

# **DEFENSE TRADE ADVISORY GROUP**

## **Working Group 1: ITAR Exemption Consolidation**

October 2020 Plenary  
White Paper

# DEFENSE TRADE ADVISORY GROUP

22 October 2020 Plenary Meeting

## Working Group 1: Consolidate ITAR Exemptions into One Part

### White Paper and Background Materials

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### I. Introduction & Executive Summary

#### A. Background

The International Traffic in Arms Regulations (22 CFR 120-130) (ITAR) requires advance approval by the Directorate of Defense Trade Controls (DDTC) for exports and temporary imports of defense articles and services and the provision of defense services and brokering. However, exemptions to that requirement permit the regulated activity to be performed without advance authorization from DDTC. There are approximately 55 exemptions found in six of the ten parts of the ITAR (Parts 122, 123, 124, 125, 126 and 129).

All exemptions have *conditions* imposed upon their use, such as the requirement that the user must be registered with DDTC, and the requirement that exemptions cannot be used for transactions involving proscribed destinations. However, there are *exceptions* to some of those conditions. For example, ITAR § 123.17(f) permits the temporary export of body armor and protective gear without a license. Although an exporter must usually be registered with DDTC to use an exemption, an exception from the registration condition is found in § 123.17(k), which states that registration with DDTC is not required for use of the § 123.17(f) exemption.

The terms *exemption*, *condition*, and *exception* are not defined in the ITAR. An *exemption* could be defined as authorization for the export, temporary import, brokering, or provision of a defense service without the need for advance written authorization (license, agreement, or other writing). A *condition* is a requirement for the use of an exemption unless permitted by an *exception* to that condition.

There are also *exclusions* from the controls of the ITAR. These exclusions identify transactions that are not subject to the jurisdiction of the ITAR, such as U.S. Government officials acting in their official capacities, and the export or temporary import of articles not defined as defense articles, such as information in the public domain (§ 120.11).

#### B. Tasking

The DDTC letter of August 20, 2020 asked DTAG to provide recommendations to DDTC related to the efforts to consolidate exemptions into a single part of the ITAR. This consolidation effort is part of DDTC's larger undertaking to reorganize the ITAR.

Specifically, the DDTC tasking read:

Provide feedback to DDTC as it works to consolidate exemptions into a single part of the ITAR. Are there policy or presentation issues (*e.g.* opportunities to standardize language, clarify availability for classified data, clarify availability

for foreign parties, etc.) that DDTC should consider in order to make exemption availability and application as clear as possible?

The tasking also specified that the DTAG should focus on “higher level considerations of the ITAR reorganization rather than recommend rewrites of any particular exemptions.”

For further clarification on our tasking we communicated with Rob Hart, Chief of the Regulatory and Multilateral Affairs Division in the Office of Defense Trade Controls Policy, who emphasized that we should focus on formulating feedback for DDTC, including recommendations to clarify or standardize exemptions so as to make them easier to use.

### **C. Working Group Members (Asterix indicates co-chair)**

- |                   |                             |
|-------------------|-----------------------------|
| • Bryon Angvall   | GE Aviation                 |
| • Maria Assusa    | ManTech Corporation         |
| • Jim Bartlett*   | Full Circle Trade Law, PLL  |
| • Mary Beran      | Georgia Tech Research Corp. |
| • Hillary Doll    | Raytheon Company            |
| • Larry Fink      | Leidos, Inc.                |
| • Melanie Fujiu   | United Launch Alliance, LLC |
| • Candace Goforth | Goforth Trade Advisors, LLC |
| • Tracy Gronewold | MLM International, LLC      |
| • Cindy Keefer    | BAE Systems, Inc.           |
| • Alexis Mitchell | Lockheed Martin Corporation |
| • Brenda Nicacio  | PPG Aerospace               |
| • Kim Pritula     | KMP Global Consulting, LLC  |
| • Johanna Reeves* | Reeves & Dola, LLP          |
| • Arthur Shulman  | The Boeing Company          |

### **D. The Working Group’s Approach to Tasking**

On the surface this tasking appeared simple. However, once we started reviewing the various exemptions it became apparent that the tasking contained hidden complexities.

#### *1. What Exemptions Should the New Part Include?*

The ITAR contains several types of carve-outs throughout the regulations, such as exemptions to registration, exemptions to licensing, and exclusions from definitions. However, it was unclear whether DDTC envisions every type of carve-out to be included in a part dedicated to exemptions. Consequently, we had to address the differences between exemptions, exceptions, and exclusions, all of which are in the ITAR but currently are not defined. We collected a list of all exemptions in the ITAR, and listed them by section number and generally by name. See [Appendix 1](#).

## 2. *How Best to Formulate Feedback?*

We were not provided any drafts of the reorganization effort, so one challenge was how best to formulate comments and feedback. We created three consolidation models showing how an exemption consolidation could be organized, as well as presenting the positives and negatives for each model.

## 3. *Resources*

In addition to our weekly meetings, we surveyed the group on critical questions, such as (1) whether the new exemption part should be limited to certain types of exemptions; (2) whether DDTC should adopt letter codes to categorize exemptions; and (3) what aids DDTC should make available to industry as part of its reorganization effort.

