



Request for Comments:

Public Notice 9136

RIN-1400-AD79

ITAR Amendment – U.S. Persons Employed by Foreign Persons

Email to DDTCpubliccomments@state.gov

Airbus Group offers the following comments in response to Public Notice 9136 pertaining to the proposed Amendment to the International Traffic in Arms Regulations: Registration and Licensing of U.S. Persons Employed by Foreign Persons, and Other Changes.

Airbus Group recommends that the scope of the proposed exemption in Section 124.17 be broadened to exempt natural U.S. persons employed by foreign companies from the registration and licensing requirements of the ITAR in cases where the foreign employer has otherwise been authorized by the U.S. Department of State to engage in defense services. Limiting the scope of the defense services exemption to only employers and defense services conducted in and for NATO and EU countries and Australia, Japan, New Zealand, and Switzerland would be too narrow to provide any significant relief. For example, the exemption would not apply to U.S. persons working on Eurofighter programs in NATO countries because the end-users of Eurofighter include governments outside of the list of exempted countries (e.g., Saudi Arabia).

We believe that imposing additional registration and licensing requirements on U.S. persons employed by foreign companies in NATO and EU countries or Australia, Japan, New Zealand, and Switzerland working on programs that have already been authorized by the U.S. Government including handling the same scope of ITAR-controlled technical data that has been authorized for foreign employees working on the same program is an unnecessary burden on those U.S. person employees and does not add any national security or foreign policy benefits. Furthermore, it would add a disincentive for foreign companies in those countries to hire U.S. persons.

Airbus Group proposes the following changes (in bold):

Section 122.1

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



person, or who is a regular employee of a foreign company located in a NATO or EU country or Australia, Japan, New Zealand, and Switzerland that has otherwise been authorized to receive defense services, is deemed to be registered.

Section 124.17

(a).....

(2) The end user(s) of the associated defense article(s) are located within NATO, EU, Australia, Japan, New Zealand, and/or Switzerland, **or the end user(s) have otherwise been authorized by the U.S. Government to receive the associated defense article(s);**

For further information, please contact Corinne Kaplan at 703-466-5741 or Corinne.Kaplan@eads-na.com.

Respectfully,

A handwritten signature in blue ink, appearing to be "Pierre Cardin", written over a circular scribble.

Pierre Cardin

SVP, Group Export Compliance Officer

A handwritten signature in blue ink, appearing to be "Alexander Groba", written in a cursive style.

Alexander Groba

Coordinator U.S. Regulations

PUBLIC SUBMISSION

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International Traffic in Arms: Registration and Licensing of U.S. Persons Employed by Foreign Persons, and Other Changes

Comment On: DOS-2015-0037-0001

International Traffic in Arms: Registration and Licensing of U.S. Persons Employed by Foreign Persons, and Other Changes

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Comment on DOS_FRDOC_0001-3249

Submitter Information

Name: Anonymous Anonymous

General Comment

Comments For

ITAR Amendment U.S. Persons Employed by Foreign Persons

Even though the rule seeks to clarify the requirement that U.S. persons performing defense services abroad are required to be registered pursuant to 22 CFR 122.2; the proposed rule does not clearly identify specifically which U.S. persons would be affected.

- o Non technical persons, i.e., contracts, compliance, finance and administrative, typically do not perform defense services as defined by the ITAR. In addition, these types of non technical personnel do not have technical or defense related backgrounds. In other words, they do not bring any additional added value as far as TAR knowledge is concerned and therefore cannot be categorized as performing defense services.

- o At least one of our foreign based US citizen employees received an Advisory Opinion from DDTC regarding her employment. The letter stated no licensing activity was needed since she did not possess a technical degree and was not employed in a technical capacity; therefore defense services were not an issue.

- o At least one US citizen employee functions in a technical capacity and that person is appropriately covered by a current technical assistance agreement for the transfer of defense services.

- o Registration for the sake of registering a US person, who is employed by a foreign defense

contractor, places an undue burden on a private individual because it assumes this person is constantly exporting technical know-how, and more often than not, they aren't.

o We believe the proposed rule should specifically address non-technical personnel.

Under the Proposed Rule, US persons employed by a non-US company that is an affiliate of a US company registered with the DDTC, would not be required to register. But, this is not robust enough to cover European parent companies to US subsidiaries whereby the US subsidiary is registered with the DDTC. In the latter scenario, the US persons employed abroad by the non-US parent company would be required to register.

The Proposed Rules exemption for NATO-plus countries would not be available for companies engaged in SME activities. For the US persons working in these countries, this would create hardship because, many of these companies, who either at the first-tier or sub-tier level support the US defense sector, may choose not to employ US persons due to the registration and recordkeeping requirements. Additionally, the Proposed Rule licensing exemption states that no technical data can be transferred. For engineers working in the industrial defense sector, creating technical data is often a job requirement.

We believe the Proposed Rule should specifically address record keeping requirements.

o If non-technical persons are not addressed in the Proposed Rule, this would mean those working in a non-technical business environment (contracts, compliance, finance, etc.) would need to initiate some type of licensing activity. Does this mean, US persons working at foreign company that produces SME, as defined by the USML, would be required to obtain a DSP-83?

o The maintenance of records ITAR requirement must now be met if US persons employed by foreign persons are required to be registered with DDTC.

o Is this US individual now required to have his/her own compliance program to meet the requirements of the ITAR and be their own empowered official?

o Who maintains the records, the US individual or their foreign employer?

o Will this US individual be required to obtain their own digital certificate and their own D-Trade account?

The Proposed Rule would also add an undue burden to DDTC and thereby significantly increase the number of license applications submitted to DDTC.

o How will this impact license processing times?

o How will this impact personnel numbers within DDTC will more licensing officers be added to handle the increased workload?

The Proposed Rule places an undue burden, both economically and from a process standpoint, on private individuals, foreign companies and DDTC. Contractors are capable of policing their employee population on their own. Perhaps more emphasis should be placed on educating foreign companies regarding ITAR requirements where US persons are employed by them in a technical capacity, through either outreach programs or SIA conferences.

27 July 2015

Mr. C. Edward Peartree, Director
Office of Defense Trade Controls Policy
U.S. Department of State
PM/DDTC, SA-1
2401 E Street, NW, Room H-1205
Washington, DC 20522-0112

Via Email: DDTCTPublicComments@state.gov

ATTN: ITAR Amendment -- US Persons Employed by Foreign Persons (80 Fed. Reg. 30001 [RIN 1400-AD79])

Dear Mr. Peartree:

BAE Systems plc offer the following comments in response to the request from the Directorate of Defense Trade Controls (DDTC) on May 26, 2015 (80 Fed. Reg. 30001). BAE Systems plc appreciates this outreach from DDTC to industry and would like to take this opportunity to provide its comments to the proposed rule.

As a non-US defense industry participant in Europe, BAE Systems greatly appreciates DDTC's efforts to clarify and update certain regulations related to US employees of non-US companies. We are largely supportive of the proposed rules, but would urge certain changes and clarification to the proposed revision to ITAR §124.17 based on our experience.

Summary: There are three areas which pose particular problems for implementing the new regulatory language proposed in this FRN for inclusion at ITAR §§124.17 and 126.6(c)(7). These areas of concern relate to individual registration with DDTC; the requirement for NATO/EU+4 end use; and the requirement for separate licensing authorizations for technical data to be transferred.

- 1) **Employee Registration & Licensing:** In the event a US employee is asked to provide assistance to his or her foreign employer using knowledge of US-origin technical data directly related to the defense article that is the subject of the assistance, the regulatory process for the US person to obtain the necessary licenses is overly burdensome. The US employee would need to apply for and maintain a costly ITAR registration and possibly apply for multiple DSP-5s. The DDTC registration system is not set up for this, with the DS-2032 Statement of Registration geared towards companies, not individuals. Most individuals will not be able to meet the burden imposed by the system.

Furthermore, a US employee seeking to register would be unlikely to meet many of the registration requirements. Individuals may not wish to take on the personal liability that comes with being a registrant. In particular, the requirement for a US employee to establish an ITAR compliance program and keep records would cause significant problems. This would likely violate companies' intellectual property management, confidentiality and security programs. In certain cases, such as the handling of sensitive

and classified information, it might breach a nation's national security laws for an employee to keep his or her own set of personal records about the work he or she does on a company site.

- 2) **NATO/EU+4 End Use:** The proposed rule for US employees of non-US companies attempts to create an exemption for some of the licensing requirements imposed above for US employees of foreign persons located in any NATO or EU member state, Australia, Japan, New Zealand, or Switzerland ("NATO/EU+4") (proposed ITAR §124.17), or where they are engaged in FMS-related activities (proposed ITAR §126.6(c)(7)). However, the US employee utilizing these exemptions must still comply with the Part 122 registration requirements. In addition, the end users of the defense services must be NATO/EU+4 countries for the exemption to apply, and a separate authorization is still needed for the US employee's transfer of any technical data.
 - a. As many non-US companies provide the same or similar defense equipment to NATO/EU+4 countries and non-NATO/EU+4 countries, it would be difficult to create a firewall within a defense program operation that separates the US employee from some end users and not others.
 - b. We recommend changing the proposed rule to remove the NATO/EU+4 country end-user requirement. US employees working in a NATO/EU+4 country should be able to benefit from the exemption regardless of the end user – as long as that end user is not a 126.1 country -- otherwise, the exemption provides no practical benefit to encourage the employment of US persons.

Alternative Solutions: Given the challenges raised by the proposed exemption for NATO/EU+4 countries and the proposed revision to the definition of defense services recently published (Proposed Rules from the Department of State entitled "International Traffic in Arms: Revisions to Definitions of Defense Services, Technical Data, and Public Domain; Definition of Product of Fundamental Research; Electronic Transmission and Storage of Technical Data; and Related Definitions" (80 Fed. Reg. 31525; RIN 1400-AD70)), we offer the following alternatives for DDTC's consideration.

- 1) **Non-Disclosure Agreements:** We urge the DDTC to consider allowing non-US companies to rely on non-disclosure agreements (NDA) rather than registration, exemptions and licensing by prospective US employees of non-US companies:
 - a. Currently, as a general practice, US persons who gain technical data during their employment with US companies sign non-disclosure agreements to ensure that they do not pass on proprietary technical data or other intellectual property when they move to a new employer. They also should be aware that any re-export of the technical data they possess would require an export license. The US persons are informed that DDTC could charge them with ITAR violations, were they to export technical data without a license, and that their previous employer could file a civil claim against them for breach of the NDA.
 - b. Rather than asking global non-US companies to develop a method to screen US persons for prior knowledge that may be relevant to their non-US employment, DDTC should permit foreign companies and US employees to agree in NDAs that no technical data will be exported without prior DDTC authorization. The US employee would sign an NDA or other certification confirming his or her understanding of ITAR controls on the export and retransfer of technical data and commitment not to

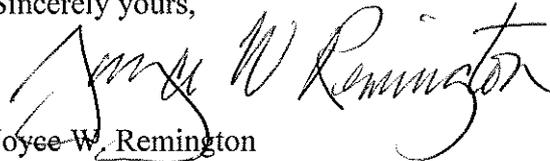
release technical data during the course of employment except pursuant to a DDTC authorization. By collecting and maintaining these certifications, the foreign company can demonstrate its efforts to comply with the relevant provisions of the ITAR.

- 2) **Existing or Precedent Licenses/Authorizations:** We urge the DDTC to consider existing licenses or precedent licenses/authorizations as sufficient to allow US employees of a non-US employer to access and retransfer to the non-US employer controlled technical data and defense services transferred pursuant to such DDTC authorizations.
- a. DDTC should authorize US employees to provide any technical data or defense services to a non-US company that the company is otherwise licensed to receive. A costly and complicated registration and licensing process for an individual can be avoided if US employees are automatically authorized to provide any technical data knowledge they possess if the non-US company is already licensed to receive such information from other parties.
- b. **Alternative:** Allow the US employee to be added to relevant TAAs or GCs as a minor amendment to such authorizations.

We hope that you will consider these alternative recommendations in the final regulation.

Thank you for considering our comments.

Sincerely yours,



Joyce W. Remington
Group Deputy Head of Export Control, Licensing &
Policy



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July 27, 2015

C. Edward Peartree
Director
Office of Defense Trade Controls Policy
Department of State
ATTN: Regulatory Change, U.S. Persons
Employed by Foreign Persons

Email: DDTCPublicComments@state.gov

Re: ITAR Amendment – U.S. Persons Employed by Foreign Persons

RIN: 1400-AD79

Dear Mr. Peartree:

Bass, Berry & Sims PLC (Bass Berry) respectfully submits this letter to provide comments to the above-referenced proposed rule to amend registration and licensing requirements under the International Traffic in Arms Regulations (ITAR) for U.S. persons employed by foreign persons (the Proposed Rule).

Background. Bass Berry was founded in Nashville, Tennessee in 1922. Since that time, the firm has provided legal representation to clients, both in the United States and abroad, on all manner of issues, including export and other trade matters.

The firm's trade group is based in Washington, DC. The group works with U.S. and non-U.S. clients on export issues under the ITAR and under the Export Administration Regulations. Like our clients, the group has followed with great interest the substantial efforts undertaken by the State Department, Commerce Department, and others in the U.S. government in furtherance of Export Control Reform (ECR).

Comments. We have carefully reviewed the Proposed Rule. We also have discussed the Proposed Rule with several clients, including, in particular, those that are based or that have substantial operations outside the United States (*i.e.*, companies that would be affected by the Proposed Rule if it is made final).

Further to those discussions and our own experience advising clients on export matters, we respectfully submit the following comments.

As an initial matter, we commend the State Department for proposing a rule that appears to advance the goals of ECR. As indicated by President Obama in August 2010, ECR is intended to “focus our resources on the threats that matter most, and help us work more effectively with our allies in the field.” Moreover, the President stated, ECR is intended to “bring transparency and coherence to a field of regulation which has long been lacking both.” And, the President added, ECR will “help us not just increase exports and create jobs, but strengthen our national security as well.”

