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U.S. State Department Proposes to Ease Controls on Exports to Dual- and Third-Country Nationals

On August 11, 2010, pursuant to President Obama's "Export Control Reform" initiative, the U.S. State Department's Directorate of Defense Trade Controls (DDTC) issued a Proposed Rule to amend the International Traffic in Arms Regulations (ITAR) easing licensing requirements on exports to dual- and third-country nationals. This amendment reflects recognition by DDTC that the current licensing process has created an enormous administrative burden on U.S. companies engaged in defense trade and their partners in allied countries and conflicts with many anti-discrimination laws and human rights protections (*e.g.*, many countries have antidiscrimination and data privacy laws in place that create liability for companies who single out employees on the basis of their nationality).

Currently under the ITAR, a non-U.S. company authorized by DDTC to receive defense articles (including technical data) and defense services must obtain separate DDTC authorization to allow its dual- and third-country national employees access to these defense articles. Specifically, a non-U.S. entity that employs (1) individuals who are nationals of both the country in which the entity is located and another country (*i.e.*, dual nationals) or (2) individuals who are nationals of a country other than the one in which the entity is located (*i.e.*, third-country nationals) must ensure that a DDTC technical assistance agreement or other approval specifically covers the nationalities of those dual- and third-country national employees. When determining an individual's nationality, DDTC requires companies to take into account an individual's country of birth, in addition to his or her citizenship.

Under the proposed rule, authorized non-U.S. end-users of defense articles would no longer be required to seek additional DDTC authorization before transferring the defense articles to dual- and third-country national employees, as long as the employees are bona fide, regular employees, directly employed by the authorized non-U.S. business entity, non-U.S. governmental entity, or international organization end-users. The transfer of defense articles, however,

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must take place completely within the physical territories of the country where the end-user is located and be within the scope of an approved export license, other authorization, or license exemption.

Importantly, the proposed amendments also require the authorized non-U.S. end-user to implement effective procedures to prevent diversion of defense articles to destinations, entities, or for purposes other than those authorized by the applicable export license or other authorization. These procedures, however, may be just as burdensome as the current licensing requirements. Specifically, the authorized non-U.S. end-user must implement one of the following procedures:

- 1.) Require a security clearance for its employees, approved by the host nation government; or
- 2.) Have in place a process to screen its employees and require the employees to execute Non-Disclosure Agreements that provide assurances that they will not transfer any information to persons or entities unless specifically authorized.

More burdensome, however, is the requirement that authorized non-U.S. end-users must screen their dual national and third-country national employees for “substantive contacts” with countries proscribed under the ITAR (*e.g.*, Belarus, Burma, China, Cuba, Eritrea, Iran, Liberia, North Korea, Syria, Sudan, and Venezuela). Substantive contacts include, but are not limited to, recent or regular travel to such countries, recent or continuing contact with agents and nationals of such countries, continued allegiance to such countries, or acts otherwise indicating a risk of diversion. Finally, the authorized non-U.S. end-user also must maintain a “technology security/clearance plan” that details its procedures for screening employees for substantive contacts and records that demonstrate it is performing such screening. The technology security/clearance plan and screening records must be made available to DDTC or its agents upon request.

DDTC will accept comments on the proposed rule until Friday, September 10, 2010. Comments may be submitted via email to ddtcresponseteam@state.gov and should reference this proposed rule in the subject line of the email.

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