We also reviewed the prior DTAG findings from the May 2020 Plenary, in which Working Group 4 examined ITAR exemptions and how they compared to general licenses. This review was part of a tasking to examine foreign licensing to determine whether there is a flexible licensing option used overseas that could be applied to the ITAR. DTAG's conclusion was that a general license is distinguished from ITAR license exemptions. In light of these findings, we caution against conflating license exemptions with general licenses.

We also reviewed the 2019 submissions in response to DDTC's Federal Register Notice in 84 FR 36040 (Jul. 16, 2019) requesting public comment on consolidating and clarifying the ITAR exemptions.

## **E. Executive Summary**

If DDTC proceeds with this reorganization, this working group recommends that DDTC move all ITAR exemptions except those related to registration in Part 122 and brokering in Part 129 to Part 125.<sup>1</sup> We further recommend DDTC (1) use new section numbers (do not reuse existing section numbers); (2) replace sections removed from other places in the ITAR with [*Reserved*]; (3) preserve the current wording and structure of each exemption; and (4) not use letter codes to identify exemptions.

We also recommend DDTC define what constitutes an *exemption*, explain the *conditions* that apply to each exemption, list the *exceptions* to those conditions in Part 125, and list the *exclusions* of transactions that are not subject to ITAR jurisdiction.

Our working group developed three models to illustrate how the exemptions could be organized in Part 125:

- (1) The Transaction Model, which resembles the organization of exceptions in Part 740 of the EAR (15 C.F.R. Part 740).

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<sup>1</sup> DDTC specified Part 125 as a potential location for the new exemption part.

- (2) The Matrix Model, which lists each exemption with the conditions and exceptions to those conditions included with each exemption in matrix form.
- (3) The Simple Model, which lists all exemptions in a designated part, such as Part 125 (except those exemptions in Parts 122 and 129) and includes the conditions and exceptions to those conditions.

We consider these models as examples of what a new consolidated exemption part could look like. However, at this time, we do not favor any particular model, nor do we recommend that DDTTC proceed with organizing a new exemption part using one of these models. As we worked on this tasking, we discovered that each model presented significant challenges and negative aspects, which we explore in further detail below.

## **II. Feedback and Recommendations**

### **A. Feedback**

Placing all the exemptions (except those pertaining to registration and brokering) into one part will make the exemptions easier to find, but some members of the working group expressed concerns that such a major restructuring of the ITAR may yield little benefit for industry after considering the cost to industry and government for the necessary changes to publications, procedures, and software.

### **B. Recommendations**

Using our models to apply a mock reorganization, we developed the following recommendations:

- (1) Define the terms *exemption*, *condition*, *exception*, and *exclusion* in Part 120, and incorporate these terms into a description of the scope of the exemption part.
- (2) Preserve the current wording of each authorization exemption that is reorganized into the single part.
- (3) Implement conforming changes to Part 126, Supplement No. 1 (change the word *excluded* to *Conditions* or *Restrictions*, because these are not exclusions from ITAR jurisdiction; they are merely conditions limiting the use of the listed exemptions).
- (4) Do not use letter codes similar to the EAR.
- (5) Move exemptions to Part 125 but include cross-references in the old sections to the location of each relocated exemption.
- (6) Publish aids to assist industry in adapting to the reorganization, including a transition table, FAQs, matrices as a supplement to an exemption part, and interpretive guidance on exemption applicability.

### III. What Would the New Exemption Part Include?

#### A. Exclusions, Exemptions, Conditions and Exceptions

Consolidating exemptions seems like a logical and necessary element to improving the organization of the ITAR. Currently, exemptions are located throughout the ITAR, are presented in different formats, and have varied requirements and restrictions on use, which can make determining the requirements for using each exemption difficult.

But what should the consolidated part include when the ITAR contains *exclusions*, *exemptions*, *conditions*, and *exceptions*? These terms are not currently defined in the ITAR, and the various contexts often cause uncertainty for the user. We recommend that DDTC define these terms in the ITAR, as explained below.

##### 1. *Exclusion*

An *exclusion* identifies a transaction that is not subject to the jurisdiction of the ITAR. These include:

- (a) Actions by officials and employees of the U.S. Government acting within the scope of their authority.
- (b) Actions as stated by law to be within the jurisdiction of other U.S. agencies.
- (c) Transit and transfers of foreign-owned military aircraft and naval vessels.

The ITAR currently labels some conditions as “exclusions,” such as Part 126, Supplement No. 1, which is confusing.

##### 2. *Exemption*

An *exemption* is advance authorization for the export, temporary import, or performance of a defense service without the need for written authorization (license, agreement, or other approval), provided that the party using the exemption complies with the *conditions* of its use.

##### 3. *Condition*

A *condition* limits the use of exemptions or imposes additional requirements.

