EIB World Trade Headlines

Evolutions In Business • www.eib.com • (978) 256-0438
Fax: (978) 250-4529 • P.O. Box 4008. Chelmsford. MA 01824

September 15, 2016 - Volume 8, Issue 17

Industry Notices DDTC, State Dept.

Hiring for Permanent Director DDTC

The Directorate of Defense Trade Controls is in the process of advertising the recruitment of the next permanent Director of the Office of Defense Trade Controls Compliance. Arthur Shulman is serving as acting office director. (09.09.16)

DDTC Needs Your Opinion

DDTC has recently acquired an electronic case management system to update its business processes and how it receives and handles information from industry. This system, once deployed, will allow users to electronically submit requests for advisory opinions to DDTC; users will be able to retrieve responses using the same system. DDTC staff members have defined the data fields which are most relevant and necessary for requests for advisory opinions and developed the means to accept this information from the industry in a secure system. The revision of this information collection is meant to conform the current OMB-approved data collection to DDTC's new case management system. DDTC is therefore requesting industry comments on the new advisory opinion form, which will be mirrored in the case management system once deployed. A copy of the draft form may be requested from DDTC using the contact information in the

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Steve Derscheid, Directorate of Defense Trade Controls, Department of State, who may be reached at *DerscheidSA@state.gov* (please include subject line ''ATTN: Advisory Opinion Form'').

NEWSLETTER NOTES

Counterintelligence

Spies might seem like a throwback to earlier days of world wars and cold wars, but they are more prolific than ever— and they are targeting our nation's most valuable secrets. The threat is not just the more traditional spies passing U.S. secrets to foreign governments, either to fatten their own wallets or to advance their ideological agendas. It is also students and scientists and plenty of others stealing the valuable trade secrets of American universities and businesses—the ingenuity that drives our economy—and providing them to other countries. It is nefarious actors sending controlled technologies overseas that help build bombs and weapons of mass destruction designed to hurt and kill Americans and others. And because much of today's spying is accomplished by data theft from computer networks, espionage is quickly becoming cyber-based.

Inside FBI Counterintelligence

National Strategy

As the lead agency for exposing, preventing, and investigating intelligence activities on U.S. soil, the FBI continues to work to combat these threats using our full suite of investigative and intelligence capabilities. We've mapped out our blueprint in what we call our Counterintelligence National Strategy, which is regularly updated to focus resources on the most serious current and emerging threats.

The strategy itself is classified, but we can tell you what its overall goals are:

- Keep weapons of mass destruction, advanced conventional weapons, and related technology from falling into the wrong hands—using intelligence to drive our investigative efforts to keep threats from becoming reality. Our new Counterproliferation Center will play a major role here.
- Protect the secrets of the U.S. intelligence community—again, using intelligence to focus our investigative efforts and collaborating with our government partners to reduce the risk of espionage and insider threats.
- Protect the nation's critical assets—like our advanced technologies and sensitive information in the defense, intelligence, economic, financial, public health, and science and technology sectors. We work to identify the source and significance of the threats against these assets, and to help their "owners" to minimize vulnerabilities.

*(*Continued On The Following Column)*

- Counter the activities of foreign spies—whether they are representatives of foreign intelligence agencies or governments or are acting on their behalf, they all want the same thing: to steal U.S. secrets. Through proactive investigations, we identify who they are and stop what they're doing.

One important aspect of our counterintelligence strategy involves strategic partnerships. And on that front, we focus on three specific areas:

- The sharing of expertise and resources of the FBI, the U.S. intelligence community, other U.S. government agencies, and global partners to combat foreign intelligence activities; Coordination of U.S. intelligence community efforts to combat insider threats among its own ranks; and
- Partnerships with businesses and colleges and universities to strengthen information sharing and counterintelligence awareness.
- Focus on cyber activities. Another key element of our counterintelligence strategy is its emphasis on detecting and deterring foreign-sponsored cyber intelligence threats to government and private sector information systems. Sometimes, spies don't have have to physically be in the U.S. to steal targeted information…they can be halfway around the world, sitting at a keyboard.

The FBI's Counterintelligence National Strategy supports both the President's National Security Strategy and the National Counterintelligence Strategy of the United States.

History and Evolution

The FBI has been responsible for identifying and neutralizing ongoing national security threats from foreign intelligence efforts since 1917, nine years after the Bureau was created in 1908. The Counterintelligence Division has gone through a lot of changes over the years—including several name changes—and at times took on additional tasks such as terrorism and subversion.