We believe the Proposed Rule, as drafted, would effectively enhance transparency and coherence regarding registration requirements in the following situations:

- *A U.S. person who furnishes defense services outside of the United States.* The Proposed Rule would make clear that – as we understand to have been the State Department’s practice – such persons are required to be registered under ITAR Part 122.
- *A natural person directly employed by a registered person or by a listed subsidiary or affiliate of a registered U.S. person.* The Proposed Rule would make clear that such a person is considered to be registered under ITAR Part 122.

We also believe the Proposed Rule goes some way towards meeting the President’s goal of allowing the United States – and U.S. companies – to work more effectively with allies. Specifically, section 124.17 of the Proposed Rule would allow certain natural U.S. person employees of a foreign person to furnish defense services to and on behalf of their employer without a license.

Conceptually, we think this is an excellent idea. In an increasingly global economy, non-U.S. companies – and non-U.S. subsidiaries of U.S. companies – routinely seek to hire U.S. persons to assist on defense projects. Section 124.17 of the Proposed Rule appears to recognize and support such activities, and thereby would help the United States work more effectively with our allies.

While proposed section 124.17 is certainly well-intended, we think it would – as drafted – be unnecessarily narrow in practice. In particular, as we read the proposed rule, a U.S. person employee of a foreign company would not, absent separate authorization, be permitted to transfer any technical data to the employer. Accordingly, as detailed below, we believe that the benefits of the proposed provision would be effectively eliminated.

Under ITAR section 120.10(a)(1), the term “technical data” is defined to include “[i]nformation . . . required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles.” Under ITAR section 120.9(a), the term “defense service” is defined to include (1) “[t]he furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;” and (2) “[t]he furnishing to foreign persons of . . . technical data . . .” As these definitions make plain, the sharing of defense technical data is inextricably intertwined with the provision of a defense service.

Yet, as we interpret the Proposed Rule, a U.S. person employee of a foreign employer would be permitted to furnish assistance to a foreign employer in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of a defense article, only so long as the employee did not provide information required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of that article. In our view, there are thus very few situations in which proposed section 124.17 would be of use.

In practice, the exemption would essentially be reduced to authorizing the U.S. person employee to provide military training. *See id.* § 120.9(a)(3) (defining “defense service” to include “[m]ilitary training of foreign units and forces . . .”). We submit that such a limited benefit is not what the Proposed Rule is intended to provide, nor does it cohere with the overall goals of ECR.

Moreover, this outcome is illogical in light of the apparently expansive scope of proposed section 124.17 with respect to a U.S. person transferring technical data to foreign persons *other than* her / his employer. As currently drafted, proposed section 124.17 appears to permit a U.S. person acting on behalf of her / his foreign employer to provide to a third party foreign person defense services that involve the transfer of technical data. While we are generally supportive of this proposed authorization, it is hard to understand in light of the prohibition on the same U.S. person providing technical data to her / his employer.

Finally, because of the protections afforded by other subsections of proposed section 124.17, any technical data transfer from a U.S. person to her / his foreign employer would not appear to endanger U.S. national security. Subsections (a)(1) and (a)(2) of proposed section 124.17 require that both the employer and end user(s) be located within countries (NATO or EU countries, Australia, Japan, New Zealand, and/or Switzerland) that are close U.S. allies. Proposed subsection 124.17(a)(4) would preclude the transfer of particularly sensitive technical data (*i.e.*, classified, SME, and / or MT technical data). And proposed subsection 124.17(a)(5) would establish a record-keeping requirement so that the U.S. government would have visibility into transfers that did occur.

We therefore respectfully suggest that section 124.17 of the Proposed Rule be amended as follows (proposed modifications are in bold):

§ 124.17 Exemption for natural U.S. persons employed by foreign persons. [*No change*]

(a) A natural U.S. person employed by a foreign person may furnish defense services to and on behalf of the foreign person employer without a license if all of the following conditions are met: [*No change*]

(1) The employer is located within a NATO or EU country, Australia, Japan, New Zealand, and/or Switzerland, and the defense services are provided only in these countries; [*No change*]

(2) The end user(s) of the associated defense article(s) are located within NATO, EU, Australia, Japan, New Zealand, and/or Switzerland; [*No change*]

(3) No U.S.-origin defense articles, **other than technical data necessary for the provision of the defense service authorized by this section and not prohibited**

by subsection (a)(4) of this section, are transferred from the U.S. person to any foreign person unless otherwise authorized.

(4) No classified, SME, or MT technical data is transferred (even if separately authorized) in connection with the furnishing of defense services; and [*No change*]

(5) The U.S. person furnishing the defense services maintains records of such activities and complies with registration requirements in accordance with part 122 of this subchapter. [*No change*]

(b) [Reserved] [*No change*]

We believe this proposed revision would more effectively advance the goals of ECR. Specifically, it would permit U.S. person employees to transfer technical data that does not present a significant threat to U.S. national security and that is necessary for the provision of a defense service to or on behalf of an employer in a country that is a well-established U.S. ally. It would thereby protect our national security while “focus[ing] our resources on the threats that matter most, and help us work more effectively with our allies in the field.”

* * * * *

As noted above, Bass Berry – both on its own behalf and with respect to the clients it has consulted about the Proposed Rule – commends the State Department for its effort to further the ECR effort. Parts of the Proposed Rule do, in our view, adhere to the goals of ECR as articulated by President Obama.

At the same time, we believe that proposed section 124.17, as drafted, is unnecessarily narrow without (a) assisting the export community or (b) significantly contributing to the protection of U.S. national security.

Many thanks for the opportunity to provide comments. If you have any questions or require additional information regarding this submission, please contact me at (202) 827-2959 or by email at tmcbride@bassberry.com.

Respectfully submitted,



Thaddeus McBride



July 24, 2015

Mr. C. Edward Peartree, Director
Office of Defense Trade Controls Policy
Directorate of Defense Trade Controls
Department of State
SA-1, 12th Floor
Washington, DC 20522-0112

Subject: Regulatory Change, United States Persons Employed by Foreign Persons

Reference: Federal Register/ Vol. 80, No. 100/ Tuesday, May 26, 2015/ Proposed Rule: Amendment to the International Traffic in Arms Regulations (ITAR) (Registration and Licensing of U.S. Persons Employed by Foreign Persons, and other Changes)

Dear Mr. Peartree,

The Boeing Company (“Boeing”) appreciates the opportunity to provide comments on the proposed rule *Amendment to the ITAR: Registration and Licensing of U.S. Persons Employed by Foreign Persons, and other Changes*, published May 26th 2015. Several of the proposed changes clarify what had already been understood as generally accepted practice or interpretations. For example, the addition of the language in §122.1(a) stating outright that, “U.S. persons wherever located” are subject to the registration requirements is not new yet it strengthens the regulations by codifying requirements more clearly. Such changes are productive and helpful in facilitating proper understanding and consistent implementation of the ITAR.

Boeing was pleased to see this proposed rule focus on U.S. persons employed by foreign persons. U.S. companies continue efforts to grow their international presence and we applaud DDTC for providing additional clarity and flexibility in this area. We do, however, propose some minor changes to the specific language within this proposed rule for further clarity.

Specific Comments:

Part 120 – Definitions

The updated definition of *Affiliate* in §120.40 is missing a pronoun before the word “section” in Note 2.



Recommendation:

Modify the first sentence of Note 2 to §120.40 *Affiliate* to read as follows:

“A registrant may establish a control relationship with another entity via written agreement such that the entity then becomes an affiliate in accordance with **this** section.”

Also, given the construct of definitions regarding persons, both §120.15 *U.S. Person* and §120.16 *Foreign Person* could reference the new definition for “*natural person*” for additional clarity since both include this term.

Recommendation:

Modify the text of §120.15 U.S. Person to read as follows:

“Person means a natural person (**as defined in §120.43 of this part**) as well as a corporation...”

Recommendation:

Modify the text of §120.16 Foreign Person to read as follows:

“*Foreign person* means any natural person (**as defined in §120.43 of this part**) who is not a lawful permanent resident as defined by 8 U.S.C. 1101(a)(20) or ...”

§124.17 Exemption for Natural U.S. Persons Employed by Foreign Persons

The third condition proposed under the new §124.17 exemption imposes limitations on transfers from “U.S. persons to the employer”, in this case foreign-person employers. If the reference is to transfers from the U.S. company under whose registration the natural U.S. person is registered, then this should be clarified since the exemption currently states it applies to all natural U.S. persons specifically, not U.S. persons generally. §120.14 defines a *person* to mean a “natural person as well as a corporation, business association, partnership, society, trust, or any other entity, organization or group, including governmental entities.” The condition appears to be aimed at preventing unauthorized transfer and can be clarified by specifying foreign person employers.

Recommendation:

Modify the language of §124.17(a)(3) to read as follows:

“(3) No U.S.-origin defense articles, to include technical data, are transferred from the U.S. persons to the **foreign person** employer without separate authorization;”



§124.1 Manufacturing License Agreements and Technical Assistance Agreements

New language is proposed in §124.1 to address authorization of defense services performed by natural U.S. persons. It seeks to clarify when natural U.S. persons employed by foreign subsidiaries or affiliates of U.S. companies may be covered by DDTC authorizations. The language may be strengthened by citing that the burden relates specifically to foreign subsidiaries or affiliates that are owned by U.S. persons.

Recommendation:

Modify the text of §124.1(a) to read as follows:

“(a) ... Natural U.S. persons employed as regular employees of **the U.S.-owned** a foreign subsidiary or affiliate listed on the DDTC registration of a **the** U.S. person may receive authorization to provide defense services via an agreement between the registered U.S. person and the **U.S.-owned** foreign subsidiary or affiliate, provided the registered U.S. person accepts responsibility for, and demonstrates ability to ensure, the natural U.S. person’s compliance with the provisions of this subchapter.”

§ 126.6 Foreign-owned military aircraft and naval vessels, and the Foreign Military Sales (FMS) program

The second condition under the new §126.6(c)(7) FMS exemption imposes limitations on transfers from “the U.S. person to the employer”, in this case foreign-person employers participating in an FMS contract. If the reference is to transfers from the U.S. company under whose registration the natural U.S. person is registered, then this should be clarified since the exemption applies to the natural person specifically, not the U.S. person generally (*see* definition of U.S. person, §120.14 referenced above). The condition appears to be aimed at preventing unauthorized transfer and can be clarified by specifying foreign person employers.

Recommendation:

Modify the language of §126. 6(c)(7)(ii) to read as follows:

“(ii) No U.S.-origin defense articles are transferred from the U.S. person to the **foreign person** employer, without separate authorization;”

The first sentence under §126.6(c) was modified to reflect a few proposed clarifications. However, the phrase “technical data” was deleted in the process. This phrase still appears in each of the subparagraphs to §126.6(c) and would retain the integrity of the section if it remained.



Mr. Edward Peartree
Page 4

Recommendation:

Modify the language of §126.6(c) to incorporate the proposed changes and retain the previous phrase “technical data” such that it reads as follows:

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

Thank you for the opportunity to provide comments. Please do not hesitate to contact me if you have any questions or need additional information. I can be reached at 703-465-3505 or via email at christopher.e.haave@boeing.com.

Sincerely,

A handwritten signature in cursive script, appearing to read "Christopher Haave".

Christopher Haave
Director, Global Trade Controls



Document Details

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Submitter Info

Comment:

Comments For ITAR Amendment U.S. Persons Employed by Foreign Persons Even though the rule seeks to clarify the requirement that U.S. persons performing defense services abroad are required to be registered pursuant to 22 CFR 122.2; the proposed rule does not clearly identify specifically which U.S. persons would be affected. o Non technical persons, i.e., contracts, compliance, finance and administrative, typically do not perform defense services as defined by the ITAR. In addition, these types of non technical personnel do not have technical or defense related backgrounds. In other words, they do not bring any additional added value as far as TAR knowledge is concerned and therefore cannot be categorized as performing defense services. o At least one of our foreign based US citizen employees received an Advisory Opinion from DDTC regarding her employment. The letter stated no licensing activity was needed since she did not possess a technical degree and was not employed in a technical capacity; therefore defense services were not an issue. o At least one US citizen employee functions in a technical capacity and that person is appropriately covered by a current technical assistance agreement for the transfer of defense services. o Registration for the sake of registering a US person, who is employed by a foreign defense contractor, places an undue burden on a private individual because it assumes this person is constantly exporting technical know-how, and more often than not, they aren't. o We believe the proposed rule should specifically address non technical personnel. Under the Proposed Rule, US persons employed by a non-US company that is an affiliate of a US company registered with the DDTC, would not be required to register. But, this is not robust enough to cover European parent companies to US subsidiaries whereby the US subsidiary is registered with the DDTC. In the latter scenario, the US persons employed abroad by the non-US parent company would be required to register. The Proposed Rules exemption for NATO-plus countries would not be available for companies engaged in SME activities. For the US persons working in these countries, this would create hardship because, many of these companies, who either at the first-tier or sub-tier level support the US defense sector, may chose not to employ US persons due to the registration and recordkeeping requirements. Additionally, the Proposed Rule licensing exemption states that no technical data can be transferred. For engineers working in the industrial defense sector, creating technical data is often a job requirement. We believe the Proposed Rule should specifically address record keeping requirements. o If non technical persons are not addressed in the Proposed Rule, this would mean those working in a non technical business environment (contracts, compliance, finance, etc.) would need to initiate some type of licensing activity. Does this mean, US persons working at foreign company that produces SME, as defined by the USML, would be required to obtain a DSP-83? o The maintenance of records ITAR requirement must now be met if US persons employed by foreign persons are required to be registered with DDTC. o Is this US individual now required to have his/her own compliance program

to meet the requirements of the ITAR and be their own empowered official? o Who maintains the records, the US individual or their foreign employer? o Will this US individual be required to obtain their own digital certificate and their own D-Trade account? The Proposed Rule would also add an undue burden to DDTC and thereby significantly increase the number of license applications submitted to DDTC. o How will this impact license processing times? o How will this impact personnel numbers within DDTC will more licensing officers be added to handle the increased workload? The Proposed Rule places an undue burden, both economically and from a process standpoint, on private individuals, foreign companies and DDTC. Contractors are capable of policing their employee population on their own. Perhaps more emphasis should be placed on educating foreign companies regarding ITAR requirements where US persons are employed by them in a technical capacity, through either outreach programs or SIA conferences. *🌐

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Government Agency Type: 🌐

Government Agency: 🌐

Category:

Cover Page: 



DRS Technologies, Inc.
Trade Compliance Office
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Arlington, VA 22202

July 27, 2015

Mr. C. Edward Peartree
Director, Office of Defense Trade Controls Policy
Directorate of Defense Trade Controls
U.S. Department of State
Washington, DC 20522-0112

Subject: Response to the Amendment to the International Traffic in Arms Regulations: Registration and Licensing of U.S. Persons Employed by Foreign Persons, and Other Changes - 80FR30001

Dear Mr. Peartree,

DRS Technologies, Inc. appreciates the opportunity to comment on proposed revisions to the ITAR related to the Licensing of U.S. Persons Employed by Foreign Persons. Our concern with the proposed rule is with regard to §120.39, the definition of a Regular Employee.