The exemption requirements and restrictions could pose a challenge to reorganization and consolidation. Some conditions are broadly stated in the ITAR, for example, the general restriction on unregistered persons from using an exemption (§ 122.1(d)), or the general restriction on using an exemption for exports of unclassified hardware if the transaction involves a § 126.1 country (§ 123.16). But there are also several exemptions that contain their own conditions and exceptions. For example, § 123.4 (the temporary import license exemptions) lists its requirements in § 123.4(c) and (d).

DDTC should clearly identify the conditions and requirements for using exemptions. The following is a list of general conditions and, where noted, conditions specific to certain exemptions:

1. Eligibility – Persons
2. Eligibility – Items
3. Authority to Claim (U.S. vs non-U.S.)
4. Recordkeeping 123.26 (hardware, defense services)
5. Certification 125.6 (technical data)
6. Reporting requirements 126.5/126.16/126.17/129.10
7. CBP Requirements 123.4(a)/123.22(b)/126.4
8. U.S. Post Office 123.24
9. Destination Control Statement
10. 125.4(a) -- NISPOM authorization required for classified articles and data

#### *4. Exception*

An *exception* negates a general condition for the use of an exemption.

For example, unregistered persons can use the temporary export exemption for body armor and other protective gear, and the condition that exemptions may not be used for exports to proscribed countries is excepted for personal protective gear and exports under the *by or for* provision in § 126.4. Further, all restrictions or conditions may be negated by § 126.2, which allows a temporary suspension or modification of the ITAR in the interest of national security and foreign policy, or § 126.3, which allows DDTC to make an exception to ITAR provisions in cases of exceptional hardship or when it is in the interest of the U.S. Government.

In summary, we recommend: (1) DDTC define the terms *exclusion*, *exemption*, *condition*, and *exception* in Part 120, and incorporate these terms into a description of the scope of the exemption part; (2) include in the exemption part a list the conditions that limit the use of exemptions, including any exceptions to those conditions; and (3) DDTC not include exclusions from the jurisdiction.

#### **B. Exemption or General License?**

At the last DTAG plenary (May 2020), DTAG reviewed foreign licensing to determine whether flexible licensing options, like those used overseas, could be applied to the ITAR. This review included examining how ITAR exemptions compare to general licenses. DTAG's conclusion was that a general license should be distinguished from ITAR license exemptions. We reiterate that conclusion and caution against conflating license exemptions with general licenses.

#### **IV. Exemption Reorganization Models**

We developed three consolidation models, identified as (1) the Transaction Model, (2) the Matrix Model, and (3) the Simple Model. To illustrate these examples, particularly the transaction and matrix models, we experimented with applying the models to three particular exemptions: § 123.4 (temporary import license exemptions), § 125.4(b)(13) (technical data



approved for public release), and § 126.6 (foreign-owned military aircraft and naval vessels, and Foreign Military Sales programs). We address each Model in turn, with examples included in the attached appendices.

## **A. The Transaction Model**

The Transaction Model is like the EAR organization of exceptions in 15 CFR Part 740. Under this model, the requirements and restrictions would be collected from the other ITAR parts and consolidated into beginning sections. The exemptions would then be organized into categories. A sample is included in [Appendix 2](#). This model is called the “Transaction Model” because the categories would be based on the transaction. For example, hardware exemptions, technical data exemptions, and activity-based exemptions. The common conditions or requirements would be organized and presented in a devoted section within the part.

When we applied our example exemptions, we began to identify potential problem areas. Exemptions applicable to temporary transactions are not limited to § 123.4. There is also § 123.19 (incidental border shipments), the *by or for* exemption in § 126.4, and of course, the Canadian exemptions in § 126.5. But only *portions* of the Canadian exemptions and the U.S. Government exemptions are for temporary exports. To group these into the temporary bucket, we would either have to break up current exemptions, which our group largely disfavored, or a separate and redundant exemption would have to be made, which should be avoided.

Because of the way § 123.4 is structured with slightly different conditions or exceptions listed in each of the subparagraphs, a consolidated list of identical requirements would be so thin that it no longer seemed to make sense to create one.

The positive aspects of the transaction model are:

- The structure aligns with Export Control Reform goals of harmonizing ITAR and EAR.
- It is intuitive, especially for novice users.
- It lends itself to a new 3-letter naming system if desired.

The negative aspects of the transaction model are:

- Reorganizing exemptions into types or categories may not be intuitive.
- Organizing into specific categories could prove difficult with duplications and overlapping, or result in exemptions being split up into different categories.
- The number of pages of the ITAR will be markedly increased.

We recommend DDTC take into consideration the following regarding this model:

- Confusion surrounding defense services may require identifying exemptions by type of defense service rather than grouping under a general header.
- Will EAR model work for ITAR exemptions? EAR exceptions are structured differently than ITAR exemptions, so the EAR may not be a workable model.
- Many exemptions in the ITAR have subparagraphs that address certain conditions. Do

- they stay with the exemption or be listed separately?
- How should exemptions that fit into more than one category be listed?

## **B. The Matrix Model**

We based this model on the Society for International Affairs' *ITAR Exemption Handbook*.<sup>©</sup> Under this approach, each exemption would be self-contained with applicable requirements and restrictions listed in every exemption and presented in matrix form. Individual conditions would be repeated for each exemption. Exemptions could be organized into groupings similar to the Transaction Model. Examples for the Matrix Model applied to sections 123.4, 125.4(b) and 126.6 are attached in **Appendix 3**.

