

Export Authorizations Pertaining to U.S. Government: Current Scope and Historical Perspective

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The International Traffic in Arms Regulations (“ITAR”), administered by the U.S. Department of State’s Directorate of Defense Trade Controls (“DDTC”) and the Export Administration Regulations (“EAR”) administered by the U.S. Department of Commerce’s Bureau of Industry and Security (“BIS”) include authorizations for exports, reexports, or transfers involving the U.S. Government (“USG”) that do not require specific licenses (i.e., companies do not have to prepare and submit a license application to BIS or DDTC but can review the authorizations included in the regulations and if the conditions are met, rely on those authorizations for the export, reexport, or transfer).

Under the ITAR, this license exemption, “Transfers by or for the United States Government,” is included at 22 C.F.R. § 126.4 (“ITAR § 126.4”). Under the EAR, this license exception, “Governments, international organizations, international inspections under the Chemical Weapons Convention, and the International Space Station” (GOV), is included at 15 C.F.R. § 740.11 (“EAR § 740.11”).

This article summarizes the two key authorizations which are very important to U.S. industry in support of government objectives. Exporters should appreciate the conditions and limitations of each authorization, including the activities that are permissible and the countries where performance can take place. In some ways by understanding the historical evolution of these authorizations, companies can more easily comply with the regulations, understand when specific licenses are needed, and advocate for future expansion of these authorizations to support export compliance of industry as well as U.S. government missions and programs.

I. ITAR § 126.4

The ITAR § 126.4 exemption last updated April 19, 2019, authorizes exports, reexports, and transfers of defense articles *by or for* the USG.²

A. Paragraph (a): By a Department or Agency

Under ITAR § 126.4(a), an ITAR license is not required to export, reexport, retransfer, or temporarily import a defense article or perform a defense service, when made by a department or agency of the USG and one of the required conditions is met: (1) official use,³ (2) carrying out a cooperative program, (3) carrying out a foreign

¹ The authors gratefully acknowledge the considerable assistance of Lyric Perot, a 2022 Summer Associate at Hogan Lovells.

² Paragraph (c) contains an exemption for returns to the United States either to a department or agency of the USG, or to the person who exported the item. Paragraph (d) notes that this exemption does not authorize any department or agency to act inconsistently with statute, U.S. arms embargoes, or United Nations Security Council Resolutions. Paragraph (e) states that an electronic filing must be made for exports shipped pursuant to this exemption, and paragraph (f) notes that any change in end-use or end-user is not authorized without approval by the Directorate of Defense Trade Controls. 84 Fed. Reg. 16,401-2 (Apr. 19, 2019).

³ Official use is defined as including employees of the USG acting within their official capacity, or persons or entities in a contractual relationship with the USG using the defense article or performing the defense service to conduct the contracted-for activities within the scope of the contractual relationship and meeting certain additional criteria. *See* 84 Fed. Reg. 16,401-2 (Apr. 19, 2019).

assistance or sales program, or (4) any other security cooperation programs of the U.S. Department of Defense (“DOD”).

Paragraph (a)’s authorization for “official use” applies to (1) official use by a department or agency of the USG, including (i) employees in their official capacity, and (ii) persons or entities in a contractual relationship with the USG using the defense article or performing the defense service to conduct the contracted-for activities within the scope of the contractual relationship and (A) within a USG-controlled facility, (B) when an employee of the USG is empowered and responsible to ensure that the defense article is not diverted and is only used within the scope of the contractual relationship, or (C) authorized by the Deputy Assistant Secretary of State for DDTC at the request of a department or agency of the USG. However, the provisions in (a)(1)(ii) may not be used to release technical data to a person or entity of a country identified in § 126.1. They also *do not* generally authorize exports by U.S. contractors supporting USG programs.⁴ Rather, such exports generally must comply with the requirements put forth in paragraph (b) for non-government persons in contractual relationships with the USG.⁵

Paragraph (a) does not authorize transactions when a USG department or agency acts as a transmittal agent on behalf of a private individual or a firm. In addition, DDTC does not need to approve a change in end-use or end-user if the export, reexport, retransfer, or temporary import made by the USG was for official use by the USG, for carrying out a cooperative project pursuant to an international agreement or in arrangement with certain authorized international partners, or for carrying out any foreign assistance or sales program under (a)(2) and (a)(3).

