.S. persons providing defense services while in the employ of foreign persons. This amendment is pursuant to the President's Export Control Reform effort, as part of the Department of State's retrospective plan under Executive Order 13563 completed on August 17, 2011. The Department of State's full plan can be accessed at <http://www.state.gov/documents/organization/181028.pdf>.

DATES: The Department of State will accept comments on this proposed rule until [insert date 60 days from date of 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, “ITAR Amendment – U.S. Persons Employed by Foreign Persons.”
- *Internet: At www.regulations.gov*, search for this proposed rule by using its RIN (1400-AD79).

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 any information for which a claim of confidentiality is asserted. All comments and 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 (DDTC) 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: Regulatory Change, U.S. Persons Employed by Foreign Persons.

SUPPLEMENTARY INFORMATION:

Changes in this Rule Related to Registration and Licensing of U.S. Persons Employed by Foreign Persons

DDTC seeks to clarify the registration and licensing requirements for U.S. persons located in the United States or abroad who are engaged in the business of furnishing defense services to their foreign person employers. Similarly, DDTC seeks to clarify when these same persons may be covered

under existing DDTC authorizations previously issued to their employers and affiliates, and when they are instead obligated to apply for their own license or agreement prior to engaging in the provisions of defense services.

The Department proposes to modify 22 CFR 120.40 *Affiliate*, add a definition for “natural persons” in 22 CFR 120.43, effect changes to 22 CFR 122.1 *Registration Requirements* and 22 CFR 122.4 *Notification of Changes in Information Furnished by Registrants*, and add an exemption for natural U.S. persons employed by foreign persons in 22 CFR 124.17, to better account for these persons and their services to their foreign person employers.

Scenarios impacted by these changes include but are not limited to the following:

(1) U.S. persons employed as regular employees of a U.S. company but working at a foreign branch of that company; (2) U.S. persons employed as regular employees of a U.S. company’s foreign subsidiary or affiliate where the U.S. company is actively participating in the provision of services to the foreign subsidiary or affiliate; (3) U.S. persons employed as regular employees of a U.S. company’s foreign subsidiary or affiliate where the U.S. company is not actively participating in the provision of services to the foreign subsidiary or affiliate; (4) U.S. persons employed outside the United States as independent contractors who do not meet the definition of a regular employee; and (5) U.S. persons employed as regular employees of a foreign company with no U.S. affiliation.

The following are the proposed changes:

(1) The note to 22 CFR 120.40 is redesignated as note 1;

(2) A second note is added to 22 CFR 120.40 to clarify that under specified circumstances, minority owners of a firm may list that company on their registration;

(3) 22 CFR 120.43 is added to provide a definition of “natural person”;

(4) 22 CFR 122.1 is revised to clarify the existing requirement that U.S. persons performing defense services abroad are required to be registered pursuant to 22 CFR 122.2;

(5) A note is added to 22 CFR 122.1 to clarify that natural persons employed by affiliates or subsidiaries of and listed on a U.S. person’s registration are deemed to be registered as well;

(6) A minor revision is made to 22 CFR 122.2 to clarify that subsidiaries and affiliates controlled by a registrant pursuant to 22 CFR 120.40 may be included on the registrant’s Statement of Registration;

(7) 22 CFR 124.1(a) is revised to clarify that defense services performed by natural U.S. persons may be authorized via a DSP-5;

(8) 22 CFR 124.1(b) is revised to clarify that applicants will forward copies of approved agreements involving classified defense articles to the Department of Defense;

(9) An exemption for natural U.S. persons employed by foreign persons located in NATO countries and other specified nations is added in 22 CFR 124.17; and

(10) An exemption for natural U.S. persons employed by foreign persons engaged in FMS-related activities is added in 22 CFR 126.6(c)(7).

Regarding the addition of 22 CFR 124.17, the Department reiterates that the use of exemptions to authorize exports and/or temporary imports of

defense articles and defense services to countries listed in 22 CFR 126.1 is not allowed, as noted in paragraph (a) of the latter section.

Other Changes in this Rule

The following are the proposed changes:

(1) 22 CFR 120.39 is revised to clarify that the phrase “long term” denotes a period of at least 1 year;

(2) 22 CFR 125.4(b)(2) and (b)(12) are removed to reserve status due to their redundancy with the exemptions in 22 CFR 124.3 and 22 CFR Part 126;

(3) 22 CFR 126.6(c) is amended to clarify that the exemption extends to classified as well as unclassified Foreign Military Sales (FMS) defense articles permanently or temporarily imported or exported, provided their transfer is made pursuant to a Letter of Offer and Acceptance; and

(4) Administrative corrections are made to 22 CFR 126.6(c).

Request for Comments

The Department welcomes public comment on any of the proposed changes set forth in this rule. In particular, we invite comments from foreign persons who currently employ or are contemplating engaging U.S. persons as regular employees or independent contractors, as well as from current or future employees and contractors themselves.