Throughout the Cold War, for example, the division changed its name several times. But foiling and countering the efforts of the Soviet Union and other communist nations remained the primary mission. Read a detailed account of the Venona Project, a 37-year effort to decrypt, decode, and exploit messages sent by Soviet intelligence agencies through the collaboration of the FBI, the National Security Agency, the CIA, and several foreign intelligence agencies.

(*Continued On The Following Page)

The following chronology shows how the FBI's Counterintelligence Division has adjusted and changed over the years to meet evolving threats.

- **Before 1939** FBI held responsibility for foreign counterintelligence (FCI), terrorism and related investigations. Prior to WWI, many of these responsibilities were shared with the Secret Service. Still, the FBI has held primary responsibility for counterintelligence within America since 1917.
- **1939** The General Intelligence Division was created to handle FCI and other intelligence investigations.
- **1940** A Special Intelligence Service Division was created to send undercover agents to South and Central America to gather intelligence and to effect counterintelligence operations against Nazi agents and supporters operating there. It was closed in 1946 when President Truman created the Central Intelligence Group.
- **1941** The General Intelligence Division was renamed National Defense Division.
- **1943** The National Defense Division was renamed the Security Division (not to be confused with the Security Division created in 2001).
- **1953** Renamed the Domestic Security Division.
- **1973** Renamed the Intelligence Division. (Then, in 1976, Domestic Intelligence/Security investigations, including those involving domestic terrorism, were transferred out, into the Criminal Investigative Division CID.)
- **1993** Renamed the National Security Division NSD. (In 1994, the domestic terrorism responsibility moved back to NSD.)
- **1999** Counterterrorism Division and Investigative Services Division were created in a Bureauwide reorganization and those responsibilities were transferred out of NSD and CID, into the new division.
- **2001** NSD was renamed the Counterintelligence Division. The Security Division, Cyber Division, and Office of Intelligence were created out of the Counterintelligence Division in December 2001

Key Issues/Threats

Economic Espionage

Economic espionage is a problem that costs the American economy hundreds of billions of dollars per year and puts our national security at risk. While it is not a new threat, it is a growing one, and the theft attempts by our foreign competitors and adversaries are becoming more brazen and more varied in their approach. The FBI estimates that hundreds of billions of U.S. dollars are lost to foreign competitors every year. These foreign competitors deliberately target economic intelligence in advanced technologies and flourishing U.S. industries.

*(*Continued On The Following Column)*

Definition

According to the Economic Espionage Act (EEA), Title 18 U.S.C., Section 1831, economic espionage is (1) whoever knowingly performs targeting or acquisition of trade secrets to (2) knowingly benefit any foreign government, foreign instrumentality, or foreign agent. And Theft of Trade Secrets, Title 18 U.S.C., Section 1832, is (1) whoever knowingly misappropriates trade secrets to (2) benefit anyone other than the owner.

Historically, economic espionage has been leveled mainly at defense-related and high-tech industries. But recent FBI cases have shown that no industry, large or small, is immune to the threat. Any company with a proprietary product, process, or idea can be a target; any unprotected trade secret is ripe for the taking by those who wish to illegally obtain innovations to increase their market share at a victim company's expense.

The FBI's role

Economic espionage falls under the Bureau's Counterintelligence Program, designated by the FBI Director as the Bureau's number two investigative priority—second only to terrorism.

In terms of our operational efforts, the FBI:

- Conducts an increasing number of investigations into suspected acts of economic espionage using our full arsenal of lawful tools and techniques.
- Takes part in the DOJ's Intellectual Property Task Force, which seeks to support prosecutions in priority areas, promote innovation through heightened civil enforcement, achieve greater coordination among federal, state, and local law enforcement partners, and increase focus on international law enforcement efforts, including reinforcing relationships with key foreign partners and U.S. industry leaders.
- Participates in the multiagency National Intellectual Property Rights Coordination Center, which facilitates the exchange of intellectual property theft information, plans and coordinates joint domestic and international law enforcement operations, generates investigative leads from industry and the public, provides law enforcement training, and works closely with industry partners on intellectual property crime.

