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## UPDATE – AUKUS MILESTONE: EXPORT LICENSE REQUIREMENTS FOR AUSTRALIA AND THE UK SIGNIFICANTLY EASED THROUGH US DEPARTMENT OF COMMERCE INTERIM FINAL RULE, AND US STATE DEPARTMENT ISSUES PROPOSED NEW ITAR EXEMPTION

*The following is an updated version of an advisory first issued on April 30. The original advisory addressed only the Department of Commerce Interim Final Rule. It has been updated to address the subsequent Department of State Proposed Rule.*

In accordance with the Fiscal Year 2024 National Defense Authorization Act (NDAA), on April 19, 2024, the US Department of Commerce's Bureau of Industry and Security (BIS) published an Interim Final Rule (the "IFR") that dramatically reduced export license requirements for exports, reexports, and transfers of items subject to the Export Administration Regulations (EAR) to and within Australia and the UK.<sup>[1]</sup> On May 1, 2024, the US Department of State (DoS) followed up with a Proposed Rule that would implement a new exemption for certain exports of defense articles and services to Australia and the UK under the International Traffic in Arms Regulations (ITAR), as well as an expedited decision-making process for license applications for export of certain defense articles

and services to Australia, the UK, and Canada.<sup>[2]</sup>

The liberalization of US EAR export license requirements for Australia and the UK, and the issuance of the proposed ITAR exemption, are significant milestones for the AUKUS Trilateral Security Partnership, formed in September 2021 to "deepen diplomatic, security, and defense cooperation in the Indo-Pacific region ... to meet the challenges of the twenty-first century," and to "streamline their collective defense collaboration while strengthening the ability to protect the sensitive technologies that underpin national security on these topics."<sup>[3]</sup>

We first describe the BIS IFR, then the DoS Proposed Rule.

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<sup>1</sup> 89 FR 28594 (April 19, 2024), available at <https://www.federalregister.gov/documents/2024/04/19/2024-08446/export-control-revisions-for-australia-united-kingdom-united-states-aukus-enhanced-trilateral>.

<sup>2</sup> 89 FR 35028 (May 1, 2024), available at <https://www.federalregister.gov/documents/2024/05/01/2024-08829/international-traffic-in-arms-regulations-exemption-for-defense-trade-and-cooperation-among>.

<sup>3</sup> <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/15/joint-leaders-statement-on-aukus/>

UPDATE – AUKUS MILESTONE...

I. Bureau of Industry and Security Interim Final Rule (content unchanged from original)

The IFR, which is effective as of April 19, removes many license requirements for EAR-controlled items to Australia and the UK, and makes other favorable adjustments for Australia and the UK, including expanding aspects of License Exceptions Aircraft, Vessels and Spacecraft (AVS), Additional Permissive Reexports (APR), and Encryption Commodities, Software, and Technology (ENC). As a result, in BIS’ words, Australia and the UK now enjoy “nearly the same licensing treatment under the EAR as Canada.”<sup>[4]</sup>

BIS is accepting public comments on the IFR until June 3, 2024, including on how the EAR could be further amended

to advance AUKUS objectives and whether it should remove encryption licensing requirements for Australia and the UK under § 742.15(a)(1) of the EAR.<sup>[5]</sup>

SUMMARY OF EAR CHANGES, EFFECTIVE APRIL 19

The substantive changes are summarized in the table below. (The rule also made conforming edits to certain sections of the EAR for clarity, without changing the substance; we do not catalogue those changes here.) The substantive changes significantly reduce the requirement for EAR licenses for export, reexport, and intra-country transfers to/in Australia and the UK, including for sensitive items such as 600-series, 9x515, and certain 6Axxx items.