In the context of Export Control Reform, as well as to accommodate the changes proposed in this rule, DDTC is considering modifying its registration fee structure. Of the many options being explored, one alternative involves providing a reduced base fee for individuals or natural U.S. persons, as defined in the proposed 22 CFR 120.43. The Department encourages the public to consider these proposed changes when reviewing this rule.

Regulatory Analysis and Notices

Administrative Procedure Act

Controlling the import and export of defense articles and services is a foreign affairs function of the United States government and rules implementing this function are exempt from sections 553 (rulemaking) and 554 (adjudications) of the Administrative Procedure Act (APA). Although this rule is exempt from the rulemaking provisions of the APA, the Department is publishing this rule with a 60-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 this rule is exempt from the rulemaking provisions of 5 U.S.C. 553, it does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

These proposed amendments do 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 they 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

These proposed amendments have been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

Executive Orders 12372 and 13132

These proposed amendments 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 these proposed amendments do 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 these proposed amendments.

Executive Orders 12866 and 13563

Executive Orders 13563 and 12866 direct agencies to assess all 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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a “significant regulatory action,” under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget (OMB).

Executive Order 12988

The Department of State has reviewed the proposed amendments 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

Notwithstanding any other provision of law, no person is required to respond to, nor is subject to a penalty for failure to comply with, a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid OMB control number. This proposed rule would affect the following approved collections: 1) Statement of Registration, DS-2032, OMB No. 1405-0002; 2) Application/License for Permanent Export of Unclassified Defense Articles and Related Unclassified Technical Data, DSP-5, OMB No. 1405-0003; 3) Nontransfer and Use Certificate, DSP-83, OMB No. 1405-0021; 4) Application/License for Permanent/Temporary Export or Temporary Import of Classified Defense Articles and Classified Technical Data, DSP-85, OMB No. 1405-0022; 5) Authority to Export Defense Articles and Services Sold Under the Foreign Military Sales (FMS) Program, DSP-94, OMB No. 1405-0051; 6) Application for Amendment to License for Export or Import of Classified or Unclassified Defense Articles and Related Technical Data, DSP-6, -62, -74, -119, OMB No. 1405-0092; 7) Request for Approval of Manufacturing License Agreements, Technical Assistance Agreements, and Other Agreements, DSP-5, OMB No. 1405-0093; 8) Maintenance of Records by Registrants, OMB No. 1405-0111; 9) Voluntary Disclosure, OMB No. 1405-0179; and 10) Technology Security/Clearance Plans, Screening Records, and Non-Disclosure Agreements Pursuant to 22 CFR 126.18, OMB No. 1405-0195. The Department of State believes there will be minimal changes to these collections.

List of Subjects

22 CFR Part 120

Arms and munitions, Exports.

22 CFR Part 122

Arms and munitions, Exports.

22 CFR Part 124

Arms and munitions, Exports, Technical Assistance.

22 CFR Part 125

Arms and munitions, Classified information, Exports.

22 CFR Part 126

Arms and munitions, Exports.

For the reasons set forth above, Title 22, Chapter I, Subchapter M, parts 120, 122, 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 120.39 is amended by revising paragraph (a)(2) to read as follows:

§120.39 Regular employee.

(a) * * *

(2) An individual in a long term (i.e., 1 year or longer) contractual relationship with the company where the individual:

- (i) Works at the company's facilities;
- (ii) Works under the company's direction and control;

- (iii) Works full time and exclusively for the company;
- (iv) Executes nondisclosure certifications for the company; and
- (v) Where the staffing agency that has seconded the individual (if applicable) has no role in the work the individual performs (other than providing that individual for that work) and does not have access to any controlled technology (other than where specifically authorized by a license).

* * * * *

3. Section 120.40 is amended by removing the Note and adding Note 1 and Note 2 to read as follows:

§120.40 Affiliate.

* * * * *

Note 1 to §120.40: For purposes of this section, “control” means having the authority or ability to establish or direct the policies or operations of the firm with respect to compliance with this subchapter. Control is rebuttably presumed to exist where there is ownership of 25 percent or more of the outstanding voting securities if no other person controls an equal or larger percentage.

Note 2 to §120.40: A registrant may establish a control relationship with another entity via written agreement such that the entity then becomes an affiliate in accordance with section. The registrant may include such an affiliate on its registration, in accordance with this subchapter and subject to DDTC’s disallowance. If an affiliate listed on a registration ceases to meet the requirements of this section, the registrant must immediately remove the affiliate from its registration and notify DDTC pursuant to §122.4(a) of this subchapter.

4. Section 120.43 is added to read as follows:

§120.43 Natural person.

Natural person means an individual human being, as distinguished from a corporation, business association, partnership, society, trust, or any other entity, organization or group.

PART 122 – REGISTRATION OF MANUFACTURERS AND EXPORTERS

5. The authority citation for part 122 continues to read as follows:

Authority: Sections 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.

