DEPARTM

22 CFR Part 126

[Public Notice: 12799]

RIN 1400-AF84

International Traffic in Arms Regulations: Exemption for Defense Trade and Cooperation Among Australia, the United Kingdom, and the United States

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: This rule streamlines defense trade and facilitates cooperation among our allies while reducing the regulatory burden for exporters, in support of the President's Executive Order 14268 of April 9, 2025, "Reforming Foreign Defense Sales to Improve Speed and Accountability". In this rule the Department of State (the Department) finalizes, with changes, the interim final rule published on August 20, 2024. The interim final rule made several amendments to the International Traffic in Arms Regulations (ITAR), pursuant to section 38(l) of the Arms Export Control Act (AECA), to facilitate defense trade and cooperation among Australia, the United Kingdom, and the United States, including through a new exemption to the licensing requirements of the ITAR. The Department is also now responding to public comments received on the interim final rule.

DATES: The rule is effective [**INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Ms. Engda Wubneh, Foreign Affairs Officer, Office of Defense Trade Controls Policy, U.S. Department of State, telephone (771) 205-9566; e-mail DDTCCustomerService@state.gov, ATTN: Regulatory Change, ITAR Section 126.7 Australia, the United Kingdom, and the United States Exemption.

SUPPLEMENTARY INFORMATION: In support of the President's Executive Order on "Reforming Foreign Defense Sales to Improve Speed and Accountability," the Department is

publishing this rule to streamline defense trade and facilitate cooperation among our allies while reducing the regulatory burden for exporters. Further, the Department is responding to public comments received pursuant to the interim final rule (89 FR 67270), which created new efficiencies within the ITAR. The interim final rule implemented new authorities provided in section 38(l) of the AECA (22 U.S.C. 2778(l)), as added by section 1343 of the National Defense Authorization Act (NDAA) for Fiscal Year 2024 (P.L. 118-31). Specifically, it added § 126.7, which previously had been reserved, to create the exemption for defense trade and cooperation among Australia, the United Kingdom (UK), and the United States ("the § 126.7 exemption"). The § 126.7 exemption states that no license or other approval is required for the export, reexport, retransfer, or temporary import of defense articles, the performance of defense services, or engaging in brokering activities between or among Authorized Users within the physical territory of Australia, the United Kingdom, and the United States provided certain requirements and limitations are met. The rule also created a new Supplement No. 2 to Part 126, an Excluded Technology List (ETL), that lists the defense articles and defense services ineligible for transfer pursuant to the § 126.7 exemption. Further, the Department added § 126.18(e) for transfers of classified defense articles to dual nationals who are citizens of Australia and the United Kingdom and another country, provided all relevant criteria are met. The Department also added § 126.15(c) and (d), which implemented expedited license processing for exports of defense articles and defense services to Australia, the United Kingdom, and Canada.

The Department acknowledges and appreciates the comments submitted in response to the interim final rule and is now publishing this final rule to address these comments.
In response to comments received, the primary changes to regulatory text in this rulemaking are as follows:

- In ITAR § 126.7, the section heading is revised to "Exemptions" to account for a new and separate exemption for reexports, retransfers, or temporary imports of defense articles to support the armed forces of Australia, the United Kingdom, or the United States,

provided certain requirements are met. Titles have been added to the paragraphs found in § 126.7 to clearly delineate each exemption and their associated requirements and limitations. Additionally, the phrase "other approval" is removed in this section.

- In ITAR § 126.7(a), the term "furnishing" replaces the phrase "the performance" in order to be consistent with existing language in the ITAR regarding defense services. In ITAR § 126.7(b)(2), language is added so that a United Kingdom or Australian government department or agency is identified as a transferor, recipient, or broker in § 126.7(b)(2), and language pertaining to U.S. persons registered with the applicable Directorate of Defense Trade Controls (DDTC) registration is changed from "not debarred under § 127.7" to "eligible under § 120.16" to account for all reasons a U.S. person may be ineligible to use the § 126.7 exemption.
- In ITAR § 126.7, paragraphs (c) and (d) are added for a new exemption for certain reexports, retransfers, or temporary imports of defense articles to support the armed forces of Australia, the United Kingdom, or the United States.
- In ITAR §§ 126.7 and 126.18, the phrase "Authorized User" replaces the phrase "authorized user" for consistency throughout the regulations.
- In ITAR §126.18(e), "Australian or United Kingdom parties described in § 126.7(b)(2)(ii) or (iii) or are regular employees thereof" replaced "authorized users or regular employees of an authorized user of the exemption in §126.7" because the parties described in §126.7(b)(2) expanded with the addition of a United Kingdom national-level government department or agency or Australian federal government department or agency.

The Department notes separately that in the spirit of promoting defense trade between and among Australia, the United Kingdom, and the United States during the initial implementation of the § 126.7 exemption, the Department began expediting all export licensing adjudications for Australia and the United Kingdom on September 1, 2024, when the interim

final rule became effective, regardless of whether a license application met the eligibility criterion in ITAR § 126.15(c). The Department now notes over 700 entities from Australia and the United Kingdom have become Authorized Users and industry from all three countries have, over the last year, utilized and familiarized themselves with the ITAR § 126.7 exemption. Now that industry has become better acquainted with the § 126.7 exemption and as it has become more readily available for widespread industry use due to the growing number of Authorized Users, the Department is now processing expedited licensing requests based on the eligibility criterion of § 126.15(c), which states expedited licensing is available for an export that cannot be undertaken under an exemption.