Change in EAR license requirements	Comparison to EAR controls for Canada	Relevant EAR sections
<ul style="list-style-type: none"><li>■ Removal for AU and UK of license requirements based on national security (NS), missile technology (MT), and regional stability (RS) reasons for control (Xs removed from the corresponding cells in the Commerce Country Chart).</li><li>■ As a result, absent Part 744 end-user, end-use, or US person service-based license requirements or General Prohibition 10 license requirements, 600-series items and 9x515 items (except ECCN 9A515.a.1-4, .g, and 9E515.f, which are subject to a worldwide license requirement per § 742.6(a)(9)) no longer require an EAR license to/in AU or UK.</li></ul>	Aligned	§§ 738, Supp. 1, 742.4(a), .5(a), .6(a), 742.6(a)(3), 742.6(a)(9), 744.9(a)(1)(iii)
<ul style="list-style-type: none"><li>■ Removal for AU and UK of additional RS1 license requirement for ECCN 0A919 foreign military commodities.</li><li>■ As a result, absent Part 744 end-user, end-use, or US person service-based license requirements, or General Prohibition 10 license requirements, foreign-made military commodities that are outside the US and not subject to the ITAR and that either (i) incorporate more than a <i>de minimis</i> amount of certain 6A or 600-series US-origin or (ii) are the direct product of 600-series technology or software under 734.9(d) no longer require an EAR license to/in AU or UK.</li></ul>	Aligned	§ 742.6(a)(3)

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<sup>4</sup> 89 FR 28594 at 28595.

<sup>5</sup> Comments may be submitted to the federal rulemaking portal ([www.regulations.gov](https://www.regulations.gov)), using the regulations.gov ID BIS-2024-0019. Comments must refer to “RIN 0694-AJ58” and comply with the additional requirements noted at the beginning of the IFR.

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Change in EAR license requirements	Comparison to EAR controls for Canada	Relevant EAR sections
<ul style="list-style-type: none"> <li>■ Removal for AU and UK of certain military end use and end user-based license requirements for certain cameras, systems, and related components (previously a license was required for all destinations except CA).</li> <li>■ As a result, absent other Part 744 end-user, end-use, or US person service-based license requirements, or General Prohibition 10 license requirements, there is no longer an EAR license requirement to/in AU or UK for: (1) cameras and plug-ins in ECCNs 6A003.a.3, 6A003.a.4, or 6A003.a.6 for military end users as defined in § 744.9(d), or (2) certain ECCN 0A504, 6A002, 6A003, 6A993.a, and 8A002.d items when intended for incorporation into an ECCN 0A919 foreign “military commodity” in AU or UK.</li> </ul>	Aligned	§§ 744.9(a)(1)(i) and (a)(1)(iii)
<ul style="list-style-type: none"> <li>■ Removal for AU and UK of license requirements for Significant Items (SI) in ECCNs 9E003.a.1-a.6, a.8, .h, .i, and .l, and related controls.</li> <li>■ As a result, absent Part 744 end-user, end-use, or US person service-based license requirements, or General Prohibition 10 license requirements, hot section technology for the development, production, or overhaul of commercial aircraft engines, components, and systems no longer requires a license for AU or UK.</li> </ul>	Aligned	§ 742.14(a)
<ul style="list-style-type: none"> <li>■ Expansion of paragraph (c) of License Exception Aircraft, Vessels and Spacecraft (AVS), 15 CFR 740.15, to authorize exports of specified commodities, including spare parts, to any destination except Cuba or Country Group D:1 (excluding the PRC) for (i) vessels or planes of US, Canadian, Australian or UK registry or (ii) installations or agents of US, Canadian, Australian or UK Airlines (where an Australian or UK airline is a company that is (a) incorporated or otherwise organized in a state or territory of Australia or a country or territory of the UK, and (b) authorized by its respective government to engage in business as an airline). This amendment is consistent with the removal of MT controls for AU and UK, and results in Australian and UK aircraft/airlines being able to receive MT-controlled spare parts in most destinations (except Cuba and D1 countries other than PRC).</li> </ul>	Aligned	§ 740.15
<ul style="list-style-type: none"> <li>■ Expansion of paragraphs (d) and (f) of License Exception Additional Permissive Reexports (APR), 15 CFR 740.16, to authorize: (i) reexports from AU, UK, and CA of any item that could be exported <i>from</i> the US to the destination under any License Exception; and (ii) reexports from a foreign country <i>to</i> AU, UK, and CA of any item that could be exported from the US to AU, UK, or CA without a license.</li> </ul>	Aligned	§ 740.16

