

DTAG ITAR Definitions Working Group Report

Submitted to the DDTC for Consideration on April 24, 2009

§120.22 Military Purpose

Current Definition	Proposed Change	Rationale/Comments
<p>Not currently defined, but found in following sections:</p> <p>“Military Purpose” - USML Category V(c)(7); Category VI(a); Category VII(a); Category IX(a); Category XI(b); XIII(a); XX(a) & (b); XXI(a); §121.3; §121.15; §126.4.</p> <p>“Military Application” - ITAR §120.3; §120.4(d); USML Category I; Category II(b); Category II(d); Category III(f); Category V(a)(35); Category V(b)(7); Category V(c)(10) & (12); Category V(e)(19); Category V(f)(21); Category V(i); Category VIII(h)(note); Category X(a); Category XI(a); Category XII(b) & (c); Category XIII(b), (g), (h), (i) & (m); Category XIV(n); Category XV(e); Category XVI(c); Category XII(a) & (g); ITAR §121.5.</p> <p>In some places the term “military application” is used and in others the term “military purpose” is used. Neither is defined and there</p>	<p>“<i>Military purpose</i>” means that the article, material or service is designed, developed, configured, adapted or modified to have a unique property that, in and of itself, distinguishes it for the purpose of projecting military force, defending against military force or gathering of intelligence directly related to projecting military force or defending against military force. The classification of a material, part or component designed, developed, configured, adapted or modified for use in a higher order component (which is a defense article) or an end-item (which is a defense article) depends on the property of the material, part or component and not on the properties of the higher-order component or end-item.</p> <p>For example: (a) a power cord for coffee maker that is modified for use in a submarine by changing the length of the power cord would not be designed for a military purpose because the modification does not, in and of itself, have a</p>	<p>In some places the term “military application” is used and in other the term “military purpose” is used. Neither is defined and there is no indication of whether the terms are meant to have different results or whether they are interchangeable.</p> <p>Suggestion only use the term “military purpose” (e.g., replace the term “military application” where it is embedded in existing terms e.g. §120.3, etc.) and define the term so that only items that are inherently military are covered.</p> <p>Definition used in various Bilateral Nuclear Agreements: “military purpose” means, for the purposes of this Agreement only, direct military applications of nuclear energy or nuclear material such as nuclear weapons or military nuclear reactors, but does not include indirect uses such as power for a military base drawn from a civil power network, or production of radioisotopes to be used for diagnosis in a military hospital;</p>

<p>is no indication of whether the terms are meant to have different results or whether they are interchangeable.</p>	<p>military property; or (b) a commercial gasoline fuel line that is modified to be shorter or longer to fit a higher order military component or end-item but lacks any modification to the functionality of the fuel line, and therefore is not modified for a military purpose.</p> <p>If the commercial parts or components of a higher order commercial component or commercial end-item are reconfigured for a military customer, the new configuration would not be for a military purpose unless the new configuration has a unique property that, in and of itself, distinguishes it for the purpose of projecting military force, etc.</p>	<p>Term: Function Definition: The action or actions which an item is designed to perform. Author: MIL-STD-480B, MIL-STD-973</p>
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§120.XX Normal Commercial Use

Current Definition	Proposed Change	Rationale/Comments
<p>1. The term “normal commercial use” is not defined in the ITAR or in any supplementary guidance provided by DDTC but it is used in three U.S. Munitions List (“USML”) categories and in one explanatory provision.</p> <ul style="list-style-type: none"> • Under the following USML Categories, “components, parts, accessories, attachments and associated equipment” that are in “normal commercial use” are <i>not</i> controlled under the USML: <ul style="list-style-type: none"> – USML Category XI(c) (“Military Electronics”) – USML Category XIII(e) (“Fire Control, Range Finder, Optical and Guidance and Control Equipment”) – USML Category XVI(b) (“Nuclear Weapons, Design and testing Related Items”) • Under ITAR § 121.10, unfinished items (<i>e.g.</i>, forgings, castings, extrusions and machined bodies) that have reached a stage in manufacture where they are clearly identifiable as defense articles are not controlled 	<p>(1) For purposes of this subchapter, an item that is in “<i>normal commercial use</i>” is any item that is of a type customarily used for purposes other than military purposes and that has been sold or offered for sale in the commercial marketplace.</p> <p>(2) Items in “<i>normal commercial use</i>” that are modified or adapted in some way remain in “normal commercial use” so long as the modification or adaptation at issue (i) is of a type generally available to all potential customers and (ii) is not made for a military purpose.</p>	<p>A review of other U.S. statutes, regulations, court cases and agency decisions did not find any materials that provided additional guidance on the meaning of the term “normal commercial use.”</p> <p>The term “normal commercial use” as used in USML Category XIII(e) was referenced in one federal district court case, but the case does not provide any clarification as to its meaning. <i>U.S. v. Gregg</i>, 829 F. 2d. 1430 (8th Cir., 1987).</p> <p>The term is used in EAR § 744.2, which imposes a licensing requirement for dual use items when the exporter has knowledge that the item will be used in certain prohibited nuclear activities. A note to the section restates the requirement of USML Category XVI(b), noting that items specially designed for devising, carrying out or evaluating a nuclear weapons test or nuclear explosions are controlled under the ITAR, “except such items as are in normal commercial use for other purposes.”</p> <p>The structure of the USML Categories referenced above dictates that “normal commercial use” cannot simply mean parts or components that are identical to items sold in the commercial marketplace.</p> <p>To be classified in one of the three USML categories identified above, a part or component must have been “specifically designed, modified and configured” for military application. If it was not so designed, modified or configured, it would not be on the USML.</p> <p>Moreover, under the policy factors set forth in ITAR § 120.3, parts and components that are identical to items in the commercial marketplace would not qualify for designation on the USML under § 120.3(a)(ii).</p> <p>The “normal commercial use” language, therefore, is clearly intended to carve out from control under the USML parts and components that were specifically designed, modified or configured for a military application/purpose but that are of a type that are generally available in the commercial market for non-military applications.</p>