This idea takes a different perspective on what it means to “*make exemption availability and application as clear as possible*.” Instead of relying on the organizational structure (by type, by country, etc.) to make exemptions easier to understand, and potentially duplicating existing requirements that need to continue to exist elsewhere too (*e.g.*, registration), this approach relies on highlighting the availability and applicability in a matrix form that arguably is easier to understand, directs users to the exact place they need to go, minimizes the need to restate requirements or create duplicative requirement sections, and renders the need for organizational “buckets” less critical to understanding applicability.

As shown in Appendix 3, the Applicability Matrix approach does not require significant reconfiguration or movement of other elements of the ITAR that are applicable (and often applicable to agreements, licenses, and exemptions) and it allows for a potential removal of duplicated or restated requirements.

This model also provides DDTC an opportunity to clearly state the intended use options for an exemption and, possibly, through the public comment process, may identify ways in which exemptions are currently being used that can positively influence the end state without necessarily requiring regulatory language changes.

For this example, we've taken § 123.4 and used the Applicability Matrix approach to identify where sections 123.4(a)(1), 123.4(a)(2), 123.4(a)(3), 123.4(a)(4), 123.4(a)(5) and 123.4(b) can be used, and what restrictions apply that are elsewhere located in the ITAR. Further into the text we were able to remove language that was duplicative.

These exemptions could remain grouped together, based on their existing grouping, leveraging groupings from Option 1 or Option 2, or by listing them and creating an Applicability Matrix for every ten exemptions. This is possible because the ease of use and readability isn't primarily based on organization construct, but on visual cues.

We determined the following positive points associated with the Matrix Model:

- Exemptions may be easier to understand, as all the restrictions and coverage is self-contained. This would be helpful to new users of the ITAR.
- It minimizes the need to restate conditions or create duplicate sections.

- The Matrix form is an easy visual way to understand applicability and conditions.

The negatives:

- Layout will be complex and difficult to publish in text format.
- The ITAR will require many more pages because of the repetition of the conditions and exceptions for each exemption.

An alternative to the Matrix Model may be for DDTC to add a comprehensive matrix to cover all exemptions as a supplement to the exemption part.

### **C. The Simple Model**

Under this model, DDTC would transfer all exemptions and common restrictions into Part 125, keeping intact the current scope and structure of each exemption. This may indeed be the easiest way for DDTC to reorganize ITAR exemptions into a single part, as it is essentially a cut-and-paste operation.

For illustration, see Exhibit 4. The exemptions currently in Part 125 would remain in their current locations without changing section numbers. The other approximately 55 exemptions are inserted into Part 125 beginning with § 125.10. At the beginning or end of Part 125, we recommend listing common conditions and exceptions to those conditions, as additional sections, such as requirements for registration, certification, and reporting.

Exemptions could be structured into groups with common conditions, such as:

- |                  |                    |
|------------------|--------------------|
| • Temporary      | • Defense services |
| • Hardware       | • Country-Related  |
| • Technical data |                    |

The positives of the Simple Model are:

- This model will be quick and easy to create because it will be a cut-and-paste operation, leaving a *[Reserved]* notation where an exemption is removed.
- It follows the organization of the current ITAR, so it will involve the fewest changes, and will be easier for industry to adopt and implement.
- Exemptions already in Part 125 would not need to be moved or change sections numbers.
- It will not require other exemptions to be broken up or to duplicate language between exemptions, so there will be little if any increase in the number of pages of the current ITAR.

The negatives of the Simple Model are:

- This model does not make it easier to understand the exemptions; they are just easier to find.
- Any benefit to the user may be outweighed by the costs of change to industry and government.

### **D. Model Recommendation**

It is important to clarify a statement made during the plenary presentation. The working group does not recommend that DDTC adopt a particular model. Each model has significant flaws that must be considered with the arguments in favor of reorganizing the exemptions. DDTC should also consider the enormous costs that will be imposed upon industry to implement a reorganization of the ITAR exemptions.

For example, many companies have established training (web-based and in person), policies, procedures, desk instructions, quick reference guides, templates, IT systems, etc., all of which reference the ITAR exemptions by section number. Most companies know where to locate exemptions in the current ITAR. There will be a large cost to change government systems and put non-U.S. entities on notice that ITAR exemption citations have changed. Cross-referencing the new locations from the prior sections would help ease the transition, but if the only benefit with this reorganization is that the exemptions will be in one place, we doubt that the negatives will be viewed as outweighing the positives.

## **V. Other Recommendations and Cautionary Notes**

### **A. Three-Letter Codes**

The WG polled its members and asked about working with three-letter codes like the EAR. Most of the WG opposed using EAR-style letter codes for ITAR exemptions because being similar to the EAR, they would cause confusion, even if distinguished with a prefix (example “I-GOV” or “DS-GOV”).