6. Section 122.1 is amended by revising paragraph (a) and adding a note to paragraph (a) to read as follows:

§122.1 Registration requirements.

(a) Any person who engages in the United States in the business of manufacturing, exporting, or temporarily importing defense articles or furnishing defense services; and any U.S. person who engages in the business of furnishing defense services wherever located, is required to register with the Directorate of Defense Trade Controls under §122.2. For the purpose of this subchapter, engaging in such a business requires only one occasion of manufacturing or exporting or temporarily importing a defense article or furnishing a defense service. A manufacturer who does not engage in exporting must nevertheless register. (*See* part 129 of this subchapter for requirements for registration of persons who engage in brokering activities.)

Note to paragraph(a): Any natural person directly employed by a DDTC-registered person, or by a person listed on the registration as a subsidiary or affiliate of a DDTC-registered U.S. person, is deemed to be registered.

* * * * *

§122.2 [Amended]

7. Section 122.2(a) is amended by adding a comma between the words “registrant” and “or” in the third sentence.

8. Section 122.4 is amended by revising paragraph (a)(2)(v) to read as follows:

§122.4 Notification of changes in information furnished by registrants.

(a) * * *

(2) * * *

(v) The establishment, acquisition, or divestment of a U.S. or foreign subsidiary or other affiliate who is engaged in manufacturing defense articles, exporting defense articles or defense services, or the inability of an affiliate listed on the registration to continue meeting the requirements in §120.40 of this subchapter; or

* * * * *

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

9. The authority citation for part 124 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. 2651a; 22 U.S.C. 2776; Pub. L. 105-261; Section 1261, Pub. L. 112-239; E.O. 13637, 78 FR 16129.

10. Section 124.1 is amended as follows:

a. Add two sentences at the end of paragraph (a).

b. Revise paragraph (b).

The addition and revision read as follows:

§ 124.1 Manufacturing license agreements and technical assistance agreements.

(a) * * * The provision of defense services by a natural U.S. person may be authorized on a Form DSP-5. Natural U.S. persons employed as regular employees of a foreign subsidiary or affiliate listed on the registration of a U.S. person may receive authorization to provide defense services via an agreement between the registered U.S. person and the foreign subsidiary or affiliate, provided the registered U.S. person accepts responsibility for, and demonstrates ability to ensure, the natural U.S. person's compliance with the provisions of this subchapter.

(b) *Classified Articles.* Copies of approved agreements involving the release of classified defense articles will be forwarded by the applicant to the Defense Security Service of the Department of Defense.

* * * * *

11. Section 124.17 is added to read as follows:

§124.17 Exemption for natural U.S. persons employed by foreign persons.

(a) A natural U.S. person employed by a foreign person may furnish defense services to and on behalf of the foreign person employer without a license if all of the following conditions are met:

- (1) The employer is located within a NATO or EU country, Australia, Japan, New Zealand, and/or Switzerland, and the defense services are provided only in these countries;
- (2) The end user(s) of the associated defense article(s) are located within NATO, EU, Australia, Japan, New Zealand, and/or Switzerland;

- (3) No U.S.-origin defense articles, to include technical data, are transferred from the U.S. persons to the employer without separate authorization;
- (4) No classified, SME, or MT technical data is transferred (even if separately authorized) in connection with the furnishing of defense services; and
- (5) The U.S. person furnishing the defense services maintains records of such activities and complies with registration requirements in accordance with part 122 of this subchapter.

(b) [Reserved]

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

12. The authority citation for part 125 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.

§125.4 [Amended]

13. Section 125.4 is amended by removing and reserving paragraphs (b)(2) and (b)(12).

PART 126 – GENERAL POLICIES AND PROVISIONS

14. 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.

15. Section 126.6 is amended by revising paragraph (c) introductory text and adding paragraph (c)(7) to read as follows:

§126.6 Foreign-owned military aircraft and naval vessels, and the

Foreign Military Sales program.

* * * * *

(c) *Foreign Military Sales Program.* A license from the Directorate of Defense Trade Controls is not required if the classified or unclassified defense article or defense service to be transferred was sold, leased, or loaned by the Department of Defense to a foreign country or international organization under the Foreign Military Sales (FMS) Program of the Arms Export Control Act pursuant to a Letter of Offer and Acceptance (LOA) authorizing such transfer (permanent or temporary), which meets the criteria stated below:

* * * * *

(7) Natural U.S. persons employed by foreign persons may provide defense services to and on behalf of their employers without a license if all of the following conditions are met:

- (i) The defense services are provided in support of an active FMS contract and are identified in an executed LOA;
- (ii) No U.S.-origin defense articles are transferred from the U.S. person to the employer, without separate authorization;
- (iii) The provision of defense services is not to a country identified in §126.1;
- (iv) No classified or SME technical data is disclosed (even if separately authorized) in connection with the furnishing of defense services; and
- (v) The U.S. person furnishing the defense services maintains records of such activities and complies with registration requirements in accordance with part 122 of this subchapter.

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