<p>under the USML, if they are in "normal commercial use."</p>		<p>Example of operation of proposed definition:</p> <p><u>Example #1:</u> Company X manufactures fuel hoses for all types of vehicles. Customers order fuel hoses from a large catalog of part numbers. In addition, customers often order customized items by specifying a product family, length, type of connector(s) and material from a menu of options. Prime Contractor is manufacturing a new armored combat vehicle for the U.S. Army and orders a fuel hose for the vehicle by identifying the product family and specifying the length, connectors and the materials from the menu of options offered by Company X. Under the proposed definition, the fuel hose would be in "normal commercial use" even if that particular configuration is unique to the Prime Contractor for use in the armored vehicle because the fuel hose is of a type that is sold in the commercial market for purposes other than military purposes.</p> <p><u>Example #2:</u> Same facts as Example #1 but the Prime Contractor also specifies that the fuel hose must be resistant to chemical and biological weapons and CBW decontaminants used by the U.S. Army. This is not an option that Company X offers to its customers, and it is required to investigate new materials and qualify a new product. Under the proposed definition, the fuel hose purchased by the Prime Contractor would <i>not</i> be in "normal commercial use" because it is not of a type sold (or offered for sale) in the commercial market and the modification was made for a military purpose (<i>i.e.</i>, defending against CBW attacks).</p>
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§120.3 Policy on designating and determining defense articles and services.

Current Definition	Proposed Change	Rationale/Comments
<p>An article or service may be designated or determined in the future to be a defense article (see §120.6) or defense service (see §120.9) if it:</p> <p>(a) Is specifically designed, developed, configured, adapted, or modified for a military application, and</p> <p>(i) Does not have predominant civil applications, and</p> <p>(ii) Does not have performance equivalent (defined by form, fit and function) to those of an article or service used for civil applications; or</p> <p>(b) Is specifically designed, developed, configured, adapted, or modified for a military application, and has significant military or intelligence applicability such that control under this subchapter is necessary.</p> <p>The intended use of the article or service after its export (i.e., for a military or civilian purpose) is not relevant in determining whether the article or service is subject to the</p>	<p>Proposed Definition 1 – using newly defined ITAR term “military purpose”</p> <p>An article or service may be designated or determined in the future to be a defense article (see § 120.6) or defense service (see § 120.9) if it:</p> <p>(a) Is specially designed or developed for a military purpose (See §120.X definition of military purpose), or</p> <p>(b) Has significant military or intelligence applicability such that control under this subchapter is necessary; or</p> <p>(c) Is specially configured, adapted or modified for a military purpose.</p> <p>The intended use of the article or service (i.e., for a military purpose or for normal commercial use) is not relevant in determining whether the article or service is subject to the controls of this subchapter. Any item covered by the U.S. Munitions List must be within the categories of the U.S. Munitions List. The scope of the U.S. Munitions List shall be changed only by amendments made pursuant to section 38 of the Arms Export Control Act (22 U.S.C. 2778).</p> <p>Standard parts, components, accessories and attachments, even if specially designed or developed for a military purpose, shall not be designated defense</p>	<p>Rationale for § 120.3 Proposed Definition #1</p> <p>DTAG members proposed modification attempts to clarify those items with the addition of a definition for military purpose adding the reference, if approved, to the ITAR Part 120. The use of “specifically” and “specially” were used interchangeably throughout the ITAR, DTAG elected to use “specially” for Part 120 exclusively and eliminated the use of “specifically”.</p> <p>A new paragraph was added to specifically state that items such as standard parts and components used for civil purposes and based on industry and government published standards/specifications are not subject to the controls of the ITAR.</p> <p><u>Rationale for § 120.3 Proposed Definition #2</u></p> <p>The rationale is similar to the proposed definition 1, but absent a clear definition of military purpose contained in the ITAR, DTAG proposes this definition as an alternative.</p> <p>If Definition Option # 2 for §120.3 is used, then the form, fit and function note may be</p>