(*Continued On The Following Page)

Beyond its investigative activity, the FBI works to counter the economic espionage threat by raising public awareness and directly reaching out to industry partners. For example:

- The Bureau's Economic Espionage Unit is dedicated to countering the economic espionage threat to include developing training and outreach materials; participating in conferences; visiting private industry; working with the law enforcement and intelligence community on requirement issues; and providing classified and unclassified presentations.
- In collaboration with the National Counterintelligence and Security Center, the FBI launched a nationwide campaign and released a short film aimed at educating businesses, industry leaders, and anyone with a trade secret about the threat and how they can help mitigate it. The Company Man: Protecting America's Secrets, based on an actual case, illustrates how one U.S. company was targeted by foreign actors and how that company worked with the FBI to resolve the problem and bring the perpetrators to justice. The Bureau has provided more than 1,300 in-person briefings on the economic espionage threat to companies and industry leaders over the past year, using The Company Man as a training tool. But through this campaign, the FBI hopes to expand the scope of the audience to include a wider range of industry representatives, trade associations, and smaller companies and encourage them to come forward if they suspect they are a victim of economic espionage.

Counterintelligence Strategic Partnerships

Our Counterintelligence Strategic Partnerships work to determine and safeguard those technologies which, if compromised, would result in catastrophic losses to national security. Through our relationships with businesses, academia, and U.S. government agencies, the FBI and its counterintelligence community partners are able to identify and effectively protect projects of great importance to the U.S. government. This provides the first line of defense inside facilities where research and development occurs and where intelligence services are focused.

Updated Statements of Legal Authority for the Export Administration Regulations

9/01/16
81 FR 60254

This rule updates the authority citations in the Export Administration Regulations (EAR) to cite the President's Notice of august 4, 2016, 81 FR 52587 (August 8, 2016), which continues the emergency declared in Executive Order 13222 This rule is purely procedural. Its purpose is to keep the authority citation paragraphs in the Code of Federal Regulations current. It does not change any right, prohibition or obligation that applies to any person under the EAR.

Amendments to Existing Validated End-User Authorization in the People's Republic of China: Boeing Tianjin Composites Co. Ltd.

9/06/16
81 FR 61104

In this rule, the Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) to revise the existing Validated End-User (VEU) list for the People's Republic of China (PRC) by updating the list of eligible destinations (facilities) for VEU Boeing Tianjin Composites Co. Ltd. (BTC). Specifically, BIS amends supplement No. 7 to part 748 of the EAR to change the written address of BTC's existing facility. The physical location of the facility has not changed. BIS updated the facility address after receiving notification of the change from BTC. The End-User Review Committee reviewed and authorized the amendment in accordance with established procedures. The updated address contributes to maintaining accurate location information for BTC's VEU.

Russian Sanctions: Addition of Certain Entities to the Entity List

9/07/16
81 FR 61595

The Bureau of Industry and Security (BIS) amends the Export Administration Regulations (EAR) by adding eighty-one entities under eighty-six entries to the Entity List. The eighty-one entities who are added to the Entity List have been determined by the U.S. Government to be acting contrary to the national security or foreign policy interests of the United States. BIS is taking this action to ensure the efficacy of existing sanctions on the Russian Federation (Russia) for violating international law and fueling the conflict in eastern Ukraine. These entities will be listed on the Entity List under the destinations of the Crimea region of Ukraine, Hong Kong, India, and Russia.

PanAmerican Seed Company Settles Potential Civil Liability for Alleged Violations of the Iranian Transactions and Sanctions Regulations

PanAmerican Seed Company ("PanAm Seed"), West Chicago, Illinois, a division of Ball Horticultural Company ("Ball Horticultural"), has agreed to pay $4,320,000 to settle potential civil liability for alleged violations of the Iranian Transactions and Sanctions Regulations, 31 C.F.R. part 560 (ITSR).[1] Specifically, OFAC alleged that from on or about May 5, 2009 to on or about March 2, 2012, PanAm Seed violated § 560.204 of the ITSR by indirectly exporting seeds, primarily of flowers, to two Iranian distributors on 48 occasions (collectively referred to hereafter as the "Alleged Violations").

OFAC determined that PanAm Seed did not voluntarily self-disclose the Alleged Violations to OFAC, and that the Alleged Violations constitute an egregious case. Both the statutory maximum and base penalty civil monetary penalty amounts for the Alleged Violations were $12,000,000.

For a number of years, up to and including 2012, PanAm Seed made 48 indirect sales of seeds to two Iranian distributors. PanAm Seed shipped the seeds to consignees based in two third- countries located in Europe or the Middle East, and PanAm Seed's customers arranged for the re-exportation of the seeds to Iran. Personnel (including several mid-level managers) from various business units within PanAm Seed and/or Ball Horticultural were aware of U.S. economic sanctions programs involving Iran and the need to apply for and obtain a specific license from OFAC in order to export the seeds in question. Despite this knowledge, PanAm Seed engaged in a pattern or practice designed to conceal the involvement of Iran and/or obfuscated the fact that the seeds were ultimately destined for distributors located in Iran.

