



Important ITAR Amendments for Additions to the §126.1 List of "Proscribed Countries"

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The State Department's Directorate of Defense Trade Controls (DDTC) took a number of significant actions to expand the list of destinations listed as "Proscribed Countries" in ITAR §126.1. This is an important compliance development for companies engaged in activities subject to ITAR.

Russia. On March 18, 2021 the State Department adopted an amendment to ITAR §126.1(d)(2) to add Russia to the countries that are subject to a policy of denial for exports of defense articles and defense services, subject to certain exceptions. (See also amendment to §126.1(d)). An exception was made to allow for the case-by-case review of exports to Russia that support government space cooperation. In addition, an exception, valid for six months from the date of the Secretary of State's determination, was made to permit case-by-case review of exports to Russia when in support of commercial space launches. Finally, ITAR §126.1(a) was amended to permit the use of the exemptions set forth in ITAR §126.4(a)(2) and (b)(2) when the export is destined for Russia and in support of U.S. government space cooperation.

Hong Kong. In a previous action DDTC announced a change in policy to treat Hong Kong as part of the People's Republic of China under ITAR.^[1] China is already listed among the countries subject to a policy of denial under ITAR §126.1. (See ITAR §126.1(d)(1).) As a result of this action, exports to Hong Kong of ITAR-controlled items are now considered exports to China and treated as exports to a §126.1 "Proscribed Country." DDTC also announced that it will review on a case-by-case basis license applications to export defense services to Hong Kong persons who (i) are physically located outside of Hong Kong or China; and (ii) were authorized to receive defense articles prior to July 14, 2020. DDTC has also advised that exporters may continue to rely on available exemptions consistent with the provisions of ITAR §126.1(a).

Requirements That Apply To "Proscribed Countries." The §126.1 list of Proscribed Countries is the "third rail" of ITAR compliance. As referenced above, if a country is designated on this list it is subject

to a policy of denial for export authorizations except for rare exceptions. Equally as important, the following restrictions also apply for potential transactions involving such countries:

1. No Proposals or Presentations To Sell ITAR-Controlled Items. Parties are prohibited from making any proposal or presentation to sell, export, reexport or retransfer any defense articles or defense services subject to ITAR to any country identified in ITAR §126.1 (including the embassies or consulates of such countries), or to any person acting on behalf of such countries, whether in the United States or abroad, without obtaining advanced written approval from DDTC. Thus merely submitting a proposal or offer for a sale to a Proscribed Country or representative thereof without an actual sale, even if made in the U.S., without advanced DDTC authorization constitutes an ITAR violation.
2. Obligation For Mandatory Disclosures To DDTC. Further, if a party knows or has reason to know of a proposed, final, or actual sale, export, reexport or retransfer of ITAR-controlled articles, services, or data to a Proscribed Country, the party is required to immediately inform DDTC of such event through a submission to DDTC's Office of Defense Trade Controls Compliance. Thus making an unauthorized proposal not only constitutes a violation but also requires the party to immediately submit a disclosure to DDTC.
3. No Proposals For or Performance of ITAR Brokering Activities; Mandatory Disclosures. Under ITAR §129.7, no person may engage in or make a proposal to engage in "brokering activities"[2] that involve any country, area, or person referred to in ITAR §126.1 without first obtaining DDTC authorization. In addition, any person who knows or has reason to know of brokering activities involving such countries or persons must immediately inform DDTC through a mandatory disclosure.
4. Shipments On Vessels, Aircraft or Spacecraft Owned/Operated by Persons From A Proscribed Country . Under ITAR §126.1(b), items subject to ITAR that have been licensed or otherwise authorized for export, temporary import, reexport or retransfer by DDTC may not be shipped on a vessel, aircraft, spacecraft or other means of conveyance that is owned by, operated by, leased to, or leased from any of the Proscribed Countries, areas, or other persons referred to in ITAR §126.1.

DDTC views ITAR-controlled activities involving the Proscribed Countries as extremely sensitive and warranting a heightened level of controls. Thus even the addition of one or two countries to this list can have important implications in an ITAR compliance program.

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[1] See DDTC Notice of License Policy Change and FAQs dated July 15, 2020 on the DDTC website.

[2] The term "Brokering Activities" is defined at 22 CFR §129.2(b).

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