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State Department Proposes Overhaul to ITAR Definition of "Defense Services"

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On April 13, 2011, the State Department's Directorate of Defense Trade Controls (DDTC) published a *Federal Register* notice proposing an overhaul of the definition of "defense services" controlled under the International Traffic in Arms Regulations (ITAR). In large part, the proposed revisions represent sensible, long-requested changes that would largely ease the export controls applicable to many U.S. companies (particularly including contractors to the Department of Defense) and would allow DDTC to more narrowly focus on areas of greatest export controls concern. However, portions of the proposed rule could introduce new ambiguities.

Background

The ITAR, which are administered by DDTC, control exports and reexports of defense articles, technical data, and defense services. In general, exports of defense services must be authorized under a Technical Assistance Agreement (TAA) between the U.S. exporter and the foreign recipient. At present, pursuant to 22 C.F.R. § 120.9, defense services controlled under the ITAR include: "The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles."

As DDTC acknowledges in the *Federal Register* notice, this definition is overly broad, and, in practice, can capture nearly any type of assistance provided to foreign persons with respect to defense articles, regardless of the nature of the project. Under the current definition, for example, a U.S. defense contractor would require a TAA

Authors

John R. Shane
Partner
202.719.7222
jshane@wiley.law

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in order to provide routine maintenance services on humvees owned by coalition forces in Afghanistan, even if the contractor is operating under a contract with the U.S. government and at the direction of the U.S. Department of Defense (DoD). The current definition also captures instances in which a U.S. person uses public domain information (*e.g.*, technical manuals freely available online) to provide training to foreign persons with respect to defense articles.

Summary of the Proposed Rule

DDTC is proposing a substantial overhaul of the definition of "defense services" that would, among other changes, remove from control routine maintenance services and training based on public domain information. In particular, the proposed definition would separate defense services into four types of activities:

1. Furnishing assistance (including training) using non-public domain data to foreign persons in the design, development, engineering, manufacture, production, assembly, testing, intermediate or depot level repair or maintenance, modification, demilitarization, destruction, or processing of defense articles.
2. Furnishing assistance to foreign persons with regard to the integration of items (whether controlled on the ITAR's U.S. Munitions List or the Commerce Control List, the Department of Commerce's list of controlled dual-use items) into a defense article.
3. Training or providing advice to foreign units and forces, including formal or informal instruction of foreign persons, in the employment of defense articles.
4. Conducting direct combat operations for or providing intelligence services to a foreign person directly related to a defense article.

The new definition would also identify several types of activities that are not considered defense services, including:

- Training in the basic operation or maintenance of a defense article;
- Mere employment of a U.S. citizen by a foreign person;
- Testing, repair, or maintenance of commercial or dual use items incorporated or installed in a defense article;
- Providing law enforcement, physical security, or personal protective training, advice, or services to or for a foreign person using only public domain data; and
- Providing assistance in medical, logistical, or other administrative support services to or for a foreign person.

In addition, DDTC is proposing to add new definitions for organizational, intermediate, and depot level maintenance. These terms, which are used in various places in the ITAR and in the proposed new definition of "defense services," had previously been left undefined by DDTC.

Potential Impact of the Proposed Rule

If implemented, the proposed rule could have a substantial impact in easing the licensing requirements applicable to U.S. companies working with foreign customers and, in particular, to U.S. government contractors supporting U.S. and coalition forces in Afghanistan, Iraq, and elsewhere. Specifically, as noted above, a TAA would no longer be required in order to provide basic maintenance services or to provide training using public domain information with regard to defense articles. Additionally, whereas under the current definition a TAA could technically be required to provide services with respect to commercial parts or components incorporated into defense articles, the proposed rule clarifies that such services are not subject to control unless the assistance covers the integration of such items into defense articles. Further, while the ITAR currently include an exemption from licensing for providing certain maintenance services to NATO partners, the exemption does not apply to services provided in Iraq or Afghanistan, as both countries remain subject to an arms embargo. By excluding such maintenance services from control, the proposed rule would allow U.S. companies to provide such services in those countries without obtaining a TAA. These changes should dramatically reduce the licensing burden currently borne by defense contractors supporting U.S. and coalition forces overseas.

However, the proposed rule also introduces new ambiguities in the definition of defense services. For example, with regard to the first type of covered activity identified above, the new definition removes the word "use," suggesting that certain assistance in the use of defense articles may no longer be controlled. At the very least, the omission leaves an open question as to exactly when assistance or training in the "use" of a defense article might cross the line into being a controlled activity. Additionally, it is unclear whether the third type of covered activity specified above, providing training or advice to foreign units or forces, would capture a situation in which a U.S. company provides such training or advice to a foreign company contractor to a foreign military.

As this is only a proposed rule subject to a public comment period, there remains the possibility that DDTC may choose to further revise and clarify the definition. However, despite these ambiguities, the proposed modifications, in particular the proposed limitations on the reach of the definition of defense services, should lighten the licensing burden on U.S. companies, particularly U.S. government contractors.