When industry first sat down with the DDTC in 2005 to discuss this subject, the concerns raised then by the DDTC were that to consider a person to be a regular employee of the company, the individual must be 1) under the control and direction of the company and 2) that there be a contractual relationship between the individual and company, that included a non-disclosure agreement.

Since then the DDTC has continued to add successive requirements that restrict the definition, but do not appear to add any additional safeguards. The proposed rule adds another requirement that the contract must be for a minimum of 1 year. This is an arbitrary time constraint that does not appear to be of any value add. If the individual is under the control and direction of the company then the duration of employment is irrelevant. An example of the negative impact of this arbitrary time constraint is the hiring of an individual consultant or support contractor, which are routinely hired for periods of less than a year. Such individuals would be excluded from even being considered as a regular employee despite that during the period of performance, such individuals are routinely badged by the company, trained by the company, and act in the capacity of a company employee, in short, they are under the direction and control of the company.

We urge the department to delete this 1 year minimum contract length. If the individual is under the control and direction of the company, the length of the contract is immaterial. Additionally, the company is responsible for the actions of the "regular employee" regardless of the contract length, further obviating the need for this restriction.

Should you have any questions in this matter or require additional information, please contact me at (703) 412-0288 or at gghill@drs.com.

Sincerely,

A handwritten signature in black ink, appearing to read "Gregory C. Hill". The signature is written in a cursive, somewhat stylized font.

Gregory C. Hill
Vice President
Global Trade Compliance
DRS Technologies, Inc.



Operating under the joint auspices of:



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24 July 2015

C. Edward Peartree
Director, Office of Defense Trade Controls Policy
U.S. Department of State
PM/DDTC, SA-1, 12th Floor
2401 E Street, NW
Washington, DC 20037
United States of America
DDTCTPublicComments@state.gov

ATTN: 80 FR 30001-30004: Amendment to the International Traffic in Arms Regulations: Registration and Licensing of U.S. Persons Employed by Foreign Persons, and Other Changes; 22 CFR Parts 120, 122, 124, 125, and 126

Dear Mr Peartree,

I write to you on behalf of the Export Group for Aerospace and Defence (EGAD), which is a not-for-profit making special interest industry group, focusing exclusively on all aspects of export and trade control compliance matters, and is the only dedicated national industrial body in the UK dealing exclusively with export and trade control issues. EGAD operates under the joint auspices of the ADS Group Ltd (ADS), British Marine, the British Naval Equipment Association (BNEA), the Society of Maritime Industries (SMI), and TechUK.

This is in response to the consultations which were launched by the US Department of State on Tuesday 26th May 2015, seeking comments on proposals to clarify requirements for the licensing and registration of U.S. persons providing defense services while in the employ of foreign persons, as part of the on-going US Export Control Reform (ECR) process.

In general, we are, as you know, very supportive of the programme of US export control reform and welcome the opportunity to comment on the above referenced consultation as a contribution to making ECR more efficient and user-friendly.

Seen in that light, and taking account too of the later proposals for a redefinition of 'defense services' in your subsequent FRN of 3 June, we have to say that the draft is somewhat disappointing, and could contribute to a reluctance by our membership to employ technically qualified US persons.

This is for two main reasons. First, the process of authorisation, including both registration and licensing, is complex, bureaucratic, and, for individuals, expensive. The current registration procedure is aimed at US companies not individuals. Nor are individuals necessarily qualified to make licence applications, which they would have to do in those instances when their foreign employer was not permitted to be a registered exporter or manufacturer.

Secondly, the proposed 'defense services' rule means that technically qualified US persons could be held to be providing a defense service even if their role were managerial or administrative, and did not involve any technical input. As a consequence of the 'derived data' rule, as set out in ITAR 124.8(5), any product (and any product into which it was incorporated) produced with the aid of a 'defense service' provided by a US national employee, would be subject to Department of State retransfer and re-export authorisations in perpetuity, even if had no US content whatsoever. This is entirely unacceptable to UK industry.

It might be suggested that, for UK companies, these effects would be largely avoided by the proposed exemption at ITAR 124.17. This is not so, for two reasons:

- The exemption is for licensing. It does not obviate the need for registration;
- Most of our membership seek markets outside NATO-plus (as, indeed, do US exporters). The limitation to NATO-plus end use in 124.17(a)(2) therefore largely vitiates the value of the exemption.

We shall be commenting separately on the 'defense services' issue in our observations on the 3 June FRN.

Meanwhile, our suggestions for improvements to this FRN are, more or less in order of priority:

- It is customary for Companies to require departing employees to sign Non Disclosure Agreements in order to protect their IPR. We therefore suggest that the complex registration and licensing procedures are replaced with a simple requirement that foreign employers should obtain, and produce when requested, copies of NDAs signed by their US employees. Obviously, any transfers of US origin technical data would need to be separately authorised.
- To broaden the scope of the 124.17 exemption to include an exemption from registration, and to limit the scope of the 124.17(a)(2) condition to ITAR 126.1 end use. This would greatly improve the utility of the exemption, and the attraction of offering employment to US persons, while, as we see it, not significantly affecting the security interests of the United States.
- Noting that the ITAR Destination Control Statement (as in ITAR 123.9(b)(1) and the DSP-5 guidance notes refer to 'incorporation' ('see through'), but not to derived data, to request that the DoS formally confirm that 'defense services' authorised by licence, rather than by agreement, are not subject to the 'derived data' rule. This would address the problem identified in the second bullet of the previous paragraph.
- To offer a simpler and cheaper registration procedure for individuals.
- To permit foreign companies to request authorisations for their US employees by means of GC letters, as an alternative to DSP-5 applications.

We are grateful for the high degree of constructive engagement, willingness to enter into open discussions and debate, and assistance that the US Government has demonstrated on ECR.

Thank you in advance for your consideration of these comments. If you have any questions about this correspondence please contact me.

Regards


Brinley Salzmänn - Secretary, EGAD



July 27, 2015

Via Email – DDTCPublicComments@state.gov

Mr. C. Edward Peartree
Director, Office of Defense Trade Control Policy
Directorate of Defense Trade Controls
U.S. Department of State
2401 E. St, NW, 12th Floor, SA-1
Washington, DC 25022

Subject: **Comments on Proposed Rule: Registration and Licensing of U.S. Persons Employed by Foreign Persons, and Other Changes**
80 *Fed. Reg.* 30,001 (May 26, 2015)

Reference: RIN 1400-AD79

Dear Mr. Peartree:

I am writing to submit joint comments from Elbit Systems of America, LLC (“ESA”) and our Israeli parent company, Elbit Systems Ltd. (“ESL”), on DDTC’s proposed amendments to the International Traffic in Arms Regulations (“ITAR”) concerning registration and licensing of U.S. Persons employed by Foreign Persons.

We are concerned that the proposed registration/licensing amendments in combination with proposed amendments to the definition of Defense Service (80 *Fed. Reg.* 31525 (June 3, 2015)), will result in unintended and unnecessary regulation of persons and transactions that do not pose a risk to U.S. security interests. These comments offer two independent solutions that would set a more appropriate balance of interests. Although the solutions involve changes only to the proposed amendments to the definition of Defense Service, they are presented herein as comments to the proposed registration/licensing rule because, without making changes to the definition of Defense Service, we believe the proposed registration/licensing rule will be unworkable.

I. REGULATION OF U.S. CITIZENS ABROAD

The proposed registration/licensing rule applies to U.S. Persons who are directly employed by Foreign Persons. Specifically, the proposed rule would require all U.S. Persons (as defined by ITAR §120.15) who provide Defense Services to a foreign employer to (i) register with DDTC and (ii) obtain authorization from DDTC to furnish the Defense Services. DDTC stated that the purpose of the proposed rule is to “[b]etter account for these persons and their services to their foreign person employers.”

According to current estimates, there are between 7-8 million U.S. citizens living and working overseas. *See* Association of Americans Resident Overseas, www.aaro.org/who-we-are/8m-americans-abroad. The largest populations of U.S. citizens living abroad are reportedly in Mexico and Canada, followed closely by Israel, the United Kingdom, France and Germany. All of these countries are close allies of the United States and share significant economic, political and historical ties with the United States.

It is understandable that DDTC would seek to use U.S. citizenship as a hook in achieving the maximum reach of U.S. jurisdiction to protect U.S. security interests. In doing so, however, the regulations as currently proposed would require registration and licensing in situations such as the following:

- An engineer who never lived in the United States and was never exposed to U.S.-origin Technical Data, but holds U.S. citizenship by virtue of his parents' U.S. citizenship, works for his or her Israeli employer on the development of a defense system for end use in the United Kingdom, in Mexico – or even the United States.
- An engineer who was born and educated in the United States, but never worked for a U.S. defense contractor and was never otherwise exposed to ITAR-controlled Technical Data, is sent by his or her Canadian employer to South Korea to assist in the employment of a Canadian defense system that the employer had supplied to South Korea.
- A South Korean engineer who was born in the United States but never exposed to U.S.-origin Technical Data works on the development of a South Korean defense system for end use in Thailand – or for end use in South Korea.

It is difficult to find any significant risk to U.S. security interests in the examples above, or in many other examples that could be given – all of which would be realistic. For this reason, the proposed registration and licensing requirements could be perceived as an unwarranted extension of U.S. extraterritorial jurisdiction, creating burdens for allies. Furthermore, if the regulations were implemented as currently proposed, it is not unreasonable to assume that these requirements could be viewed by foreign employers of U.S. citizens as imposing an unreasonable burden and undue interference with otherwise lawful business activities.

Nevertheless, we believe changes could be made to the definition of Defense Service and thereby permit the proposed registration/licensing rule to be implemented with a more appropriate balance. In the following sections, we describe two ways to do so.

II. SPECIFIC COMMENTS

A. Consider and issue any final regulations on this proposed rule simultaneously with the proposed changes to the definition of Defense Service

Almost simultaneously with the issuance of the proposed registration/licensing rule, DDTC issued a new (third) proposed revision to the definition of Defense Service. *See* 80 *Fed. Reg.* 31,525 (Jun. 3, 2015). Significantly, with few exceptions, the new proposed definition captures all services by U.S. Persons (including services by U.S. Persons holding citizenship of foreign countries in which they are employed) working on the development or employment of non-U.S. Defense Articles, even where the U.S. Person had never been exposed to related U.S.-origin technology.

Because the furnishing of Defense Services is the trigger to the application of the proposed registration/licensing requirements for U.S. Persons employed by Foreign Persons, the two proposed rules should be addressed together. Also, we would suggest that DDTC not finalize either rule unless it is able to finalize both rules simultaneously.

B. Apply the “knowledge of U.S.-origin technical data” requirement, currently in proposed §120.9(a)(1), to development and employment services in §120.9(a)(2) and (a)(3)

This solution would be implemented by making the following changes:

- Change § 120.9(a)(2) to read:

(2) The furnishing of assistance (including training) to a foreign person (see § 120.16), whether in the United States or abroad, in the development of a defense article, or the integration of a defense article with any other item regardless of whether that item is subject to the ITAR or technical data is used, **by a U.S. person or foreign person in the United States, who has knowledge of U.S.-origin technical data directly related to the defense article that is the subject of the assistance, prior to performing the service;**

- Change § 120.9(a)(3) to read:

(3) The furnishing of assistance (including training) to a foreign person (see § 120.16), regardless of whether technical data is used, whether in the United States or abroad, in the employment of a defense article, other than basic operation of a defense article authorized by the U.S. government for export to the same recipient, **by a U.S. person or foreign person in the United States, who has knowledge of U.S.-origin technical data directly related to the defense article that is the subject of the assistance, prior to performing the service;**

- Change the application and wording of Notes 1, 2 and 3 to §120.9(a)(1) such that they are applicable to paragraphs (a)(1), (a)(2), and(a)(3).

We recognize that DDTC explained its rationale for not implementing the suggested changes in the proposed rule because (a) development involves the advancement of another country's military capacity and (b) assistance with a Defense Article's employment is inherently a military activity. Nevertheless, we are respectfully requesting that DDTC reconsider this rationale in light of the following:

- These changes would not diminish the restrictions on activities that could benefit § 126.1 countries. Those restrictions would remain intact by virtue of § 120.9(a)(5), which applies the Defense Service definition broadly to § 126.1 countries, and by the other ITAR provisions specifically relating to such countries. This is the key path for applying the new registration/licensing requirements to persons and programs of concern.
- There is precedent for drawing the line at 126.1 countries in the recently revised brokering regulations, specifically in Section 129.2(b)(2)(iii), which excludes certain activities from the definition of brokering activities – including activities by a U.S. Person on behalf of a foreign employer – but the exclusion does not apply when the activities involve 126.1 countries.
- As for development work and employment assistance in non-§ 126.1 countries, the “knowledge” requirement provides a more balanced degree of protection for U.S. interests. For example, if an engineer with U.S. citizenship worked for a U.S. defense contractor on a guided missile program, but was subsequently hired by a foreign company to work on a project within the same USML paragraph, the changes proposed above would still require registration and licensing. Indeed, registration and licensing would still be required unless (a) the foreign project involved a different USML paragraph and (b) the U.S. engineer had no previous access to U.S.-origin Technical Data directly related to the foreign project.

