

State Department Extends Temporary Remote Work Provisions and Announces Upcoming Notice and Solicitation of Comments for Permanent ITAR Revisions Relating to Remote Work

December 16, 2020

Key Points

- In May of 2020 and due to the ongoing pandemic, the DDTC temporarily revised certain ITAR requirements. Most notably, the changes allow an employee of a licensed entity to work remotely in a country not previously authorized without jeopardizing their status as “regular employees,” and the changes also authorize the employee to send, receive, or access any technical data that DDTC has authorized to their employer. This temporary authorization does not apply if the regular employee is in Russia, China or another country listed in ITAR § 126.1.
- On December 11, 2020, DDTC extended the remote work-related changes until June 30, 2021, and stated that it would soon solicit comments for a permanent revision to the ITAR relating to remote work.
- The proposed revisions could be an opportunity for exporters to update and implement practical telework and remote polices for employees that require regular access to ITAR-controlled technical data. Exporters and other parties affected by ITAR compliance (e.g., non-U.S. companies that are licensees on ITAR authorizations) interested in providing comments on the proposed revisions when released should begin preparing submissions to DDTC to provide input on this rule.

Background

In May 2020, the State Department’s Directorate of Defense Trade Controls (DDTC) temporarily suspended, modified or made exceptions to certain International Traffic in Arms Regulations (ITAR) requirements to address the challenges, and ease the risks, presented by COVID-19. The temporary changes included an extension of certain ITAR registrations, extension of certain ITAR licenses and reduced registration fees (for a more detailed summary, please see our [alert](#)). Importantly, and barring personnel in Russia and Section 126.1 countries, the changes enabled company personnel to work remotely abroad while retaining “regular employee” status and temporarily authorized regular employees of licensed entities working remotely in a

Contact Information

Comments may be submitted by U.S. and non-U.S. entities and may even be submitted anonymously. Parties interested in submitting comments should begin preparing their submissions as soon as possible. If you have questions about these changes or would like to discuss proposed comments, please contact:

Thomas J. McCarthy
Partner

tmccarthy@akingump.com
Washington, D.C.
+1 202.887.4047

Kevin J. Wolf
Partner

kwolf@akingump.com
Washington, D.C.
+1 202.887.4051

Anne E. Borkovic
Partner

aborkovic@akingump.com
Washington, D.C.
+1 202.887.4432

Jonathan C. Poling
Partner

jpoling@akingump.com
Washington, D.C.
+1 202.887.4029

Shiva Aminian
Partner

saminian@akingump.com
Los Angeles
+1 310.552.6476

country not included in the relevant authorization to send, receive, or access technical data authorized for export, reexport or retransfer to their employer using that authorization.

Extension of Temporary Relief and Proposed Permanent Revisions

On December 11, 2020, DDTC **announced** in the Federal Register that it would be extending the remote work-related provisions listed above, until June 30, 2021. Most notably, DDTC stated that “in the coming months the Department intends to provide notice of and solicit comment related to proposed revisions to the ITAR provisions related to remote work” and that the extension was “necessary to provide time for DDTC to consider a permanent revision to the ITAR provisions relating to remote work.”

DDTC did not say when to expect the proposed rule and request for public comments. However, on December 3, 2020, DDTC did send a proposed rule titled “Amendment to the International Traffic in Arms Regulations: Regular Employee” to the Office of Management and Budget (OMB) for formal review. Such review usually takes between two weeks and two months and rules are generally published about a week after review is concluded.

DDTC also did not say how long the comment period would be, but these types of proposed rules often have a 30 or 45 day comment window. This is not a lot of time for companies to develop new ideas and obtain approval internally or through their industry associations to submit to the U.S. government. Therefore, it would be beneficial for U.S. ITAR exporters and their foreign licensees to begin to gather information now on remote work to begin outlining comments for submission to DDTC.

Impact

While companies will welcome the extension of relief to support ITAR compliance during the pandemic, the announcement of upcoming and permanent revision to the ITAR to support remote work has the potential to significantly modernize practical ITAR compliance. DDTC has temporarily implemented limited procedures acknowledging the new reality of widespread remote work, including allowing various submissions to be provided electronically and/or via email and sending applicants email scans of certain documents in lieu of hard copy mailings. However, it is likely that the U.S. government is proposing changes to the ITAR to impose new requirements on these COVID-19 motivated provisions.

The upcoming rule change could provide significant additional flexibility for both U.S. and non-U.S. companies with multinational operations and reduce overall compliance burden, but only if companies are ready and comment to DDTC with concrete suggestions that will meet DDTC’s goal of protecting U.S. national security and foreign policy. ITAR compliance can be resource intensive, and identifying and tracking employee locations and dual- and third-country nationals working on ITAR projects and programs can be particularly challenging for multinational enterprises. The rule change presents an opportunity for the industry to suggest practical changes, such as expanding ITAR §125.4(b)(9) to allow authorized foreign companies and their employees to reexport ITAR-controlled technical data when travelling to third countries or revising ITAR § 126.18(c)(1) to allow foreign defense worker screening to qualify for

Mahmoud (Mac) Fadlallah
Partner
mfadlallah@akingump.com
Dubai
+971 4.317.3030

Tatman R. Savio
Registered Foreign Lawyer
Tatman.savio@akingump.com
Hong Kong
+852 3694.3015

Robert J. Monjay
Senior Counsel
rmonjay@akingump.com
Washington, D.C.
+1 202.887.4557

Sina Kimiagar
Associate
skimiagar@akingump.com
Washington, D.C.
+1 202.887.4306

automatic approval along with security clearances. There is also room for more expansive suggestions, such as implementing more consistent application of the arms embargo provisions, so that dual nationals who are citizens of allied countries are not excluded from the ability to receive ITAR authorizations for work in the U.S., simply because they continue to hold citizenship from a Section 126.1, without any assessment of their actual risk to divert U.S. technology.

Additionally, this would be an excellent opportunity to again recommend that DDTC correct the confusion caused by the revision to the definition of release in ITAR § 120.50(a)(3) that appear to make it a controlled event to enable a foreign person to access technical data, even if they do not ever access it. This apparent return of theoretical access last year has upset compliance programs across the industry and made the difficult task of managing global employees, and particularly dual- and third-country nationals, even more taxing.

akingump.com