



AUGUST 20, 2024

DDTC Issues Long-Awaited Rule Implementing AUKUS: Five Key Takeaways

On August 16, 2024, the U.S. Department of State (“State”) [announced](#) a broad exemption from export licensing requirements for most defense trade between and among “authorized users” in the United States, Australia, and the United Kingdom, thereby issuing much-anticipated export control relief in implementation of the AUKUS security pact. Specifically, State’s Directorate of Defense Trade Controls (“DDTC”) published an [interim final rule](#) (“IFR”) to amend the International Traffic in Arms Regulations (“ITAR”), effective September 1, 2024, to authorize the export, reexport, transfer, and temporary import of defense articles, the furnishing of defense services, and brokering activities by authorized parties within the AUKUS countries. See also State’s [fact sheet](#).

We summarize below five key takeaways on this rule, including: 1) the new exemption at Section 126.7 of the ITAR, 2) notable limitations and requirements, 3) expedited licensing procedures, 4) potential future expansion, and 5) anticipated new guidance about the authorized user list.

The IFR is the capstone of the U.S. government’s implementation of the trilateral AUKUS security pact. This follows other regulatory actions by DDTC and the U.S. Department of Commerce’s Bureau of Industry and Security (“BIS”) that were the subject of a previous Blank Rome [alert](#).

The IFR provides for a 90-day public comment period that closes on November 18, 2024.

BACKGROUND

The AUKUS agreement, initially announced in September 2021, aims to provide Australia with nuclear-powered submarines and deepen cooperation between the United States, Australia, and the United Kingdom in the Indo-Pacific region. The pact also covers cooperation on cyber capabilities, quantum technologies, artificial intelligence, hypersonic and counter-hypersonic capabilities, electronic warfare, and undersea capabilities.

An essential element of AUKUS implementation, which has eluded the member countries until now, is export control relief under the ITAR. Specifically, the U.S. government held off on a relaxation of ITAR requirements until State could certify to Congress that Australia and the United Kingdom had enacted export control systems comparable to the ITAR and implemented a reciprocal export control exemption for U.S. entities. After years of work on the issue by the three participants, on August 16, 2024, State made the required certification to Congress, paving the way for issuance of an ITAR exemption.

FIVE KEY TAKEAWAYS

The signature provision of the IFR is the exemption set out at new Section 126.7 of the ITAR, described in more detail below. The exemption will be available for use on September 1, 2024, between and among “authorized users.” According to State’s fact sheet, DDTC will post the list of such authorized users in the Defense Export Control and Compliance System (“DECCS”) on August 30, 2024.

Here are five key takeaways regarding the IFR and the exemption:

- **(1) New ITAR § 126.7 sets out a broad exemption for defense trade between and among Australia, the United Kingdom, and the United States.**
 - The exemption authorizes the export, reexport, transfer, and temporary import of defense articles; the furnishing of defense services; and brokering activities between and among authorized users within Australia, the United Kingdom, and the United States.
 - The relevant activity must be to or within the physical territories of Australia, the United Kingdom, and the United States.
 - Exemption usage is limited to “authorized users,” *i.e.*, (a) U.S. persons registered with DDTC and eligible to receive ITAR authorizations under Section 120.16 of the ITAR; (b) a U.S. government department or agency; or (c) Australian or UK Authorized Users identified in DECCS.
 - The exemption permits activities involving Australian and UK dual national authorized users or regular employees of authorized users, provided they hold a Secret-level security clearance issued by an AUKUS country and are located within an AUKUS country or are a member of the armed forces of such a country.
- **(2) The exemption is subject to important limitations and requirements.**
 - **Excluded technology.** While the vast majority of defense articles and defense services described on the U.S. Munitions List (“USML”) are eligible under the exemption, DDTC has identified a range of ineligible defense articles and services on the Excluded Technology List (“ETL”), set out at new Supplement No. 2 to Part 126. Restricted items on the ETL include (among others): all Missile Technology Control Regime (“MTCR”) items on the USML and directly related technical data and defense services; readily identifiable anti-tamper articles not already installed in the commodity they are intended to protect, and directly related technical data and defense services; cluster munitions and articles specially designed for cluster munitions; and the F-22 aircraft and articles specially designed for the F-22.
 - **Congressional notification threshold.** The activity at issue must be within value thresholds for congressional notification set out at Section 123.15 of the ITAR.
 - **No SME manufacturing abroad.** The activity must not involve the manufacturing abroad of “significant military equipment” as identified in the ITAR.
 - **Destination control statement.** Parties making use of the exemption must include a destination control statement on the invoice as specified in Section 123.9(b) of the ITAR.
- **(3) Expedited licensing will be available for activities not covered by the exemption.** Section 126.15 of the ITAR will provide for expedited consideration of license applications for non-exempt exports to Australia, the United Kingdom, and Canada. “To the extent practicable,” for exports pursuant to a government-to-government agreement, DDTC must complete its review within 30 days, and must complete review for other applications within 45 days.
- **(4) DDTC may expand the exemption in the future.** The Federal Register notice setting out the IFR states that a “large number” of commenters recommended expansion of the § 126.7 exemption to include transfers:
 - (1) to or within the physical territory of Australia, the United Kingdom, or the United States; (2) to members of the armed forces of Australia, the United Kingdom, or the United States acting in their official capacity or while on deployment; (3) to government employees of Australia, the United Kingdom, and the United States;

(4) to § 126.7 authorized users deployed in support of such armed forces, to include maintenance, repair, and overhaul providers; (5) to international waters when in support of AUKUS testing or operations; and (6) by Australian, U.S., and UK persons to export or transfer defense articles for end use by the armed forces of Australia, the United Kingdom, or the United States outside of their physical territories.

DDTC noted that it needs additional time to consider these proposals, with the benefit of another round of public comments.

- *(5) It is important to review DDTC guidance regarding the exemption.* It is important for anyone seeking to use the exemption to review the *Federal Register* notice in its entirety due to the large number of interpretive points that DDTC has set out therein. Furthermore, DDTC announced that it will be issuing guidance regarding the authorized user list.

Defense contractors engaged in business with Australia and/or the United Kingdom, or interested in such business, should monitor developments regarding AUKUS implementation, and the streamlined compliance obligations pursuant to the IFR.

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