In summary, the suggested changes above to the Defense Service definition would seem to resolve the concerns over undue interference and overreaching into legitimate foreign activities, while leaving the new registration and licensing requirements in place for the key areas of concern – namely, assistance related to § 126.1 countries or where the individual employee is relying on previous exposure to related U.S.-origin technology.

C. Alternatively, create an additional exclusion from the definition of Defense Service for low risk U.S. persons when no U.S.-origin Defense Articles or Technical Data are involved

An alternative solution would add a new provision (as a note or as a new paragraph (b) in § 120.9) that excludes the following from the definition of Defense Service:

Activities by natural U.S. persons who are regular employees (see §120.39 of this subchapter) of a foreign person and who are acting on behalf of their foreign person employer, provided that:

- (a) The U.S. person employee has (i) citizenship of the country of employment and (ii) a security clearance approved by the country of employment;**
- (b) The U.S. person employee has no knowledge of U.S.-origin technical data directly related to the defense article that is the subject of the assistance (see Note 1 to paragraph (a)(1)); and**
- (c) The activities do not involve a defense article originating in or destined for any proscribed country, area or person identified in §126.1 of this subchapter.**

This second approach accomplishes essentially the same outcome as the first one, but with some additional restrictions to further reduce risk. The rationale for this approach draws on (a) the precedent in other ITAR provisions recognizing reduced risk from regular employees holding foreign security clearances, (b) a consistently phrased restriction on the use of U.S.-origin Technical Data directly related to the foreign program and (c) drawing a line at § 126.1 countries. Each of these elements is discussed below.

(a) Lower risk associated with regular employees holding security clearances:

ITAR §126.18 was implemented after many years of unwieldy and unsatisfactory attempts to regulate third party nationals and dual nationals (who did not hold U.S. citizenship) in the context of Part 124 agreements. The solution reflected in §126.18 is premised on lower risk to U.S. interests from regular employees (notwithstanding the absence of U.S. citizenship) holding security clearances in their country of employment or otherwise satisfactorily screened, thereby permitting ITAR-controlled transfers to such employees without additional specific authorizations that had previously been employed. This concept was subsequently carried forward into the recently revised brokering regulations, specifically in § 129.2(b)(2)(iii), which excludes certain activities from the definition of brokering activities – including the activities of third party nationals and dual nationals, who by definition do not hold U.S. citizenship, but who meet the security clearance requirements of §126.18.

The regular employee/security clearance criteria should be recognized as reducing risk with even greater confidence when the employee holds U.S. citizenship. Thus, the regular employee/security clearance criteria should be an effective tool, particularly when combined with U.S. citizenship, in striking a more appropriate balance in the Defense Service definition.

Mr. C. Edward Peartree
Director, Office of Defense Trade Control Policy
July 27, 2015
Page 6 of 6

(b) Consistently phrased restriction on the use of U.S.-origin technical data:

This exclusion recognizes DDTC's legitimate concern where a U.S. person employee of a foreign company has had prior exposure to U.S.-origin technology (e.g., by prior employment with a U.S. defense company). Thus the exclusion would not apply to U.S. persons having "knowledge" as defined in the § 120.9 notes. By tracking back to the § 120.9 notes, the exclusion maintains drafting harmony.

(c) Excluding § 126.1 countries

This exclusion would also draw a line at § 126.1 countries. We used language tracking the § 126.1 limitation in the brokering rules – specifically, the note to § 129.2(b)(2)(iii).

In summary, we believe that both of the above proposed solutions will strike an appropriate balance in the definition of Defense Service between legitimate DDTC concerns and unwarranted burden on allies, in each case focusing on the key issues of "knowledge" of Technical Data and maintaining § 126.1 restrictions. Once the definition of Defense Service is more appropriately balanced, the proposed registration/licensing rule will then become workable. This again is the reason we believe both rules should be considered and finalized simultaneously.

* * *

If you have any questions concerning these comments, please do not hesitate to contact the undersigned at (817) 234-6767 or via email at Ben.Gaffield@elbitsystems-us.com.

Sincerely,



Ben Gaffield
Corporate Technology Control Officer &
Director, Trade Compliance

PUBLIC SUBMISSION

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International Traffic in Arms: Registration and Licensing of U.S. Persons Employed by Foreign Persons, and Other Changes

Comment On: DOS-2015-0037-0001

International Traffic in Arms: Registration and Licensing of U.S. Persons Employed by Foreign Persons, and Other Changes

Document: DOS-2015-0037-0005

Comment on DOS_FRDOC_0001-3249

Submitter Information

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General Comment

I hope this document is rewritten. It will affect our company and is confusing and will be costly. Based on Foreign availability I believe all uncooled products should be given to Commerce. The Foreign Competition is growing and Commercial markets are growing giving foreign competitors opportunity and compromising U.S. Business opportunities.



GE

Kathleen L. Palma
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C. Edward Peartree
Director, Office of Defense Trade Policy
Directorate of Defense Trade Controls
U.S. Department of State
Washington, D.C.

Regulation Id: RIN 1400-AD79

July 27, 2015

Subject: Comments on Proposed Revisions to the ITAR: Registration and Licensing of US Persons Employed by Foreign Persons, and Other Changes

Dear Mr. Peartree:

General Electric submits the following comments for the referenced proposed rule. Our comments relate to two areas: (1) Definition of Regular Employee in §120.39 and (2) proposed § 124.17 exemption for natural US persons employed by foreign persons.

(1) Definition of Regular Employee

GE is disappointed with the proposed change in the regular employee definition to codify the policy that "long term" equates to 1 year or longer in § 120.39(a)(2). In practice, the term "regular employee" is applied to contract or contingent workers in foreign facilities. Mandating a period of 1 year or longer for the relationship significantly compromises the ability of a non-US defense company to take advantage of the provision. Many companies do not employ contract workers for periods of a year or longer because doing so can create a risk under labor and employment law that the contract worker would take legal action to acquire the benefits and other rights of employees. We do not believe a specific period of time should be mandated for this provision. The five specific criteria enumerated under §120.39 are adequate to ensure appropriate control of ITAR data in that the worker must: (i) work at the company's facilities; (ii) work under the company's direction and control; (iii) work full time and exclusively for the company; (iv) execute nondisclosure certifications for the company and (v) not be taking direction from the staffing company. Why is it necessary for the relationship to be "long term" if those criteria are satisfied? The company engaging the contract employee will be responsible for the conduct of the worker regardless. The company can decide the

length of relationship that would be appropriate given these competing considerations. Moreover, the timing requirement does not apply in other contexts. What if a company hires an employee and the employee quits after 30 days. There would be no “long term” relationship under those circumstances either.

The primary use of the “regular employee” definition is in the application of the § 126.18 screening policy. This regulation was adopted so that non-US firms could have flexibility in applying the requirements of the ITAR as relate to individuals who are dual or third country nationals given that privacy laws impact the ability of these companies to ask about countries of nationality, citizenship and birth. Those risks do not become lesser because the relationship will last for a shorter period of time with a contract employee.

We strongly under DDTC to change the proposed language as follows:

§ 120.39 Regular employee

(a) * * *

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

(2) Section 124.17 Exemption for Natural US Persons Employed by Foreign Persons

GE supports the concept of introducing an exemption for natural US persons employed by foreign persons, however we are concerned that as written, the proposal is unworkable. Under the proposed exemption, there are five conditions that must be satisfied to qualify for the exemption. Our concern is particularly with criterion (2) “The end user(s) of the associated defense article(s) are located within NATO, EU, Australia, Japan, New Zealand, and/or Switzerland.” We have two serious concerns with the proposed end use restriction.

First, it is not always known at the time of development what customers will be interested in a specific defense article. There are many circumstances in which end users are not identified at the start of product development and may be added throughout the lifecycle of the product. What is DDTC’s expectation when there is no end user identified? What is DDTC’s expectation under the circumstances in which a NATO end user is first identified but soon thereafter a non-NATO/allied country customer becomes interested in the product. Would approvals be required to enable the continuation of defense services from that point? Would the non-US company be expected to freeze its activities at that point? This would be highly impractical and would significantly compromise the utility of the proposed exemption.

Second, in many instances defense articles are developed first for use by NATO and other allies, but may be subsequently sold to other parties. The subsequent use may not be identified until well after the development work has taken place for a particular defense article. Does the proposal expect that the non-US employer would pursue authorization for the defense services “provided” at the time that defense article is delivered to a third country? How are non-US companies supposed to manage that requirement? The Aviation industry, in particular, is a long life-cycle business, so establishing a requirement that could result in an expectation of seeking authorization for work that was done 20+ years ago for the benefit of a product not a particular end user seems highly problematic.

At a minimum, DDTC should clarify that the end use countries should be evaluated at the time of product development (when considering work that a US person would do in the development phase) and that no additional authorization would be required if that product were later sold to a country that is not included in the list under §124.17(a)(2). We recommend that DDTC eliminate the

end use requirement entirely for this exemption (particularly since exemptions do not apply to work for 126.1 countries anyway).

We appreciate the opportunity to provide comments on this Proposed Rule. If you have any questions or require additional information concerning this submission, please contact the undersigned at (202) 637-4206 or by email at: kathleen.palma@ge.com or George Pultz at (781) 594-3406 or by email at: george.pultz@ge.com.

Sincerely,

A handwritten signature in cursive script that reads "Kathleen Lockard Palma".

Kathleen Lockard Palma
International Trade Compliance

PUBLIC SUBMISSION

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International Traffic in Arms: Registration and Licensing of U.S. Persons Employed by Foreign Persons, and Other Changes

Comment On: DOS-2015-0037-0001

International Traffic in Arms: Registration and Licensing of U.S. Persons Employed by Foreign Persons, and Other Changes

Document: DOS-2015-0037-0003

Comment on DOS_FRDOC_0001-3249

Submitter Information

Name: Josh Hunt

General Comment

To whom it may concern:

I strongly oppose the rewrite of the State Departments arms control regulations (ITAR), which could potentially grant the State Department a wide-ranging power to monitor and control gun-related speech on the Internet.

The new language -- which includes making technical data available via a publicly available network (e.g., the Internet) -- could put anyone who violates this provision in danger of facing decades in prison and massive fines.

So posting information on virtually any firearm or ammunition could be defined by the Obama administration as requiring, not only government permission, but potentially a government license. This means violators would potentially face significant criminal penalties.

I also oppose the addition of the word software into these regulations, as it appears to be a not-so-veiled effort to ban 3-D printers.

I urge you to repeal these new regulations in their entirety. Whether you like it or not, the First and Second Amendments are still the law of the land!

Sincerely, Josh Hunt

PUBLIC SUBMISSION

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International Traffic in Arms: Registration and Licensing of U.S. Persons Employed by Foreign Persons, and Other Changes

Comment On: DOS-2015-0037-0001

International Traffic in Arms: Registration and Licensing of U.S. Persons Employed by Foreign Persons, and Other Changes

Document: DOS-2015-0037-0004

Comment on DOS_FRDOC_0001-3249

Submitter Information

Name: John Murphy

General Comment

I feel that any and all things related to the ITAR should not be fast tracked. Further more everything about and related to ITAR should be made public and all off congress should be made to review completely not just sign off on it.

July 24, 2015

Department of State
Bureau of Political-Military Affairs
Directorate of Defense Trade Controls
2401 E Street, N.W.
12th Floor, SA-1
Washington, D.C. 20522

ATTN: Mr. C. Edward Peartree
Director, Defense Trade Controls Policy

SUBJECT: ITAR Amendment –U.S. Persons Employed by Foreign Persons
(RIN 1400-AD79 [Public Notice 9136])

Dear Mr. Peartree:

Northrop Grumman Corporation (NGC) wishes to thank the Department of State for the opportunity to submit comments in review of the above proposed rules as we support the Department's implementation of Export Control Reform. In response, NGC provides the following recommendations:

General Observation

Supplementary Information – As part of the Supplementary Information section of this publication under “Scenarios impacted by these changes...:”, recommend that scenario (1) be revised to read “...at a foreign branch, subsidiary, or affiliate of that company.” This change better reflects the scenarios where a U.S. person may be working abroad.

§ 120.39 – Regular Employee

§ 120.39(a)(2)(i) – While we concur with the general concept of “long term contractual relationship” as set forth in this regulatory provision, many “regular employees” as defined under (a)(2) may be employed directly to support specific contracts that may be performed away from the company facility (e.g., U.S. government facility) or may be granted work-life balance options that permit the individual to telework. Therefore, we recommend removal of § 120.39(a)(2)(i), which requires individuals to “[w]ork[] at the company’s facilities” in order to qualify as a regular employee. We believe the other requirements identified under § 120.39(a)(2) provide sufficient framework to ensure transfers will not occur to a parent staffing agency and hold the employing party sufficiently liable for the regular employees’ actions, regardless of the work location of the individual employed.

§ 124.1 – Manufacturing License Agreements and Technical Assistance Agreements

§ 124.1(a) – The proposed § 124.1(a) language currently reads as follows:

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

(Emphasis added).

We recommend modifying the bolded word “the” to “any” in the above sentence, adding the phrase “In addition, in lieu of a DSP-5”, and removing the final statement “provided the registered U.S. person accepts responsibility for, and demonstrates ability to ensure, the natural U.S. person's compliance with the provisions of this subchapter.” With the recommend revisions, this sentence would read as follows:

The provision of defense services by a natural U.S. person may be authorized on a Form DSP-5. **In addition, in lieu of a DSP-5,** natural U.S. persons employed as regular employees of a foreign subsidiary or affiliate listed on the registration of a U.S. person may receive authorization to provide defense services via an agreement between **any** registered U.S. person and the foreign subsidiary or affiliate.

Rational for word changes and additions: The word “the” should be changed to “any” to make clear that a natural U.S. employee of a foreign subsidiary or affiliate listed on the registration of a U.S. person may receive authorization to perform defense services via an agreement between the foreign subsidiary or affiliate and any other U.S. company, not only the U.S. company under whose registration that individual is deemed to be registered with the Department of State. Further, the “In addition, in lieu of a DSP-5” clarifies that authorization to provide defense services can be obtained via a DSP-5 or via any agreement that includes the foreign subsidiary or affiliate employer as a signatory.

