June 15, 2011

VIA eRulemaking Portal: Docket No. DOS-2011-0078

PM/DDTC, SA-1, 12th Floor
Directorate of Defense Trade Controls, Office of Defense Trade Controls Policy
ATTN: Regulatory Changes – Defense Services, Bureau of Military Affairs
United States Department of State
Washington, DC 20522-0112

REF: RIN 1400-AC80

RE: Proposed Revisions to the International Traffic in Arms Regulations: Defense Services

Dear DDTC:

The American Bar Association (“ABA”) Section of International Law (“Section”) appreciates this opportunity to comment on the proposed rule published by the U.S. Department of State, Directorate of Defense Trade Controls (“DDTC”) on April 13, 2011 (76 Fed. Reg. 71, 20590-20593) regarding revisions to the International Traffic in Arms Regulations (“ITAR”) (the “Proposed Rule”).

The views expressed herein are presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, accordingly, should not be construed as representing the policy of the ABA itself.

The ABA is the largest voluntary professional association in the world. The Section, with over 20,000 members, is the ABA leader in the development of policy in the international arena, the promotion of the rule of law and the education of international law practitioners. Many of its members are experienced in the export control laws of the United States and other countries.

We applaud DDTC’s efforts to amend the ITAR, as part of the President’s Export Control Reform effort, to enhance support of our allies, improve efficiency in licensing, and reduce unintended consequences. We recognize the thought and effort put into the Proposed Rule to capture more accurately the activities that warrant ITAR control.

Our comments follow:
1. As a general comment, we believe the intent of the Proposed Rule may best be served by restructuring it to provide a logical progression from what is a defense service to what is not a defense service without unnecessarily complicating the analysis with intermittent exceptions. Accordingly, we have attached a proposed draft that we believe will provide greater clarity to regulated persons, while continuing to control relevant defense articles, services, and technical data (See Exhibit A).

2. Section 120.9(a)(1) as proposed provides that “[t]he furnishing of assistance (including training) using other than public domain data to foreign persons (see § 120.16 of this subchapter), whether in the United States or abroad, in the design, development, engineering, manufacture, production, assembly, testing, intermediate or depot level repair or maintenance (see § 120.38 of this subchapter), modification, demilitarization, destruction, or processing of defense articles (see § 120.6 of this subchapter)” is a defense service.

   a. We support DDTC’s proposed removal of the words “operation” and “use” from the definition of defense service. By including as defense services those activities that merely assisted foreign persons to operate and use defense articles which they had already been authorized to receive – and presumably operate and use – the prior definition was duplicative and unnecessary.

   b. We recommend removing parenthetical references to allow the reader a smoother transition within the structure of the Proposed Rule. We believe that a general statement about the applicability of definitions within Section 120, proposed to be § 120.9(c)(3), accomplishes this goal. This comment is applicable to multiple sections of the Proposed Rule but will not be repeated to avoid redundancy in our comments.

   c. The removal of “operation” and “use” from the definition of defense service should be carried over to the definition of “technical data” in Section 120.10(a)(1) by removing “operation” and modifying “maintenance” to include only “intermediate or depot level repair or maintenance.” Without this change, the activities removed from the definition of defense service, by virtue of removing “operation” and “use” from § 120.9(a)(1), would still require licenses for non-public data that is used in carrying out those activities.

3. Section 120.9(a)(2) as proposed provides that “[t]he furnishing of assistance to foreign persons, whether in the United States or abroad, for the integration of any item controlled on the U.S. Munitions List (USML) (see § 121.1 of this subchapter) or the Commerce Control List (see 15 CFR part 774) into an end item (see § 121.8(a) of this subchapter) or component (see § 121.8(b) of this subchapter) that is controlled as a defense article on the USML, regardless of the origin” is a defense service.

   a. We support DDTC’s distinction between the meaning of “integrated” and “installed” contained in the preamble to the Proposed Rule. We applaud DDTC for this proposed definition, which makes clear that mere “plug-and-play” installation is not a defense service. This clarity is useful and will allow U.S. exporters to be more competitive with many of their foreign counterparts who have never been subject to this constraint.
b. We recommend that definitions of “integrated” and “installed” be incorporated into the Proposed Rule, as new § 120.9(c)(1)-(2), to provide more clarity and certainty. The definitions would be as follows:

1. Integration – The systems engineering design process of united 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.

2. Installation – The act of putting something in its predetermined place and does not require changes or modifications to the item in which it is being installed (e.g., installing dashboard radio into a military vehicle where the only assistance necessary is connecting wires, drilling holes into the radio receptacle, adjusting a spatial dimension by a small amount, or fastening the radio to the vehicle at predetermined points).

c. We believe that the defense services defined in the proposed § 120.9(a)(2) are already captured in § 120.9(a)(1), and that the purpose of the proposed § 120.9(a)(2) is to exempt “plug-and-play” installation services from defense services. To avoid duplication, streamline the proposed rule and provide greater clarity that this change is an exemption not an additional control, we recommend making two changes:

1. Adding a phrase to (a)(1) to clarify that the furnishing of assistance can include integration of any item into a defense article:

   (a)(1) 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, intermediate or depot level repair or maintenance, modification, demilitarization, destruction, or processing of defense articles, including the integration of any item into a defense article;

2. Removing § 120.9(a)(2) from the Proposed Rule and inserting the following language into § 120.9(b):

   The following is not a defense service: … the furnishing of assistance in the installation (as opposed to integration) of any item into a defense article ….