Although outside the scope of this rulemaking, comments received related to the Authorized User Terms and Conditions and subsequent changes the Department has made to these terms and conditions facilitate use of the § 126.7 exemption are addressed in detail below. The Authorized User Terms and Conditions are the compliance requirements Australian and United Kingdom parties agree to as part of the process to become an Authorized User. A detailed review and response to the public comments submitted in the interim final rule, organized by ITAR section, is as follows.

ITAR § 126.7: Exemption for defense trade and cooperation among Australia, the United Kingdom, and the United States.

Three commenters recommended expanding the § 126.7 exemption outside of the physical territories of Australia, the United Kingdom, and the United States in support of Australia, the United Kingdom, or the United States' armed forces or Authorized Users deploying overseas to support those armed forces. Another commenter recommended including the modified § 126.7 in § 126.1(a), which describes exceptions to the policy of denial the Department holds toward certain proscribed destinations. Also, another commenter recommended that § 126.7 mirror § 120.54(a)(6). The Department declines to accept all of these comments in full and reiterates that the scope of the § 126.7 exemption was defined pursuant to

AECA section 38(l)(1)(C)(2), which did not include transfers outside of Australia, the United Kingdom, or the United States. However, based on these comments and consultations with Australia and the United Kingdom, the Department is adding a new and separate exemption found in § 126.7 for reexports, retransfers, or temporary imports of defense articles to support the armed forces of Australia, the United Kingdom, or the United States, provided certain requirements are met.

Two commenters recommended removing the provisions in § 126.7(b)(4) that relate to sections 36(c) and 36(d) of the AECA regarding congressional certifications. The Department declines to accept this recommendation as those provisions are required by law.

One commenter sought confirmation that the provision of defense services authorized via a mechanism other than a Technical Assistance Agreement (TAA) or Manufacturing License Agreement (MLA), including the § 126.7 exemption, does not subject the resultant foreign-origin defense article to the ITAR or its reexport and retransfer requirements. The Department states that, pursuant to the Authorized User Terms and Conditions, defense articles produced or manufactured from technical data or defense services exported from the United States via the § 126.7 exemption are subject to reexport and retransfer requirements under the ITAR. Such reexport or retransfer may be authorized, however, pursuant to the § 126.7 exemption. Additionally, the interim final rule (89 FR 67270) amended § 124.8(a)(5) to enable the transfer of defense articles produced or manufactured pursuant to such agreements pursuant to the § 126.7 exemption. If such an agreement does not include the updated § 124.8(a)(5) clause referencing § 126.7, the U.S. agreement holder may submit a minor amendment to update the subject clause if they want to utilize the § 126.7 exemption as the authorization for a reexport or retransfer.

One commenter sought clarification as to whether an item exported from the United States to an Authorized User using a DSP-5 license in furtherance of a Warehouse and Distribution Agreement (WDA) and later retransferred to an eligible recipient under the § 126.7

exemption would need to be included in the WDA annual sales report. As an initial matter, the Department notes that § 124.14(b)(2) requires applicants to include a detailed statement of the terms and conditions under which defense articles licensed under the WDA will be exported and distributed. Unless the § 126.7 exemption is identified as a likely method of authorizing distribution, transfers of defense articles licensed under a WDA should not occur. Assuming that the § 126.7 exemption has been identified in the WDA, items retransferred pursuant to § 126.7 should be included in the WDA annual sales report.

The same commenter inquired as to where Directorate of Defense Trade Controls (DDTC) guidance may be found regarding the Australian, Canadian, and United Kingdom's exclusion from signing DSP-83's. The Department notes, specifically with respect to exports undertaken pursuant to the country exemptions for Australia, Canada, and the United Kingdom, the text of § 123.10(a) was amended by the interim final rule (89 FR 67270) to exclude §§ 126.5 and § 126.7.

The same commenter asked whether transfers pursuant to cooperative programs are eligible under the § 126.7 exemption. The Department notes that the § 126.7 exemption is only available for qualifying transfers that rely on the ITAR as the transfer authority.

One commenter asked, in a scenario in which an item is exported under the authorities in § 126.7 to the United Kingdom and the United Kingdom later needs to reexport the item to another country, whether the reexport authorization request should go to the United States or the United Kingdom. Similarly, if the item is being reexported to a country that is not Australia, the United Kingdom, or the United States, the commenter asked if a DSP-5 should be sought in order to cover the initial export from the United States to the United Kingdom and any subsequent reexport to another country. The Department clarifies that provided all criteria are met, the § 126.7 exemption is available for use for the initial export, but the exporter may still elect to apply for a license if it prefers. If the defense article later needs to be reexported from the United Kingdom to a third country, reexport authorization from the Department would be

required, whether in the form of a license or another authorization such as an exemption. The Department defers to the UK government on the question of whether it would also impose a licensing requirement on the export of the defense article from the United Kingdom.

One commenter asserted that individuals must be regular employees to use the § 126.7 exemption and that certain contractors for the UK and Australian governments do not meet the definition of regular employee found at § 120.64 as they are sole proprietors. The same commenter recommended amending § 120.64 with a new paragraph stating that the "[s]taffing agency includes other contract employee providers and individuals trading as a sole proprietorship and seconded by the staffing agency and meet all requirements of § 120.64(a)(2) are deemed to be a regular employee." Further, the commenter requested the Department publish a frequently asked questions (FAQ) clarifying that contract employees include foreign persons who meet the definition of a regular employee in § 120.64. The Department declines to accept the commenter's recommendations and clarifies that there is no requirement to be a regular employee to use the § 126.7 exemption, nor is the definition of regular employee limited to U.S. persons. Pursuant to § 126.7(b)(2), the parties described are eligible to use the § 126.7 exemption provided all other criteria are met.