B. Paragraph (b): By a Person on Behalf of a Department or Agency

Paragraph (b) authorizes exports, reexports, retransfers, and temporary imports made by another person *for* USG a department or agency (1) to a USG department or agency at its request or (2) to another entity at the written direction of a USG department or agency or pursuant to an international agreement or arrangement for an activity authorized for that department or agency that is for official use by the USG, for carrying out a cooperative project pursuant to international agreement, for carrying out any foreign assistance or sales program, or for any other security cooperating programs and activities of the DOD. The authorization under (b)(2) is only permitted when the agency itself would have been authorized under paragraphs (a)(1)-(a)(4).⁶

Technical data is eligible for authorization under paragraphs (a) and (b) if the transaction satisfies the provisions.⁷ However, (a)(1)(ii), which authorizes transactions for official use by a department or agency of the USG including by persons or entities in a contractual relationship with the USG, cannot be used to release technical data to a person or entity identified in § 126.1. Under (b)(1) transfers of technical information to a USG department or agency are approved pursuant to a “request,” while under (b)(2) transfers of technical information to an entity other than the USG or pursuant to an international agreement are approved pursuant to a “written request.”⁸ Government agencies are responsible for developing their own criteria and procedures of what

⁴ DDTC guidance on §126.4(a)(1)(ii) reads: “If a department or agency of the U.S. government is undertaking the transfer, they may do so if the recipient is a U.S. government employee or a person or entity in a contractual relationship with the U.S. government that satisfies the conditions outlined in ITAR § 126.4(a)(1)(ii)(A)-(D).” DDTC Guidance,

https://www.pmdtc.state.gov/ddtc_public?id=ddtc_public_portal_faq_detail&sys_id=c51459d4db7058d05c3070808c9619d5.

⁵ *Id.*

⁶ *Id.*

⁷ DDTC Guidance,

https://www.pmdtc.state.gov/ddtc_public?id=ddtc_public_portal_faq_detail&sys_id=4a0915d0dbf058d05c3070808c9619a0. In addition to § 126.4, other provisions in the ITAR such as 125.4(b) allow for transfers of technical data in various circumstances.

⁸ *Id.*

qualifies as a “request,” which means in some instances it could be verbal, but “written requests” may never be verbal.⁹

C. Conditions of ITAR § 126.4 Use

Broadly speaking, ITAR § 126.4 can be used to conduct classified transfers.¹⁰ It cannot be used in lieu of obtaining third party transfer approval for articles procured via the Foreign Military Sales program.¹¹ The person or entity undertaking any transfer is responsible for the filing, record keeping, and certification requirements, while the exporter should be able to satisfy relevant record keeping requirements.¹² The text of § 126.4 does not limit the scope of the exemption to apply only to certain portions of the USML, transfers otherwise prohibited by any other administrative provisions or by any statute are not permitted.¹³

Exemptions such as § 126.4 generally cannot be used to export to any proscribed § 126.1 country, with some exceptions, such as when the recipient is a USG department or agency.¹⁴ In addition to reviewing § 126.4, exporters must review §126.1 which has been recently amended in the context of sanctions against Russia. In relevant part, § 126.1 states:

The exemptions provided in this subchapter, except §§ 123.17, 126.4(a)(1) or (3) and (b)(1), and 126.4(a)(2) or (b)(2) when the export is destined for Russia and in support of government space cooperation, and § 126.6, or when the recipient is a U.S. government department or agency, do not apply with respect to defense articles or defense services originating in or for export to any proscribed countries, areas, or persons.¹⁵

On March 18, 2021, § 126.1 was amended to add the language “when the export is destined for Russia and in support of government space cooperation” which appears to narrow the use of the exemptions in § 126.4(a)(2) or (b)(2). Prior language in § 126.1 exempted “§ 123.17 of this subchapter and §§ 126.4(a)(1) or (3) and (b)(1) and 126.6, or when the recipient is a U.S. Government department or agency,”¹⁶ leaving out §§ 126.4(a)(2) and (b)(2) completely. The updated language therefore now includes an exception for exports, reexports, and transfers authorized by a cooperative program or completed by an entity other than the USG at the written

⁹ DDTC Guidance,

https://www.pmddtc.state.gov/ddtc_public?id=ddtc_public_portal_faq_detail&sys_id=e13855dcd058d05c3070808c96192a.

