

Defense Trade Advisory Group (DTAG)

PPE Exemption Working Group White Paper

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DTAG Task:

The Directorate of Defense Trade Controls (DDTC) tasked the DTAG to consider changes to and expansion of ITAR exemption §123.17, Exemption for Personal Protective Gear.

DDTC requests that the DTAG provide recommendations for revisions to §123.17, or other general advice or observations regarding attempted use of the exemption, that would inform a potential amendment of this exemption. DDTC requests input principally to ensure that the exemption allows for the export of a modern and complete set of PPE, and to provide an appropriate exemption for PPE given the inability to use the §126.4 exemption for certain transfers to proscribed destinations. Additionally, DDTC requests input from the DTAG on whether the §123.17 exemption should be bifurcated to separately address transfers by companies under contract with the USG and individuals (e.g., NGOs or journalists) without such relationship with the USG.

Approach

The working group reviewed the exemption provisions, which remain in §123.17 following removal from that section of exemptions relating to exports of firearms for personal use. The working group then shared and discussed first-hand experiences with the exemption, noting the particular difficulties and challenges with implementing its provisions. Relatedly, the working group also reviewed and discussed guidance provided by DDTC and DoD concerning the temporary export of PPE in support of U.S. government (USG) contracts, most notably special PPE provisions to address common difficulties in fulfilling standard license requirements (e.g., permitting contractors to self-decrement a DSP-73 license for PPE at the time of deployment). The working group also reviewed the provisions and discussed implementation of the recently revised exemptions contained in §126.4 for exports “by or for the U.S. government,” applicable for PPE in certain scenarios. The working group also reviewed previous industry proposals to amend the PPE exemption. Finally, the working group reviewed other ITAR exemptions, comparing their provisions and requirements to those of §123.17.

Current PPE Exemption §123.17

Scope

The exemption in ITAR §123.17 limits the temporary export of the following specific defense articles to the following items and quantities:

- One set of body armor covered by U.S. Munitions List Category X(a)(1);
- One helmet covered by U.S. Munitions List Category X(a)(6); and
- One set of chemical agent protective gear covered by U.S. Munitions List Category XIV(f)(4) including one additional filter canister

The exemption may be used for travel to §126.1 countries provided the purpose is for official USG business or work under a USG contract.

Method of export

The exemption requires the PPE to be exported with the individual traveling to an international location. The PPE must be hand-carried or in checked luggage. Shipping the PPE via U.S. mail or a freight forwarder is not permitted.

Special Customs and Border Protection (CBP) Requirements

In addition to making an electronic filing regarding the export, each traveler must present the Internal Transaction Number (ITN) from the electronic filing, and the equipment itself, to a CBP officer at the port of departure for review and inspection. If the ITN is not available at departure, the traveler must follow the instructions of the CBP officer.

DTAG Concerns

The working group identified a number of concerns with ITAR §123.17 which negatively impact U.S. companies supporting USG contracts outside the United States (including in combat zones), as well as other U.S. entities operating in such risky environments (non-governmental and media organizations, research institutions, etc.). The challenges are particularly acute currently, due to the exceptional circumstances resulting from the COVID-19 pandemic, combined with the ongoing relocation of U.S. forces stationed in the Middle East and Southwest Asia.

Scope of the exemption is outdated. The most glaring deficiency of the exemption is that it does not include all of the items currently issued to contractor employees who deploy through the CONUS Replacement Center (CRC). Due to changes in the threat assessment for forward deployments, the CRC added decontamination kit and detection paper to the equipment requirements for U.S. contractors, neither of which are included in §123.17. Non-contractor entities would be similarly limited in their use of the exemption to equip their personnel deploying to risky environments abroad.

The exemption does not account for changes to USG issued protective equipment. The exemption lists specific defense articles and quantities, making it difficult or impossible to use should PPE requirements change. As in the case of the decontamination kits and detection paper, the current wording of §123.17 does not provide sufficient flexibility to account for changes to the CRC equipment list. The working group notes that changes to the equipment list may occur due to a change in threat specifics faced by contractor employees, or the inclusion of new protective equipment not previously available.