One commenter asked for more information about the security and handling requirements for defense articles, including technical data, for Authorized Users in Australia. The same commenter asked if marking documents is required, and if Note 1 to § 126.7(b)'s reference to the Australian Government Protective Security Policy Framework is the only security requirement. The Department clarifies that Note 1 to paragraph (b) of § 126.7 reminds the public that the exemption does not remove any other U.S. statutory and regulatory requirements. The listed requirements are examples, not an exhaustive list of security requirements. Further, there are no specific marking requirements in the § 126.7 exemption. Regarding Australia's security and handling requirements, the Department cannot opine on laws or regulations outside its jurisdiction.

One commenter sought confirmation that classified transfers are allowed under the § 126.7 exemption. The Department confirms that classified transfers (*e.g.*, exports, reexports, retransfers, etc.) are allowed under §§ 126.7 and 126.18, provided the relevant exemption's criteria are met.

One commenter asserted that DDTC's registration acknowledgement letter does not identify U.S. affiliates or subsidiaries and thus does not confirm that an affiliate or subsidiary is included as part of a U.S. person's registration. The same commenter recommended publishing a FAQ on the DDTC website confirming that U.S. affiliates or subsidiaries identified in block 8 of the DS-2032 form are eligible to use the exemption as part of the parent's registration. Further, the commenter recommended modifying DDTC's registration acknowledgement letter to include any U.S. affiliates or subsidiaries from the DS-2032, allow Authorized Users to have DECCS accounts, and create a feature for users to search for U.S. registrants including affiliates and subsidiaries. DDTC is publishing an FAQ on its website to clarify that U.S. subsidiaries and affiliates of U.S. person DDTC registrants listed in block 8 of the DS-2032 are eligible to self-certify to exemption usage and meets the registration requirement of § 126.7(b)(2)(i).

ITAR § 126.15: Expedited processing of license applications for the export of defense articles and defense services to Australia, the United Kingdom, or Canada.

One commenter asserted that the U.S. allies, including Canada, who are eligible for expedited processing for export license applications pursuant to the provisions of § 126.15 should be treated the same for purposes of the ITAR. The Department notes the National Defense Authorization Act for Fiscal Year 2024 called for expedited licensing for the United Kingdom, Australia, and Canada. It also separately created section 38(l) of the AECA, which ultimately resulted in the creation of a defense trade exemption for the United Kingdom and Australia. The Department implemented what was required by law, and the inclusion of Canada within the framework of the exemption described in section 38(l) of the AECA was not included in the law. The Canadian exemption in § 126.5 exists pursuant to different authority under the

AECA, and the provisions of section 38(l) of the AECA do not extend to transfers to or from Canada.

One commenter sought clarification regarding whether the expedited processing of license applications described in § 126.15(c) and (d) applies to all United Kingdom and Australian companies or only Authorized Users. The Department confirms that the expedited procedures apply to all parties in the United Kingdom, Australia, and Canada. The same commenter requested that the expedited processing of license applications also apply to General Correspondence requests submitted by Australian and UK companies. The Department declines to accept this recommendation as the expediting requirement set forth in section 1344 of the NDAA for Fiscal Year 2024 (22 U.S.C. § 10423) applies to exports and not other types of transfers (*e.g.*, reexports or retransfers) that would be authorized via General Correspondence. One commenter suggested the Department create an Open General License for the reexport and retransfer of unclassified defense articles, in support of AUKUS, among Australia, the United Kingdom, the United States and allied countries, such as NATO and Five Eyes partners, allowing for retransfers and reexports to be authorized by the country of reexport or retransfer rather than the country of origin. Alternatively, if the Department is not amenable to this suggestion, the commenter recommended amending § 126.15(c) and (d) to apply to reexports to third country partners if the end-use is in support of AUKUS. The Department declines to accept these suggestions. The expedited procedures set out in section 1344 of the NDAA for Fiscal Year 2024 and implemented in the ITAR were intended to facilitate defense trade between the United States, the United Kingdom, and Australia, not reexports from those countries to additional countries.

One commenter recommended that a Department decision to deny a license application or return without action (RWA) a license application be a decision made at the Deputy Assistant Secretary (DAS) level. Further, the same commenter recommended the DDTC DAS review on a monthly or quarterly basis those license applications that have been adjudicated but not

approved, in order to ensure that license applications are not being rejected because the statutorily required timeframes are approaching. This comment is outside the scope of the current rulemaking as it addresses internal Department processes and procedures and sections of the ITAR that are not the subject of this rulemaking. Furthermore, the recommendations are unnecessary and duplicative. ITAR § 120.1(b)(2)(i) delegates to the Director of the Office of Defense Trade Controls Licensing (DTCL) the responsibilities related to licensing. The DTCL Director already routinely reviews all licenses recommended for denial and tracks in real time all licenses subject to the expedited review procedures. The Department has not to date, and has no plans in the future, to implement a policy of denying or returning without action license applications because the statutorily required timeframes are approaching. Furthermore, all license applications that are returned without action are also subject to secondary review procedures to ensure consistent treatment and determine whether an incomplete or defective license application can be salvaged. For these reasons, the Department declines to accept the recommendations.

One commenter recommended changing the expedited license processing timelines found in § 126.15(d) to 15 days and 21 days, respectively, for applications related to government-to-government agreements and all other applications. The Department declines to accept this comment as the 30- and 45-day license application timeframes were established by statute in the National Defense Authorization Act for Fiscal Year 2024.