¹⁰ DDTC Guidance,

https://www.pmddtc.state.gov/ddtc_public?id=ddtc_public_portal_faq_detail&sys_id=5e991914dbf058d05c3070808c9619f5.

¹¹ DDTC Guidance,

https://www.pmddtc.state.gov/ddtc_public?id=ddtc_public_portal_faq_detail&sys_id=abc85d90dbf058d05c3070808c96191d.

¹² DDTC Guidance,

https://www.pmddtc.state.gov/ddtc_public?id=ddtc_public_portal_faq_detail&sys_id=f9591514dbf058d05c3070808c961940.

¹³ DDTC Guidance,

https://www.pmddtc.state.gov/ddtc_public?id=ddtc_public_portal_faq_detail&sys_id=ff685ddcd058d05c3070808c9619bf.

¹⁴ 22 C.F.R. § 126.1(a); DDTC Guidance,

https://www.pmddtc.state.gov/ddtc_public?id=ddtc_public_portal_faq_detail&sys_id=7fb9fc241ba36c14d1f1ea02f54bcb24.

¹⁵ 86 Fed. Reg. 14,803 (Mar. 18, 2021).

¹⁶ 84 Fed. Reg. 16,401 (Apr. 19, 2019).

direction of a department or agency or pursuant to an international agreement as long as the export is destined for Russia and in support of government space cooperation.

II. EAR GOV

EAR § 740.11, last updated on October 21, 2021 authorizes exports, reexports, or transfers of items subject to the EAR for or by the USG. The GOV license exception consists of five paragraphs, and only paragraph (b) deals with the USG.¹⁷ GOV (b)(2) authorizes exports, reexports, and transfers (in-country) (i) for personal use by personnel and agencies of the USG, (ii) *by* or consigned to a department or agency of the USG solely for its official use, (iii) *for* carrying out any USG program with foreign governments or international organizations, or (iv) at the direction of the DOD.¹⁸

A. GOV (b)(2)(i) : Items for Personal Use by Personnel and Agencies

Under GOV (b)(2)(i), items may be shipped for personal use by personnel and agencies of the USG only for items in quantities sufficient for the personal use of members of the U.S. armed forces or civilian personnel of the USG (including U.S. representatives to public international organizations),¹⁹ and their immediate families and household employees.

B. GOV (b)(2)(ii) : Made by or Consigned to a Department or Agency

GOV (b)(2)(ii), authorizes exports made *by* the USG to contractor support personnel of a USG department or agency when in the performance of their duties and pursuant to the applicable contract. Contractor support personnel is defined as those who provide administrative, managerial, scientific, or technical support under contract to a USG department or agency. Private security contractors do not qualify under this provision. It is limited to those individuals who are providing such support within a USG owned and operated facility or under the direct supervision of a USG employee. This authorization is not available when a USG department or agency acts as a transmittal agent on behalf of a non-USG person.

C. GOV (b)(2)(iii) : Made for or on Behalf of a Department or Agency

Exports, reexports, and transfers (in-country) that are made *for or on behalf of* a department or agency of the USG under (b)(2)(iii) are also permitted in certain circumstances. Exports, reexports, and transfers (in-country)

¹⁷ The first paragraph addresses international safeguards designed to ensure that special nuclear materials and other related nuclear facilities, equipment, and material are not diverted from peaceful purposes to non-peaceful purposes, while the third paragraph authorizes exports, reexports, and transfers (in-country) of certain items to agencies of cooperating governments or agencies of the North Atlantic Treaty Organization (NATO), including all civilian and military departments, branches, missions, and other governmental agencies of a cooperating national government. “Cooperating governments” include the countries listed in Country Group A:1 (Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Ireland, Italy, Japan, South Korea, Latvia, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom) as well as Singapore and Taiwan. The fourth paragraph authorizes international inspections under the Chemical Weapons Convention and the fifth paragraph authorizes exports and reexports of certain commodities to launch sites for supply missions to the ISS.