Export and import rules set forth in the current exemption are too restrictive. The requirement that PPE accompany a specific traveler, either as a hand-carried item or checked luggage, is highly restrictive and at odds with the challenging circumstances and timeframes facing U.S. contractors and public interest organizations (NGOs and media) when deploying to hazardous areas. No other ITAR exemption imposes such restrictions on exports of defense articles.

- The restriction complicates the ability of U.S. companies and organizations to manage PPE in overseas locations as employers struggle to address common workforce issues, such as employee leave, medical/personal emergencies, terminations and company transfers. Under such circumstances, PPE cannot be returned to the United States under the exemption using freight forwarders but must accompany a traveler. The exemption also explicitly forbids sending PPE through the U.S. Postal Service APOs and FPOs from the CRC, a common practice for U.S. military and civilian personnel.

- U.S. contractors transiting through certain countries are subject to seizure of their PPE and even arrest and imprisonment under local customs laws, a risk that would be reduced or eliminated through the use of freight forwarders to transfer the items.
- Under the exemption, a traveler must present the PPE and an ITN number for the export to a CBP officer for inspection prior to departure. Individual U.S. contractor personnel often leave directly from the CRC on a MILAIR or commercial flight, where a CBP officer is unavailable – making compliance with these requirements difficult or impossible.
- Contractor personnel may be required under the USG contracts to transit from one foreign country to another. Since reexports are not authorized under the exemption, contractors must obtain a separate General Correspondence reexport authorization for their PPE from DDTC before deploying to another country.

The current exemption places compliance responsibilities and actions on individual travelers rather than their employer. In contrast to other ITAR temporary import and export exemptions, §123.17 places considerable onus on individual travelers carrying PPE to execute special exemption requirements.

The ITAR requirement to file electronically for hardware exports is procedurally challenging for unaffiliated individuals (independent contractors, etc.) seeking to use this exemption. Per 2010 U.S. Census Bureau rule change, for security reasons individuals are not allowed to use their Social Security number as an identifier in the Automated Export System (AES) electronic filing system. The filing individual must have a company identification number and must establish an account in CBP's Automated Commercial Environment (ACE), which is the only point of access to the AES system. The individual account holder/filer must understand and comply with the U.S. Foreign Trade Regulations (FTR) regarding accurate data reporting, knowledge of correct HTS/Schedule B tariff numbers, and timely revisions of changes to the data, or be subject to penalties by Census. Freight forwarders can file on behalf of another party, but some have been unwilling to assist the individual traveler hand-carrying PPE because they may not be made aware of changes requiring filing revision and thus they are at risk for FTR noncompliance.

Recommended Changes

In light of the aforementioned concerns, the DTAG proposes the following changes to §123.17:

- Bifurcate the exemption to address transfers by entities pursuant to the U.S. government (including under contract) separately from those by entities and individuals without such a relationship with the U.S. government (e.g., NGOs, media organizations, research institutions or those working for foreign customers).
 - The current exemption uniformly covers exports of PPE by all parties, including those not registered with DDTC, and consequently is more restrictive than any other temporary import or export exemption in the ITAR.