### **B. DDTC Can Help Industry Adjust to the New ITAR**

If the ITAR is amended to place all exemptions in one part of the ITAR, we recommend that DDTC offer the following tools to industry through its website:

- Transition table from old section numbers to new section numbers
- FAQs
- Matrices for quick reference
- Interpretive guidance
- Embed cross references in the text of the ITAR at the old location to show where the new location is.

We thank DDTC for the opportunity to examine this challenging and complex issue, and to provide feedback on these efforts. Although we do not recommend a particular model at this time, we welcome the opportunity to continue to work with DDTC if it moves forward with this reorganization effort.

## Appendix 1

### List of ITAR Exemptions, Conditions, Exceptions, and Exclusions with Current Citations

- 122.1(b): Registration not required (Exception)*
- 120.1(d): Parties not eligible to use exemptions (Condition)*
- 123.4(a)(1): Import for overhaul, service, and repair*
- 123.4(a)(2): Temporary import for enhancement or upgrade*
- 123.4(a)(3): Temporary import for exhibition, demonstration, or marketing*
- 123.4(a)(4): Articles rejected for permanent import*
- 123.4(a)(5): Temporary import under FMS*
- 123.4(b): Temporary import for incorporation into other articles*
- 123.6: Exports to FTZ and U.S. Customs bonded warehouses (an explanation of license requirement, not an exemption) (Exclusion)*
- 123.9(a): Electronic Export Information (Condition)*
- 123.9(e): Re-export to NATO, Australia, Israel Japan, New Zealand or the Republic of Korea*
- 123.11(b): Movement of USML vessels & aircraft outside of U.S. if not carrying USML cargo*
- 123.12: Shipment between U.S., P.R., and U.S. possessions (Exclusion)*
- 123.13: Domestic air shipment via a foreign country (Exclusion)*
- 123.15(c): Congressional certification for exemptions (Condition)*
- 123.16(a): Proscribed destinations, MTCR, SME, EEI (Condition)*
- 123.16(b)(1): Unclassified hardware in furtherance of agreements*
- 123.16(b)(2): Parts under \$500, split orders*
- 123.16(b)(3): Packing cases*
- 123.16(b)(4): Unclassified models and mockups*
- 123.16(b)(5): Public exhibitions and trade shows*
- 123.16(b)(9): Unclassified hardware by US Post Office to U.S. subsidiaries overseas*
- 123.17(f): Temporary export of body Armor and protective gear*
- 123.17(g): Temporary export of body Armor and protective gear for personal use in 126.1 countries*
- 123.17(h): Temporary export of body Armor and protective gear for personal use under USG contract in Iraq*
- 123.17(i): Temporary export of body Armor and protective gear for personal use under USG contract to Afghanistan*
- 123.17(k): Registration not required for temporary PPE exports (Exception)*
- 123.19: Shipment from Canada or Mexico transiting USA*
- 123.22(b)(2): Emergency Shipments of Hardware that Cannot Meet the Pre-departure Filing requirements.*
- 123.23: Shipment not exceeding 10% value authorized by license*
- 123.26. Recordkeeping for exemptions (Condition)*
- 124.2(a): Training in basic O&M of defense articles authorized for export to same recipient*
- 124.2(b): Services by U.S. member of foreign military (Exclusion)*
- 124.2(c): Unclassified maintenance, training, & tech data, for NATO countries, Australia, Japan, or Sweden*
- 124.3: Exports of technical data in furtherance of an agreement*
- 124.13 Offshore Procurement by U.S. Persons*
- 124.15(d): No exemptions for insurance data (Condition)*
- 125.4(a): No exemptions for proscribed destinations or persons (Condition)*
- 125.4(a): No exemptions for § 126.1 countries (Condition)*
- 125.4(a): No exemptions for persons*

considered generally ineligible under § 120.1(c) (Condition)

125.4(a): No exemptions for offshore procurement arrangements or offshore production (Condition)

125.4(b)(1): Tech data disclosed per request or directive from DOD

125.4(b)(2): Tech data in furtherance of MLA or TAA

125.4(b)(3): Tech data, classified or unclassified, in furtherance of contract with USG

125.4(b)(4): Copies of tech data previously authorized for export to same recipient

125.4(b)(5): Basic operations, maintenance, and training related to same party

125.4(b)(6): Data related to firearms not exceeding caliber .50

125.4(b)(7): Data, classified or unclassified, returned to foreign source

125.4(b)(8): Data related to classified previously authorized for export to same party

125.4(b)(9): Data exported, reexported, or retransferred by or to US person or foreign employee of US person temporarily abroad

125.4(b)(10): Disclosures in US by US college to college employees

125.4(b)(11): Data per exemption granted by DDTC for DOD, DOE, or NASA contracts

125.4(b)(12): Tech data exempt under part 126

125.4(b)(13): Tech data approved by USG for public release

125.4(c): Services and unclassified data to NATO, Australia, Japan, and Sweden for response to DOD request for quote, bid, or proposal

125.5(a): Unclassified data during approved classified plant visit

125.5(b): Classified tech data during approved classified plant visit

125.5(c): Unclassified data during USG approved classified or unclassified plant visit

125.6: Certification requirements for exemptions (Condition)