ITAR § 126.18: Exemptions regarding intracompany, intra-organization, and intragovernmental transfers to employees who are dual nationals or third-country nationals.

One commenter asked what qualifies as a SECRET level security clearance under § 126.18(d) and if security clearances required under § 126.18(d) are different than those under § 126.18(e). The Department notes that § 126.18(d) is reserved for the reexport of unclassified defense articles or defense services. There is no security clearance requirement in this portion of the exemption. The relevant requirement in § 126.18(e) is for a UK or Australian dual national to

hold a security clearance approved by Australia, the United Kingdom, or the United States that is equivalent to the classification level of SECRET or above in the United States. That differs from § 126.18(c), which states a qualifying condition is a security clearance approved by the host nation government for its employees.

One commenter sought clarification regarding whether a dual citizen of both the United States and Australia is considered a dual national for purposes of § 126.18(e). The Department confirms § 126.18(e) is available in the case of a dual citizen of the United States and Australia. One commenter inquired whether § 126.7 should be read with § 126.18(d), but exclusive of ITAR § 126.18(e). The Department clarifies that § 126.7, § 126.18(d) and § 126.18(e) are all separate ITAR exemptions. ITAR § 126.7(b)(2) lists who may be eligible to use the § 126.7 exemption, § 126.18(d) authorizes transfers to dual and third-country nationals provided all other criteria are met for the exemption, and § 126.18(e) is available to dual nationals of the United Kingdom or Australia provided all other criteria are met for the exemption.

Supplement No. 2 to Part 126 – Excluded Technology List

Multiple commenters expressed appreciation for the work of all three governments to refine the Excluded Technology List (ETL) from what was initially published in the proposed rule. The Department notes, as a threshold matter, that it monitored licensing requests for Australia or the United Kingdom against the ETL over a three-month period and assesses approximately 18% of such licensing requests would not be eligible for transfer under the exemption because of the ETL. The Department has expedited those licensing requests with an average processing time of 16.6 days. Multiple commenters requested additional efforts to align the ETL for the § 126.7 exemption with the ETLs implemented by Australia and the United Kingdom. The Department continues to work with its international partners to more clearly align the three ETLs where practicable. However, due to differences in the underlying export control lists, the three ETLs will not align perfectly and each partner must maintain its own implementation to account for differences in national legal and policy requirements and to

remain agile in adapting to revisions of its own national regulations.

One commenter, in expressing appreciation for the Department's commitment to periodic reviews of the ETL, encouraged the Department to continue to engage with industry and open another comment period specifically for further review of the ETL. The Department values the industry contributions in the two prior comment periods and declines to open another comment period at this time, although it may issue a request for such comment at a future date.

Two commenters criticized the ETL as burdensome, without identifying specific examples of where the list is overly burdensome or suggestions for changes to the list. The Department has committed to an annual review of the ETL for the first five years after implementation, and periodically thereafter.

One commenter requested more transparency when updates to the ETL are made either by website posting or utilizing other technologies to release updates to the public. The Department notes that any future changes to the ETL will be published in the *Federal Register*. Two commenters suggested revising ETL entries to clarify the scope of excluded technical data and defense services. The first recommended rewording the ETL entry for United States Munitions List (USML) Category XVIII to clarify it excludes "classified technical data and defense services directly related to classified articles specially designed for counter-space operations," and not "all classified USML Category XVIII technical data and defense services," asserting that the semicolon after "counter-space operations" creates confusion. The commenter specifically suggests the entry is unclear as to whether the final clause refers only to the antecedent "Classified articles described in USML Category XVIII specially designed for counter-space operations" or if it refers to the entire USML category. The Department declines to revise this entry and notes its use of the semicolon in this entry is consistent both with usage throughout the ETL and the Department's intent. Specifically, use of the adjective phrase "directly related [to]" requires an object. As in the other ETL entries, "directly related technical data and defense services" refers to all antecedent defense articles within the entry. An example

where the Department intends to exclude technical data for all articles in a USML category is found in the ETL entry for USML Category XVI. The second commenter requested specific revisions of the ETL entry for Category XI(a)(4)(i), (c)(1) through (3), and (d), to provide that only "classified, directly related classified technical data and classified defense services to the previously proposed exclusions" are excluded. The Department declines to do so, assessing the entry is already sufficiently clear and concise, and consistent with entries throughout the ETL. Because "directly related" in this entry modifies both "technical data" and "defense services," "classified," must similarly modify both. Thus, the excluded technical data and defense services in this entry comprise: classified technical data directly related to the articles identified in the preceding clause(s) and classified defense services directly related to the articles identified in the preceding clause(s).

One commenter encouraged DDTC to limit the ETL entry for MT-designated articles and services only to the exclusions outlined in AECA subsection (j)(1)(C)(ii). That commenter and one other requested amendment of that ETL entry to apply only to complete unmanned aerial systems (UAS). The first commenter proposed using language it previously suggested in response to the proposed rule. As it did in the interim final rule, the Department again declines to rely on the regulated community to interpret elements of the AECA and Missile Technology Control Regime (MTCR), including the term "for use in rocket systems," for the purposes of authorizing exports. One of the commenters asserted industry regularly interprets whether MTCR controls apply; however, discrepancies in MT designations for license application submissions do not carry the same risk as discrepancies in self-assessing whether a technology may be exported as required by the exemption. The Department previously removed USML entries with an "MT" designation from the MTCR entry on the ETL when the USML entry (1) does not include MTCR Category I commodities and (2) does not include MTCR Category II commodities for use in rockets.