¹⁸ License exception GOV does not have the same country designation eligibility carve outs as the exemptions in the ITAR for § 126.1 countries and exporters may have to simultaneously comply with sanctions regulations administered by the U.S. Treasury Department’s Office of Foreign Assets Control (“OFAC”) at the same time as complying with the EAR or ITAR, as applicable. *See* 15 C.F.R. Part 746.

¹⁹ Items for personal use are defined as including household effects, food, beverages, and other daily necessities.

solely for use by a department or agency of the USG are authorized when the items are destined for a U.S. person and the item is sent pursuant to a contract between the exporter and a department or agency of the USG.²⁰

Paragraph (b)(2)(iii)(B) authorizes exports, reexports, and transfers (in-country) of items to implement or support any USG cooperative program with a foreign government or international organization or agency.²¹ For the purposes of this paragraph, non-governmental organizations are not considered international organizations.²² However, the items do not need to be consigned to the foreign government, international organization or agency, as long as the cooperative program is in force.²³ When that is the case, the consignee must be a documented participant in the program, project, agreement, or arrangement and the responsible agency must certify to the exporter that the consignee is such a participant.²⁴

Paragraph (b)(2)(iii)(C) authorizes the temporary (i.e., within four years of the date of export, reexport, or transfer) export, reexport, or transfer (in-country) of an item in support of any foreign assistance or sales program provided certain conditions are met.²⁵ This temporary authorization cannot be used if one knows at the time of import that an item is for a permanent export, reexport, or transfer (in-country).²⁶ Paragraph (b)(2)(iii)(D) authorizes the export, reexport, or transfer of commodities or software at the direction of the DOD for an end use in support of an Acquisition and Cross Servicing Agreement. Paragraph (b)(2)(iii)(E) authorizes the export, reexport, or transfer (in-country) of Government Furnished Equipment made by a USG contractor in certain conditions. Government Furnished Equipment is property in the possession of, or directly acquired by, the Government and subsequently furnished to the Contractor for performance of a contract.²⁷

D. GOV (b)(2)(iv) : At the Direction of the Department of Defense

Under paragraph (b)(2)(iv), items exported, reexported, or transferred (in-country) at the direction of the U.S. DOD with official written request or directive are also authorized.²⁸

Selected History of ITAR Authorizations Pertaining to U.S. Government

The 1955 Rule

On August 26, 1955, the ITAR were first published in their current form under the authority of the Mutual Security Act of 1954 and the USG authorizations exemption was included under § 75.70 entitled “Shipment by or to the United States Government.”²⁹ The authorizations included in this original ITAR rule broadly provided that the exportation of arms, ammunition and implements of war *by* or consigned *to* the USG or any agency thereof did not require an import or export license.³⁰

²⁰ Solely is defined as only for uses specific to the USG. BIS Guidance, <https://www.bis.doc.gov/index.php/policy-guidance/faqs>.

²¹ *Id.*

²² *Id.*

²³ *Id.* For example, the exporter could export directly to a non-governmental organization or aid recipient, provided there was an agreement between the USG and the foreign government or international organization or agency, and the non-governmental organization was assisting them with implementing the cooperative program, project, agreement, or arrangement, or the aid recipients were the intended beneficiaries of the program or agreement.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ 86 Fed. Reg. 58,209 (October 21, 2021).

²⁹ 20 Fed. Reg. 6,254 (August 26, 1955).

³⁰ The 1955 text reads in full: “The exportation of arms, ammunition, and implements of war by the United States Government or any agency thereof is not subject to the provisions of the Mutual Security Act, and therefore an

The 1984 Rule

Following some revisions in 1969, the Mutual Security Act was largely superseded by the Arms Export Control Act (AECA) in 1976, expanding the President's authority to control the export and import of defense articles and defense services.³¹ On December 19, 1980, a proposed revision to the ITAR was published and received extensive comments from the public resulting in a series of changes to the proposed rule which culminated in a final rule published on August 29, 1984.³² After receiving some further comments, this rule was revised and republished on December 6, 1984. The 1984 changes to the ITAR attempted to: incorporate changes in government policies and licensing procedures, improve its organization, simplify and modernize its terminology, improve its enforceability, and implement recent Congressional notification requirements.³³ No specific comments or reasons for the significant §126.4 reform in 1984 are included in the Federal Register.³⁴