- The DTAG proposes to preserve the current, appropriate restrictions on private parties' transfers of PPE unrelated to the U.S. government – including strict limits on the quantity and type of PPE permitted.
- But the DTAG also believes that the USG and implementing government contractors in industry would be better served by separate treatment for transactions pursuant to U.S. government direction and oversight, allowing flexibility on the quantity and type of PPE.
- Broaden the scope of the exemption (for transfers pursuant to U.S. government direction) to cover PPE in USML Categories X and XIV rather than subcategories or specific defense articles, in order to accommodate changes to the CRC equipment list and permit the USG to address contractor safety based on specific circumstances. This revision would also permit shipments under the exemption (as USML paragraph (x) items) of PPE articles and kit components that are subject to the U.S. Export Administration Regulations.
- Permit shipments of PPE (including by freight forwarders) under the exemption, in addition to hand-carry and luggage - on par with other ITAR exemptions for temporary imports and exports. This will afford users the flexibility to address logistical requirements beyond the exporter's control and reduce or eliminate the risk of seizure, detainment or arrest by local enforcement authorities.
- Eliminate CBP physical inspection and ITN presentment requirements for PPE to accompany a traveler either as a hand-carry or in checked luggage per §123.17(f)(1). These requirements are often difficult if not impossible to meet and are not included in any other ITAR exemption.
- Permit entities (and not solely individuals) to be the exporters or transferors under the exemption. This would facilitate both transfers of PPE exported by an organization among its personnel abroad, and transfers abroad of personnel with their PPE (if exported individually) between U.S. contractor entities - as can happen if a follow-on U.S. government contract is awarded to a different company.
- Permit reexport and retransfer of PPE (originally exported pursuant to a license or exemption) without the requirement for General Correspondence requests, to countries and entities directed by the U.S. government in a contract or otherwise, or to eligible U.S. persons. Among other things, this would enable U.S. government contractor personnel to travel and transit abroad with their PPE pursuant to their contracts, and also facilitate transfer of contractor employees in theater from one U.S. company to another as directed by USG.
- Permit transfers of PPE to foreign person employees of U.S. person entities, on par with the exemption in §125.4(b)(9).
- Permit transfers to proscribed destinations under §126.1, even if not for USG purposes as is required currently, but prohibit transfers to any persons who are citizens or nationals of those destinations. This would enable U.S. government contractors, journalists, NGO workers,

researchers and others to use the exemption and take their PPE to protect themselves in those destinations.

- Retain the requirement to report instances when items transferred under the exemption are subsequently transferred without ITAR authorization and/or cannot be returned to the United States (for example, due to loss or abandonment). But DTAG recommends that the reports be submitted to the Office of Defense Trade Controls Licensing (rather than Compliance) and include information required in §123.9 (rather than §127.12). DTAG also recommends that ITAR registrants (due to their pre-existing compliance obligations and regular contact with DDTC):
 - Be permitted to satisfy this requirement via periodic aggregated reporting similar to that under the Canadian Exemption, and
 - Be permitted to retain records in lieu of reporting, for scenarios involving items not returnable due to being consumed, expended or destroyed during use (or due to deterioration).
- Rename the provision, to “Exemption for Personal Protective Equipment.”

Proposed Updated Exemption Provisions

The working group has drafted a new, “clean-sheet” PPE exemption for DDTC’s consideration. These proposed provisions incorporate and reflect the concerns and recommendations identified by the working group and described above. Among other features, the proposed revisions treat separately activities pursuant to the U.S. government (and therefore subject to special oversight) and other activities, by tailoring requirements and conditions specifically to each type of scenario.

§123.17 Exemption for personal protective equipment

(a) *Support of the U.S. government.* A license is not required for the temporary export of personal protective equipment (PPE) identified on the U.S. Munitions List, including to proscribed destinations under §126.1 of this subchapter (but not to any persons subject to the prohibitions in that section), by a U.S. person (§120.15), or a foreign person employee of a U.S. person, provided:

- (1) The items are for the exclusive use of an individual who is a U.S. person (§120.15), or a foreign person employee of a U.S. person; and
- (2) The items are limited to U.S. Munitions List Categories X and XIV;¹ and
- (3) The items are for use at the official written request or directive of the U.S. Government as identified in a valid U.S. Government contract, subcontract, task order or official policy directive.²

¹ Note: (a) specifies that the items must be PPE, so the provision permits exports only of PPE (not any item) in USML Categories X and XIV.

² For transfers pursuant to USG direction, there is not a quantity limit for exports under the exemption, so stockpiling or pre-positioning in support of USG is permitted.