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Change in EAR license requirements	Comparison to EAR controls for Canada	Relevant EAR sections
<ul style="list-style-type: none"> <li>■ Amendment of paragraph (e) of License Exception Encryption commodities, software, and technology (ENC), 15 CFR 740.17, to: (i) exempt exports under ENC to AU, UK, and CA from semi-annual reporting requirements; and (ii) require semi-annual reporting for reexports from AU, UK, and CA of items described in ENC (b)(2) and (b)(3)(iii), except as specified in paragraph (e)(1)(iii).</li> <li>■ Addition of AU and UK to the countries that are exempt from the scope of the requirement in § 734.17(c)(1) – applicable to internet transfers of 740.17(b)(2)-eligible encryption software, encryption source code and general purpose encryption toolkits – to verify (via domain name / internet address check) that a system requesting or receiving such a transfer is not associated with a foreign government end user (e.g., “.gov,” “.gouv,” “.mil” or similar addresses). As a result, parties transferring 740.17(b)(2)-eligible software via the internet do not need to check the domain name/internet address of systems in the US, AU, UK, or CA (previously, only US and CA were exempt).</li> </ul>	Aligned	§§ 740.17, 734.17
<ul style="list-style-type: none"> <li>■ Exemption of AU and UK alongside CA from unilateral reporting requirements for thermal imaging camera transactions under § 743.3(b).</li> </ul>	Aligned	§ 743.3(b)

## WHAT HASN'T CHANGED?

- A license is still required for Australia and the UK for firearm-related items in ECCNs 0A501 (except 0A501.y), 0A502, 0A503, 0A504, 0A505.a, .b, and .x, 0D501, 0D505, 0E501, 0E502, 0E504, and 0E505. Before the IFR, these license requirements were implemented through NS1/RS1 reasons for control; having removed those controls, BIS replaced them with new Footnote 9 to the Commerce Country Chart. These license requirements apply to a slightly broader group of items than the 0x5xx controls for Canada.
- Despite the amendments to licensing requirements on item-based controls, the amendments do not change the licensing requirements stemming from most of the catch-all end use and end user controls under EAR Part 744 or General Prohibition 10. For example, licensing requirements remain in place to/in AU and UK when an

entity on the Entity List would be a party to the transaction or when there is reason to know that a violation has occurred or will occur in connection with the transaction.

## II. Department of State Proposed Rule (new content)

The DoS Rule is designed to “foster defense trade and cooperation between and among the United States and two of its closest allies”,<sup>[6]</sup> and includes a proposed new ITAR exemption for Australia and the UK and a proposed expedited decision-making process for license applications to export certain defense articles and defense services to Australia, the UK, and Canada.

The State Department is accepting public comments on the Proposed Rule until May 31, 2024,<sup>[7]</sup> including on the clarity and utility of the proposed ITAR exemption and the proposed list of items that will be ineligible for export under the exemption.

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<sup>6</sup> 89 FR 35028.

<sup>7</sup> Comments may be submitted via email to [DDTCTPublicComments@state.gov](mailto:DDTCTPublicComments@state.gov), with the subject line “Australia, the United Kingdom, and the United States ITAR Exemption” or through the federal rulemaking portal ([www.regulations.gov](http://www.regulations.gov)) using Docket DOS-2024-0013.

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SUMMARY OF PROPOSED ITAR CHANGES

The proposed changes are summarized in the table below.

Implementation of the Proposed Rule is conditional on State Department certification that Australia and the UK have implemented systems of export controls that are comparable to those of the US with respect to areas

identified in Section 38(l) of the Arms Export Control Act (22 U.S.C. 2778(l)), and on reciprocal implementation of a comparable exemption for the US under Australia/ UK export controls.<sup>[8]</sup> The State Department declined to certify Australia and the UK by its most recent deadline of April 19, 2024, but expects to certify the countries within the next 120 days.

