International Trade Alert

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DDTC Publishes New FAQs on Defense Services Performed by U.S. Persons Abroad and How to Get Them Approved via GC

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Key Points

- On January 6, 2020, DDTC published a new FAQ on Defense Services Performed by U.S. Persons Abroad, confirming that the ITAR regulate defense services performed by a U.S. person employed by a non-U.S. company outside of the United States.
- The FAQ includes a link to 14 additional FAQs that describe how such a U.S. person may comply with the ITAR by getting a GC authorization and confirming that registration is not required if the U.S. person is outside the United States.
- The FAQs also confirm that a U.S. person providing approved defense services does not *per se* cause a foreign-origin defense article that results from the service to be subject to the ITAR.

Background

The U.S. International Traffic in Arms Regulations (ITAR) have traditionally been understood to require U.S. person **entities** to register and obtain authorization before furnishing defense services abroad. Over the past decade, actions taken by military contractors—particularly non-U.S. entities employing U.S. persons—have raised questions regarding the extent to which the ITAR regulate U.S. person **individuals** employed by a non-U.S. entity. Specifically, the Directorate of Defense Trade Controls (DDTC) had not clarified the extent to which U.S. person individuals employed by non-U.S. companies were required to register to seek authorization under the ITAR.

In April 2013, DDTC released rev. 4.0 of its *Guidelines for Preparing Electronic Agreements* (the "*Guidelines*"), Section 3.10 of which articulated DDTC's position on this issue for the first time, as follows:

> If a U.S. Person is employed abroad by a foreign company or foreign government, an agreement does not provide authorization for the U.S. Person even if the foreign company/government is a signatory. If a U.S. Person employed abroad is providing defense services to a foreign party, the U.S. Person must have proper authorization to provide the defense services.

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In order to gain proper authorization for a U.S. Person employed abroad to provide defense services, the U.S. Person may register with DDTC and be a signatory to agreements. Another option is for the U.S. Person to be employed by a U.S. company registered with DDTC, allowing the U.S. Person to provide defense services when the U.S. company is a signatory to an agreement.

Since many different scenarios may arise pertaining to U.S. Persons employed abroad, DDTC recommends submitting an Advisory Opinion when unsure how to handle a certain scenario.

These *Guidelines* led to a flurry of questions and concerns from industry regarding the breadth of this requirement. In October 2013, DDTC released rev. 4.1 of the *Guidelines*, which removed the above language and instead stated Section 3.10 as "Reserved." In May 2015, DDTC released a Proposed Rule to amend the ITAR to include requirements associated with the "Registration and Licensing of U.S. Persons Employed by Foreign Persons." In March 2016, DDTC released rev. 4.3 of the *Guidelines* which state in Section 3.10 that, "Any requirements and procedures for U.S. persons employed abroad who provide defense services will be disseminated via final rules in the *Federal Register*." The current *Guidelines* continue to include this language, resulting in a lack of clarity regarding the registration and licensing requirements applicable to U.S. persons performing defense services on behalf of their non-U.S. employers.

New FAQs on U.S. Persons Abroad

On January 6, 2020, DDTC issued new frequently asked questions (FAQs) to clarify the status of U.S. persons performing defense services for their non-U.S. employers. DDTC has now found a workable middle ground that allows U.S. persons to get authorization for working abroad without requiring registration (and the accompanying $2,250 annual registration fee), and providing clarity to non-U.S. companies that their products will not become ITAR controlled in most instance merely by hiring a U.S. person. DDTC has also made it clear that the U.S. person, not the non-U.S. company, is the exporter and is responsible for ITAR compliance.

DDTC published a single FAQ on its website under Licensing FAQs, which states that the ITAR applies to defense services performed outside the United States by individual U.S. persons in the course of their employment by a non-U.S. entity.

DDTC also published 14 additional FAQs in a linked PDF that expand on the first FAQ, provide clarity on the process for obtaining authorization and address the concerns about collateral consequences. The FAQs provide that:

- The requirement to get ITAR authorization applies whether the defense service is to be furnished to foreign persons inside or outside the United States.
- Registration is not required for U.S. persons located outside the United States to obtain authorization to provide defense services. This is a straightforward interpretation of the registration requirement in ITAR Section 122.1, which provides that any "person who engages ***in the United States*** in the business of manufacturing or exporting or temporarily importing defense articles or furnishing defense services, is required to register with the Directorate of Defense Trade Controls." (emphasis added).

- DDTC will, in most cases, authorize defense services by an individual U.S. person outside the United States through a General Correspondence (GC) authorization pursuant to section 126.9(b).
- Authorizations will be issued to the individual U.S. person seeking to furnish defense services, not to the prospective employer. Employers may help facilitate submissions, but the U.S. person is the one responsible for ensuring compliance with the ITAR as the exporter of a defense service.