Renumbered as ITAR § 126.4 and entitled "Shipments by or for United States Government Agencies," the updated 1984 exemption was broken into three paragraphs.³⁵ The first paragraph stated that a license was not required for export of any defense article or technical data by or for any agency of the USG so long as it was for official use by a USG agency or for carrying out any foreign assistance or cooperative or sales program.³⁶ The rule further stipulated that special approval from the Office of Munitions Control (the precursor to DDTC) must be obtained to permanently transfer a defense article to a foreign person unless the transfer was pursuant to a sale, lease, or loan under the AECA or Foreign Assistance Act or the defense articles were rendered useless for military purposes beyond the possibility of restoration.³⁷ The second paragraph of the rule provided that no exports by a government agency were permitted that would otherwise be prohibited by administrative provisions or statute.³⁸ The third paragraph of the rule provided that a license was not required for the export of any defense article or technical data provided it had an end-use by a USG agency and was pursuant to contract or written direction by a USG agency, the end-user was a USG agency or facility and the defense articles or technical data were not transferred to a foreign person, and the export was urgent. ITAR § 126.6 was also added in the 1984 rule to exempt certain exports of defense articles and services sold by DOD to foreign governments or international organizations.³⁹

The 2019 Rule

In 1993, a revised rule was published that, pursuant to ITAR §126.4, authorized temporary imports and temporary exports and certain transfers resulting in U.S.-origin defense articles incorporated into foreign-owned launches or satellites to be launched overseas are permanent exports and require the prior approval of DDTC, thereby not qualifying for the exemption.⁴⁰ Revisions in 2005 and 2017 made very minor changes to the exemption.

In 2019 a major revision to the ITAR and to § 126.4 occurred, which is the last major revision to date. The purpose of the revision was to clarify when exports, reexports, retransfers, temporary imports, and performance

export license is not required. The importation of arms, ammunition, and implements of war consigned to the United States Government or any agency thereof is not subject to the provisions of the Mutual Security Act and therefore an import license is not required." 20 Fed. Reg. 6,254 (August 26, 1955).

³¹ 49 Fed. Reg. 47,682 (Dec. 6, 1984).

³² *Id.*

³³ *Id.*

³⁴ 49 Fed. Reg. 47,683 (Dec. 6, 1984).

³⁵ 49 Fed. Reg. 47,702 (Dec. 6, 1984).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 58 Fed. Reg. 39,282 (July 22, 1993).

of defense services may be made by and for the USG without a license.⁴¹ Prior to this revision, ITAR § 126.4 and its predecessors only authorized exports, reexports, retransfers, temporary imports, and performance of defense services when made *by* the USG (now authorized by ITAR § 126.4(a)). Based on public comment, the rule expands the exemption to allow for permanent exports, reexports, and retransfers, in addition to temporary exports and imports, and to allow transfers by third parties acting *for* the USG (now generally authorized by ITAR § 126.4(b)).⁴² As such, the heading of the rule was also amended to read: “Transfers by or for the United States Government.”⁴³ The rule removes the requirement that all aspects of the transaction be conducted by the USG and eliminated language limiting the scope of the rule to temporary imports and temporary exports.

Addressing Comments and Purpose Between 1955-2019

Comments related to the § 126.4 exemption requested clarifying conditions in which contractors fell under the purview of the exemption, expanding the rule to allow for permanent exports, and removing the requirement that the USG perform or direct all aspects of the transaction.⁴⁴ Some commenters to the 2019 rule remarked that any reference to technical data was removed.⁴⁵ DDTC explained that because technical data falls within the definition of defense articles, reference to technical data was removed. DDTC clarified that the exemption authorizes exports of technical data.⁴⁶ Some commenters requested clarification regarding scope of official use, some requested the allowance of use by contractors who are not U.S. persons, one commenter requested that the scope allowed by contractors under the exemption be reevaluated, and another asked DDTC to state that any use by a USG contractor in the course of a contract is within the scope of official use.⁴⁷ In response to these comments, DDTC revised the provisions regarding use by a U.S. government contractor, providing that use by contractors is within the scope of the exemption when: (1) within a USG-owned facility, (2) a USG employee is responsible for control of the defense articles, or (3) otherwise approved by DDTC.⁴⁸ The rule also no longer requires contractors to be U.S. persons, however § 126.1 country contractors are still prohibited.⁴⁹ These revisions are found in the current version of the ITAR at § 126.4 (a)(1)(ii).

