

To: Our Clients and Friends

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DDTC Issues Proposed Rule Clarifying the Definition of “Defense Service”

On April 13, 2011, the Department of State, Directorate of Defense Trade Controls (“DDTC”) issued a proposed rule to amend the International Traffic in Arms Regulations (“ITAR”) to clarify the scope of activities that constitute a “defense service.” 76 Fed. Reg. 20590. The proposed rule also introduces new definitions, dividing maintenance activities into one of three categories: organizational level, intermediate level or depot level maintenance. DDTC is accepting public comment on the proposed rule through June 13, 2011.

DDTC proposes to clarify the definition of “defense service” (ITAR §120.9), admitting the current definition is “overly broad” and captures activities that do not warrant ITAR control. A significant change is that DDTC proposes to explicitly remove assistance based solely upon the use of public domain data from the definition of defense services. After release of the Analytical Methods consent agreement in 2009, concern existed among some in industry that the provision of technical assistance or training using data or information in the public domain could constitute a defense service. Such concerns should be alleviated by this proposed rule, though exporters should continue to be cautious and ensure that the data and/or information at issue is actually within the public domain, particularly when dealing with data that has been combined from more than one source. The new rule also identifies five activities that *do not* constitute a defense service, including training in the basic operation or basic maintenance of a defense article and testing, repair and maintenance of items subject to the Export Administration Regulations (“EAR”) incorporated into defense articles. However, additional clarity from DDTC is desirable for several of these issues.

In addition, DDTC proposes to create ITAR §120.38, for the purpose of defining organization-level maintenance, intermediate-level maintenance and depot-level maintenance. The terms are defined based on who performs the maintenance, which may preclude some parties from getting the full advantage of these changes if the definitions are left unchanged. For example, organizational level is defined as being performed by the end user; yet there are clearly cases where an OEM will perform these same basic maintenance services. As worded, the definition may preclude the OEM from benefitting from the changes to the defense services definition as they relate to maintenance services. Hence, exporters should carefully review the proposed definitions in light of business operations to determine if further definition or clarification of terms is required, and if DDTC’s attempt to categorize maintenance activities into the three proposed levels is appropriate.

The regulated community should also take note of the proposed revisions to §120.9(a)(2), which now explicitly states that a defense service includes assistance in the integration of items controlled on the United States Munitions List (“USML”) or Commerce Control List (“CCL”) into a defense article, *regardless* of origin. In addition to a reminder that the concept of defense services is not limited to U.S. origin defense articles, the ability to provide integration assistance without a licensing authorization may now depend on the Commerce Department classification of the item to be integrated into the U.S. or foreign origin defense article. There is no mention of public domain in this subsection. As presently drafted, §120.9(a)(2) is arguably more permissive than §120.9(a)(1).

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