

## DDTC issues FAQs on defense services provided by U.S. persons abroad

16 January 2020

On 6 January 2020, the State Department's Directorate of Defense Trade Controls (DDTC) issued [new frequently asked questions](#) (FAQs) regarding the registration and licensing requirements under the International Traffic in Arms Regulations (ITAR) applicable to individual U.S. Persons (USPs) who are employed abroad by foreign entities and provide defense services to their foreign employer.

The ITAR requirements and procedures set forth in the FAQs differ in significant respects from those previously proposed by DDTC in a May 2015 Federal Register notice (the May 2015 Proposed Rule) that was never finalized regarding USPs employed by foreign companies abroad. DDTC has long taken the position that individual USPs employed abroad are required to obtain authorization if they are providing defense services but had not previously published regulations or guidance providing specific procedures for obtaining such authorization or clarifying the registration requirements, if any, for such individuals. (In 2013, DDTC had briefly added a section to its "Agreement Guidelines" on this issue, but that section was removed again a short time later.)

The newly published FAQs now make clear that USPs who are employed by foreign entities abroad and provide defense services do not need to be registered with DDTC but must obtain DDTC authorization through submission of a "General Correspondence" (GC) request prior to providing defense services abroad. However, individual USPs performing defense services within the United States for foreign persons are still required to register and obtain authorization from DDTC.

### **The FAQs make clear that DDTC does not plan to implement the May 2015 Proposed Rule**

As currently drafted, the ITAR's registration provisions apply only to USPs performing defense services within the United States and therefore can be interpreted not to require USPs working abroad to register under the ITAR. In its May 2015 Proposed Rule, however, DDTC proposed to amend the ITAR to "clarify" that individual USPs employed abroad by foreign entities are nonetheless required to be registered with DDTC. A note in the May 2015 Proposed Rule stated that "any natural person directly employed by a DDTC-registered person, or by a person listed on the registration as a subsidiary or affiliate of a DDTC-registered U.S. person is deemed to be registered."

Based on the proposed rule and guidance received from DDTC, some non-U.S. entities with large numbers of USP employees working abroad sought to work with ITAR-registered U.S. entities to obtain coverage for their USP employees working abroad. Recognizing that some companies have already implemented approaches that may not be consistent with the procedures outlined in the FAQs, DDTC noted in FAQ #14 that any "good faith effort" to guide USPs furnishing defense services abroad based on the May 2015 Proposed Rule will generally be viewed in that light when DDTC reviews controlled activity. Presumably, existing authorizations issued previously by DDTC covering USPs working abroad remain valid, but companies that obtained such authorization should consider contacting the State Department for further guidance.

Going forward, the new FAQs make clear that USPs are not required to register if those persons are physically located outside the United States. Registration is only required if a person furnishes defense services or manufactures, exports, or temporarily imports defense articles in the United States. Moreover, the FAQs clarify that USPs, not their foreign employers abroad, are responsible for seeking the required DDTC authorization in order to provide defense services to their foreign employer abroad.

#### **USPs working abroad must obtain DDTC authorization to provide defense services**

USPs employed by foreign entities abroad and providing defense services to their employers must obtain DDTC authorization via a GC pursuant to ITAR § 129.6. Per the FAQs, USPs must include the following information in the GC request:

- a) A description of the scope of the request, including:
  - i. A description of the program or defense article that is the subject of the proposed defense service.
  - ii. A description of the defense services to be provided (ITAR § 120.9(a)).
- b) A description of the defense service provider's ties to the United States, including:
  - i. Any employment/education in the United States.
  - ii. A full description of any previous work activities or coursework that pertain to U.S. Munitions List-controlled defense articles or defense services; and
  - iii. Information about any prior work on any U.S. government program(s), including the name of the program(s).

The FAQs also recommend including a resume and a detailed job description for the position for which the authorization is being requested.

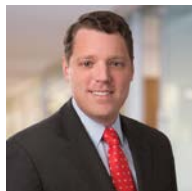
#### **Analysis**

The issuance of the FAQs fills a long-standing void in DDTC's guidance and provides welcome clarity on these important issues for individuals and affected industries. From a national security perspective, the licensing process outlined in the FAQs also represents a more rational approach than DDTC had taken in the past because it allows the agency to obtain and consider more specific details about the experience of the individual USPs, including information on any sensitive U.S. Government programs they may have worked on previously. The collection of this information on an individual basis will enable the agency to make better informed licensing decisions.

Moreover, the FAQs make clear that although the individual USPs ultimately are responsible for obtaining the required ITAR authorizations, non-U.S. employers may provide assistance to their employees to facilitate the process and may group applications for multiple individuals in a single submission. Although this process initially may create additional administrative burdens for the non-U.S. employers as they seek to establish new procedures to assist their USP employees in obtaining required authorizations, ultimately the process set forth in the FAQs should make it easier for non-U.S. companies to ensure that their USPs are in compliance.

For further information or assistance, please contact any of the Hogan Lovells lawyers below.

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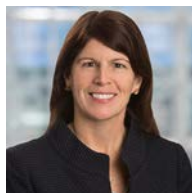
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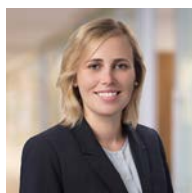


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