The settlement amount reflects OFAC's consideration of the following facts and circumstances, pursuant to the General Factors under OFAC's Economic Sanctions Enforcement Guidelines, 31 C.F.R. part 501, app. A. OFAC considered the following to be aggravating factors: (1) PanAm Seed willfully violated U.S. sanctions on Iran by engaging in, and systematically obfuscating, conduct it knew to be prohibited; (2) PanAm Seed demonstrated recklessness with respect to U.S. sanctions requirements by ignoring its OFAC compliance responsibilities, despite

*(*Continued On The Following Column)*

[1] On October 22, 2012, OFAC changed the heading of 31 C.F.R. part 560 from the Iranian Transactions Regulations to the ITSR, amended the renamed ITSR, and reissued them in their entirety. *See* 77 Fed. Reg. 64,664 (Oct. 22, 2012). For the sake of clarity, all references herein to the ITSR shall mean the regulations in 31 C.F.R. part 560 in effect at the time of the activity, regardless of whether such activity occurred before or after the regulations were renamed and reissued

substantial international sales and warnings that OFAC sanctions could be implicated; (3) multiple PanAm Seed and Ball Horticultural employees, including mid-level managers, had contemporaneous knowledge of the transactions giving rise to the Alleged Violations and that the seeds were intended for reexportation to Iran, and PanAm Seed continued sales to its Iranian distributors for nearly eight months after its Director of Finance learned of OFAC's investigation; (4) PanAm Seed engaged in this pattern of conduct over a period of years, providing over $770,000 in economic benefit to Iran; (5) PanAm Seed did not initially cooperate with OFAC's investigation, providing some information that was inaccurate, misleading, or incomplete; and (6) PanAm Seed is a division of Ball Horticultural, a commercially sophisticated, international corporation.

OFAC considered the following to be mitigating factors: (1) PanAm Seed has not received a Penalty Notice or Finding of Violation from OFAC in the five years preceding the earliest date of the transactions giving rise to the Alleged Violations, making it eligible for "first offense" mitigation of up to 25 percent; (2) the exports at issue were likely eligible for an OFAC license under the Trade Sanctions Reform and Export Enhancement Act of 2000; (3) PanAm Seed took remedial steps to ensure future compliance with OFAC sanctions, including stopping all exports to Iran, implementing a compliance program, and training at least some of its employees on OFAC sanctions; and (4) PanAm Seed cooperated with OFAC by agreeing to toll the statute of limitations for a total of 882 days.

For more information regarding OFAC regulations, please go to: www.treasury.gov/ofac.

DEPARTMENT OF STATE

22 CFR Parts 120, 125, 126, and 130 [Public Notice: 9672] RIN 1400–AD70
International Traffic in Arms: Revisions to Definition of Export and Related Definitions
AGENCY: Department of State. **ACTION:** Final rule.

SUMMARY: On June 3, 2016, the Department of State published an interim final rule amending and adding definitions to the International Traffic in Arms Regulations (ITAR) as part of the President's Export Control Reform (ECR) initiative. After review of the public comments to the interim final rule, the Department further amends the ITAR by revising the definition of ''retransfer'' and making other clarifying revisions.
DATES: The rule is effective on September 8, 2016.

FOR FURTHER INFORMATION CONTACT: Mr. C. Edward Peartree, Director, Office of Defense Trade Controls Policy, Department of State, telephone (202) 663–1282; email DDTCResponseTeam@ state.gov. ATTN: ITAR Amendment—Revisions to Definitions.

SUPPLEMENTARY INFORMATION: The Directorate of Defense Trade Controls (DDTC), U.S. Department of State, administers the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120 through 130). On June 3, 2015, the Department of State published a rule (80 FR 31525) proposing to amend the International Traffic in Arms Regulations (ITAR) by revising key definitions, creating several new definitions, and revising related provisions, as part of the President's Export Control Reform (ECR) initiative. After review of the public comments on the proposed rule, the Department published an interim final rule (81 FR 35611, June 3, 2016) implementing several of the proposed revisions and additions, with an additional comment period until July 5, 2016. After reviewing the public comments to the interim final rule, the Department further amends the ITAR by revising the definition of ''retransfer'' in § 120.51, adding a new paragraph (f) to § 125.1, revising § 126.16(a)(1)(iii) and
§ 126.17(a)(1)(iii), revising § 126.18(d)(1), and revising § 130.2.