Rationale for removing final statement: A parent U.S. company already takes on responsibility for any natural U.S. person employed as a regular employee of the foreign subsidiaries and affiliates included on its registration. There is no need to require additional assurances be made for each agreement. Removing the final statement in this sentence allows the registration requirement to serve as sufficient assurance of the U.S. company's responsibility for said U.S. employee, regardless of whether the U.S. employee's parent company is on the authorization. Including this added statement would simply make it difficult for the foreign subsidiary or affiliate employing the natural U.S. person to enter into an agreement with another U.S. company without including their own U.S. parent company on the agreement.

§ 124.1(b) – No objection to removing DDTC. Kindly request, however, that such requirement also be levied by DDTC via a proviso on applicable agreements.

§ 124.17 – Exemption for Natural U.S. Persons Employed by Foreign Persons

§ 124.17(a)(3) – This sub-paragraph includes the criteria that “[n]o U.S.-origin defense articles, to include technical data, are transferred from the U.S. person to the employer, without separate authorization.” We recommend revising “without separate authorization” to “unless separately authorized” as we feel the phrase “without separate authorization” implies additional authorization must be obtained, whereas “unless separately authorized” better portrays that valid authorizations (with any U.S. Entity) may already be in place.

§ 124.17(a)(4) – This sub-paragraph includes the criteria that “[n]o classified, SME, or MT technical data is transferred (even if separately authorized) in connection with the furnishing of defense services.” We recommend removing the phrase “(even if separately authorized)” because separate authorizations (e.g., DSP-5, DSP-85, TAA, MLA, GC Exceptions to Policy) should not be limited in their applicability based upon whether or not this exemption is used to supply related defense services.

§ 125.4 – Exemptions of General Applicability

§ 125.4(b)(2) – With regard to the proposed removal of § 125.4(b)(2) based on redundancy, we concur that there are redundancies between this exemption and § 124.3. However, it has been the general practice within industry to utilize § 125.4(b)(2) rather than § 124.3 since § 125.4 provides the overall construct for use, documentation, and reporting. In addition, § 125.4(b)(2) allows for classified and/or unclassified export under the same exemption, whereas § 124.3(a) and (b) would both need to be cited to cover the same transmission. Therefore, we recommend retaining § 125.4(b)(2) and removing § 124.3 in order to address this redundancy.

§ 126.6 – Foreign-Owned Military Aircraft and Naval Vessels, and the Foreign Military Sales Program

§ 126.6(c)(7)(ii) – This sub-paragraph includes the criteria that “[n]o U.S.-origin defense articles, to include technical data, are transferred from the U.S. person to the employer, without separate authorization.” We recommend revising “without separate authorization” to “unless separately authorized” as we feel the phrase “without separate authorization” implies additional authorization must be obtained, whereas “unless separately authorized” better portrays that valid authorizations (with any U.S. Entity) may already be in place.

§ 126.6(c)(7)(iv) – This sub-paragraph includes the criteria that “[n]o classified or SME technical data is disclosed (even if separately authorized) in connection with the furnishing of defense services.” We recommend removing the phrase “(even if separately authorized)” because separate authorizations (e.g., DSP-5, DSP-85, TAA, MLA, GC Exceptions to Policy) should not be limited in their applicability based upon whether or not this exemption is used to supply related defense services.

Should clarification or subsequent technical discussions be necessary, please contact Jennifer McGinn at jennifer.mcginn@ngc.com, (703-280-3954), or myself at thomas.p.donovan@ngc.com, (703-280-4045).

Sincerely,

A handwritten signature in blue ink, appearing to read 'T. P. Donovan', with a long horizontal flourish extending to the right.

Thomas P. Donovan
Director, Export Management
Global Trade Management

From: [Andre Rego](#)
To: [DDTCTPublicComments](#)
Subject: ITAR Amendment—U.S. Persons Employed by Foreign Persons
Date: Thursday, June 11, 2015 9:38:23 AM

Good morning,

Please see below comments/feedback for your consideration:

§124.1(a)

As proposed: “*** The provision of...”

Suggestion: Remove current references to the §125.4(b)(2) exemption

Rationale: The proposed addition of text only to the current §124.1(a) will entail inadvertently leaving in the existing references to the §125.4(b)(2) exemption although §125.4(b)(2) is being reserved

Also, with regard to the proposed text for §124.1(a), it seems to suggest that, for example, a DDTC-approved TAA between a U.S. applicant and, among others, a foreign affiliate signatory [which employs a natural U.S. person] wherein the U.S. applicant accepts responsibility for the natural U.S. person’s compliance with the ITAR, would be a means to authorize a natural U.S. person employee of a foreign affiliate to provide defense services under the authority of that respective TAA.

If so, could you please explain the benefit of requiring the same natural U.S. person to obtain separate export authorization when his/her foreign employer is not an affiliate of the U.S. applicant but is nevertheless a signatory to the same TAA? I am assuming that the differentiation hinges on jurisdictional concerns with natural U.S. persons versus other types of U.S. persons [e.g., U.S. corporation] as well as the [U.S.] organizational control over that natural U.S. person, but was simply looking for clarification.

Thank you,

Andre Rego

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July 27, 2015

Via Email

Mr. C. Edward Peartree
Director
Office of Defense Trade Controls Policy
Directorate of Defense Trade Controls
U.S. Department of State
2401 E Street, NW
SA-1, 12th Floor
Washington, DC 20037

Email: DDTCPublicComments@state.gov

Reference: RIN 1400-AD79

Subject: Review of Proposed Rule on U.S. Persons Employed by Foreign Persons

Dear Mr. Peartree:

Raytheon Company (“Raytheon”) respectfully submits the following comments in response to the *Amendment to the International Traffic in Arms Regulations: Registration and Licensing of U.S. Persons Employed by Foreign Persons, and Other Changes*, 80 Fed. Reg. 30001 (May 26, 2015). Based upon our experience in the defense industry, we would like to draw the attention of the Directorate of Defense Trade Controls (“DDTC”) to certain entries in the proposed rule that we believe may benefit from clarification or revision.

Overall Comment

Raytheon has reviewed the five scenarios outlined in the introduction on page 30,001 of the proposed rule. We would like to bring to your attention another scenario that arises with some frequency – a natural U.S. person employed by a DDTC-registered U.S. company and working at a foreign affiliate of the company that is listed on the U.S. company’s registration statement. We understand the proposed rule did not mean to limit the scenarios considered; however, the above scenario occurs frequently -- and differs from the “foreign branch” in scenario 1. Accordingly, Raytheon recommends that DDTC explicitly consider and address this employment arrangement in the proposed rule.

More specifically, Raytheon employs U.S. persons in the United States and abroad at its affiliates using a variety of methods to suit different business requirements. A U.S. person employee may be deployed to a foreign affiliate for a set period of time or on an indefinite basis. The employee may be paid by one or more U.S. person entities or foreign person entities, or a combination thereof. Regardless of the payroll arrangements, an employee may be directed by

or perform work for the U.S. person or the foreign person. Raytheon recommends that DDTC allow a natural U.S. person employed by a DDTC-registered U.S. entity but working at and on behalf of a controlled foreign affiliate that is included on the U.S. parent registrant's registration statement to be treated in the same way the proposed rule treats a natural U.S. person employed by a foreign person employer. If the U.S. employer and the foreign affiliate both are DDTC-registered and take responsibility for ITAR compliance, then the same safeguards would be in place as in the current expression of the proposed rule addressing scenarios in which the foreign person entity employs the U.S. person.

This overall comment applies to Sections 120.39, 124.1, 124.17, and 126.6.

Section 120.39 – Clarify Definition of Regular Employee

Raytheon observes that the current definition of “regular employee” does not provide sufficient guidance to determine how to treat specific individuals who may be employed under complex international posting arrangements. Raytheon recommends that the definition be revised to treat all natural U.S. person employees employed by entities listed on a single registration statement similarly.

As mentioned above in the Overall Comment, Raytheon employs U.S. persons at its affiliates using a variety of methods to suit different business requirements. One individual may be paid by one or more entities, sitting in the offices of another entity, but reporting to someone working for a third entity. Complicated international employment arrangements of this type arise frequently, yet the rule does not account clearly for these business requirements.

Raytheon recommends that any definition of “regular employee”, or rule changes involving natural persons “employed by” an entity, be flexible enough to account explicitly for these varied and complex arrangements by treating all natural U.S. person employees employed by entities listed on a single registration statement similarly. In other words, a natural U.S. person employed by a DDTC-registered U.S. company but working at a foreign affiliate of the company that is listed on the U.S. company's registration statement should be treated the same as a natural U.S. person employed by a foreign subsidiary or affiliate listed on the registration statement of a U.S. company. This approach is reflected in the proposed Note to paragraph (a) to Section 122.1 and it would be helpful if the concept was explicitly extended to the other proposed rule amendments.

Note 2 to Section 120.40 – Clarify Note 2 relating to the Definition of Affiliate

Raytheon recommends that the proposed Note 2 be clarified to specify that 1) a registrant must have an ownership interest in an entity in order to enter into a control relationship and 2) only one registrant may list a particular entity on its registration statement. Raytheon recommends that DDTC clarify the circumstances under which a control relationship can be established.

Note 2 to Section 120.40 states that a registrant may “establish a control relationship with another entity via written agreement such that the entity then becomes an affiliate” in accordance with Section 120.40. It is not clear whether DDTC intended to allow a registrant to establish a

control relationship with an unaffiliated entity. We think that DDTC meant: “A registrant may establish a control relationship with another *affiliated* entity via written agreement such that the entity then becomes a *controlled* affiliate in accordance with this section. We recommend that DDTC clarify this language by adding the italicized words.

Note 2 to Section 120.40 allows a registrant to establish a control relationship with another entity via written agreement, but does not specify whether an entity can be listed on the registration statement of more than one registrant. Raytheon recommends that DDTC add a requirement that only one registrant can list a specific entity.

Note to paragraph (a) of Section 122.1 – Clarify Type of Subsidiary or Affiliate

Raytheon requests that DDTC clarify the note to paragraph (a) of Section 122.1 to explicitly include U.S. and foreign subsidiaries and affiliates.

The note to paragraph (a) of Section 122.1 states that “Any natural person directly employed by a DDTC-registered person, or by a person listed on the registration as a subsidiary or affiliate of a DDTC-registered U.S. person, is deemed to be registered.” Raytheon understands this statement to mean that a natural person directly employed by either a U.S. or foreign subsidiary or affiliate would be deemed to be registered. Raytheon recommends that DDTC insert the words “U.S. or foreign” in front of “subsidiary or affiliate” to clarify this note.

Section 124.1 – Clarify Language

Raytheon notes that the proposed Section 124.1 allows an authorization for natural U.S. persons employed as regular employees of a foreign subsidiary or affiliate to provide defense services, but does not allow the same authorization for a natural U.S. person employed by a DDTC-registered U.S. person to provide defense services to a controlled affiliated foreign person listed on its registration statement. Raytheon recommends that DDTC modify Section 124.1 or another related section to allow for this situation. In addition, Raytheon recommends one minor clarification to the proposed language.

Section 124.1 references “natural U.S. persons employed as regular employees of a foreign subsidiary or affiliate listed on the registration of a U.S. person...” First, Raytheon would like to refer to its Overall Comment above regarding the variety of employment relationships which Raytheon uses based on differing business and personal circumstances. Raytheon recommends that a natural U.S. person directly employed by any DDTC-registered entity should be treated similarly. Thus, Raytheon recommends that a natural U.S. person employed by a DDTC-registered U.S. company but working at and on behalf of a controlled foreign affiliate of the company that is listed on the U.S. company’s registration statement receive the same authorization to provide defense services that is provided in Section 124.1 to natural U.S. persons employed as regular employees of a foreign subsidiary.

Second, Raytheon believes that the second sentence of the amendment to Section 124.1 should be revised to indicate explicitly that the DSP-5 referenced in the first sentence of the new proposed language would not be required in the circumstance where there is an authorized agreement between a registered U.S. person and the foreign subsidiary or affiliate and where that

agreement explicitly provides for the U.S. person to provide defense services to the foreign subsidiary or affiliate. Raytheon recommends the following language replace the second sentence of (a): “Natural U.S. persons are not required to obtain DSP-5 authorization where such natural U.S. persons employed as regular employees of a foreign subsidiary or affiliate listed in the registration of a U.S. person receive authorization to provide defense services via an agreement between the registered U.S. person and the foreign subsidiary or affiliate, provided the registered U.S. person accepts responsibility for, and demonstrates ability to ensure, the natural U.S. person’s compliance with the provisions of this subchapter.”

Section 124.17 – Clarify use of Exemption for Natural U.S. Person Employed by U.S. Person

Raytheon notes that the proposed Section 124.17 allows an exemption for natural U.S. persons employed by foreign persons to provide defense services, but does not allow an exemption for a natural U.S. person employed by a DDTC-registered U.S. person to provide defense services to a foreign person listed on its registration statement. Raytheon recommends that DDTC modify Section 124.17 or another related section to allow for this situation.

Section 124.17 provides an exemption for natural U.S. persons employed by foreign persons to provide defense services to and on behalf of the foreign person employer without a license, if certain conditions are met. This exemption appears to allow a natural U.S. person to provide defense services to a foreign person employer (such natural U.S. person is not under the control of a U.S. entity), but does not appear to offer the same benefit if the natural U.S. person were employed by a U.S. person employer working at a foreign affiliate of the company which is listed on the U.S. company’s registration statement. For instance, if a U.S. person employed by a DDTC-registered U.S. person were sent to the offices of a controlled foreign person to provide defense services on short-term assignment, the exemption would not appear to apply.

Raytheon recommends DDTC consider whether this additional scenario may present the same trusted circumstances as those set forth in Section 124.17, and should be added to the proposed rule. In this scenario, as in the others listed, the U.S. registrant would “accept responsibility for, and demonstrate[s] ability to ensure, the natural U.S. person’s compliance...”