Some commenters requested clarification about the scope of “any foreign assistance, cooperative project, or sales program authorized by law.”⁵⁰ While the DDTC declined to provide a general rule on such transfers, it noted that exporters should be guided by their authorizing language, such as in an international agreement or statute.⁵¹ Another comment requested the provision requiring the USG to perform or direct all aspects of the transaction be removed.⁵² The Department complied, replacing it with provisions providing specific guidance that most exports by third parties will require written direction from the USG.⁵³

On October 22, 2020, the U.S. Department of State’s Defense Trade Advisory Group (“DTAG”) responded to DDTC’s request for insights on the updated § 126.4 exemption’s utility and recommendations for improvement.⁵⁴ DTAG first reported that industry was very supportive and appreciative of the revised § 126.4

⁴¹ 84 Fed. Reg. 16,398 (Apr. 19, 2019).

⁴² 84 Fed. Reg. 16,400 (Apr. 19, 2019).

⁴³ 84 Fed. Reg. 16,399 (Apr. 19, 2019).

⁴⁴ 84 Fed. Reg. 16,398-9 (Apr. 19, 2019).

⁴⁵ 84 Fed. Reg. 16,400 (Apr. 19, 2019).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 84 Fed. Reg. 16,399 (Apr. 19, 2019).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ U.S. Department of State Directorate of Defense Trade Controls, Defense Trade Advisory Group Plenary, slides 91-101 (Oct. 22, 2020), https://www.pmdtc.state.gov/sys_attachment.do?sys_id=3e24ef961b8ce0502b6ca932f54bcb78.

exemption.⁵⁵ However, based on discussions with industry, DTAG identified three main areas for improvement: clarity and consistency on “written direction”; limited use of § 126.4 in § 126.1 countries; and international agreements.⁵⁶

ITAR § 126.4(b)(2) authorizes exports without a license “at the written direction of a department or agency of the U.S. Government.” However, DTAG notes that what constitutes “written direction” is unclear, and agency guidance is unavailable and inconsistent, driving confusion for industry.⁵⁷ In addition to defining that term, DTAG recommends revising § 126.4(b)(2) further to allow exports within the scope of contract or subcontract issued by a department or agency without any further written direction.⁵⁸

§ 126.1(a) prohibits the use of § 126.4(b)(2) to export to proscribed destinations, regardless of whether the recipient is a U.S. contractor or a coalition partner, making it very difficult for U.S. Government Support Contracts to be fulfilled, impacting critical security cooperation activities.⁵⁹ DTAG recommends that § 126.1(a) be revised to allow the use of § 126.4(b)(2) for exports to proscribed destinations as long as there is not a transfer to “a person or entity to whom prohibitions set forth in 126.1 are applicable.”⁶⁰

Finally, DTAG identified a concern with ambiguity surrounding what an “international agreement” is defined as under § 126.4(b)(2) which authorizes exports and the performance of defense services when such activities are pursuant to an international agreement or arrangement.⁶¹ DTAG recommends defining “international agreement” and providing additional guidelines for requesting definitive clarification on agreement or arrangement scope and limitations, as well as eligibility under § 126.4(b)(2), such as a statement or certification in a USG contract.⁶²

Selected History of EAR Authorizations Pertaining to U.S. Government

The 1996 Rule

In 1993, the Secretary of Commerce submitted a report to conduct a comprehensive review of the EAR to “simplify, clarify, and make the regulations more user-friendly.”⁶³ As a part of this initiative, on May 11, 1995, the first mention of a “GOV” license exception was published in the Federal Register.⁶⁴ This proposed amendment was introduced to consolidate numerous license exceptions into a smaller number of license exceptions assembled in one part of the EAR.⁶⁵ The GOV license exception, then listed under §740.6 and titled “Governments,” allowed for certain items to be exported and reexported to personnel and agencies of the USG or agencies of cooperating governments.⁶⁶ The items authorized included: (1) Items for personal use by personnel and agencies of the USG, (2) Items for official use by personnel and agencies of the USG, (3) Items for official use within national territory by agencies of cooperating governments, and (4) Diplomatic and consular missions of a cooperating government.⁶⁷ The rule also included definitions of “agency of the U.S. Government” and

⁵⁵ *Id.* at slide 95.