Changes in This Rule
The following changes are made to the ITAR with this final rule: (i) Revisions to the definition of ''retransfer'' in § 120.51 to clarify that temporary transfers to third parties and releases to same-country foreign persons are within the scope of the definitions; (ii) addition of a new paragraph (f) in
§ 125.1 to mirror the new sections of the ITAR in §§ 123.28 and 124.1(e) detailing the scope of licenses; (iii) revising § 126.16(a)(1)(iii) and § 126.17(a)(1)(iii) to reflect the definitions of reexport and retransfer in the Defense Trade Cooperation Treaties with Australia and the United Kingdom, respectively, and to make appropriate revisions to the definitions of

*(*Continued On The Following Column)*

reexport in § 120.19 and retransfer in § 120.51 to reflect that these definitions do not apply in the treaty context; (iv) revisions to
§ 126.18(d)(1) to clarify that the provisions include all foreign persons who meet the definition of regular employee in § 120.39; and (v) revisions to § 130.2 to ensure that the scope of the Part 130 requirements does not change due to the revised and new definitions. The remaining definitions published in the June 3, 2015 proposed rule (80 FR31525) and not addressed in the June 3, 2016 interim final rule or this final rule, will be the subject of separate rulemakings and the public comments on those definitions will be addressed therein.

Response to Public Comments
One commenter stated that § 120.17 (a)(1) is ambiguous and could lead to misinterpretation as to whether the transfer of a defense article to a foreign person within the United States would be considered an export. The Department notes that a transfer of a defense article to a foreign person in the United States is not an export, unless it results in a release of technical data under § 120.17(a)(2), is a defense article covered under § 120.17(a)(3), or involves an embassy under § 120.17 (a)(4). The Department confirms that simply allowing a foreign person in the United States to possess a defense article does not require authorization under the ITAR unless technical data is revealed to that person through the possession, including subsequent inspection, of the defense article, or that person is taking the defense article into an embassy.
One commenter stated that § 120.17(a)(2) implies that only transfers to foreign persons that occur in the United States constitute an export and asked the Department to add ''or abroad'' to include transfers to foreign persons outside of the United States. The Department does not accept the comment. One of the improvements of the new definitions for export, reexport, and retransfer is that they more specifically delineate the activities described by each term. The Department confirms that the transfer of technical data to a foreign person is always a controlled activity that requires authorization from the Department. The shipment of technical data, in physical, electronic, verbal, or any other format, from the United States to a foreign country is an export under § 120.17(a)(1). The release of technical data to a foreign person in the United States is an export under § 120.17(a)(2). The release of technical data to a foreign person in a foreign country is a retransfer under § 120.51(a)(2), if the person is a national of that country, or a reexport under § 120.19(a)(2), if the person is a dual or third country national (DN/TCN). The shipment of technical data, in physical, electronic, verbal, or any other format, from one foreign country to another foreign country is a reexport under § 120.19(a)(1). Finally, the shipment of technical data, in physical, electronic, verbal, or any other format, within one

*(*Continued On The Following Page)*

oreign country is a retransfer under § 120.51(a)(1).
One commenter asked why paragraph (b) in §§ 120.17 and 120.19 is not within paragraph (a)(2) of each definition, as that paragraph deals with releases of technical data. The Department did not include the text of paragraph (b) in §§ 120.17 and 120.19 as a note because it warrants being included in the ITAR as regulatory text. The Department notes that paragraph (b) applies to all of paragraph (a) and not just to paragraph (a)(2). The Department did not include paragraph (b) in § 120.51 because a retransfer will only involve same country nationals. A release to a dual or third country national will be an export or reexport.
One commenter asked if theoretical or potential access to technical data is a release. The Department confirms that theoretical or potential access to technical data is not a release. As stated in the preamble to the interim final rule however, a release will have occurred if a foreign person does actually access technical data, and the person who provided the access is an exporter for the purposes of that release.
One commenter asked how extensively an exporter is required to inquire as to a foreign national's past citizenships or permanent residencies. The Department confirms that any release to a foreign person is a controlled event that requires authorization to all countries where that foreign person holds or has held citizenship or is a permanent resident. The Department also confirms that it will consider all circumstances surrounding any unauthorized release and will assess responsibility pursuant to its civil enforcement authority based on the relative culpability of all of the parties to the transaction.
One commenter asked if an exporter is required to inquire into citizenships a foreign national has renounced. The Department confirms that any release to a foreign person is a controlled event that requires authorization to all countries where that foreign person has held citizenship.
One commenter asked which citizenship controls (for purposes of DDTC authorizations) apply where a foreign national has multiple citizenships. The Department confirms that any release to a foreign person is a controlled event that requires authorization to all countries where that foreign person holds or has held citizenship or is a permanent resident, and that such authorization or authorizations must authorize all applicable destinations.
One commenter asked if DDTC considers an individual's country of birth sufficient to establish a particular nationality for that individual for ITAR purposes (i.e., will DDTC consider a person born in a particular country as a national of that country, even if the person does not hold citizenship or permanent residency status in his/her country of birth?). The Department confirms that in circumstances where birth does not confer citizenship in the country of birth, it does not confer citizenship or permanent residency in that country for purposes of the ITAR. One commenter noted that the DDTC Agreement Guidelines refer to the country of origin or birth, in addition to citizenship, as a consideration when vetting DN/TCNs. The Department has updated the Agreement

