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DDTC Issues Proposed Rule Regarding Replacement Parts/Components and Defense Articles Incorporated into Dual-Use Items

On March 15, 2011, the Department of State, Directorate of Defense Trade Controls ("DDTC") issued a proposed rule to amend the International Traffic in Arms Regulations ("ITAR") in two important respects. 76 Fed. Reg. 13928. First, DDTC proposes to create a license exemption to allow for the export of replacement parts and components to support previously licensed defense articles. Second, DDTC proposes to eliminate export licensing requirements, in a limited number of instances, for defense articles that are incorporated into dual-use items subject to the Export Administration Regulations ("EAR"). DDTC is accepting public comment on the rule through April 14, 2011.

Replacement Parts and Components

DDTC proposes to create ITAR § 123.28 to allow for the expeditious shipment of replacement parts/components for certain U.S. origin defense articles previously licensed for export. Upon adoption of this rule, exporters will be permitted to export replacement parts/components without the need to obtain additional export licensing authorization. However, the proposed exemption outlines nearly a dozen restrictions or administrative requirements that may serve to limit its applicability. While certain of these requirements were to be expected (i.e., limitations on ITAR § 126.1 destinations and recognition of Congressional notification thresholds), two of the requirements may pose challenges to exporters that serve to limit the utility of the exemption.

First, the exporter of the replacement parts/components must be the applicant of the original authorization to export the end-item, which could cause logistical issues for exporters. DDTC declined to adopt a Defense Trade Advisory Group ("DTAG") recommendation that the exemption be extended to a "second exporter" such as a subcontractor or component supplier, stating that the DTAG term was too broad. However, DDTC did indicate that it is willing to "explore" the possibility of expansion beyond the original applicant, so this issue is ripe for comment by the regulated community. Second, the consignee of the replacement parts/components must be the foreign government approved under the original export authorization, and cannot be an affiliate, distributor or business partner, who may be the entity actually contracted to service and support the end-items in question. Exporters should consider whether this limitation defeats the purpose of the exemption and comment accordingly.

Defense Articles Incorporated into Items Subject to the EAR

In addition to the export of replacement parts/components, DDTC also proposes to modify the so-called "see through rule." Under that rule, the incorporation of a U.S. origin defense article into an otherwise commercial end-item effectively renders the commercial end-item subject to ITAR control. DDTC "sees through" the end-item to the defense article incorporated therein and continues to control the defense article. The proposed rule eliminates the need for ITAR authorization for two types of items: (1) defense articles incorporated into an end item that is subject to the EAR, and (2) defense articles incorporated into a component that is subject to the EAR. However, the conditions imposed in the proposed rule appear to severely limit its application in several areas. Three conditions in particular merit comment. First, the initial

premise of the rule assumes that the item at issue will be installed into "an end-item subject to the Export Administration Regulations." As written, the rule does not contemplate the incorporation of ITAR-controlled items into items that are not subject to the EAR, but also not ITAR-controlled (i.e., items incorporated into foreign origin dual use items). Manufacturers of foreign origin dual use items that incorporate ITAR-controlled components should consider commenting on the applicability of this rule to their end items. Second, the removal of the item must render the end-item *inoperable*, which may serve to limit the exemption's utility for less critical items. For example, the removal of a fastener or fuel tank bladder may well lessen the effectiveness of an aircraft, but will not render the aircraft "inoperable" as the term is normally understood. Finally, the value of the defense article must be less than 1% of the end-item. Exporters should consider commenting on whether this value requirement limits the utility of the exemption for certain high value components, and whether this requirement is necessary to accomplish the national security goals embodied by the rule.

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