⁵⁶ *Id.* at slide 94.

⁵⁷ *Id.* at slide 96.

⁵⁸ *Id.* at slide 97.

⁵⁹ *Id.* at slide 98.

⁶⁰ *Id.* at slide 99.

⁶¹ *Id.* at slide 100.

⁶² *Id.* at slide 101.

⁶³ 61 Fed. Reg. 12,714 (Mar. 25, 1996).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ 61 Fed. Reg. 12,775-6 (Mar. 25, 1996).

⁶⁷ *Id.*

“agency of a cooperating government.”⁶⁸ Notably absent from this 1996 rule is any applicability of the GOV exception to parties acting on behalf of the USG, such as contractors.

However, the interim rule expanded the proposed GOV license exception by adding a paragraph addressing international nuclear safeguards and specifying items that can be exported under the GOV exception under categories (3) and (4) for official use within national territory by agencies of cooperating governments and diplomatic and consular missions of a cooperating government.⁶⁹ Comments on this interim rule led to a revision published in the Federal Register on December 4, 1996.⁷⁰ The revised 1996 rule also added Hong Kong, New Zealand, and Taiwan to the list of “cooperating” countries and renumbered the exception to §740.10.⁷¹

The 2013 Rule

In 2009 President Obama directed a broad-based review of the U.S. export control system “in order to identify additional ways to enhance national security.”⁷² While minor changes had been made to the GOV exception over the years, including which countries or specific items were eligible, in 2010 the GOV exception was further expanded to allow for exports or reexports for commodities needed at a launch destination outside of the U.S. for use on the International Space Station.⁷³ In 2011, public comments were solicited for a major revision to the GOV exception.⁷⁴ Received comments combined with BIS’s internal analysis prompted an interim rule proposing significant revisions to the now §740.11 GOV exception.⁷⁵ Specifically, the comments requested that the GOV license exception be expanded to include third parties acting on behalf of the USG, such as contractors, which was incorporated in the 2012 interim rule and ultimately published on April 16, 2013, in the final rule.⁷⁶

Addressing Comments and Purpose Between 1996 – 2013

The differences between the 2013 rule and the 1996 rule are numerous. The 2013 rule restructured GOV into five main paragraphs rather than two, and only the second paragraph addresses the USG.⁷⁷ The second paragraph

⁶⁸ 61 Fed. Reg. 12,776 (Mar. 25, 1996).

⁶⁹ 61 Fed. Reg. 12,775-6 (Mar. 25, 1996).

⁷⁰ 61 Fed. Reg. 64,272-3 (Dec. 4, 1996).

⁷¹ 61 Fed. Reg. 64,273 (Dec. 4, 1996). Hong Kong has not been considered a “cooperating country” since 2020, as transactions with Hong Kong are considered transactions with China. *See* BIS Guidance, <https://www.bis.doc.gov/index.php/policy-guidance/foreign-import-export-license-requirements/hong-kong>.

⁷² 78 Fed. Reg. 22,661 (Apr. 16, 2013).

⁷³ 75 Fed. Reg. 6,301 (Feb. 9, 2010).

⁷⁴ 78 Fed. Reg. 22,661 (Apr. 16, 2013).

⁷⁵ *Id.*

⁷⁶ The main difference in the final 2013 rule compared to the 2012 interim rule is that it adds “or transferred (in-country)” to a number of paragraphs and it removes a paragraph authorizing the “export, reexport, or transfer of an item to implement or support a program directed by the Secretary of Defense, with the concurrence of the Secretary of State, to build the capacity of: A foreign government’s national military forces in order for that country to conduct counterterrorist operations or participate in or support military and stability operations in which the U.S. Armed Forces are a participant; or a foreign country’s maritime security forces to conduct counterterrorism operations” under certain conditions. *See* 77 Fed. Reg. 37,536-40 (June 21, 2012); 78 Fed. Reg. 22,661 (Apr. 16, 2013).