*(*Continued On The Following Column)*

consistent with the interim final rule.
Several commenters asked whether a temporary retransfer to a separate legal entity within the same country, such as for the purpose of testing or to subcontractors or intermediate consignees, is within the scope of
§ 120.51. The Department confirms that such a temporary retransfer is a temporary change in end-user or end- use and is within the scope of § 120.51. The Department revises § 120.51 to clarify this point by adding ''. . . or temporary transfer to a third
party. . . .'' Several commenters asked that the Department remove ''letter of explanation'' from §§ 123.28 and 124.1(e), stating that foreign parties do not have access to ''letters of explanation'' and other side documents which may have been submitted by the U.S. applicant, and which may impact the scope of the authorization. The Department does not accept the comments to the extent that they recommend a change to the regulatory text. However, the Department acknowledges the importance of the foreign parties being informed of the scope of the authorization relevant to their activities and will address the commenters' concerns in the licensing process.
One commenter noted that, based upon the consolidation of § 124.16 into § 126.18, the reference to § 124.16 under § 126.18(a) is no longer accurate. The Department notes that amendatory instruction #16 in the interim final rule makes this amendment.
One commenter asked if use of the word reexport in new § 126.18(d) means that only employees who have the same nationality as their employer can receive technical data directly from, or interact with, the U.S. exporter, with attendant responsibility on the employer who reexports such technical data to its DN/TCN. The Department confirms that, to the extent that a DN/ TCN employee of an authorized end user, foreign signatory, or consignee acts as an authorized representative of that company, the provision of technical data by an authorized U.S. party to the foreign company through the DN/TCN employee is a reexport from the foreign company to the DN/TCN employee that may be authorized under § 126.18.
One commenter noted that new § 126.18(d)(4) will require individual DN/TCNs to sign an non-disclosure agreement (NDA) unless their employer is a signatory to a relevant agreement, meaning that authorized DN/TCNs will have to sign an NDA for access to articles covered by a license. The commenter further noted that the exemptions progressively introduced for DN/TCNs were motivated at least in part by concerns among U.S. allies about domestic anti-discrimination law. The Department does not accept this comment. All activities that could be authorized under § 124.16 remain available under § 126.18(d). If a foreign party is not able to utilize the expansion of the authorization to non-agreement-related reexports due to its domestic law, the other provisions of § 126.18 remain available.

*(*Continued On The Following Page)*

One commenter asked whether the requirement of § 126.18(d)(5) that authorized individuals are ''[n]ot the recipient of any permanent transfer of hardware'' is intended to limit authorized recipients of temporary hardware transfers or to require, in the case of reexports to an individual person, the separate authorization by name or controlling entity on the agreement. The Department intended that permanent retransfers of hardware not be authorized under § 126.18(d). Eligible individuals may receive temporary hardware transfers or receive hardware on a temporary basis. If a permanent retransfer to an individual is intended, that person should be separately authorized by name or controlling entity on the agreement.

One commenter noted that in §§ 125.4(b)(9) and 126.18(d), the defined term regular employee is modified. Revised § 125.4(b)(9)(iii) requires that an employee, including foreign person employees, be ''directly employed by'' a U.S. person. Revised § 126.18(d)(1), refers to ''bona fide regular employees directly employed by the foreign business entity . . . .'' The commenter requested that the Department clarify the use of the term ''regular employee'' and state clearly if conditions apply beyond those stated in the definition of ''regular employee'' set forth in § 120.39.