One commenter also requested the Department consider carving out USML Category

IV(d)(3) in the same manner as the Department previously carved out USML Category VIII(h)(12) from the MTCR entry. The Department declines to do so and notes the articles described in USML Category IV(d)(3) are described in Item 20.A.1.b of the MTCR Annex. Because paragraph (d)(3) describes MTCR Category II commodities for missiles, rockets, and space launch vehicles, the Department affirms that articles described in that entry are not eligible for transfer under the § 126.7 exemption.

Two commenters suggested revisions to the USML Category I through XX anti-tamper (AT) entry on the ETL. One commenter recommended expanding this entry to exclude AT technologies verified and validated by the U.S. Department of Defense (DoD) to control those technologies that are not U.S. Programs of Record and do not have a DoD Program Protection Plan. Having consulted with DoD, the Department declines to expand the ETL as requested. Another commenter recommended revising the exclusion to clarify it does not exclude articles with AT features that are already installed in a major component they are designed to protect, similar to those installed in end-items. The Department declines to do so and notes that components and end-items are already both included in the definition of a commodity at § 120.40(a). Thus, articles having excluded anti-tamper features that are already installed in the commodity, including components and end items, they are designed to protect, are not currently excluded by this ETL entry.

One commenter noted the control text of USML Category XI(a)(3)(xxix) refers to paragraphs (a)(6) and (a)(13) of USML Category VIII, which are currently reserved. The Department thanks the commenter for this observation and notes this does not materially affect the operation of the USML or the ETL. Although updates to the USML are outside the scope of this rulemaking, the Department is tracking this issue for future updates to the USML.
One commenter recommended the Department "streamline" the entry that currently applies to paragraphs (c) and (d) of Category XI by removing references to paragraph (d) technical data and defense services. The commenter proposed language that does not appear to differ from the

current ETL. The Department declines to remove the references to technical data and defense services, as it would inappropriately reduce the scope of the exclusion.

One commenter requested the Department clarify that defense services furnished by a U.S. Authorized User based solely on information furnished by an Australian or UK Authorized User are not excluded by the ETL. The Department declines to do so, as the request is overly broad and would complicate compliance efforts. Furthermore, the Department notes one of the reasons it regulates defense services is its interest in ensuring the use of U.S. expertise and know-how is consistent with U.S. national security and foreign policy objectives, even if no technical data is transferred. The commenter specifically posed a hypothetical scenario in which the Australian Department of Defence (ADoD) hires a U.S. company to provide advisory services that constitute a defense service directly related to a USML Category XI(b) defense article. According to the hypothetical, to furnish these services, the U.S. company must review classified information furnished by the ADoD, directly related to articles described in USML Category XI(b). The commenter asserted the U.S. company may not rely on the exemption provided at § 126.7 due to the ETL entry that excludes classified articles described in USML Category XI(b) and classified, directly related technical data and defense services. As a result, the U.S. company must seek a technical assistance agreement (TAA) for this service, even though it does not plan to export any hardware, software, technical data, or information about U.S. Government (USG) systems or methods. The Department affirms that classified defense services directly related to a classified USML Category XI(b) defense article are not eligible to be furnished under the § 126.7 exemption, even if those services do not involve the transfer or use of U.S.-origin hardware or technical data. However, the Department also clarifies that classified defense services are those that meet the definition of "classified" in § 120.38. Thus, defense services are not "classified" solely on the basis that the service involves the use of classified information or classified hardware. The Department also notes it has committed to, and is currently meeting, expedited licensing timelines pursuant to § 126.15, which should facilitate

U.S. companies obtaining any necessary licenses or agreements.

One commenter inquired whether the § 126.7 exemption places limits on the figure of merit (FOM) for night vision devices transferred under the exemption. The Department observes the ETL does not currently exclude articles based on FOM criteria. Note that all applicable ETL entries must be reviewed to determine whether a particular defense article is eligible for transfer pursuant to the exemption.

One commenter requested clarification regarding whether the § 126.7 exemption allows exports of unclassified technical data regarding USG cryptographic devices that have not yet been certified and not yet approved for foreign release by the appropriate USG entities. The Department affirms the referenced ETL entry is not intended to exclude unclassified technical data or articles related to USG cryptographic devices. However, the § 126.7 exemption pertains specifically to ITAR license requirements. It does not relieve exporters of the obligation to comply with other applicable requirements outside the ITAR, such as National Security Agency certification requirements.

One commenter objected to the ETL entry for USML Category XX(d), asserting it does not reflect U.S. legal obligations and that it will disrupt the development of AUKUS Pillar I and Pillar II activities. The Department declines to modify the USML Category XX(d) entry of the ETL at this time because the USG assesses that continued review of licenses or use of the § 126.4 exemption is required to protect critical technologies. The Department further notes that authorizations to export such technology are subject to the expedited licensing procedures referenced above.

Authorized User-related Public Comments

A number of commenters offered observations and recommendations regarding the Authorized User Terms and Conditions. The Authorized User Terms and Conditions are the compliance requirements of Australian and UK parties participating in transfers or activities via the § 126.7 exemption. Australian and UK parties must sign the Authorized User Terms and

Conditions to complete their Authorized User enrollment package and to initiate their governments' review processes. The Authorized User Terms and Conditions were established as part of separate government-to-government agreements with Australia and the United Kingdom to provide maximum speed and accountability in enrolling and maintaining Authorized Users of Australia and the United Kingdom. While the administration of the Authorized User enrollment process is outside of the scope of this rulemaking, the Department summarizes and provides information in response to those comments here as a matter of convenience.

