 PART 129—REGISTRATION AND LICENSING OF BROKERS

8. The authority citation for part 129 is revised to read as follows:


§129.7 [Amended]
9. Section 129.7 is amended by removing paragraph (e).

§129.8 [Amended]
10. Section 129.8 is amended by removing paragraph (c).

Dated: August 18, 2010.
Ellen O. Tauscher,
Under Secretary, Arms Control and International Security, Department of State.

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DEPARTMENT OF STATE

22 CFR Part 125

[Public Notice: 7135]
RIN 1400–AC59

Amendment to the International Traffic in Arms Regulations: Export Exemption for Technical Data

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: The Department of State is amending the International Traffic in Arms Regulations (ITAR) to clarify an exemption for technical data. The clarification is 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 under certain specified circumstances reflected in 22 CFR 125.4(b)(9)(i) through (iii) (74 FR 61292). This amendment will add after the word “information” the words “and regardless of media or format.” Also, the words “sent” by a U.S. corporation to a U.S. person employed by that corporation overseas or to a U.S. Government agency” has been replaced by “sent or taken by a U.S. person who is an employee of a U.S. corporation or a U.S. Government agency to a U.S. person employed by that corporation or to a U.S. Government agency outside the United States.” Thus, the exemption will explicitly allow hand carrying technical data by a U.S. person employed by 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, as long as certain criteria in §§ 125.4(b)(9) and 125.4(b)(9)(ii)–(iii) are met. The word “overseas” will be replaced by “outside the United States” at §§ 125.4(b)(9), 125.4(b)(9)(i), 125.4(b)(9)(ii), and 125.4(b)(9)(iii). Also, § 125.4(b)(9)(ii) will be amended to add the words “or taken” after the word “sent.” As stated in 22 CFR 125.4(a), this exemption does not apply to exports to proscribed destinations under 22 CFR 126.1.

The Proposed Rule had a comment period ending January 25, 2010. Nine parties filed comments by January 25 recommending changes. Having thoroughly reviewed and evaluated the comments and the recommended changes, the Department has determined that it will, and hereby does, adopt the Proposed Rule, with minor edits, and promulgate it as a final rule.

The Department’s evaluation of the written comments and recommendations follows:

Comment Analysis

One commenting party recommended that “sent or taken” be changed to “sent, taken or accessed.” This recommendation was deemed not necessary since it is implied the U.S. person who is an employee of a U.S. corporation or the U.S. person who is an employee of a U.S. Government agency taking the technical data outside of the United States may access the technical data.

One commenting party inquired whether a U.S. corporation (manufacturer) could use the exemption to send (orally or via e-mail) technical data to an employee of a U.S. Government agency outside the United States, as well as what steps the U.S. manufacturer would take to ensure that 22 CFR 125.4(b)(9)(i)–(ii) are met. The U.S. corporation (in compliance with 22 CFR part 122) is able to use the exemption to send (orally or via e-mail) technical data to a U.S. person employed by a U.S. Government agency outside the United States, so long as the U.S. company takes reasonable precautions to ensure that conditions in 22 CFR 125.4(b)(9)(i) through (ii) are met:

1. The technical data will be used outside of the United States solely by U.S. persons; and
2. The U.S. person outside of the United States is employed by a U.S. Government agency.

Two commenting parties recommended that it be explicit that the technical data could be for “personal use” by the U.S. person claiming the exemption. That recommendation was not adopted since it introduced uncertainty about uses beyond those related to employment.

One commenting party pointed out that when technical data is exported from a U.S. port using an exemption, the ITAR does not require the report of such an export using the Automated Export System (AES); instead, the exporter is to provide electronic notification directly to the Directorate of Defense Trade Controls (DDTC) (see 22 CFR 123.22(b)(3)(iii)). The commenting party recommended that if the system to electronically file directly to DDTC is not going to be implemented, then DDTC should arrange for AES to be the reporting mechanism. The commenting party also recommended that if classified technical data is being exported under the provisions of the Department of Defense National Industrial Security Program Operating Manual, an Electronic Export Information should be filed within AES. For exports of technical data using exemptions, there is no system to electronically file directly to DDTC. DDTC is reviewing carefully the possibility of having all exports of technical data using an exemption be reported using an Electronic Export Information within Census Bureau’s Automated Export System.