126 Supp. No. 1: Australia, Canada, UK) (Conditions – erroneously labeled exclusions)

126.2: Temporary suspension or modification of any or all regulations (Authorization; not exemption)

126.3: Exceptions by DAS (undue hardship) (Authorization; not exemption)

126.4(a)(1)(i): Actions by USG employees in official capacity (Exclusion)

126.4(a)(1)(ii): Actions by persons or entities in a contractual relationship with the USG

126.4(a)(2): Cooperative project, program, or other activity

Temporary import or export by or for USG, or for program authorized by President, or by USG Bill of Lading (Exclusion) when made by a department or agency of the U.S. Government

126.4(a)(3): Foreign assistance or sales program authorized by President

126.5(a): Temporary import and return of unclassified articles from Canada

126.5(b): Permanent and temporary export of defense articles, defense services and tech data to Canada for Canadian Gov't or CRP

126.5(d): Canadian reexport/retransfers

126.6(a): Article or tech data sold/lent by DOD to foreign Gov't if delivered in USA

126.6(b): Entry and departure of foreign military aircraft and vessels

126.6(c): FMS

126.9(b): Related Authorizations

126.16(e)(1)-(4): US-Australia Treaty

126.17(e)(1)-(4): US-UK Treaty

126.18: Transfers to dual/3rd-country national employees

129.3(b): Broker registration

129.5: Broker License/Approval

## Appendix 2

### The Transaction Model

(We include examples of exemptions with current citations)

1. Introduction (definition of *exemption* subject to the new part)
2. General Requirements/Restrictions on Using Exemptions
  - 2.1. Congressional notification: 123.15(b), 124.11
  - 2.2. Not eligible: 124.2(c)(5); 126 Supp. No. 1 (various)
  - 2.3. Insurance providers and underwriters: 124.15(d)
  - 2.4. Not registered with DDTC: 127.1(b)(3)
  - 2.5. Proscribed destinations: 123.16(a), 125.4(a), 126.1(a), *but see* 126.1(a), re 123.17, 126.4, and 126.6, or when the recipient is a U.S. Government department or agency.
3. Types of Exemptions
  - 3.1. “List-based” (or “article-based”)
    - 3.1.1. Hardware
      - 3.1.1.1. Body armor (PPE): 123.17(f)-(k)
      - 3.1.1.2. Cases, packing: 123.16(b)(3)
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**Appendix 3**  
**The Matrix Model**  
**Re-Configured 123.4(a):**

New section 125.# Temporary Import License Exemptions

Applicability							
Exemption	Hardware	Temp or Perm	Technical Data	Defense Services	Unclassified / Classified	SME	MTCR
(a)(1)	X	T			U	X	X
(a)(2)	X	T			U	X	X
(a)(3)	X	T			U	X	X
(a)(4)	X	T			U	X	X
(a)(5)	X	T			U	X	X
(b)	X	T			U	X	X

Restrictions and Requirements											
Exemption	120.1(c)	120.1(d)	122.5(a)	123.9(b)	123.15(b)	123.22	123.24	123.26	125.6	126.1	Other
(a)(1)	X	X	X	X	X	X	X			X	Note 1
(a)(2)	X	X	X	X	X	X	X			X	Note 1
(a)(3)	X	X	X	X	X	X	X			X	Note 1
(a)(4)	X	X	X	X		X	X			X	Note 1
(a)(5)	X	X	X	X		X	X			X	Note 1
(b)	X	X	X	X	X	X	X			X	Note 1

(a) Port Directors of U.S. Customs and Border Protection shall permit the temporary import (and subsequent export) without a license, for a period of up to 4 years, of unclassified U.S.-origin defense items (including any items manufactured abroad pursuant to U.S. Government approval) if the item temporarily imported:

(1) Is serviced (e.g., inspection, testing, calibration or repair, including overhaul, reconditioning and one-to-one replacement of any defective items, parts or components, but excluding any modifications, enhancement, upgrade or other form of alteration or improvement that changes the basic performance of the item), and is subsequently returned to the country from which it was imported. Shipment may be made by the U.S. importer or a foreign government representative of the country from which the goods were imported; or

(2) Is to be enhanced, upgraded or incorporated into another item which has already been authorized by the Directorate of Defense Trade Controls for permanent export; or

(3) Is imported for the purpose of exhibition, demonstration or marketing in the United States and is subsequently returned to the country from which it was imported; or

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

(5) Is approved for such import under the U.S. Foreign Military Sales (FMS) program pursuant to an executed U.S. Department of Defense Letter of Offer and Acceptance (LOA).

Note 1: These Exceptions do not apply to shipments that transit the U.S. to or from Canada (see § 123.19 and § 126.5 of this subchapter for exceptions.

(b) Port Directors of U.S. Customs and Border Protection shall permit the temporary import (but not the subsequent export) without a license of unclassified defense articles that are to be incorporated into another article, or modified, enhanced, upgraded, altered, improved or serviced in any other manner that changes the basic performance or productivity of the article prior to being returned to the country from which they were shipped or prior to being shipped to a third country. A DSP-5 is required for the reexport of such unclassified defense articles after incorporation into another article, modification, enhancement, upgrading, alteration or improvement.

