

# Government Contracts Blog

Posted at 7:16 AM on September 13, 2010 by Sheppard Mullin

## **ITAR License Exemption Amended To Allow Hand-Carrying Of Technical Data Outside The United States**

By [John M. Hynes](#)

On August 27, 2010, the Department of State amended section 125.4(b)(9) of the International Traffic in Arms Regulations (“ITAR”) to clarify an exemption to the license requirement related to the hand-carrying of technical data outside the United States.

### **ITAR Treatment Of Technical Data Generally**

The ITAR generally dictate that certain defense-related articles and services found on the United States Munitions List may not be exported unless a license from the Department of State is obtained or a special ITAR exemption applies. 22 CFR § 123.1. The ITAR further require such a license for the export of “technical data.” *Id.* §§ 125.2; 125.3. “Technical data” means:

1. Information . . . which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation.
2. Classified information relating to defense articles and defense services;
3. Information covered by an invention secrecy order;
4. Software as defined in § 121.8(f) of this subchapter directly related to defense articles.
5. This definition does not include information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or information in the public domain as defined in § 120.11. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles. *Id.* § 120.10.

## **Amendments To ITAR Exemption For Certain Exports Of Technical Data**

ITAR section 125.4(b)(9) contains a special exemption to the license requirement for the export of technical data provided that certain requirements are met. As amended on August 27, 2010, ITAR section 125.4(b)(9) exempts the following export from the license requirement (important additions in italics):

Technical data, including classified information, *and regardless of media or format, sent or taken by a U.S. person who is an employee of a U.S. corporation or a U.S. Government agency to a U.S. person employed by that U.S. corporation or to a U.S. Government agency outside the United States.* This exemption is subject to the limitations of §125.1(b) of this subchapter and may be used only if:

- (i) The technical data is to be used *outside the United States* solely by a U.S. person;
- (ii) The U.S. person *outside the United States* is an employee of the U.S. Government or is directly employed by the U.S. corporation and not by a foreign subsidiary; and
- (iii) The classified information is sent *or taken outside the United States* in accordance with the requirements of the Department of Defense National Industrial Security Program Operating Manual (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed). 22 CFR § 125.4(b)(9).

As stated in the rule above, use of the exemption in ITAR section 125.4(b)(9) is limited by ITAR section 125.1(b). Under section 125.1(b), “the exemptions in section 125.4 may not be used for foreign production purposes or for technical assistance unless the approval of the Directorate of Defense Trade Controls has been obtained.” 22 CFR. § 125.1(b).

## **Department Of State Guidance On The Amendments**

The Department of State explained that the amendments to ITAR section 125.4(b)(9) are intended to clarify that the exemption “covers technical data, regardless of media or format, sent or taken by a U.S. person who is an employee of a U.S. corporation or a U.S. Government agency to a U.S. person employed by that U.S. corporation or to a U.S. Government agency outside the United States.” 75 Fed. Reg. 52625. The Department of State further made clear that the exemption explicitly allows “hand carrying technical data” outside the United States provided that the other requirements for the exemption are met. *Id.* Moreover, the exemption

allows the U.S. person who carries the technical data outside the United States to access the data him or herself. *Id.*

The Department of State also made clear that the exemption applies only to the sending or taking of technical data by a U.S. person who is an employee of a *U.S. corporation or U.S. Government agency* to another U.S. person who is an employee of *that same U.S. corporation or to a U.S. Government agency*. The Department of State rejected a recommendation that the exemption apply to an exporter who is a U.S. person and an employee of “*any entity, organization, or group incorporated or organized to do business in the United States*” and a recipient who is a U.S. person and an employee of that same entity, organization or group. 75 Fed. Reg. 52625-52626 (emphasis added). It likewise rejected a recommendation that the exemption apply to employees of “*accredited institutions of higher learning.*” *Id.* at 52626. While the ITAR do not define “*accredited institution of higher learning,*” the term is generally understood to mean a college or university accredited by a regional, national or professional accrediting agency. Accordingly, the exemption in ITAR section 125.4(b)(9) is narrow in scope and applies only to U.S. persons who are employees of U.S. corporations and U.S. Government agencies, and not any other entities, groups or organizations.

The Department of State also offered some guidance on the duty imposed on U.S. corporations using the exemption to send or carry technical data to an employee of a U.S. Government agency outside the United States. U.S. corporations must take “*reasonable precautions*” to ensure that the data will be used outside the United States solely by U.S. persons and that the recipient is in fact employed by a U.S. Government agency. 75 Fed Reg. 52625.

### **Implications Of The Amendments**

Prior to the amendments to ITAR section 125.4(b)(9), the exemption allowed U.S. corporations to send ITAR-controlled technical data to their employees and to U.S. Government agencies outside the United States, but did not allow for the hand-carrying (*i.e.*, taking) of technical data outside the United States. Thus, for an employee of a U.S. corporation to possess technical data outside the United States, that U.S. corporation had to send the technical data to the employee after the employee had arrived in the foreign country. U.S. persons were not permitted to take or carry technical data in any form outside the United States. For example, U.S. persons could not travel overseas with a laptop computer containing technical data.

The amendments make clear that U.S. persons are now permitted to hand-carry ITAR-controlled technical data outside the United States provided that certain requirements are met. The amendments also clarify that the technical data can be hand-carried outside the United States in any media or format. Thus, U.S. persons who are employees of U.S. corporations or U.S. Government agencies can now freely travel outside the United States with information that fits the ITAR definition of “*technical data*” in any form. For example, U.S. employees may carry outside the United States, among other things, hard copy documents, laptop computers, compact discs, cellular phones and flash drives containing technical data.

Those seeking to use amended ITAR section 125.4(b)(9) must remain mindful of the narrowly drawn requirements that must be met for the exemption to apply. First, they must be aware that

the exemption will not apply if the technical data is being carried for foreign production purposes or for technical assistance. Second, they must be certain that the employee carrying the technical data outside the United States is a U.S. person. Third, they must take all the necessary precautions to ensure that the data is shared only with (1) other U.S. persons who are employees of the same U.S. corporation as the U.S. person carrying the data (and not a foreign subsidiary of that corporation) or (2) an employee of a U.S. Government agency. Finally, if the technical data includes classified information, it must be carried outside the United States in accordance with the requirements of the Department of Defense National Industrial Security Program Operating Manual (unless such requirements conflicts with guidance of the Directorate of Defense Trade Controls, which must be followed).

### **Conclusion**

The amendments to ITAR section 125.4(b)(9) are a victory for U.S. corporations that are required to send employees outside the United States to conduct business. U.S. persons who are employees of U.S. corporations may now carry ITAR-controlled technical data outside the United States provided that the requirements discussed above are met. U.S. corporations no longer have to send such data to their employees after the employees arrive in the foreign country. In using the exemption, however, U.S. corporations must ensure that the narrowly drawn requirements for using the exemption are met.

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