Three commenters recommended modifying the Authorized Users Terms and Conditions to align the text with existing provisions of the ITAR, including § 127.12. The Department notes the Authorized User Terms and Conditions have been updated based on these recommendations to incorporate by reference existing disclosure guidance and requirements in §§ 127.12 and 126.1.

Three commenters recommended modifying the Authorized Users Terms and Conditions for the United Kingdom to use the existing § 123.9(b) destination control statement, and to amend § 123.9(b)(1)(iv) to refer to a destination as "country or countries." The Department notes the Authorized User Terms and Conditions have been updated to incorporate by reference the standard destination control statement in § 123.9(b).

One commenter suggested UK industry is still unclear regarding the process of becoming an Authorized User, and the commenter stated that the UK Ministry of Defence assured them further guidance on the process is forthcoming. The commenter further expressed this has caused delays for industry. The Department notes the UK Ministry of Defence has provided further guidance regarding the Authorized User enrollment process since the publication of the interim final rule that introduced the § 126.7 exemption.

One commenter reported problems with locating a list of U.S. Authorized Users and sought clarification as to whether that list is provided somewhere other than the Defense Export Control and Compliance System (DECCS). The Department notes, per the language of

ITAR § 126.7(b)(2)(i), all U.S. persons registered with DDTC and who are eligible to receive an ITAR license or other authorization as stated in ITAR § 120.16 may utilize the exemption provided all other criteria in § 126.7 are met.

One commenter sought clarity regarding the process that should be followed to share technology with entities that are not Authorized Users within Australia, the United Kingdom, and the United States. The Department notes that while the § 126.7 exemption is not available in such cases, all other existing authorization mechanisms under the ITAR remain available, including the licensing process or other license exemptions within the ITAR, according to their terms.

One commenter inquired as to whether the Authorized User process for the § 126.7 exemption included audits, certifications, or supply chain reviews. The Department notes that the Authorized User process is an intergovernmental process for vetting Authorized Users of the exemption within the UK and Australia. Additional information on becoming an Authorized User is available on the DDTC website and from the UK and Australian governments.

One commenter noted that there will be a need to train companies who are Authorized Users not only on compliance with the § 126.7 exemption, but on their compliance obligations generally. The Department acknowledges the comment and continues to work with the governments of both the United Kingdom and Australia and industry in both countries to promote compliance.

One commenter suggested that the Authorized User enrollment process is administratively burdensome, lengthy, and inconsistent among the three countries. The Department notes enrollment of Authorized Users is a priority across all three governments to support industry use of the § 126.7 exemption and has already been modified and streamlined as described in this rule.

One commenter stated that the respective Authorized User guidance documents for the United Kingdom and Australia have different notification requirements regarding changes to corporate information furnished to each respective government. Further, the commenter

recommended that the UK reporting requirement to notify both the UK Ministry of Defense and DDTC of corporate information changes should be amended to conform to existing notification requirements pursuant to § 127.12. The Department has recently updated the UK Authorized User Terms and Conditions accordingly.

One commenter recommended that Australia, the United Kingdom, and the United States develop a process to report publicly when a former Authorized User is removed from the Authorized User list. The Department offers a reminder that the Authorized User list is the official up-to-date record of Authorized Users of Australia and the United Kingdom who are eligible via § 126.7(b)(2)(iii). Non-governmental parties and state, territorial, or local government parties of Australia or the United Kingdom are required to be enumerated on the Authorized User list to be eligible via § 126.7(b)(2)(iii). Exemption users are responsible for checking if there are any changes to the list.

One commenter recommended the Department enumerate UK and Australian government departments and agencies in § 126.7(b)(2), rather than on the Authorized User list, so that it is clear which entities are eligible to use the § 126.7 exemption. Similarly, another commenter recommended clarifying that government agencies that report to the Australian Department of Defence, the UK Ministry of Defence, and any other government departments are included as Authorized Users. The Department accepts this recommendation, in part, by adding regulatory text confirming that UK national-level and Australian federal government departments or agencies are within the scope of § 126.7(b)(2), but those departments or agencies are not enumerated on the Authorized User list, unless they so request.

One commenter recommended moving away from manual reviews of the Authorized Users list in DECCS and providing an Application Programming Interface (API) – establishing a software communications protocol – between DECCS and industry screening tools to verify Authorized Users at the time of export. Alternatively, the commenter suggested the Department could also provide a downloadable Excel document with all Authorized Users. The Department

acknowledges this comment and notes it is exploring upgrades to the Authorized User List in DECCS to increase functionality.

Other Public Comments

One commenter recommended the Department consider adding Canada, to include the Canadian exemptions found at § 126.5, into the new defense trade and cooperation framework for the United Kingdom and Australia. Alternatively, the commenter suggested retaining the Canadian exemptions at § 126.5, but revising the language of those exemptions to mirror the language found in the § 126.7 exemption. The Department declines to accept both recommendations. The creation of the ITAR exemption for defense trade among the UK, Australia, and the United States came pursuant to section 38(l) of the AECA; upon positive certification, the AECA called for the creation of an ITAR exemption with specific requirements. The Department continues to review options to improve standardization of exemption presentation throughout the regulations but also notes that the § 126.7 exemption has requirements that differ from the Canadian exemptions and that are imposed by statute.