(c) Requirements. To use an exemption under § 123.4 (a) or (b), the following criteria must be met:

(1) At the time of export, the ultimate consignee named on the Electronic Export Information (EEI) must be the same as the foreign consignee or end-user of record named at the time of import;

(2) The foreign exporter must not require documentation of U.S. Government approval of the temporary import. If the foreign exporter requires documentation for a temporary import that qualifies for an exemption under this subchapter, the U.S. importer will not be able to claim the exemption and is required to obtain a DSP-61 Application/License for Temporary Import of Unclassified Defense Articles.

(d) Procedures. To the satisfaction of the Port Directors of U.S. Customs and Border Protection, the importer and exporter must comply with the following procedures:

(1) At the time of temporary import—

(i) File and annotate the applicable U.S. Customs and Border Protection document (e.g., Form CF 3461, 7512, 7501, 7523 or 3311) to read: “This shipment is being imported in accordance with and under the authority of 22 CFR 123.4(a) (identify subsection),” and

(ii) Include, on the invoice or other appropriate documentation, a complete list and description of the defense article(s) being imported, including quantity and U.S. dollar value; and

(2) At the time of export, in accordance with the U.S. Customs and Border Protection (CBP) procedures, the Directorate of Defense Trade Controls (DDTC) registered and eligible exporter, or an agent acting on the filer’s behalf, must electronically file the export information with CBP, identify 22 CFR 123.4 as the authority for the export, and provide, as requested by CBP, the entry document number or a copy of the CBP document under which the article was imported.

### **Reconfigured New Section 125.#(b)(13):**

#### **§ 125.1 Exports Subject to this Part**

(a) The controls of this part apply to the export of technical data and the export of classified defense articles. Information which is in the public domain (see § 120.11 of this subchapter and § 125.4(b)(13)) is not subject to the controls of this subchapter.

(b) A license for the export of technical data ~~and the exemptions in § 125.4~~ may not be used for foreign production purposes or for technical assistance unless the approval of the Directorate of Defense Trade Controls has been obtained. Such approval is generally provided only pursuant to the procedures specified in part 124 of this subchapter.

(c) Technical data authorized for export may not be reexported, transferred or diverted from the country of ultimate end use or from the authorized foreign end user (as designated in the license or approval for export) or disclosed to a national of another country without the prior written approval of the Directorate of Defense Trade Controls.

(d) The controls of this part apply to the exports referred to in paragraph (a) of this section regardless of whether the person who intends to export the technical data produces or manufactures defense articles if the technical data is determined by the Directorate of Defense Trade Controls to be subject to the controls of this subchapter.

(e) For the export of technical data related to articles in Category VI(e), Category XVI, and Category XX(b)(1) of § 121.1 of this subchapter, please see § 123.20 of this subchapter.

(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.

## **§ 125.2 Exports of Unclassified Technical Data**

...

## **§ 125.3 Exports of Classified Technical Data and Classified Defense Articles**

...

## **§ 125.# Exemptions of General Applicability**

Applicability							
Exemption	Hardware	Temp or Perm	Technical Data	Defense Services	Unclassified / Classified	SME	MTCR
(b)(1)			X		U / C	X	X
(b)(2)			X	X	U / C	X	X
(b)(3)			X		U / C	X	X
...			...		...	...	...
(b)(13)			X		U	X	X
(c)			X	X	X		

Restrictions and Requirements											
Exemption	120.1(c)	120.1(d)	122.5(a)	123.9(b)	123.15(b)	123.22	123.24	123.26	125.6	126.1	Other
(b)(1)	X	X	X	X	X	X	X	X	X	X	
(b)(2)	X	X	X	X	X	X	X	X	X	X	124.3
(b)(3)	X	X	X	X	X	X	X	X	X	X	

...	...	...	...	...	...	...	...	...	...	...	...
(b)(13)			X			X	X	X	X		
(c)	X	X	X	X	X	X	X	X	X	X	

(a) Exemptions in § 125.# may not be used for foreign production purposes or for technical assistance unless the approval of the Directorate of Defense Trade Controls has been obtained. Such approval is generally provided only pursuant to the procedures specified in part 124 of this subchapter. The exemptions are also not applicable for purposes of establishing offshore procurement arrangements or producing defense articles offshore (see § 124.13), except as authorized under § 125.4 (c). Transmission of classified information must comply with the requirements of the Department of Defense National Industrial Security Program Operating Manual (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed) and the exporter must certify to the transmittal authority that the technical data does not exceed the technical limitation of the authorized export.

(b) The following exports are exempt from the licensing requirements of this subchapter.

- (1) ...
- (2) ...
- (3) ...
- (4) ...
- (5) ...
- (6) ...
- (7) ...
- (8) ...
- (9) ...
- (10) ...
- (11) ...
- (12) ...

(13) Technical data approved for public release (i.e., unlimited distribution) by the cognizant U.S. Government department or agency or Office of Freedom of Information and Security Review. This exemption is applicable to information approved by the cognizant U.S. Government department or agency for public release in any form. It does not require that the information be published in order to qualify for the exemption.

