# ECR marches on: State and Commerce announce more proposed changes

**By Thad McBride and Cheryl Palmeri, Bass, Berry & Sims PLC**

**www.bassberry.com**

As yet another step in the continuing Export Control Reform ('ECR') effort, the U.S. government has recently issued a series of proposed rules that may help clarify key regulatory definitions and requirements that have confused exporters in the past. In particular, the proposed rules may ease licensing requirements for U.S. persons – and the employers of U.S. persons – working in the global defence industry.

First, on 26 May, the U.S. Department of State, Directorate of Defense Trade Controls ('DDTC') proposed changes to the International Traffic in Arms Regulations ('ITAR') to clarify the registration and licensing requirements that apply to U.S. persons in the United States or abroad who furnish defence services to, or on behalf of, their non-U.S. person employers. See 80 Fed. Reg. 30001 (26 May 2015).

Then, on 3 June, DDTC issued proposed revisions to help clarify the scope of activities and information covered by the ITAR. See 80 Fed. Reg. 31525 (3 June 2015). The same day, the U.S. Department of Commerce, Bureau of Industry and Security ('BIS') issued a parallel proposed rule to amend key definitions of the U.S. Export Administration Regulations ('EAR'). See 80 Fed. Reg. 31505 (3 June 2015).

What follows is a brief summary of several of the key changes.

## Technical data

The U.S. government generally prohibits unauthorised exports, re-exports, or transfers of controlled articles or certain information related to those articles. Under both the ITAR and the EAR, information is controlled if it is 'required' for certain activities involving controlled articles. In the past, the term 'required' was defined in the EAR, but not the ITAR. This deficiency left many manufacturers of defence articles – and those who provide defence services – scratching their heads. Under the proposed revisions, the ITAR would include a definition of 'required' mirroring that of the EAR: information would be controlled only if it is 'peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions' of a defence article. It remains to be seen how useful this proposed definition will be, but at the least, general information about a defence article would seem to be excluded from the scope of 'required' information.

## Export

What qualifies as an 'export' of controlled information has always been a sticky concept. In the context of cloud computing, it has been as sticky as Super Glue: information stored 'on the cloud' can transit or be stored on servers in any number of countries.

Both DDTC and BIS are proposing to refine the definition of export and specifically exclude (among other information) certain cloud-based information. Under the proposed rules, as long as such information is (i) unclassified, (ii) secured using acceptable end-to-end encryption, and (iii) not stored in certain problematic countries, it will not be considered to have been exported.

## ITAR registration and licensing requirements

The ITAR currently require any person 'in the United States' who engages in activities covered by the ITAR to register with DDTC. Under the 26 May rule, the ITAR would be amended to clarify that: (i) U.S. persons performing defence services abroad also must register; (ii) subsidiaries and affiliates controlled by a registrant may be included on the registrant's registration statement; and (iii) natural persons employed by a registrant, or by its affiliates or subsidiaries that are listed on its registration statement, are deemed to be registered.

In addition, the proposed revisions would authorise U.S. person regular employees of a non-U.S. subsidiary or affiliate listed on a U.S. person's registration to provide defence services without additional authorisation under certain conditions.

Importantly, the proposed revisions would, in certain cases, permit natural U.S. persons employed by a non-U.S. person to furnish defence services to and on behalf of the employer without a licence. This revision would only apply when the non-U.S. employer is located within a NATO or EU country, Australia, Japan, New Zealand, or Switzerland, or if the defence services are provided in support of an active foreign military sale contract and are identified in an executed letter of offer and acceptance. Other limitations also apply.

## Conclusion

The 26 May and 3 June rules contain a number of other proposed revisions to the ITAR and EAR that, if implemented, will impact companies in the United States and elsewhere. Overall, as with the ECR effort generally, the hoped-for outcome is that some restrictions – on persons and entities, on licensing and registration, and on exports of goods and information – will be liberalised.

Comments on the proposed rules are being accepted until 27 July (for the proposed rule issued on 26 May) and 3 August (for the proposed rules issued on 3 June).

Many exporters could be dramatically affected by a number of the proposed changes – including those not specifically addressed here. We therefore encourage the exporting community to review the proposed rules and consider commenting. To truly accomplish ECR's goal of improving U.S. export control laws, DDTC and BIS need to hear from those affected.

This article is reproduced from the June 2015 issue of WorldECR, the journal of export controls and sanctions.

**www.worldecr.com**