The Department accepts the comment in part. The Department also confirms that a regular employee is any party who meets the definition set forth in § 120.39 and that § 126.18(d) is updated to clarify that the control relates to regular employees as defined in § 120.39. However, in § 125.4(b)(9), the term ''directly employed'' is used to distinguish employees of a U.S. person from employees of related business entities, such as foreign subsidiaries. The Department confirms that all regular employees of the U.S. person, under § 120.39, are included within the authorization, including an individual in a long-term contractual relationship hired through a staffing agency.

One commenter noted that § 125.4(a) excludes use of the § 125.4(b) exemptions for § 126.1 countries and stated that it would be advantageous for the U.S. government if U.S. exporters could utilize § 125.4(b)(9) in the context of U.S. persons or foreign person employees supporting the U.S. government in a § 126.1 country. The Department does not accept the comment. Exports by private companies to § 126.1 countries require individual authorizations, unless authorized under § 126.4. Changes to § 126.4 to account for transfers in support of U.S. government efforts will be addressed in a separate rulemaking.

One commenter noted that the revision to § 125.4(b)(9) expands the scope of the provision to allow exports, reexports, and retransfers to and between U.S. persons employed by different U.S. companies and the U.S. government. The commenter stated their opinion that this expansion is appropriate and desirable, as it benefits the U.S. government in practical situations. The Department accepts this comment and confirms that such exports, reexports, and

*(*Continued On The Following Column)*

retransfers may be authorized under the revised § 125.4(b)(9), if all other terms and conditions are met.

One commenter asked the Department to clarify the impact of the new and revised definitions on the requirements under Part 130. The Department confirms that the changes to the ITAR
in the interim final rule did not change the requirements under Part 130. The Department also revises § 130.2 to clarify this understanding.

One commenter noted that the Department did not publish a final rule for activities that are not exports, reexports, or retransfers, and that the Bureau of Industry and Security (BIS) at the Department of Commerce did publish such a provision. The commenter asked the Department to clarify if any of the activities described by BIS as not being exports, reexports, or transfers under the Export Administration Regulations (EAR) would be exports, reexports, or retransfers under the ITAR. The Department confirms that it would not be appropriate to rely on provisions outside of the ITAR or guidance provided by any entity other than the Department for authoritative interpretive guidance regarding the provisions or scope of the ITAR. The Department also notes that any activity meeting the definition of export, reexport, or retransfer requires authorization from the Department unless explicitly excluded by a provision of the ITAR, the Arms Export Control Act, or other provision of law.

One commenter asked if, as the Department did not publish a final rule defining ''required'' or ''directly related,'' exporters can rely on definitions in the EAR or guidance from the BIS on those two terms. The ITAR does not define ''required'' or ''directly related.'' The Department confirms that it would not be appropriate to rely on definitions outside of the ITAR or guidance provided by any entity other than the Department for authoritative interpretive guidance regarding the provisions or scope of the ITAR. Further questions regarding the application of the terms ''required'' or ''directly related'' should be referred to the Department for additional interpretive guidance.

Several commenters submitted comments regarding definitions and other provisions that were included in the proposed rule, but not published in the interim final rule. The Department did not accept comments on issues not addressed in the interim final rule and will address those definitions and other provisions included in the proposed rule, but not published in the interim final rule, in a separate rulemaking.

Other Changes in This Rulemaking

In this final rule, the Department has also made changes to §§ 126.16 and 126.17 to ensure that they remain consistent with the definitions contained in the treaties (with Australia and the United Kingdom, respectively) that they implement. These treaties are controlling law, and the Department realized that, unless a correction were made in this final rule, the ITAR definitions of ''reexport'' and ''retransfer'' would be inconsistent with the treaty definitions. Therefore, for those two sections and the matters controlled therein, the treaty definitions will control. Conforming edits were also made to

*(*Continued On The Following Page)*

the definitions in §§ 120.19 and 120.51 to clarify that the definitions did not apply to matters covered by the treaties.

Regulatory Findings

Administrative Procedure Act

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

Regulatory Flexibility Act

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

Unfunded Mandates Reform Act of 1995

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

Small Business Regulatory Enforcement Fairness Act of 1996

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (the ''Act''), a major rule is a rule that the Administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) finds has resulted or is likely to result in: (1) An annual effect on the economy of $100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and foreign markets. The Department does not believe this rulemaking will meet these criteria.

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,

*(*Continued On The Following Column)*

it is determined that this rulemaking does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this rulemaking.

Executive Orders 12866 and 13563

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

Executive Order 12988

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

Executive Order 13175

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, Executive Order 13175 does not apply to this rulemaking.

Paperwork Reduction Act

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

List of Subjects

22 CFR 120 and 125

Arms and munitions, Classified information, Exports.