Another potential means to implement Raytheon’s comment could be a revision to Section 125.4(b)(9) to allow the provision of defense services as well as the transfer of technical data.

Section 124.17(a)(4) – Clarify use of Exemption for Natural U.S. Persons Employed by Foreign Persons

Raytheon requests clarification on the meaning of Section 124.17(a)(4), which states that a U.S. person may not disclose classified, SME, or MT technical data “(even if separately authorized)...” Raytheon recommends that DDTC should further explain this parenthetical.

Section 124.17(a)(4) allows natural U.S. persons employed by foreign persons to provide defense services to and on behalf of their employers without a license if certain conditions are

met. One of the conditions, found in Section 124.17(a)(4) is that “no classified, SME, or MT technical data is transferred (even if separately authorized) in connection with the furnishing of defense services;...”

Raytheon seeks clarification regarding the circumstances under which this exclusion set out in the parenthetical would apply. If a separate specific authorization has been received, it may seem incongruous that the transfer of SME or MT technical data should not take place. If DDTC means “even if separately authorized by another exemption,” it would be helpful to clarify the language.

Section 126.6(c)(7)(iv) – Clarify use of Foreign Military Sales Exemption

Raytheon requests clarification on the meaning of Section 126.6(c)(7)(iv), which states that a U.S. person may not disclose classified or SME technical data “(even if separately authorized)....” Raytheon recommends that DDTC should further explain this parenthetical.

This comment is similar to Raytheon’s comment above regarding Section 124.17(a)(4). Under Section 126.6(c), a license from DDTC is not required if the classified or unclassified defense article or defense service to be transferred was sold, leased, or loaned by the Department of Defense to a foreign country or international organization under the Foreign Military Sales (FMS) Program of the Arms Export Control Act pursuant to a Letter of Offer and Acceptance (LOA) authorizing such transfer. The LOA must meet certain criteria, including that “no classified or SME technical data is disclosed (even if separately authorized) in connection with the furnishing of defense services;...”

It is not clear what is meant by the parenthetical. Raytheon seeks clarification regarding the circumstances under which this exclusion would apply. If a separate specific authorization has been received, it may seem incongruous that the transfer of SME technical data should not take place. If DDTC means “even if separately authorized by another exemption,” it would be helpful to clarify the language.

Thank you for the opportunity to present Raytheon’s views concerning U.S. persons employed by foreign persons.

If you have any questions concerning this submission, please contact the undersigned, Julia Court Ryan, at julia.court.ryan@raytheon.com.

Sincerely,



Julia Court Ryan
Senior Counsel
Global Trade Compliance, Governance



Perry A Smith
Director
Export and Import Compliance
Office of the General Counsel

**Rockwell
Collins**

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July 27, 2015

Mr. C. Edward Peartree
Director, Office of Defense Trade Controls Policy
US Department of State

Re: Comments Related to Revision of 22 CFR Parts 120, 122, 124, 125, and 126

Dear Mr. Peartree:

Rockwell Collins appreciates the opportunity to provide comments on the proposed Amendment to the International Traffic in Arms Regulations: Revision of 22 CFR Parts 120, 122, 124, 125, and 126 (RIN 1400-AD79), published in the Federal Registrar on May 26, 2015.

Rockwell Collins, Inc. is an industry recognized leader in the design, production and support of communications and aviation electronics for commercial and military customers worldwide. While our products and systems are primarily focused on aviation applications, our Government Systems business also offers products and systems for ground and shipboard applications. The integrated system solutions and products we provide to our served markets are oriented around a set of core competencies: communications, navigation, automated flight control, displays/surveillance, simulation and training, integrated electronics and information management systems. We also provide a wide range of services and support to our customers through a worldwide network of service centers, including equipment repair and overhaul, service parts, field service engineering, training, technical information services and aftermarket used equipment sales. We are headquartered at 400 Collins RD NE, Cedar Rapids, Iowa 52498 and employ approximately 20,000 individuals worldwide.

Regarding the proposed changes to the International Traffic in Arms Regulations: Revision of 22 CFR Parts 120, 122, 124, 125, and 126; Amendment to the International Traffic in Arms Regulations: **Registration and Licensing of U.S. Persons Employed by Foreign Persons, and Other Changes.**

Rockwell Collins submits the following comments:

Proposed language in 124.1 states that "The provision of defense services by a natural U.S. person may be authorized on a Form DSP-5. Natural U.S. persons employed as regular employees of a foreign subsidiary or affiliate listed on the registration of a U.S. person may receive authorization to provide defense services via an agreement between the registered U.S. person and the foreign subsidiary or affiliate, provided the registered U.S. person accepts responsibility for, and demonstrates ability to ensure, the natural U.S. person's compliance with the provisions of this subchapter."

While this language clearly states that a U.S. person can be authorized under a DSP-5, the language is unclear when and how the U.S. person can be authorized under an agreement. Some specific examples are:

1. When there is an agreement between a registered U.S. person and the foreign subsidiary of the U.S. person (when both are listed on the U.S. person's registration) and the foreign subsidiary employs a U.S. natural person, is the U.S. natural person employed by that foreign subsidiary authorized to perform defense services under that agreement?

It is recommended that clarifying language be provided.

Mr. C. Edward Peartree

July 27, 2015

RE: Comments Related to Revision of 22 CFR Parts 120, 122, 124, 125, and 126

Page 2 of 2

2. Is a U.S. natural person employed by a foreign person (with no U.S. company affiliation) required to be a signatory to an agreement with a U.S. person? For example, if ABC Company (ABC) of Saudi Arabia employed a U.S. person and the U.S. person is not associated with a registered U.S. person, how would a registered U.S. person structure the agreement to cover ABC and the U.S. person that they employ?

It is recommended that clarifying language be provided.

3. If a foreign subsidiary (with a natural U.S. person employed by the subsidiary) has a TAA with a U.S. person not affiliated with the foreign subsidiary; is the U.S. parent company of that U.S. person required to be a signatory to the agreement? For example, if Rockwell Collins (U.S.) has an agreement with XYZ U.K., XYZ U.K. employs a U.S. person and both XYZ U.S. and their subsidiary in the U.K. are listed on the XYZ U.S. registration, would XYZ U.S. need to be a signatory to the Agreement to accept responsibility of the U.S. person's compliance?

It is recommended that clarifying language be provided.

What is the vehicle of accepting responsibility for and demonstrating ability to ensure the natural U.S. person's compliance? (i.e. NDA specific to the TAA, explicitly defined in the agreement, mere signature by the U.S. Person/Party to the Agreement, etc.)

It is recommended that clarifying language be provided.

Rockwell Collins is fully committed to supporting the Administration's efforts in moving export control reform forward. We greatly appreciate the opportunity to provide comments to the proposed changes.

If you have any questions or would like to discuss the comments provided above, feel free to contact me directly at 319-295-5396, or via email at perry.smith@rockwellcollins.com

Sincerely,



Perry A. Smith
Director, Export and Import Compliance
Rockwell Collins



Saab North America, Inc.

24 July 2015

C. Edward Peartree, Director
Office of Defense Trade Controls Policy
Directorate of Defense Trade Controls
U.S. Department of State
2401 E St., N.W., SA-1, 12th Floor
Washington, DC 20037

Via e-mail: ddtcpubliccomments@state.gov

Subject: Comments to Proposed Rule on Registration and Licensing of U.S. Natural Persons Employed by Foreign Persons

Dear Mr. Peartree:

Saab North America, Inc., representing its parent company Saab AB (publ), of Sweden, inclusive of its business and market areas (collectively, "Saab"), herewith submits comments to the proposed rule "Amendment to the International Traffic in Arms Regulations: Registration and Licensing of U.S. Persons Employed by Foreign Persons, and Other Changes", published in the May 26, 2015, *Federal Register*. Saab welcomes your office's attention to the following content.

Proposed Rule – Further explanation is requested as to why the proposed changes are needed.

The proposed rule stipulates new registration and licensing requirements, with certain exceptions, to regulate U.S. natural persons employed by foreign persons. **This appears to be a limited regulatory subset of regular registration and licensing issues rather than a pervasive policy concern, and not a topic seemingly whose breadth necessitates new regulations and compliance obligations** to U.S. natural persons employed by foreign persons, to the employing foreign persons, or to U.S. companies registered with DDTC (depending on the scenario). Although DDTC in the "Supplementary Information" part of the proposed rule identified some general scenarios, **amplifying information was missing to present the overall scope of the issue and why such conditions would necessitate new regulatory requirements at a time when U.S. export control reforms are being implemented.** Without adequate

explanatory information, the proposed rule gives an appearance of being “regulation for regulation’s sake”.

Just as U.S. export control reforms are predicated upon a risk-based approach (as are existing parts of the ITAR, for example, eligibilities of dual-national and third-country national employees of foreign persons) taking into account what should be controlled and why, and importantly what the risk would be of and for a negative consequence, the proposed rule seemingly seeks to address rare “worst-case” potential scenarios rather than the significantly vast majority of situations in an already-nominal subset of activities. **It would be greatly beneficial therefore for DDTC to present in detail the foreign policy and national security imperatives and objectives that warrant the proposed amendments.**

Proposed Section 122.1(a) of the ITAR – U.S. natural person employees of foreign persons are not “in the business” analogously as companies; a registration exemption should be created.

Proposed Section 122.1(a) of the ITAR seeks to amend the existing registration requirement for “Any person who engages in the United States in the business of manufacturing or exporting or temporarily importing defense articles, or furnishing defense services”. Regarding defense services, proposed Section 122.1(a) would delink the existing Section 122.1(a) plain text for persons “who engage in the United States”, and replace it by referring to “any U.S. person who engages in the business of furnishing defense services wherever located”.

The phrase “in the business of” from the AECA and ITAR seemingly conveys a particular commercial notion, given that the registration requirement could have been written without that phrase and without losing the ostensible intent; the phrase should mean something, to have been included. Existing Section 122.1(a) of the ITAR provides a regulatory statement that “engaging in such a business requires only one occasion of manufacturing or exporting or temporarily importing a defense article or furnishing a defense service”; however, this interpretation is not stated in the AECA, and was not part of the ITAR until April 2006. If the regulatory statement is maintained, it seems inequitable to have identical registration requirements for individual U.S. natural person employees of foreign persons as for U.S. companies commonly understandable as being “in the business”. **A new registration exemption in Section 122.1(b) of the ITAR should be created for U.S. natural persons employed by foreign persons;** such U.S. natural persons employed by foreign persons are not “in the business” analogously as companies.

Proposed Section 124.17 of the ITAR – All countries except countries enumerated in Section 126.1 of the ITAR should be eligible, for practical, real-world application.

The qualifying territory for the exemption in proposed Section 124.17 of the ITAR is unnecessarily restrictive. Reputable companies exist in countries other than NATO or EU countries, Australia, Japan, New Zealand, and Switzerland; conversely, questionable companies exist in the notionally acceptable territory. The proposed rule did not present rationale as to why, for example, a U.S. natural person employee of an Indian company should be subjected to licensing requirements when a U.S. natural employee of an Italian company performing the same work scope could be exempted from licensing requirements. Similarly, for example, it is an incongruity that a U.S. natural person employee of a United Kingdom company may be exempted from licensing requirements for performing work for his employer for an end-user located in Norway (whether the end-user is a company, or government entity); but that the same U.S. natural person employee of the same United Kingdom company should be subjected to licensing requirements for performing the same work scope for his employer to an end-user located in South Korea (whether the end-user is a company, or government entity). The purported controls are on the U.S. natural person employee, not on the foreign person employer or its country of location. **Instead of a predetermined limitation on countries, which by its structure disfavors reputable companies (and U.S. natural person employees of those companies) located in or doing business with customers in non-proscribed countries, the only territorial proscription should be for foreign employers or foreign end-users in countries enumerated in Section 126.1 of the ITAR.**

It is worth noting under the proposed rule that, in situations where a U.S. natural person employee of a foreign person would need to meet individual licensing requirements, that such a U.S. natural person employee of a foreign person would be responsible for requirements which would not exist for dual-national or third-country national employees of the same foreign person, even if such individuals were performing the same, or greater, work than the U.S. natural person employee and would potentially have the same, or greater, access to U.S.-origin content.

Proposed Sections 124.1(a), 124.17 and 126.6(c)(7) of the ITAR should be deleted. Instead, straightforward license exemptions in Parts 124 and 125 of the ITAR should be created for U.S. natural persons employed by foreign persons to furnish defense services to and on behalf of the foreign person employers, with the exception of foreign employers and foreign end-users in countries enumerated in Section 126.1 of the ITAR.

Part 126 of the ITAR should then also be amended to prohibit U.S. natural persons employed by foreign persons to furnish defense services, without licenses or other prior written approvals, to and on behalf of foreign person employers and foreign end-users in countries enumerated in Section 126.1 of the ITAR; but that a policy of denial would be presumed to exist unless otherwise stated.

Proposed Rule – The lack of details on registration and licensing general practicalities limits detailed comments.

The proposed regulations are unlikely to address completely the many potential scenarios regarding U.S. natural persons employed by foreign persons. Myriad realistic situations can be conceived, for which even slight variations could alter assessments and implementation. Regulations should be written to be clear and precise to avoid confusion and misinterpretation, and should not need to be further explained by guidance from outside the regulations.

The proposed rule does not go into detail, either in the proposed amendments or in the “Supplementary Information” part of the *Federal Register* notice, on certain registration and licensing general practicalities. Notwithstanding the preceding registration and licensing recommendations, for informed discourse and more detailed public comments, **it would be useful for DDTC to provide its perspectives and reasoning on registration and licensing practicalities**, including but not limited to:

- How would U.S. natural person employees of foreign persons know about potential registration and licensing requirements, particularly if the foreign persons do not have any affiliation with any U.S. person? Many U.S. natural persons have lived overseas for many years, and would not be familiar with DDTC and the ITAR.
- What information and documentation requirements would U.S. natural person employees of foreign persons need to provide to satisfy requirements for registration? It seems likely that the requirements would differ for such individuals when compared to requirements, for example, for U.S.-based corporations.
- Would U.S. natural person employees of foreign persons be required to pay an annual registration fee? The base \$2,250 registration fee, or even a reduced fee as a considered alternative, would be a substantial cost for U.S. natural person employees of foreign persons, and may not be reimbursed by the foreign employers (or could perhaps be deducted by foreign employers from an overall compensation package).
- What records of activities would U.S. natural person employees of foreign persons need to maintain? As a condition of employment, it is possible such records of activities created by U.S. natural person employees of foreign persons may belong to the foreign employer. In addition, many foreign companies do not permit individual employees to provide information or sign documents in an individual capacity.