Proposed Change in ITAR Regulations	Implementation	Countries Affected	Proposed ITAR Sections
<div><div>■ Proposed exemption for export / reexport / retransfer / temporary import / brokering of defense articles, defense services between or among the physical territories of AU, UK, or US, provided that: (1) US parties (if any) are registered with the Directorate of Defense Trade Controls (DDTC) and not debarred (a status that foreign parties will be able to request that DDTC confirms); (2) foreign parties qualify as “authorized users” through an (as yet unspecified) user enrollment process and listing on DDTC’s website; (3) the relevant defense articles / services are not listed in (proposed) Supplement 2 to Part 126, which identifies items ineligible for the exemption;<sup>[9]</sup> (4) the transfers would not require Congressional certification under AECA sections 36(c) and 36(d) (ITAR 123.15 (related to value) and 124.11 (related to overseas manufacturing of Significant Military Equipment); (5) the parties obtain non-transfer and use assurances for any significant military equipment, and comply with all other standard ITAR requirements; and (6) the parties satisfy the recordkeeping requirements set forth in the exemption.</div><div>■ Items subject to government security classification (classified items) would be eligible for transfer under the exemption, provided that the relevant authorized users satisfy US, UK, or AU industrial security requirements, as applicable.<sup>[10]</sup></div></div>	Conditional on certification	AU, UK	§ 126.7(a-b)
<div>■ Proposed expansion of the existing 126.18 exemption for intercompany transfers to authorize dual national citizens of AU or UK to receive <u>classified</u> defense articles and services, provided that the individuals are: (1) “authorized users” under the new 126.7 exemption described above, or regular employees of such an “authorized user”; (2) hold a security clearance approved by AU, UK, or US that is equivalent to US SECRET clearance or higher; and (3) are either within the physical territory of AU, UK, or US or are a member of the armed forces of the AU, UK, or US and acting in their official capacity.</div>	Conditional on certification	AU, UK	§ 126.18(e)

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<sup>8</sup> On May 1, the UK released a draft AUKUS **open general export license** and Australia released draft AUKUS-related **amendments** to its Defence Trade Legislation.

<sup>9</sup> Ineligible items will include: Missile Technology Control Regime (MTCR) items in most USML categories; “readily identifiable anti-tamper articles, not already installed in the commodity they are intended to protect, and directly related technical data and defense services” in most USML categories; and specific items within certain USML entries (e.g., under Category XIX, “classified articles described in USML Category XIX(e), (f)(1), or (f)(2), not already integrated into a complete engine, and directly related technical data and defense services” and, under Category VIII, “[t]he F-22 aircraft and articles specially designed for the F-22, other than those also used in aircraft other than the F-22; and directly related technical data and defense services.”).

<sup>10</sup> Per the Proposed Rule, for US entities this would be the National Industrial Security Program Operating Manual (NISPOM) (32 CFR part 117) and, for Restricted Data, the Atomic Energy Act of 1954, as amended. For Australian entities, this would be the Defence Security Principles Framework (DSPF) Principle 16 and Control 16.1, Defence Industry Security Program. For UK entities, this would be the Government Functional Standards (GovS) 007: Security.

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Proposed Change in ITAR Regulations	Implementation	Countries Affected	Proposed ITAR Sections
■ Expedited processing, within 45 days, for ITAR license applications to or between the physical territories of the /AU/UK/CA from/to government or corporate entities of those countries provided that no ITAR exemption is available and that congressional certification is not required. (If an ITAR exemption could be used, no expedited processing will be granted.)	May be implemented by a separate final rule, based on timing and statutory constraints	AU, UK, CA	§ 126.15(c)
■ Expedited processing, within 30 days, for ITAR license applications related to a government-to-government agreement between AU/UK/CA and US provided that no ITAR exemption is available, and that congressional certification is not required. (If an ITAR exemption could be used, no expedited processing will be granted.)	May be implemented by a separate final rule, based on timing and statutory constraints	AU, UK, CA	§ 126.15(d)

For more information on the topics covered in this advisory or any other aspect of US export controls or economic sanctions, contact Partner **Tahlia Townsend**, co-chair of Wiggin and Dana's **International Trade Compliance Practice Group**.

*This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.*