(b) *Other scenarios.* A license is not required for the temporary export of personal protective equipment (PPE) identified on the U.S. Munitions List, including to proscribed destinations under §126.1 of this subchapter (but not to any persons subject to the prohibitions in that section), by a U.S. person (§120.15), or a foreign person employee of a U.S. person, provided:

- (1) The items are for the exclusive use of an individual who is a U.S. person (§120.15), or a foreign person employee of a U.S. person; and
- (2) The items are limited to U.S. Munitions List Categories X(a)(1), X(a)(6) and XIV(f)(4); and
- (3) The items comprise a single set of PPE usable by an individual, plus a single set of spares.

(c) *Reexports and Retransfers.* Temporary reexports and retransfers of PPE temporarily exported pursuant to this subchapter³ are permitted to U.S. persons (§120.15), or a foreign person employee of a U.S. person, without a license provided the recipient retains effective control of the PPE and complies with the requirements of this section.

(d) *Filing and Reporting of Export Information.*

- (1) *Shipments of PPE.* PPE may be shipped pursuant to this section.⁴ When shipping PPE from the United States, the filing of export information through CBP's electronic system(s) must be made per §123.22 of this subchapter. Invoices for PPE shipments pursuant to this section must be annotated: "This shipment is authorized for export pursuant to 22 CFR 123.17."
- (2) *Exported with Personal Effects.* When PPE is not shipped but is exported, reexported or retransferred pursuant to this section with an individual's baggage or effects, whether accompanied or unaccompanied, the individual must carry a letter documenting use of the exemption for the transfer.

(e) *Record keeping and Reporting.*

- (1) The information required per §123.26 of this subchapter must be maintained for all instances of exemption use. This information should also document all instances of items reexported or retransferred to another person and/or not returned to the United States by the exporter.
- (2) If an article is temporarily exported, reexported, or retransferred pursuant to this section, a subsequent transfer (or change in end-user or end-use) not authorized pursuant to this section or this subchapter must be reported to the Office of Defense Trade Controls Licensing, with information specified in §123.9(c) of this subchapter. DDTC registrants may satisfy this requirement via aggregated semi-annual or annual reporting.⁵ DDTC registrants may also retain records pursuant to paragraph (e)(1) in lieu of reporting for articles not

³ This also captures items originally exported under a DSP-73. DDTC may consider further expanding the scope by also permitting temporary retransfer or reexport under this exemption of items originally exported permanently (and not only temporarily).

⁴ This permits shipments by national mail services, freight forwarders, common carriers, etc.

⁵ This language would be modified to reflect acceptable reporting cadence.

returnable due to being consumed, expended or destroyed during use (or due to deterioration). ITAR violations may be reported pursuant to §127.12 of this subchapter.⁶

- (f) *Registration.* Registration with the Department of State pursuant to part 122 of this subchapter is not required in order to use the exemption in this section.

Summary

The Working Group reviewed the research and identified the general themes and findings. These themes and findings represent fact-based observations based on the group's research and were the basis for final recommendations.

Based on the DTAG review, the current exemption does not cover all of the items currently required by the USG. The exemption is too narrow in its scope and contains specific requirements that are often difficult if not impossible to implement from a practical perspective. Such requirements are appropriate for individual travelers not registered with DDTC, but less so for U.S. companies supporting USG contracts. Yet the current exemption uses a "one size fits all," "lowest common denominator" approach.

The DTAG supports a revised §123.17 exemption that will reduce time, cost and violation risk while supporting U.S. military operations and other important activities overseas. The revised exemption contains sufficient flexibility on par with other ITAR temporary import/export exemptions, and addresses demands of supporting USG contracts in high-risk locations. A PPE ITAR exemption so updated will benefit industry, the U.S. government and other users.

⁶ In addition to the mandatory reporting and/or recordkeeping required in this section, exporters and transferors may also elect to voluntarily disclose potential violations.

Appendix 1 – DTAG Tasking Letter