One commenter sought clarity on nontransfer and use certificate (*i.e.*, DSP-83) signature requirements when certain parties to a transaction are Authorized Users and others are not. The Department reiterates that § 123.10(a) was amended to remove the requirement to sign a DSP-83 when relying on the exemptions in §§ 126.5 and 126.7. With respect to § 126.5, the exemptions do not include any requirement that any party be an Authorized User and, pursuant to § 123.10(a), the requirement to complete a DSP-83 is waived for transactions pursuant to that exemption regardless of any party's status as an Authorized User. With respect to the § 126.7 exemption, if any party to the transaction is not an Authorized User, the transaction would not qualify for the § 126.7 exemption. In other words, the hypothetical scenario posed by the commenter is not possible because any transaction involving both Authorized Users and parties that are not Authorized Users would not be eligible for the § 126.7 exemption and would therefore need an alternative form of authorization, which would require the completion of a

DSP-83 consistent with § 123.10(a).

One commenter recommended revising § 123.9(c)(4) to include the § 126.7 exemption. The Department declines to accept this comment as § 123.9(c)(4) outlines criteria specific to the UK and Australian Defense Trade Cooperation Treaties exemptions found at §§ 126.16 and 126.17 and reexports or retransfers must likewise be authorized in accordance with the provisions of those Treaties.

One commenter sought clarification on whether § 123.9(e) excludes § 126.7, similar to how it excludes §§ 126.16 and 126.17. The Department confirms that defense articles exported pursuant to § 126.7 are not excluded from § 123.9(e).

One commenter suggested there is a need for Australia, the United Kingdom, and the United States to harmonize cyber security standards to effectively share defense-related technologies. The Department notes this comment is outside the scope of the rulemaking. One commenter expressed that industry is hoping for parallel changes to the Foreign Military Sales (FMS) process that are similar to the § 126.7 exemption and that such changes are necessary for AUKUS to succeed. The Department acknowledges this comment; however, it is outside the scope of the rulemaking.

One commenter recommended a Defense Trade Advisory Group made up of foreign industry, primarily from host countries that are U.S. allies, rather than just U.S. industry, to provide advice to the U.S. Government on regulatory issues. The Department acknowledges this comment; however, it is outside the scope of the rulemaking.

One commenter recommended the Department clarify whether values for purposes of congressional certification are calculated on a "per shipment" includes "per transfers" of technical data and/or defense services. Further, the commenter requested the Department create an FAQ clarifying that congressional certification thresholds should not be based on the total contract value, including when a contract modification causes it to meet or exceed current congressional certification thresholds, but rather value for congressional certification purposes

should be based on individual transactions that meet or exceed the congressional thresholds or those that involved the manufacturing of significant military equipment abroad. The Department notes the DDTC website has an existing FAQ on this topic, which states parties should base their calculations for congressional certification on a per shipment basis.

One commenter recommended the Department work with its interagency partners and Congress to eliminate, within the context of the AUKUS partnership, the license requirement, interagency review, and tiered review of transfers that meet the congressional certification thresholds. The commenter went on to suggest that industry should only be required to submit notification of a transfer to the Department, who would then notify Congress using a 15-day review period. The Department will monitor the implementation and effectiveness of the § 126.7 exemption and make further amendments as appropriate, particularly after industry and government stakeholders are familiar with its application, but notes that the exemption articulates the scope of transfers the Department assesses are currently appropriate without the need for a license or congressional notification, as applicable. Sections 36(c) and 36(d) of the AECA require the Department to notify Congress pursuant to the requirements articulated therein.

One commenter encouraged continued Department engagement with industry through outreach events, communication via the DDTC website, and FAQs. The commenter noted that additional information on the Authorized User process, reporting requirements under § 126.7, reexports and retransfers, and expedited processing of license applications is welcomed. The Department appreciates this feedback and will continue to engage with industry to encourage use of the § 126.7 exemption.

One commenter assessed that the § 126.7 exemption will facilitate collaboration between the United States and Australia on space activities, but also expressed concern about potential industry confusion due to actual or perceived "crossover" between the § 126.7 exemption and the recently-executed Technologies Safeguard Agreement (TSA) between the United States and

Australia. The commenter did not suggest changes to regulatory language; rather, they requested the Department provide guidance to assist industry in navigating the requirements of the ITAR and the two governments' TSA implementation and to consider how to reduce the administrative burden on exporters subject to both sets of requirements. The Department notes that TSAs are important pre-conditions that help ensure the necessary foundation is in place to adequately protect transfers of certain space launch vehicle assistance and technologies. In this respect, the responsibilities and obligations outlined in TSAs stem from and complement requirements in the ITAR.

REGULATORY ANALYSIS AND NOTICES

Administrative Procedure Act

This rulemaking is exempt from the notice-and-comment rulemaking and minimum effective date requirements of the Administrative Procedure Act (APA) pursuant to 5 U.S.C. 553(a)(1) as a military or foreign affairs function of the United States Government. For the reasons described in the interim final rule (89 FR 67270, as amended by 89 FR 68778), the Department also believes that good cause exists to proceed with this rulemaking expeditiously as per 5 U.S.C. 553(b)(B) and 553(d)(3).

Regulatory Flexibility Act

Since this rule is exempt from the notice-and-comment provisions of 5 U.S.C. 553 as a military or foreign affairs function, and based on the Department's finding of good cause, the rule does not require 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 are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

The Department does not believe this rulemaking is a major rule within the definition of 5 U.S.C. 804(2).