d. Should DDTC retain its proposed section 120.9(a)(2), the phrase in proposed paragraph (a)(2) "any item controlled ... on the Commerce Control List" could cause confusion about whether integration of an item that would be classified as "EAR99" would be a defense service. The Commerce Control List ("CCL") includes specific Export Control Classification Numbers ("ECCNs") that designate items that meet specified control parameters and are subject to specific EAR export license requirements, such as 3A001, 5D992, etc. Such items would clearly fall within the scope of items "on the CCL."
The designation "EAR99" is used to designate items that do not fall under a specific ECCN on the CCL but are subject to the EAR, so it would be reasonable for exporters to conclude that EAR99 items are not "on the CCL" for these purposes. Indeed, Part 774 of the EAR states that “[t]hose items subject to the EAR but not specified on the CCL are identified by the designator ‘EAR99.’” At the end of each CCL Category, however, there is a note that states "EAR99 - Items subject to the EAR that are not elsewhere controlled by this CCL category or in any other category in the CCL are designated by the number EAR99." While this note appears to be intended as a guidance note to assist with classification, some exporters might interpret the listing of EAR99 at the head of the note as an additional ECCN category, thus including EAR99 items among those items that are "on the Commerce Control List" for this purpose.

If DDTC’s intent is to either include or exclude the integration of EAR99 items from the definition of "defense services", we recommend that a note be added to clarify whether EAR99 items are covered, e.g. "any item subject to the Export Administration Regulations (including items designated as EAR99)" or "any item controlled ... on the Commerce Control List (not including items designated as EAR99).”

c. We believe that proposed §120.9(b)(3) may cause confusion because of the use of the word “incorporated.” We recommend replacing the word “incorporated” with “integrated” for consistency of terms within the Proposed Rule. Accordingly, we propose the following revision for DDTC’s consideration:

Testing, repair, or maintenance of an item “subject to the Export Administration Regulations” administered by the Department of Commerce, Bureau of Industry and Security, that has been integrated or installed into a defense article.

4. Section 120.9(b)(2) as proposed provides that “[m]ere employment of a U.S. citizen by a foreign person” is not a defense service.

a. The use of the word “citizen” appears to consider the employment of a U.S. permanent resident differently from that of a citizen. Understanding that DDTC wishes to exclude corporations and other legal entities from this clause and, therefore, has purposefully avoided the use of the words “U.S. person,” we recommend amending the language to read as follows:

Mere employment of an individual who is a U.S. person by a foreign person.

5. Section 120.9(b)(4) as proposed provides that “[p]roviding law enforcement, physical security or personal protective training, advice, or services to or for a foreign person (see § 120.16 of this subchapter), using only public domain data” is not a defense service.
a. We recommend that all law enforcement, physical security or personal protective training, advice, or services be treated as non-defense services regardless of whether they involve the use of public or non-public domain data, unless the activities otherwise involve the furnishing of ITAR controlled technical data. Accordingly, we propose the following revision for DDTC’s consideration:

Providing law enforcement, physical security or personal protective training, advice, or services to or for a foreign person, except to the extent that such services involve the furnishing of technical data controlled under this subchapter.

6. Section 124.1(a) as proposed provides in part that the approval requirements apply to “the training of any foreign military forces, regular and irregular, in the employment of defense articles.”

a. We recommend that the language of § 120.9(a)(3) (120.9(a)(2) in our proposed draft) be amended to read consistently with § 124.1(a) as follows: “[t]raining or providing advice to foreign military units or forces, regular or irregular … in the use of a defense article” is a defense service in order to be consistent with the language in § 124.1(a). Otherwise, training non-military forces – such as police units or fire departments would arguably constitute the provision of a defense service.

b. As reflected immediately above, we also recommend replacing the word “employment” with the word “use” as they are synonymous and “use” has a commonly understood meaning in the realm of defense articles. This change should be made in §§ 124.1(a) and 120.9(a)(3).

We believe the recommendations and comments set forth above are consistent with the rationale and objectives set forth in the preamble to the Proposed Rule, and will further clarify the scope of “defense services.” We look forward to continued communications regarding these important issues, and we appreciate your consideration of these comments.

Sincerely,

Salli A. Swartz
Chair, ABA Section of International Law
§ 120.9 Defense service.

(a) Except as otherwise limited by this section, defense service means:

(1) 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, intermediate or depot level repair or maintenance, modification, demilitarization, destruction, or processing of defense articles, including the integration of any item into a defense article; or

(2) Training or providing advice to foreign military units or 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 use of defense articles; or

(3) Conducting direct combat operations for or providing intelligence services to a foreign person directly related to a defense article.

(b) The following is not a defense service:

(1) The furnishing of assistance (including training) set forth in § 120.9(a)(1) using only public domain information; or

(2) The furnishing of assistance in the installation (as opposed to integration) of an item into a defense article; or

(3) Training in the basic operation (functional level) or basic maintenance of a defense article; or

(4) Mere employment of a natural U.S. person by a foreign person; or

(5) Testing, repair, or maintenance of an item “subject to the Export Administration Regulations” (see 15 CFR § 734.2), that has been integrated or installed into a defense article; or

(6) Providing law enforcement, physical security or personal protective training, advice, or services to or for a foreign person, except to the extent that such services involve the furnishing of technical data controlled under this subchapter; or

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

(c) For the purposes of this section, the following definitions apply:

(1) Integration is the systems engineering design process of united 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;
EXHIBIT A

(2) Installation is the act of putting something in its predetermined place and does not require changes or modifications to the item in which it is being installed (e.g., installing a dashboard radio into a military vehicle where the only assistance necessary is connecting wires, drilling holes into the radio receptacle, adjusting a spatial dimension by a small amount, or fastening the radio to the vehicle at predetermined points); (3) Where a term used in this section is defined elsewhere in this subchapter, such definition applies.