⁷⁷ The first paragraph addresses International Safeguards ensuring that nuclear materials are not diverted from peaceful purposes to non-peaceful purposes, not included in the original 1996 version of the exception. The third paragraph of the rule addresses Cooperating Governments and contains the same categories included in the 1996 rule: (1) Items for official use within national territory by agencies of cooperating governments and (2) Diplomatic and consular missions of a cooperating government.⁷⁷ The third paragraph of the rule also contains some specific exceptions for cooperating governments. Finally, the 2013 rule also contains a fourth paragraph for international inspections under the Chemical Weapons Convention and a fifth paragraph for certain exports

of the rule pertains to the USG and is broken into 4 largely different categories than the 1996 rule: (1) Items for personal use by personnel and agencies of the USG, (2) Exports, reexports, and transfers (in-country) made by or consigned to a department or agency of the USG, (3) Exports, reexports, and transfers (in-country) made for or on behalf of a department or agency of the USG, and (4) Items exported at the direction of the DOD. Notably, the three latter categories have been added to the rule, there is no longer a category for “official use”, and the two categories for cooperating governments included as (3) and (4) in the 1996 rule have been broken out in the 2013 rule to create a separate third paragraph of the rule.

Paragraph (b)(2) broadens the exception for the USG to authorize additional exports, reexports, and transfers (in-country) that are not consigned to and for the official use of the USG, but are “closely tied”, (i.e., exported, reexported, or transferred (in-country) in order to “further the U.S. Government interests of the specific agency).”⁷⁸ The rule was specifically broadened in two ways: adding a definition for contract support personnel, and addressing scenarios for USG exports to a foreign government or an international organization.⁷⁹ This revision was one of the most responsive additions to the 2013 rule, based on input from commenters, as it includes “contractor support personnel” of a department or agency of the USG if their duties are conducted pursuant to the applicable contract or other official duties. The term “contractors” only applies to people who provide administrative, managerial, scientific, or technical support under a contract with a USG department or agency. While paragraph (b)(2) does broaden the exception for contractors, it also sets forth specific criteria that must be met to qualify for the exception. The relevant criteria are: acting in the performance of the contracted duties pursuant to the applicable contract or other official duties and providing only administrative, managerial, scientific, or technical support within a USG-owned or operated facility or under the direct supervision of a USG employee.

Paragraph (b)(4) implemented changes to DOD authorized shipments, notably broadening their authorization to align the EAR authorizations with the ITAR authorizations.⁸⁰ This change was implemented because of commentary that the ITAR and EAR did not have matching scope in their government license exceptions, and therefore BIS wanted to include authorizations under the EAR that are similar to ITAR authorizations.⁸¹ Another key reform objective was to address DOD’s interoperability issues with close allies overseas, so the 2013 rule in (b)(2)(iv) authorizes both contractor and USG exports pursuant to an official written directive from the DOD.⁸²

In conclusion, over the years, both the EAR GOV and ITAR § 126.4 license exceptions for exports, reexports, and transfers have become increasingly aligned in scope, and have been expanded to allow for exports, reexports, and transfers *for* the USG, rather than just *by* the USG. These changes have benefitted government and industry. DDTC in particular should consider whether § 126.4 has enough flexibility for government contractors as increasingly the U.S. government is asking contractors to take on more tasks and responsibilities directly when dealing with foreign contractors or government officials.

to launch sites for supply missions to the International Space Station. Neither of these latter portions were included in the 1996 version of the rule.

⁷⁸ BIS License Exceptions Doc. 2942649, page 12, <https://www.bis.doc.gov/index.php/documents/pdfs/1492-2016-license-exceptions-webinar-transcript/file>.

⁷⁹ *Id.* at 12-13.

⁸⁰ *Id.* at 12.

⁸¹ *Id.*

⁸² *Id.*