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 amendment 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, 13563, and 14192

Executive Order 12866, as supplemented by Executive Order 13563, directs 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). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Because the scope of this rule does not impose additional regulatory requirements or obligations, the Department believes costs associated with this rule will be minimal. Regarding the exemption, Australia and the United Kingdom, as set forth in the section 655 reports required annually by the Foreign Assistance Act of 1961, as amended, are ordinarily among the most commonly licensed destinations for transfers subject to the ITAR. The Department expects that far fewer licensing applications will be submitted for transfers of defense articles and defense services to and between Australia, the United Kingdom, and the United States as a result of the exemption. Consequently, this exemption will relieve licensing burdens for most exporters. Regarding when an ITAR exemption is not available for use, the

expedited licensing process provides a substantial benefit to U.S. exporters for licensing applications involving Australia, the United Kingdom, or Canada. This rule is exempt from the requirements of Executive Order 14192 because it relates to a foreign affairs function of the United States. This rule has been designated as a significant regulatory action by the Office and Information and Regulatory Affairs under Executive Order 12866.

Executive Order 12988

The Department of State has 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 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 or revise any information collections subject to 44 U.S.C. Chapter 35.

List of Subjects in *22 CFR Part 126*

Arms and munitions, Exports, Reporting and recordkeeping requirements, Technical assistance.

For the reasons set forth above, Title 22, Chapter I, Subchapter M, part 126 is amended as follows:

PART 126 – GENERAL POLICIES AND PROVISIONS

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

Authority: 22 U.S.C. 287c, 2651a, 2752, 2753, 2776, 2778, 2779, 2779a, 2780, 2791, 2797, 10423; sec. 1225, Pub. L. 108-375, 118 Stat. 2091; sec. 7045, Pub. L. 112-74, 125 Stat. 1232; sec. 1250A, Pub. L 116-92, 133 Stat. 1665; sec. 205, Pub. L. 116-94, 133 Stat. 3052; and E.O. 13637, 78 FR 16129, 3 CFR, 2013 Comp., p. 223.

2. Revise and republish § 126.7 to read as follows:

§ 126.7 Exemptions for defense trade and cooperation among Australia, the United Kingdom, and the United States

(a) *By U.S. persons, government departments or agencies, or Authorized Users*. No license is required for the export, reexport, retransfer, or temporary import of defense articles, furnishing of defense services, or engaging in brokering activities as described in part 129 of this subchapter, between or among parties described in § 126.7(b)(2), subject to the requirements and limitations in paragraph (b) of this section.

(b) *Requirements and limitations*. The exemption described in paragraph (a) of this section is subject to the following requirements and limitations:

(1) The activity must be to or within the physical territory of Australia, the United Kingdom, or the United States;

(2) The transferor, recipient, or broker must each be:

(i) A U.S. person registered with the applicable Directorate of Defense Trade Controls (DDTC) registration pursuant to §§ 122.1 and 129.3 of this subchapter, and eligible under § 120.16 of this subchapter;

(ii) A U.S. Government department or agency, United Kingdom national-level government department or agency, or Australian federal government department or agency; or

(iii) An Authorized User identified through the DDTC website and, if engaging in brokering activities, registered with DDTC pursuant to § 129.3 of this subchapter;

(3) The defense article or defense service is not identified in supplement no. 2 to this part as ineligible for transfer under the exemption in paragraph (a) of this section;

(4) The value of the transfer does not exceed the amounts described in § 123.15 of this subchapter and does not involve the manufacturing abroad of significant military equipment as described in § 124.11 of this subchapter; and

(5) Transferors must comply with the requirements of § 123.9(b) of this subchapter.

Note 1 to paragraph (b): The exemption in paragraph (a) of this section does not remove other applicable U.S. statutory and regulatory requirements. For example, for U.S. parties, transfers of classified defense articles and defense services must still meet the requirements in 32 CFR part 117, National Industrial Security Program Operating Manual (NISPOM), in addition to all other applicable laws. Australian Authorized Users must, for example, meet the requirements in the Australian Protective Security Policy Framework, including appropriate security risk management for contracted providers. United Kingdom Authorized Users must, for example, meet the requirements in the Government Functional Standards GovS 007: Security.

(c) *Reexports, retransfers, or temporary imports in support of the armed forces of Australia, the United Kingdom, or the United States*. No license is required for the reexport or retransfer of defense articles among parties described in § 126.7(b)(2) or temporary import of defense articles into the United States, subject to the requirements and limitations in paragraph (d) of this section.

(d) *Requirements and limitations*. The exemption described in paragraph (c) of this section is subject to the following requirements and limitations:

(1) The defense article was originally exported pursuant to a license or other approval;

(2) To the extent that any party described in § 126.7(b)(2)(i) or (iii) is a party to the reexport, retransfer, or temporary import into the United States, such party is under contract with and either directly embedded with the armed forces of Australia, the United Kingdom, or the United States or operating alongside and in support of such forces; and

(3) The purpose of the reexport, retransfer, or temporary import is for:

(i) The provision of on-site support to the armed forces of Australia, the United Kingdom, or the United States, or

(ii) The return to Australia or the United Kingdom, or the United States of defense articles used in on-site support of the armed forces of Australia, the United Kingdom or the United States; and

(iii) The reexport, retransfer or temporary import is subject to paragraphs (b)(3) through (5) of this section.

3. Amend § 126.18 by revising paragraph (e)(2) to read as follows:

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

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(e) * * *

(2) Are Australian or United Kingdom parties described in § 126.7(b)(2)(ii) or (iii) or are regular employees thereof;

* * * * *

Thomas G. DiNanno,

Under Secretary,

Arms Control and International Security,

Department of State.

Billing Code: 4710-25

[FR Doc. 2025-23998 Filed: 12/29/2025 8:45 am; Publication Date: 12/30/2025]