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International Trade Compliance Alert

Proposed Change to the ITAR's Definition of Defense Services: Critical Analysis and Related Concerns

Recently, the U.S. Department of State, Directorate of Defense Trade Controls ("DDTC") published several proposed changes to the International Traffic in Arms Regulations ("ITAR") that would redefine the scope of activities controlled as defense services. DDTC is accepting comments on this proposed rule until June 13, 2011. *See* 76 Fed. Reg. 20590 (Apr. 13, 2011). The changes were proposed after DDTC reviewed the treatment of defense services "with a view to enhancing support to allies and friends, improving efficiency in licensing, and reducing unintended consequences." That review found that the current definition of defense services was "overly broad" and captured "certain forms of assistance or services that do not warrant ITAR control." *Id*. In some respects, the proposed changes narrow the scope of defense services, though a lack of clarity on certain points may cause unexpected questions and compliance risks. In other respects, however, the proposed new definition appears to expand the scope of defense services, in some cases without sufficiently clear boundaries.

ITAR § 120.9(a) currently consists of three sections that define "defense services" as (1) "furnishing of assistance (including training) to foreign persons . . . in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;" (2) furnishing technical data to foreign persons; and (3) "[m]ilitary training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice." The proposed rule revises sections (1) and (3), eliminates the current section (2), and adds two new definitions of defense services. It also lists five activities that are "not" defense services in a new § 120.9(b).

Use of Public Domain Data Would Not Constitute a Defense Service, but the Benefits of This Change may be Limited

The proposed rule would change § 120.9(a)(1) so that the provision of assistance in connection with a defense article using only public domain data is not a defense service.
The current definition of defense services does not mention public domain data. However, ITAR § 124.1, which governs the requirement to obtain DDTC approval for manufacturing license agreements and technical assistance agreements, states such approvals are required "whether or not technical data is to be disclosed or used . . . (*e.g.*, all the information relied upon by the U.S. person in performing the defense service is in the public domain or is otherwise exempt)." The proposed rule inserts "using other than public domain data" in the definition of defense services in § 120.9(a)(1) and deletes the text in § 124.1 discussing public domain data.

Although this change will be beneficial in certain situations such as education and training, it may be less helpful in other contexts, and may create compliance traps for the unwary. For example, the proposed change does not appear to decontrol technical discussions with a foreign person about the application of public domain data to the foreign person's defense article (*e.g.*, how a published paper might be used to solve a problem with a foreign defense article). It also is likely that certain discussions about public domain data (*e.g.*, analysis of the data) in connection with, for example, the design of a foreign defense article, would be deemed to constitute a defense service. The only activity that the proposed change clearly excludes from the definition of defense services is the mere provision of public domain data to a foreign person.

In this regard, it will be important to recognize that the definition of public domain in ITAR § 120.11 is narrower than its commonly understood meaning: to be in the public domain, the data must meet one of eight specific definitions. Data that is in the public domain as most people understand that term may not be "public domain data" under § 120.11. For example, data subject to government control is not in the public domain merely because it has been released to the public; it is only in the "public domain" under ITAR after approval by the cognizant U.S. Government department or agency. Accordingly, DDTC has determined that pictures of military aircraft posted on the Internet were not in the public domain because they were not properly released.

Remaining Changes to § 120.9(a) Would Clarify the Scope of Defense Services, but Raise Questions that May Cause New Compliance Risks

Deletion of § 120.9(a)(2) eliminates redundant provision

The proposed rule deletes the current § 120.9(a)(2), which made the furnishing of technical data to a foreign person a defense service. As doing so is an export under ITAR § 120.17(a)(4), this change will eliminate unnecessary redundancy.

Assistance with the integration of export controlled items into defense articles

The proposed new § 120.9(a)(2) makes it a defense service to furnish assistance to foreign persons for the integration of items controlled on the U.S. Munitions List ("USML") or the Commerce Control List ("CCL") into an end item or component that is a defense article (regardless of origin).

The proposed rule does not provide a definition of "integration" but the notice of the proposed rule states that "integration" means the "systems engineering design process of uniting two or more things in order to form, coordinate, or blend into a functioning or unified whole, including introduction of software to enable proper operation of the device [and] includes determining where to install something (*e.g.*, integration of a civil engine into a destroyer which requires changes or modifications to the destroyer in order for the civil engine to operate properly; not simply plug and play)." Without a clearer and simpler definition in the rule, the reach of this proposed provision may be unclear in practice.

Another omission from the proposed rule could lead to confusion unless remedied in the final rule. Because "assistance" with the integration of items into a defense article was arguably already a

defense service, it is unclear why assisting with integration of items not on the CCL or USML (*e.g.*, EAR 99 items) would not be construed as a defense service. Moreover, as worded, assistance with the integration of foreign commercial items into defense articles is not a defense service because they are not "controlled on" the USML or the CCL. Because these activities could arguably still be deemed to be included within the definition of defense services in § 120.9(a)(1), the lack of clarity in the proposed rule could lead to unanticipated questions and compliance risks.