- What information and documentation requirements would U.S. natural person employees of foreign persons need to provide to satisfy requirements for licensing, and how many licenses would U.S. natural person employees of foreign persons need to obtain? It would not appear efficacious to require U.S. natural persons employed by foreign persons, without familiarity with the ITAR, to correctly develop and implement complete and detailed individual authorizations, which could change quickly (for example, by a change in employment status, or program need). Also, prospective hires may not have complete information from prospective foreign employers to provide in support of a license application.

Significant delays in both registration and license preparation, review and approval times, and also time necessary for implementation of provisos, could be negatively impactful to U.S. government, allied or cooperating country procurement and supply options; and be damaging to coalition partnerships, operations, and interoperability.

Proposed Rule – Clarification is requested on whether U.S. natural person employees of foreign persons are treated as U.S. Persons or Foreign Persons.

Broadly speaking, U.S. natural person employees of foreign persons have been viewed for licensing purposes as themselves being foreign persons; this has been articulated in public fora for many years, including by U.S. government speakers. By this reasoning, in most scenarios, where the U.S. natural person employee of a foreign person would be a “regular employee”, if that individual is compelled to fulfill registration and licensing conditions, it would have the effect of undermining the definition of “regular employee” (even as revised in the proposed rule) and corresponding provisions of the ITAR. If a U.S. natural person employee of a foreign company is not viewed as a “regular employee” of its foreign employer, then by being subject to individual registration and licensing requirements, the same individual could not be viewed or treated as a foreign person, and so would be a U.S. person for purposes, for example, of being eligible to receive technical data without a license if visiting the U.S. **The U.S. natural person employee of a foreign company would need to be viewed either as a U.S. person or a foreign person, but not both.**

Proposed Rule – Regulatory enforcement would seem to be impractical.

Regulatory enforcement of the proposed amendments, if implemented, would seem to be impractical and would create inequities and inconsistencies. It would be improbable that DDTC could track compliance globally on this topic, or disseminate the requirements effectively to an international audience, without allocation of meaningful resources. Additionally, some persons may submit numerous requests for approval; some persons will decide not to proceed with activities so as not to be ensnared by the

proposed regulations; and some persons will either be unaware of the requirements or operate outside the bounds. U.S. government actions taken to administer the proposed regulations would inevitably be incomplete, lead to selective enforcement and accusations of bias to or against companies and individuals, and create “unlevel playing fields”.

Proposed Note 2 to Section 120.40 of the ITAR – The purpose is unclear.

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

Except for a brief mention in the “Supplementary Information” part of the proposed rule that Proposed Note 2 to § 120.40 would “clarify that under specified circumstances, minority owners of a firm may list that company on their registration”, the proposed rule doesn’t indicate the purpose of Proposed Note 2 to Section 120.40 of the ITAR or the “specified circumstances”; doesn’t describe a minority ownership example to which Proposed Note 2 to § 120.40 would pertain; doesn’t elucidate what a written agreement would be or need to include; doesn’t explain how such a written agreement would satisfy the existing ITAR definition of “affiliate”; and doesn’t establish under what conditions DDTC would accept or disallow such an agreement.

It is further unclear if Proposed Note 2 to Section 120.40 of the ITAR is part of the topic of U.S. natural persons employed by foreign persons, which is substantively the dominant point of consideration of the proposed rule, or if the proposed change in this regard is included as a convenience in publication with the topic of U.S. natural persons employed by foreign persons. If the subjects are related, additional comments would be forthcoming. Otherwise, unless a compelling reason exists, **Proposed Note 2 to Section 120.40 of the ITAR should be deleted.**

Proposed rule – The proposed changes do not appear congruent with the President’s Export Control Reform Initiatives.

From the White House’s *Fact Sheet on the President’s Export Control Reform Initiative*, the interagency task force’s assessment determined “the current U.S. export control system does not sufficiently reduce national security risk based on the fact that its structure is overly complicated, contains too many redundancies, and tries to protect

too much.” **It would be unfortunate and counterproductive if momentum gained by other U.S. export control reforms would be undercut by imposing new registration, licensing and compliance requirements whose benefit other than for rare “worst-case” scenarios is moot.** Even with the proposed exemption in proposed Section 124.17 of the ITAR, the number of new registrations and license requests would be expected to rise.

The “Summary” section of the *Federal Register* notice stated that the proposed “amendment is pursuant to the President’s Export Control Reform effort, as part of the Department of State’s retrospective plan under Executive Order 13563, completed on August 17, 2011.” The topic of U.S. natural persons employed by foreign persons was not seen in that document. **It would be constructive for DDTC to present in detail how the topic of U.S. natural persons employed by foreign persons is connected to the President’s Export Control Reform effort.**

Summary

U.S. natural persons employed by foreign persons are hired because of the working experience and skills they have to perform a job position. Those individuals serve, and act on behalf of, their employers. The proposed rule would skew that relationship, in that U.S. natural persons employed by foreign persons (or hoping to be hired by foreign persons) would be acting in mandated self-interest, under conditions and indefinite timelines imposed by the U.S. government, which would limit the foreign employers in what they are able to do internally and externally. If a foreign employer feels disadvantaged or discriminated against by the proposed regulations, **it is very conceivable that the foreign employer will not hire U.S. natural persons, and would terminate employment of existing hires.**

Saab supports the Administration’s U.S. export control reform efforts but believes **the proposed rule is contrary to those efforts, and would impose new and inapt burdens to U.S. persons, U.S. natural persons employed by foreign persons, foreign persons, and the U.S. government without commensurate benefits to the parties.**

Please feel free to contact me at 703-406-7206 or e-mail jeff.riekhoff@saabgroup.com if you have any questions or require additional information. Thank you for your full consideration of Saab’s comments.

Sincerely,



Jeff Rieckhoff
Vice President, International Trade Compliance



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August 5, 2015

C. Edward Peartree
Director, Office of Defense Trade Controls Policy
PM/DDTC, SA-1, Room 1200
Directorate of Defense Trade Controls (DDTC)
Bureau of Political Military Affairs
U.S. Department of State
Washington, D.C. 20522-0112

Re: Comments to May 26, 2015 Proposed Rule Regarding Registration and Licensing of U.S. Persons Employed by Foreign Persons, and Other Changes, and June 3, 2015 Proposed Rule Regarding Revision of U.S. Munitions List Category XV and Definition of "Defense Service"

Dear Mr. Peartree:

We hereby submit the following comments and questions with regard to proposed ITAR rules published in Federal Register Notices on May 26, 2015 and June 3, 2015. The comments reflect discussions with and concerns of clients. We believe that the two sets of proposed rules are closely connected, and therefore we anticipate filing comments prior to the deadlines for comments on each rule, that include cross-references to the other.

Employment of U.S. Person Dual Nationals (U.S. citizens who also possess citizenship of the country in which each resides and works)

We believe that the proposed rules would give rise to significant problems relating to the employment abroad of U.S. nationals; in particular, we believe there is a strong basis for concern, if promulgated as currently proposed, that these proposed rules could have very adverse impacts on the employment abroad of U.S. persons who are also nationals of the countries in which they are living and employed and lead to either the termination of their employment in their countries of such dual nationality or create a very significant chilling effect with respect to such employment. Such a result would do a disservice to such U.S. person dual national employees, their employers and, in many cases, close allies of the U.S. in which such U.S. person dual nationals reside and live.

We understand that there are important national security considerations dedicated to ensuring that U.S. nationals do not engage in the transfer of technical data controlled under the

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ITAR to countries whose foreign and national security policies are adverse to those of the U.S. We recognize the significance of all of the controls established with respect to those countries, specifically as identified in ITAR 126.1. However, problems inherent in the May 26 proposed registration rules and June 3 proposed rules become discernible when the proposals are considered together, particularly because of the expansive definition provided in the June 3 Notice with respect to the concept of what constitutes a “defense service.”

Specifically, the June 3 Notice, in proposed ITAR 120.9(a)(2), defines “defense service” as “[t]he furnishing of assistance (including training) to a foreign person...whether in the United States or abroad, in the development of a defense article, or the integration of a defense article with any other item regardless of whether that item is subject to the ITAR or technical data is used...” While the immediately prior subsection, proposed ITAR 120.9(a)(1), has “knowledge qualifier language” relating to “participation of such U.S. persons in the production, assembly, testing...[et al]...by a U.S. person...who has knowledge of U.S.-origin technical data directly related to the defense article that is the subject of the assistance, prior to providing the assistance[;]” subsection (a)(2), quoted above, does not have this “knowledge qualifier.” This breadth of subsection (a)(2), without such knowledge qualifier language, gives rise to the significant concerns that are contained in this comment.

We also recognize DDTC’s concerns with respect to non-inclusion of the knowledge qualifier in subsection (a)(2), as expressed in DDTC’s comments found in the June 3 Notice; however, we believe that the myriad of problems presented by the extent of proposed ITAR 120.9(a)(2)’s reach, some of which are referenced below, strongly argue for focusing the most extensive requirements, including the knowledge qualifier, on ITAR 126.1 countries, and otherwise limiting the registration and licensing requirements of 120.9(a)(1), (a)(2) and (a)(3) to situations in which the knowledge qualifier applies, particularly with respect to the activities of U.S. person dual nationals working in their countries of second nationality.

For example, assuming the practicalities of the form of registration are overcome, it is not clear what types of information the U.S. person dual national would have to supply to DDTC in order to obtain a license to participate in such a development effort. Among other things, it is conceivable that the U.S. person dual national might be confronted with export control laws and regulations in his/her country of employment, or security clearance and classification requirements in his/her country of employment, that preclude his/her ability to provide substantive information to DDTC about the pending development project. At the very least, he/she would be expected to provide information about the foreign employer’s most sensitive projects or face potential U.S. legal problems. The choice facing the U.S. dual national might require that he/she either contravene the laws of the foreign country or be unable to participate in the project. It is conceivable, perhaps inevitable, that allies of the U.S. abroad, faced with requirements that their U.S. person dual nationals provide these types of information to DDTC in

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order simply to be permitted to participate in such development or integration activities, might view this expansion of DDTC involvement in foreign countries' security procedures as far too invasive and even offensive. On the level of U.S. international relations with close allies, this could present real difficulties. On the level relating to individual U.S. person dual nationals, this could well mean that the U.S. person would have to resign his position with his foreign employer.

Alternatively, it may well be that, in order to avoid such situations, foreign employers will simply refrain from hiring U.S. person dual nationals for such positions, or will be required to terminate the employment of such U.S. person dual nationals specifically because of these DDTC requirements. It is not difficult to anticipate that a significant chilling effect on the hiring of U.S. nationals, including U.S. person dual nationals living abroad, will be a necessary consequence of promulgation of the May 26 and June 3 proposed rules in their current forms. We respectfully suggest that such limitations on the employment of U.S. person dual nationals should not be the consequence of export control regulations, particularly when no technology controlled by the ITAR is involved.

We would also note that the proposed provisions found in the May 26 Notice, in proposed ITAR 124.17(a)(1), clearly do not resolve this problem. First, foreign defense contractors located in a country not listed in this section as having an exemption from licensing and who want to make sure that they are meticulously enforcing all aspects of the proposed rules, will have no choice but to avoid hiring U.S. citizens, thereby causing U.S. person dual nationals living abroad to suffer significant economic harm. In addition, there is likely to be an adverse impact in all friendly countries, including countries listed in proposed ITAR 124.17(a)(1), since that license exemption does not eliminate the need for registration or the maintenance of records with respect to all activities; furthermore, it does not apply at all if the end users of the products are located in other countries (for example, U.S. person dual nationals working for a UK defense contractor that is developing a defense article for sale to the Brazilian or Israeli governments would not be covered by the license exemption). Furthermore, the requirement that foreign defense contractors investigate the dual nationality of their employees and pay particular attention to the employment of U.S. person dual nationals could have particularly pernicious effects and even contravene foreign privacy laws. The scope of these requirements would presumably apply to U.S. person dual nationals who have acquired their U.S. citizenship through their birth abroad to U.S. parents or who have been living for their adult lives in the foreign country and have had no other contact of any kind with U.S. defense contractors or U.S. defense technology other than through the public domain.

Recommendation

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A solution appears clearly to be required for such a potential impact, and we respectfully suggest that the following approach be considered, since it is direct, continues rigorous controls on ITAR 126.1 countries, and does not give rise to either the multilateral or individual concerns referenced above:

- a) The requirement for registration and licensing for U.S. persons should remain as is and not include the knowledge qualifier language provided in proposed ITAR 120.9(a)(1) in the case of the circumstances identified in proposed ITAR 120.9(a)(5), focused on countries listed in ITAR 126.1;
- b) The requirement for registration and licensing for U.S. persons relating to other countries and currently included in proposed ITAR 120.9(a)(2) and (a)(3) should be limited by the knowledge qualifier language provided in proposed ITAR 120.9(a)(1) and the note to that proposed provision; and
- c) The proposed text of ITAR 120.9(a)(4) should be left unchanged.

If DDTC views the revision suggested in subsection (b) above to be too broad, we respectfully suggest that the requirement for registration and licensing be limited by the knowledge qualifier language, in proposed ITAR 120.9(a)(2) and (a)(3,) at least for U.S. person dual nationals living and working in the country of their second nationality.