The FAQ provides details on what should be included in the GC request. In addition to the individual U.S. person's resume and a detailed job description, the request should describe (i) the program or defense article that is the subject of the proposed defense service and (ii) the defense services to be provided. The request should also describe the defense service provider's ties to the United States, including (i) any employment or education in the United States; (ii) any previous work activities or coursework that pertain to defense articles; and (iii) any prior work on any U.S. government programs.

The FAQs also confirm that the mere presence or involvement of a U.S. person in the design or development of a foreign-origin defense article does not per se cause it to be subject to the ITAR. It further provides that this is the case even if the U.S. person is providing defense services that are authorized via a GC. It clarifies that it is the clauses in technical assistant agreements (TAAs) and manufacturing license agreements (MLAs) required by ITAR section 124.8(a)(5) that attach State Department approval requirements to foreign-made defense articles that are produced or manufactured from technical data, software or services provided under the authority of the MLA or TAA. This clarification will benefit the non-U.S. defense industry because it means that technical data and defense services provided under a DSP-5 license or an exemption do not cause a foreign-made defense article to become subject to the ITAR. These FAQs, however, do not affect the general rule that ITAR-controlled components and software remain ITAR controlled even when incorporated into a foreign-origin item (also known as the "see-through" rule). The FAQ also suggests that DDTC may consider **unauthorized** defense services to cause foreign-origin items made with the benefit of such services to be subject to the ITAR.

The FAQs abandon the 2015 proposed rule on registration and licensing of U.S. persons employed by foreign persons, stating that it was never adopted as a final rule and has no regulatory effect. However, the FAQs also note that DDTC will generally view any unauthorized activities taken in a good faith effort to comply with the provisions of the proposed rule to be a mitigating factor when considering the appropriate penalty for any violations.

Finally, the FAQs do not state that the authorization requirement is new or that past unauthorized defense services were not violations of the ITAR. In fact, by stating that it will take good faith compliance with the proposed rule into account, it is clear that DDTC considers past unauthorized defense services to be violations and likely expects that they will be voluntarily disclosed. While the U.S. person employees are the responsible party under the ITAR, taken as a whole, the FAQs imply that DDTC would consider voluntary disclosures of unauthorized defense services made by non-U.S. companies on behalf of their U.S. person employees to satisfy the provisions of ITAR section 127.12.

Conclusion

While the new FAQs are welcome clarifications of several long-standing issues, they fall short of addressing certain issues affecting entities that employ non-U.S. persons abroad in roles involving the furnishing of defense services. For example:

- Many non-U.S. entities have resorted to establishing U.S. subsidiaries for the purpose of employing such individuals, obtaining a single registration and authorization in the form of a TAA on their behalf, and seconding the individuals back to their original non-U.S. person employer. While Section 3.10 of the *Guidelines* originally referenced this model, the FAQs are silent on it, suggesting that parties relying on that model may continue to do so for so long at their registrations and TAAs are valid.
- The FAQs may create an administrative burden for DDTC and for non-U.S. entities employing large numbers of U.S. persons in defense services roles. While the FAQs permit the non-U.S. employer to consolidate requests for authorization for its individual U.S. person employees into a single request, the FAQs also make clear that DDTC will issue individual authorizations for each U.S. person in response to this request. In this respect, the GC authorization is unlike a TAA, which would apply to all regular employees of an applicant. Instead, non-U.S. entities wishing to rely on this avenue of authorization and manage authorizations on behalf of its workforce must do so for each U.S. person employee individually, and must reapply for authorization for each U.S. person new hire that enters its workforce in a role involving furnishing defense services. This will likely lead to delays—possibly of several months or more—from when an individual starts work to when that individual is able to perform their job functions that involve furnishing defense services.
- Many companies supported the 2015 proposed rule, which proposed exemptions for foreign military sales (FMS) transactions as well as U.S. persons employed by a non-U.S. entity in a NATO, European Union or certain other allied countries ("NATO/EU+4"). The FAQs do not suggest that any such exemptions to the ITAR are forthcoming. Indeed, the FAQs make clear that even U.S. persons working on an approved FMS program, or on behalf of an employer in a NATO/EU+4 country, must obtain authorization to furnish defense services.

The new FAQs nonetheless make clear that U.S. persons, including individuals and companies, who perform defense services for a foreign person require authorization from DDTC regardless of where they are located. They also confirm that non-U.S. companies can hire U.S. persons into their defense businesses with a clearly identifiable path toward ensuring that individual's role is authorized, and without concern that the ITAR will cause their foreign-made items made from foreign-origin technical data to be subject to the ITAR.

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