22 CFR 126

Arms and munitions, Exports.

22 CFR 130

Arms and munitions, Campaign funds, Confidential business information, Exports, Reporting and recordkeeping requirements.

Accordingly, for the reasons set forth above, the interim final rule that was published at 81 FR 35611 on June 3, 2016, is adopted as a final rule with the following changes:

*(*Continued On The Following Page)*

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 120.19 is amended by revising paragraph (a) introductory text to read as follows:

§ 120.19

Reexport.

(a) Reexport, except as set forth in § 126.16 or § 126.17, means:

■ 3. Section 120.51 is revised to read as follows:

§ 120.51

Retransfer.

(a) Retransfer, except as set forth in § 126.16 or § 126.17, means:

(1) A change in end use or end user, or a temporary transfer to a third party, of a defense article within the same foreign country; or

(2) A release of technical data to a foreign person who is a citizen or permanent resident of the country where the release or transfer takes place.

(b) [Reserved]

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

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

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

■ 5. Section 125.1 is amended by adding paragraph (f) to read as follows:

§ 125.1 Exports subject to this part.

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

*(*Continued On The Following Column)*

PART 126—GENERAL POLICIES AND PROVISIONS

■ 6. 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.

■ 7. Section 126.16 is amended by revising paragraph (a)(1)(iii) to read as follows:

§ 126.16 Defense Trade Cooperation Treaty between the United States and Australia.

(a) * * * (1) * * * (iii) Reexport and retransfer. (A) Reexport means, for purposes of this section only, the movement of previously Exported Defense Articles by a member of the Australian Community from the Approved Community to a location outside the Territory of Australia.

(B) Retransfer means, for purposes of this section only, the movement of previously Exported Defense Articles by a member of the Australian Community from the Approved Community to a location within the Territory of Australia;

■ 8. Section 126.17 is amended by revising paragraph (a)(1)(iii) to read as follows:

Exemption pursuant to the

§ 126.17 Defense Trade Cooperation Treaty between the United States and United Kingdom.

(a) * * *

(1) * * *

(iii) Reexport and retransfer. (A) Reexport means, for purposes of this section only, movement of previously Exported Defense Articles by a member of the United Kingdom Community from the Approved Community to a location outside the Territory of the United Kingdom.

(B) Retransfer means, for purposes of this section only, the movement of previously Exported Defense Articles by a member of the United Kingdom Community from the Approved Community to a location within the Territory of the United Kingdom. **** *

■ 9. Section 126.18 is amended by revising paragraph (d)(1) to reads as follows:

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

(d) * * *

(1) Regular employees of the foreign business entity, foreign governmental entity, or international organization;

*(*Continued On The Following Page)*

PART 130—POLITICAL CONTRIBUTIONS, FEES AND COMMISSIONS

■ 10. The authority citation for part 130 continues to read as follows:
Authority: Sec. 39, Pub. L. 94–329, 90 Stat. 767 (22 U.S.C. 2779); 22 U.S.C. 2651a; E.O. 13637, 78 FR 16129.
■ 11. Section 130.2 is revised to read as follows:

§ 130.2 Applicant.

Applicant means any person who applies to the Directorate of Defense Trade Controls for any license or approval required under this subchapter for the export, reexport, or retransfer of defense articles or defense services valued in an amount of $500,000 or more which are being sold commercially to or for the use of the armed forces of a foreign country or international organization. This term also includes a person to whom the required license or approval has been given.

Rose E. Gottemoeller,

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

[FR Doc. 2016–21481 Filed 9–7–16; 8:45 am]
BILLING CODE 4710–25–P

Web Notice: The Directorate of Defense Trade Controls (DDTC) is currently in the process of modernizing its IT systems. During this time period, we anticipate there may be delays in response times and time to resolve IT related incidents and requests. We apologize for any inconvenience, and appreciate your patience while we work to improve DDTC services. If you need assistance, please contact the DDTC Service Desk at (202) 663-2838, or email at DtradeHelpDesk@state.gov (06.28.16)

"Be So Good They Can't Ignore You."

Training and Seminars

September 15 Silicon Valley, CA
Technology Controls
Details

September 21 Buffalo, NY
Essentials of U.S. Export Controls
Details

September 22 Buffalo, NY
How to Develop an Export Management and Compliance Program
Details

http://www.bis.doc.gov/index.php/compliance-a-training/current-seminar-schedule

NOTE: In accordance with Title 17 U.S.C. Section 107, this material is distributed without profit or payment for non-profit news reporting and educational purposes only.