We would also note that DDTC has in recent years clearly recognized concerns relating to unnecessarily burdensome treatment of dual nationals working abroad through the promulgation of the brokering provisions found in ITAR 129.2(b)(2)(iii), connected with ITAR 126.18's requirements for security clearances or Non-Disclosure Agreements for dual nationals working abroad, with very tight controls relating to ITAR 126.1 countries. When the dual national in question is a U.S. person dual national, there should logically be a level of comfort that is at least as high as that demonstrated through this brokering rule. We therefore respectfully suggest that a requirement that U.S. person dual nationals register and seek licenses for work performed for their employers that does not involve any knowledge of prior U.S. technical data directly related to their development or integration work is not necessary and is likely to give rise to the problems referenced above, and possibly other adverse consequences.

We thank you for the opportunity to participate in this process.

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Respectfully Submitted
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Submitted Via Email

July 27, 2015

Mr. C. Edward Peartree
Director, Office of Defense Trade Controls Policy
Directorate of Defense Trade Controls
PM/DDTC, SA-1, 12th Floor
Bureau of Political Military Affairs
U.S. Department of State
Washington, D.C. 20522-0112

Attn: ITAR Amendment - U.S. Persons Employed by Foreign Persons

Re: Proposed Rule; Comments on Amendment to the International Traffic in Arms Regulations: Registration and Licensing of U.S. Persons Employed by Foreign Persons, and Other Changes (80 Fed. Reg. 30001, May 26, 2015)

Dear Mr. Peartree:

United Technologies Corporation (“UTC”)¹ appreciates the opportunity to submit these comments to the Directorate of Defense Trade Controls (“DDTC”) on the proposed amendments to the International Traffic in Arms Regulations (“ITAR”) regarding registration and licensing of U.S. persons employed by foreign persons, among other changes. Employment models at UTC impacted by these changes include, but are not limited to, U.S. persons employed as regular employees of a U.S. company but at a foreign branch, subsidiary or affiliate, as well as U.S. persons employed as regular employees of a UTC foreign subsidiary or affiliate.

I. Regular Employee

UTC notes that Section 3.9 of DDTC’s *Guidelines for Preparing Electronic Agreements* states that individuals can be hired through staffing agencies “or other contract employee providers.” Therefore, UTC recommends that DDTC revise ITAR § 120.39(a)(2)(v) to include “or other contract employee provider” after each reference to “staffing agency.” This change will align the ITAR with the *Guidelines for Preparing Electronic Agreements* and reflect DDTC’s current interpretation of this provision.

UTC concurs with the revision in ITAR § 120.39(a)(2) to reflect that “long term” indicates that the contractual relationship is intended to be one year or longer. However, a

¹ UTC is a global, diversified corporation based in Hartford, Connecticut, supplying high technology products and services to the aerospace and building systems industries. UTC’s companies are industry leaders, among them Pratt & Whitney, Sikorsky, UTC Aerospace Systems, UTC Building & Industrial Systems, and United Technologies Research Center.

company would most likely enter into a contract with the staffing agency and not each individual being seconded for that work. Therefore, UTC recommends that DDTC add a Note at the end of ITAR § 120.39 that clarifies that the contractual relationship can be with the individual, the staffing agency or the other contract employee provider.

On October 31, 2013, the Bureau of Industry & Security (“BIS”) published updated guidance on its website regarding deemed reexports of technology in order to harmonize with certain ITAR definitions as part of Export Control Reform.² In Section V.D of this guidance, BIS referenced DDTC’s definition of “regular employee” in ITAR § 120.39 and defined the phrase “permanent and regular employee” for purposes of the Export Administration Regulations. BIS’ definition provides that a contract employee can be located at the company’s facilities “or locations assigned by the [company] (such as a remote site or on travel)[.]” UTC recommends that DDTC adopt the same language in ITAR § 120.39(a)(2)(i) for maximum harmonization.

II. Registration Requirements

UTC appreciates the addition of the Note to ITAR § 122.1(a), clarifying that natural persons employed by a DDTC-registered person do not need to be separately registered. If a company is required to be registered under the terms of ITAR § 122.1(a), we believe it logically follows that all regular employees of the DDTC-registered company, to include employees of its listed subsidiaries and affiliates, are covered by that registration.

The proposed revision to ITAR § 122.4(a)(2)(v) uses the phrase “inability of an affiliate...to continue meeting the requirements in § 120.40” as an event that requires notification to DDTC. UTC recommends revising subparagraph (v), which references the requirements in ITAR § 120.40, to use the same or similar language to Note 2 to § 120.40 because the requirement is not triggered by an affiliate’s “inability” but rather by the cessation of the underlying activities that require registration. Therefore, ITAR § 122.4(a)(2)(v) would be revised to read, as follows:

(v) The establishment, acquisition, or divestment of a U.S. or foreign subsidiary or other affiliate who is engaged in manufacturing defense articles, exporting defense articles or defense services, or the cessation of manufacturing defense articles, exporting defense articles or defense services by an affiliate pursuant to § 120.40 of this subchapter; or

III. Licensing U.S. Persons Employed by Foreign Persons

This proposed rule clarifies section 124.1(a) to state that defense services performed by a natural U.S. person employed by a foreign person may be authorized by a DSP-5 or an agreement. UTC acknowledges that DDTC published a separate rule on June 3, 2015

² Updated BIS Guidance Regarding the Treatment of Dual and Third Country Nationals with Respect to Deemed Reexports of Technology or Source Code Subject to the EAR (Oct 31, 2013).
<https://www.bis.doc.gov/index.php/policy-guidance/deemed-exports/deemed-reexport-guidance1>.

(“Definitions Rule”)³ and that this proposed rule adds provisions to clarify that certain activities would not be defense services by a U.S. person when employed by a foreign person. UTC will submit comments to the Definitions Rule separately. Therefore, these comments apply to the extent that the activity by natural U.S. persons employed by a foreign person meets the definition of “defense services” and requires ITAR authorization.

It is also important for DDTC to be mindful that the natural U.S. persons at issue here are employees of foreign persons and likely resident outside the United States. Therefore, the same types of constraints on determining the nationality/country of birth of employees that DDTC acknowledged and to which industry submitted comments in 2010 to then-proposed changes to ITAR §§ 124.16 and 126.18 are present here with respect to U.S. person employees.⁴ Foreign person employers will be precluded from identifying the U.S. person status of employees by domestic anti-discrimination, human rights or privacy laws in many countries in which UTC maintains operations and does business, including our closest NATO and non-NATO allies and partners. Unless such employees provided evidence of U.S. person status upon hire by the foreign employer, consistent with domestic law, there would be no means to routinely identify natural U.S. persons without screening the entire employee population for nationality and country of birth. Such a practice would undercut the gains we have made under the revised screening requirements pursuant to ITAR § 126.18 for foreign person employees.

With respect to the specific licensing vehicles proposed, UTC proposes that no additional authorization should be required to authorize defense services by U.S. persons employed by a subsidiary or affiliate of a DDTC-registered U.S. person where the underlying manufacturing or technical assistance agreement is between the DDTC-registered U.S. person and its own foreign subsidiary/affiliate. The rationale is that: (1) the DDTC-registered U.S. person (*i.e.*, U.S. applicant) and the foreign subsidiary/affiliate are related companies; (2) provision of such defense services by the U.S. applicant to the foreign party under an approved agreement means that defense services by U.S. persons are already contemplated and in scope of the agreement; (3) the U.S. person employed by the foreign employer will be receiving the U.S.-origin technical data as a result of activities on behalf of that employer, who is already authorized to have the U.S.-origin data; and (4) there is no increased national security risk in having these U.S. persons employed by foreign persons to provide defense services to or on behalf of the foreign person employer under these circumstances.

However, if U.S. persons employed by a foreign subsidiary/affiliate of a DDTC-registered company need to be authorized, we recommend that DDTC permit the use of the same agreement that authorizes the underlying activity between the U.S. applicant and its foreign subsidiary/affiliate by including authorization for natural U.S. person employees of that foreign subsidiary/affiliate to provide defense services. We believe this is the intent of the proposed language to be added to ITAR §124.1(a), but the language is not clear in this respect. We further recommend that DDTC issue guidance that such individuals need not be identified by name in agreements and only by nationality in the ITAR § 124.7(4) clause, as we would do for foreign person employees. DDTC should issue guidance that clarifies that existing valid agreements

³ International Traffic in Arms Regulations: Revisions to Definitions of Defense Services, Technical Data, and Public Domain; Definition of Product of Fundamental Research; Electronic Transmission and Storage of Technical Data; and Related Definitions. 80 Fed. Reg. 31525 (June 3, 2015).

⁴ Amendment to the International Traffic in Arms Regulations: Dual Nationals and Third-Country Nationals Employed by End-Users. 75 Fed. Reg. 48625 (Aug 11, 2010).

need not be amended to include U.S. person employees in the section 124.7(4) clause until the next major amendment. UTC also notes that there is no parallel provision for foreign persons who are not listed on the registration of a U.S. person to obtain authorization for their U.S. person employees via agreement.

UTC disagrees with the additional proposed language in section 124.1(a) that the registered U.S. person must accept responsibility for and demonstrate the ability to ensure the natural U.S. person's compliance with the ITAR. No similar language exists for a registered U.S. person to provide such assurances for foreign person employees of its subsidiaries and affiliates. Moreover, this language is unnecessary because a U.S. registered company already accepts compliance responsibility for affiliates, which would include their employees, under ITAR § 122, and also assumes responsibility for compliance with the ITAR in accordance with ITAR §127.1(c) when the affiliate undertakes activity under a U.S. registered applicant's licenses or agreements. If DDTC adds an independent requirement that U.S. registered applicants affirmatively accept responsibility for U.S. person employees of foreign affiliates/subsidiaries, DDTC should allow applicants to include a clause to agreements (for existing agreements, at the next major amendment) with this acceptance, but not require any additional demonstration.

Finally, UTC has no objection to allowing the provision of defense services by a natural U.S. person to be authorized on a Form DSP-5. However, if this is intended to permit a foreign person employer to obtain authorization for its U.S. person employee (*i.e.*, the converse of a DSP-5 for a foreign person employed by a U.S. person), there is no mechanism by which a foreign person can submit such a DSP-5. We think it is unlikely that an unaffiliated U.S. applicant would submit an application for a foreign company's U.S. person employee to provide defense services to his/her foreign person employer, even if such services are intended in furtherance of an existing agreement between the U.S. applicant and foreign company. UTC is unlikely to use a DSP-5 to authorize U.S. person employees of its foreign affiliates and subsidiaries to provide defense services because it would create a burden on UTC companies to manage multiple authorizations that ostensibly cover the same activity.

IV. Removal of Section 125.4(b)(2)

The preamble states that DDTC is removing ITAR § 125.4(b)(2) because it is redundant with the exemption in ITAR § 124.3. UTC agrees with the underlying objective and concurs that section 124.3 is the best location for requirements on exports of technical data in furtherance of approved agreements due to the title of the section. However, we do not view these as redundant exemptions. Section 125.4(b) explicitly exempts from licensing requirements the types of exports enumerated thereunder, which includes exports of technical data – unclassified and classified – in furtherance of an approved agreement. It further references that the requirements of ITAR § 124.3 need to be met, which would be circular if these were both exemptions. Instead, ITAR § 124.3 identifies requirements for the export process itself: subparagraph (a) directs U.S. Customs & Border Protection and the U.S. Postal Service to permit the export without a license of unclassified technical data in furtherance of an approved agreement; and subparagraph (b) sets forth certain certification requirements to the Department of Defense and mandates compliance with the Department of Defense National Industrial Security Program Operating Manual with respect to the transmission of classified information. There is no language in either subparagraph that explicitly grants an exemption to a licensing requirement, as ITAR § 125.4(b) does. Moreover, the language in ITAR § 124.3(b) – “does not require further

approval” – suggests that an exemption is not needed at all for exports of classified data in furtherance of an approved agreement.

UTC submits that the need for an exemption to export technical data in furtherance of an approved agreement is duplicative *authorization*. We recommend that the export of such technical data be accomplished under the authority of the respective agreement⁵ and that no exemption be needed. UTC recommends the following change to ITAR § 124.3 to make clear that exports of unclassified technical data do not require additional licensing or an exemption if made in furtherance of (and within the scope of) an agreement.

(a) *Unclassified technical data*. The export of unclassified technical data does not require further approval from the Directorate of Defense Trade Controls (DDTC), and the U.S. Customs and Border Protection or U.S. Postal authorities shall permit the export without a license, if the export is in furtherance of a manufacturing license or technical assistance agreement which has been approved in writing by the DDTC and the technical data does not exceed the scope or limitations of the relevant agreement. The approval of the DDTC must be obtained for the export of any unclassified technical data that may exceed the terms of the agreement.

In the alternative, if DDTC determines that exports of technical data in furtherance of an approved agreement must be authorized by an exemption, UTC recommends that ITAR § 124.3(a) be revised to include the language below and that existing subparagraphs (a) and (b) be renumbered as (b) and (c) respectively:

(a) *Exemption*. Exports of technical data, including classified information, in furtherance of a manufacturing license or technical assistance agreement approved by the Directorate of Defense Trade Controls are exempt from the licensing requirements of this subchapter.

UTC also notes that removal of ITAR § 125.4(b) will necessitate revisions to ITAR § 123.22. Specifically, ITAR § 123.22(b)(ii) will need to reference section 124.3 instead of section 125.4, and reference to section 125.4(b)(2) in ITAR § 123.22(b)(iii) will need to be deleted. In the course of making these revisions, UTC recommends that DDTC remove the provisions in section 123.22(b)(3) and the subsequent Note relating to filing export data electronically when exports of technical data are made from a U.S. port. The ITAR was amended in October 2003 to include this requirement but, to date, DDTC has not implemented any electronic reporting mechanism for exporters to use.⁶

⁵ The Electronic Export Information filed in the Automated Export System for exports of such technical data through a port can reference the DSP-5 vehicle as the authorization for the export.

⁶ Amendment to the International Traffic in Arms Regulations: Mandatory Electronic Filing of Shipper's Export Declarations with U.S. Customs Using the Automated Export System (AES). 68 Fed. Reg. 61101 (Oct 27, 2003).

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For additional information, please contact the undersigned at (202) 336-7458 or christine.lee@utc.com.

Sincerely,

A handwritten signature in green ink, consisting of several loops and a long horizontal stroke extending to the right.

Christine Lee
Director, Compliance
International Trade Counsel