Revised military training provision

DDTC proposes to replace the current § 120.9(a)(3) with the following: "Training or providing advice to foreign units and forces, regular and irregular, regardless of whether technical data is transferred to a foreign person, including formal or informal instruction of foreign persons in the United States or abroad by any means including classroom or correspondence instruction, conduct or evaluation of training and training exercises, in the employment of defense articles." The proposed change from "military training" to "training" is counterbalanced by a new requirement that the training be provided "in the employment of defense articles." These changes help to focus this definition on defense articles, but would appear to control any training or advice to foreign forces that involves the use of a defense article even if not "military" in nature. For example, as noted below in connection with the proposed new § 120.9(b)(4), it may be that this proposed change and/or the proposed new § 120.9(a)(4) is/are intended to capture certain law enforcement, physical security, or personal protective training, advice and services, but the failure of the proposed revision to specifically address the basis for control over these activities creates uncertainty as to the circumstances under which those activities will be controlled.

Direct combat operations and intelligence services directly related to defense articles

The proposed new § 120.9(a)(4) makes conducting "direct combat operations" for or providing "intelligence services" to a foreign person (not just foreign forces or units) "directly related to a defense article" a defense service.

While it is evident why DDTC should control the conduct of direct combat operations under the ITAR, a definition for direct combat operations would help to avoid uncertainty as to the scope of this new term. For example, can providing "administrative support services" referenced in the new § 120.9(b)(5) (discussed below), constitute conducting direct combat operations? If not, it is unclear why such services need to be excluded from the definition of defense services.

The lack of a definition of "intelligence service" could also lead to unintended consequences. For example, does a local threat briefing provided to a foreign business operating in Iraq constitute an intelligence service? If that briefing simply discusses defense articles that pose a risk to company employees (*i.e.*, explosive devices), does that constitute a defense service?

Additionally, for reasons that are not clear, the proposed rule does not appear to exclude intelligence services that are provided using only public domain data from the definition of defense services.

Proposed Exclusions from Defense Services Raise Questions

The proposed rule specifically excludes five activities from the definition of defense services. The following are "not" defense services under the new § 120.9(b) (1) through (5):

Training in the basic operation (functional level) or basic maintenance of defense articles

This proposed provision replaces ITAR § 124.2(a), which exempts training in the basic operation and maintenance of defense articles, but only if lawfully exported or authorized for export to the same recipient. "Basic maintenance" will be defined in a new § 120.38(a) as the first level of maintenance performed by an end-user unit or organization on equipment (directly on the defense article or support equipment) assigned to the inventory of the end-user unit or organization and includes "repair, inspecting, servicing, or calibration, testing, lubricating and adjusting equipment, as well as replacing minor parts, components, assemblies and line-replaceable spares or units."

While the proposed change seems straightforward and will reduce the scope of services requiring authorization by DDTC, it is not clear why the definition of defense services is being amended rather than simply expanding the existing exemption. Basic operation and maintenance training for defense articles is "assistance" that is controlled under § 120.9(a)(1). Adding a provision stating that such activity is "not" a defense service is a step backward if the intention is to simplify and clarify the definition of defense services.

Mere employment of a U.S. citizen by a foreign person

In contrast to the basic operations and maintenance training provision above, it should be clear that the mere hiring of a U.S. citizen is not a defense service because it does not involve any act by the U.S. citizen that meets any definition of defense services. What the proposed change does not make clear, however, is that U.S. citizens who are hired by foreign persons may provide unauthorized defense services in the performance of their duties -- a point that may have provided more useful guidance.

Testing, repair, or maintenance of an item subject to the Export Administration Regulations ("EAR") that has been incorporated or installed into a defense article

This is a helpful clarification, but it gives rise to some unanswered questions that create compliance risks. What if, for example, the activity requires removal and replacement or disassembly and reassembly of an associated USML item? In addition, it is not clear whether upgrades or updates to EAR items (*e.g.*, new firmware) constitute "maintenance" that would be excluded from the definition of defense services, particularly if they improve the performance of the defense article. Caution is warranted in other circumstances as well. For example, if the item subject to the EAR has been modified by the end-user in some way for incorporation into the defense article it may now be a USML item.

Providing law enforcement, physical security or personal protective training, advice, or services to or for a foreign person using only public domain data

Setting aside the limitations discussed above regarding public domain data, this proposal raises

significant questions. In particular, why are these activities the subject of an exclusion from the definition of defense services in the first place? These activities arguably are not defense services under the current rule and under the proposed rule they would appear to be controlled only if they are provided to foreign units or forces and involve the employment of a defense article, or constitute conducting direct combat operations directly related to defense articles. Adding a specific exclusion related to these activities without clarifying when and under what circumstances they are controlled is likely to lead to confusion.

In addition, it is not clear why the public domain data use exclusion is limited to these activities and not other activities that may be deemed by DDTC to be controlled under the same rationale.

Providing assistance (including training) in medical, logistical (other than maintenance), or other administrative support services to or for a foreign person

It is not clear why this provision was deemed necessary as these activities would not appear to constitute defense services under the proposed rule. Does the specific exclusion of these services mean that these activities can constitute "direct combat operations" and/or that they are not to be construed as defense services even if they involve a defense article? The proposal also raises questions as to what activities will be deemed "other administrative services." Using the medical and logistics examples specifically cited in the proposed rule, is training a medic in the use of a defense article for self-defense or moving ordinance around a military base excluded from the definition of defense services? The intention may be simply to exclude these activities from the definition of direct combat operations. Additional clarification from DDTC would be helpful in understanding the scope and intention of this exclusion and more importantly the reason it was deemed necessary to specifically identify these services in the proposed rule.

Questions or Assistance?

Shipman & Goodwin LLP lawyers have experience in these issues and are able to advise our clients concerning them. Please contact either of the following attorneys if you would like to discuss the proposed rule or seek our assistance in submitting formal comments to DDTC.

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