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CLIENT ALERT

Anticipated ITAR Rulemaking Developments for 2024

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Introduction

The State Department's Directorate of Defense Trade Controls (DDTC) recently updated its [list](#) of planned rulemaking concerning the International Traffic in Arms Regulations (ITAR) and U.S. Munitions List (USML). This article summarizes those regulatory proposals and revisions that may take place in 2024.

Anticipated Developments

DDTC's anticipated rulemaking list includes 16 intended actions, as well as a civil monetary penalty [adjustment](#). The following are some of the significant rulemaking items.

Proposed Revisions to Defense Services. DDTC plans to publish a [proposed rule](#) regarding the ITAR's control of defense services. Specifically, the proposed rule involves "revisions to definitions and controls related to defense services." Although this planned rulemaking is new to the regulatory agenda, it is already going through its final interagency review, as DDTC submitted it for that clearance in early November. This proposal will be the *fourth* proposed rule by DDTC concerning defense services. It published the [first](#) proposed rule in 2011, the [second](#) in 2013, and the [third](#) in 2015. Each time, DDTC conceded that the current rule is "overly broad."

The ITAR's defense services controls have been essentially unchanged for four decades—with two notable changes. *First*, in 1984, when DDTC [added](#) the definition of defense services to the ITAR, it changed its policy by controlling technical assistance "regardless of whether technical data will be used or disclosed." In making that "significant" change, DDTC stated that it was previously the agency's practice to control assistance "only if it involved the disclosure of technical data or the use of technical data that was not exempt from the licensing requirements of Part 125." *Second*, in 1997, DDTC [amended](#) the definition to cover military training, now appearing within ITAR § 120.32(a)(3).

USML Revisions. In addition to the defense services proposed rule, DDTC intends to issue the following three rulemakings concerning the USML:

- An [interim final rule](#) "to revise and exclude entries on the [USML] that no longer warrant inclusion and to add entries for critical and emerging technologies that do."

- A proposed rule that will seek to revise several areas of the USML that may involve revisions to [Category IV and XV](#) and circuit boards and semiconductors covered within [Category XI\(c\)](#).
- A [final rule](#) that will respond to public comments and complete the control criteria revisions from the April 2023 [interim final rule](#) to Category XI(c)(5), which involves certain high-energy storage capacitors.

DDTC's regulatory agenda also includes a [proposal](#) to modernize the USML and Supplement No. 1 to Part 126 to enhance their "clarity, consistency, and ease of use." The agenda additionally includes issuing a [final rule](#) to address the public comments DDTC received for the USML revisions to Categories IV, V, VIII, XI, and XV that took place through an [interim final rule](#) in 2018.

Proposed Registration Fee Increase. DDTC expects to issue a [proposed rule](#) to increase the ITAR's registration fees. The last fee change occurred in [2008](#), with other previous changes occurring in 2004, 1997, and 1985. The ITAR's registration fees were the subject of [litigation](#) in 2015 concerning DDTC's ability to raise those fees, but that case did not address the merits because the plaintiff lacked standing. This proposed rule is going through a final interagency review, and DDTC expects to publish it for public comment in the first half of 2024.

Final Rule Concerning Technical Data Releases to Foreign Persons. DDTC plans to issue a [final rule](#) to change how the ITAR handles "deemed exports" and "deemed reexports" of technical data to foreign persons so that there is "a release only to any countries in which that foreign person currently holds citizenship or permanent residency." Both situations currently control such releases "to all countries in which the foreign person has held or holds citizenship or holds permanent residency." DDTC issued a [proposed rule](#) regarding this rulemaking in February 2022.

Final Revisions Clarifying Non-Controlled Events. DDTC intends to issue a [final rule](#) amending ITAR § 120.54 to add two activities that are not exports, reexports, retransfers, or temporary imports. As DDTC explained in the [proposed rule](#), the two activities cover:

- "the taking of defense articles outside a previously approved country by the armed forces of a foreign government or United Nations personnel on a deployment or training exercise is not a controlled event, provided there is no change in end-use or end-user"; and
- "the transfer of a foreign defense article originally imported into the United States that has since been exported out of the United States, is not a controlled event, unless certain enumerated circumstances have occurred."

Notably, DDTC acknowledged that the rule intends to “codify” the agency’s “long-standing policy” that these two activities “are not controlled events.”

Proposed Rule Concerning Regular Employees. DDTC intends to issue another [proposed rule](#) seeking to revise the meaning of a regular employee within ITAR § 120.64. Specifically, the proposed revisions would update the definition by allowing “subject persons to work remotely, and to clarify the contractual relationships that meet the definition of regular employee.” The [first proposed rule](#), published in May 2021, received several public comments critical of the proposed approach to distinguish between contract employees based on the duration of employment.

Proposed Rule Consolidating Licensing Provisions and Exemptions. DDTC plans to issue a [proposed rule](#) involving the consolidation of ITAR Parts 123, 124, and 125. That consolidation will place most licensing exemptions into Part 125, while Part 123 will focus on the licensing requirements and Part 124 will focus on the licensing process. The Defense Trade Advisory Group (DTAG) recently [reviewed](#) this consolidation process in October 2023.

Final Rule Concerning the Personal Protective Equipment (PPE) Exemption. DDTC is preparing a [final rule](#) “to expand the list of personal protective equipment covered by the exemption in ITAR section 123.17.” DTAG [reviewed](#) this exemption in May 2021 and submitted proposed revisions based on its recommendations.

Corrections and Clarifications. DDTC expects to build upon the initial Part 120 consolidation effort with a [final rule](#) covering non-substantive corrections and clarifications. DDTC calls this corrections and clarifications rule “ITAR Reorg 1.5.”

Next Steps

Regulated parties affected by or interested in these rulemaking developments should monitor their progress and consider submitting public comments when the applicable notice appears in the Federal Register.

Contact Information



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