(c) ...

(d) [Reserved]

### **Re-Configured 126.6(c):**

**New section 125.#** Foreign-Owned Military Aircraft and Naval Vessels, and the Foreign Military Sales Program

Applicability							
Exemption	Hardware	Temp or Perm Hdwr.	Technical Data	Defense Services	Unclassified / Classified	SME	MTCR
(a)	X	T / P			U / C	X	X

(b)	X	P			U / C	X	X
(c)	X	P	X	X	U / C	X	X

Restrictions and Requirements											
Exemption	120.1(c)	120.1(d)	122.5(a)	123.9(b)	123.15(b)	123.22	123.24	123.26	125.6	126.1	Other
(a)	X	X	X	X	X	X	X			X	
(b)	X	X	X		X	X	X			X	
(c)	X	X	X		X	X	X	X		X	

(a)...

(b)...

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

(1) Transfers of the defense articles, technical data or defense services using this exemption may take place only during the period which the FMS Letter of Offer and Acceptance (LOA) and implementing USG FMS contracts and subcontracts are in effect and serve as authorization for the transfers hereunder in lieu of a license. After the USG FMS contracts and subcontracts have expired and the LOA no longer serves as such authorization, any further provision of defense articles, technical data or defense services shall not be covered by this section and shall instead be subject to other authorization requirements of this subchapter; and

(2) The defense article, technical data or defense service to be transferred are specifically identified in an executed LOA, in furtherance of the Foreign Military Sales Program signed by an authorized Department of Defense Representative and an authorized representative of the foreign government, and

(3) The transfer of the defense article and related technical data is effected during the duration of the relevant Letter of Offer and Acceptance (LOA), similarly a defense service is to be provided only during the duration of the USG FMS contract or subcontract and not to exceed the specified duration of the LOA, and

(4) For transfers of defense articles and technical data,

(i) The transfer is made by the relevant foreign diplomatic mission of the purchasing country or its authorized freight forwarder, provided that the freight forwarder is registered with the Directorate of Defense Trade Controls pursuant to part 122 of this subchapter, and

(ii) At the time of shipment, U.S. Customs and Border Protection is provided the Electronic Export Information, Internal Transaction Number and any other documents required by U.S. Customs and Border Protection in carrying out its responsibilities. The invoices for the shipment must be annotated: "This shipment is authorized for export pursuant to 22 CFR 126.6(c), under FMS Case [insert case identification]. The U.S. Government point of contact is \_\_\_\_\_, telephone number \_\_\_\_\_," and

(iii) Any classified hardware and related technical data involved in the transfer must have the requisite U.S. Government security clearance and transportation plan and be shipped in accordance with the Department of Defense National Industrial Security Program Operating Manual. The exporter shall provide an electronic copy of the transportation plan via the U.S. Customs and Border Protection's electronic system(s), unless electronic reporting of such information is unavailable, in which case U.S. Customs and Border Protection will issue instructions, or

(5) For transfers of defense services:

(i) A contract or subcontract between the U.S. person(s) responsible for providing the defense service and the USG exists that:

(A) Specifically defines the scope of the defense service to be transferred;

(B) Identifies the FMS case identifier,

(C) Identifies the foreign recipients of the defense service

(D) Identifies any other U.S. or foreign parties that may be involved and their roles/responsibilities, to the extent known when the contract is executed,

(E) Provides a specified period of duration in which the defense service may be performed, and

(ii) The U.S. person(s) identified in the contract maintain a registration with the Directorate of Defense Trade Controls for the entire time that the defense service is being provided. In any instance when the U.S. registered person(s) identified in the contract employs a subcontractor, the subcontractor may only use this exemption when registered with DDTC, and when such subcontract meets the above stated requirements, and

(iii) In instances when the defense service involves the transfer of classified technical data, the U.S. person transferring the defense service must have the appropriate USG security clearance and a transportation plan, if appropriate, in compliance with the Department of Defense National Industrial Security Program Operating Manual.

## **Appendix 4**

### **Example Table of Contents of Part 125 under the Simple Model**

- § 125.1 Exports Subject to this Part
- § 125.2 Exports of Unclassified Technical Data
- § 125.3 Exports of Classified Technical Data and Classified Defense Articles
- § 125.4 Exemptions of General Applicability
- § 125.5 Exemptions for Plant Visits
- § 125.6 Certification Requirements for Exemptions
- § 125.7 Procedures for the Export of Classified Technical Data and other Classified Defense Articles
- § 125.8 [Reserved]
- § 125.9 Filing of Licenses and Other Authorizations for Exports of Classified Technical Data and Classified Defense Articles
- § 125.10 Temporary Import for overhaul, service, and repair
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- § 125.16 Exports to FTZ and U.S. Customs bonded warehouses
- § 125.17 Re-export to NATO, Australia, Israel Japan, New Zealand or S. Korea
- § 125.18 Movements of Vessels and Aircraft Covered by the U.S. Munitions List Outside the United States
- § 125.18 Domestic air shipment via a foreign country
- § 125.19 Unclassified hardware in furtherance of agreements

...(and many more)