Two commenting parties recommended the exemption at § 125.4(b)(9) be expanded so the exporter would be a U.S. person who is an employee of any entity, organization, or group incorporated or organized to do business in the United States. Also, the recipient would be a U.S. person employed by that entity, organization,
mandate that will result in the
Unfunded Mandates Reform Act of 1995
analysis under the Regulatory
Regulatory Flexibility Act
procedures contained in 5 U.S.C. 553
affairs function of the United States and,
Regulatory Analysis and Notices
Administrative Procedure Act
This amendment involves a foreign
Regulatory Flexibility Act
Since this amendment is not subject
to 5 U.S.C. 553, it does not require
analysis under the Regulatory
Unfunded Mandates Reform Act of 1995
This amendment does not involve a
mandate that will result in the
expenditure by State, local, and tribal
governments, in the aggregate, or by
the private sector, of $100 million or more
in any year and it will not significantly
or uniquely affect small governments.
Therefore, no actions were deemed
necessary under the provisions of the
Small Business Regulatory Enforcement
Fairness Act of 1996
This proposed amendment has been
found not to be a major rule within the
meaning of the Small Business
Regulatory Enforcement Fairness Act of 1996.
Executive Orders 12372 and 13132
This proposed amendment will not
have substantial direct effects on the
States, on the relationship between the
national government and the States, or
on the distribution of power and
responsibilities among the various
levels of government. Therefore, in
accordance with Executive Order 13132,
it is determined that this amendment
does not have sufficient federalism
implications to require consultations or
warrant the preparation of a federalism
summary impact statement. The
regulations implementing Executive
Order 12372 regarding
intergovernmental consultation on
Federal programs and activities do not
apply to this amendment.
Executive Order 12866
This proposed amendment is exempt
from review under Executive Order
12866, but has been reviewed internally
by the Department of State to ensure
consistency with the purposes thereof.
Executive Order 12988
The Department of State has reviewed
the proposed amendments in light of
sections 3(a) and 3(b)(2) of Executive
Order 12988 to eliminate ambiguity,
minimize litigation, establish clear legal
standards, and reduce burden.
Executive Order 13175
The Department of State has
determined that this rulemaking will
not have tribal implications, will not
impose substantial direct compliance
costs on Indian tribal governments, and
will not pre-empt tribal law.
Accordingly, the requirement of Section
5 of Executive Order 13175 does not
apply to this rulemaking.
Paperwork Reduction Act
This proposed rule does not impose
any new reporting or recordkeeping
requirements subject to the
Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects in 22 CFR Part 125
Arms and munitions, Classified
information, Exports.

Accordingly, for the reasons set forth
above, Title 22, Chapter I, Subchapter
M, part 125 is amended as follows:

PART 125—LICENSES FOR THE
EXPORT OF TECHNICAL DATA AND
CLASSIFIED DEFENSE ARTICLES

1. The authority citation for part 125
is revised to read as follows:
Authority: Secs. 2 and 38, Pub. L. 90–629,
90 Stat. 744 (22 U.S.C. 2752, 2778); E.O.
11958, 42 FR 4311; 3 CFR, 1977 Comp. p.79;

2. Section 125.4 is amended by
revising paragraphs (b)(9) to read as follows:

§ 125.4 Exemptions of general
applicability.

(b) * * *

(9) 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.
government agency outside the United
States, is an employee of the U.S.
Government or is directly employed by
the U.S. corporation's U.S. prime contractor
or subcontractor, not a foreign subsidiary,
employed by the U.S. corporation's U.S.
prime contractor or a U.S. subcontractor,
employed by a U.S. person employed by the U.S.
government agency outside the United
States, or is directly employed by the same U.S.
Government or is directly employed by
the U.S. corporation or U.S. subcontractor,
employed by the 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).

Dated: August 18, 2010.
Ellen O. Tauscher,
Under Secretary, Arms Control and
International Security, Department of State.