<p>controls of this subchapter. Any item covered by the U.S. Munitions List must be within the categories of the U.S. Munitions List. The scope of the U.S. Munitions List shall be changed only by amendments made pursuant to section 38 of the Arms Export Control Act (22 U.S.C. 2778).</p>	<p>articles provided that they are the performance equivalent to those used for commercial applications (e.g., fasteners, sealants, raw materials, hydraulic systems, wiring harnesses, brackets, etc.) and that are based on industry and government published standards/specifications.</p> <p>Proposed Definition 2 – if “military purpose” is not added as a definition in the ITAR</p> <p>An article or service may be designated or determined in the future to be a defense article (see §120.6) or defense service (see § 120.9) if it:</p> <ul style="list-style-type: none"> (a) Is specially designed or developed for a military purpose, and (i) Does not have predominant commercial purpose, and (ii) Does not have performance equivalent (defined by form, fit and function) to those of an article or service used for commercial purposes; or (b) Is specially designed or developed for a military purpose, and (i) Has significant military or intelligence applicability such that control under this subchapter is necessary; or (c) Is specially configured, adapted or modified for a military purpose, and (i) The performance equivalent (defined by form, fit and function) exceeds those of an article or service used for 	<p>removed from §120.4 to avoid redundancy.</p>
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	<p>commercial purposes.</p> <p>The intended use of the article or service (i.e., for a military purpose or for normal commercial use) is not relevant in determining whether the article or service is subject to the controls of this subchapter. Any item covered by the U.S. Munitions List must be within the categories of the U.S. Munitions List. The scope of the U.S. Munitions List shall be changed only by amendments made pursuant to section 38 of the Arms Export Control Act (22 U.S.C. 2778).</p> <p>Standard parts, components, accessories and attachments, even if specially designed or developed for a military purpose, shall not be designated defense articles provided that they are the performance equivalent to those used for commercial applications (e.g., fasteners, sealants, raw materials, hydraulic systems, wiring harnesses, brackets, etc.) and that are based on industry and government published standards/specifications.</p> <p>NOTE: The form of the item is its defined configuration, including the geometrically measured configuration, density, and weight or other visual parameters which uniquely characterize the item, component or assembly. The fit of the item is its ability to physically interface or interconnect with or become an integral part of another item. The function of the item is the action, or actions, it is designed to perform.</p>	
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§120.4 Commodity Jurisdiction

Current Definition	Proposed Change	Rationale/Comments
<p>(a) The commodity jurisdiction procedure is used with the U.S. Government if doubt exists as to whether an article or service is covered by the U.S. Munitions List. It may also be used for consideration of a re-designation of an article or service currently covered by the U.S. Munitions List. The Department must provide notice to Congress at least 30 days before any item is removed from the U.S. Munitions List. Upon written request, the Directorate of Defense Trade Controls shall provide a determination of whether a particular article or service is covered by the U.S. Munitions List. The determination, consistent with §§ 120.2, 120.3, and 120.4, entails consultation among the Departments of State, Defense, Commerce and other U.S. Government agencies and industry in appropriate cases.</p> <p>(b) Registration with the Directorate of Defense Trade Controls as defined in part 122 of this subchapter is not required prior to submission of a commodity jurisdiction request. If it is determined that the commodity is a defense article or defense service covered by the U.S. Munitions List, registration is required for exporters, manufacturers, and furnishers of such defense articles and defense</p>	<p>(a) Any non-governmental entity may seek a determination on the jurisdictional control of a commodity through the Commodity Jurisdiction process if doubt exists as to whether an article or service is covered by the U.S. Munitions List. A Commodity Jurisdiction request may also be used for consideration to redesignate an article or service currently controlled on the U.S. Munitions List. The Department must provide notice to Congress at least 30 days before any item is removed from the U.S. Munitions List. Upon written request, the Directorate of Defense Trade Controls shall provide a determination of whether a particular article or service is covered by the U.S. Munitions List. The determination, consistent with §120.2, 120.3, and 120.4, entails consultation among the Departments of State, Defense, Commerce and other U.S. Government agencies and industry in appropriate cases.</p> <p>(b) Registration with the Directorate of Defense Trade Controls as defined in Part 122 of this subchapter is not required prior to submission of a commodity jurisdiction request. If it is determined that the commodity is a defense article or defense service covered by the U.S. Munitions List, registration is required for exporters, manufacturers, and furnishers of such defense articles and defense services (See Part 122 of this</p>	<p>DTAG members proposed slight modifications to the current CJ definition. The proposed definition clarifies that it is a "process". Exporters or any non-governmental entity may use the "process" to determine jurisdiction. Adds the exception for Category XV in Section 3 (ii).</p>

<p>services (see part 122 of this subchapter), as well as for brokers who are engaged in brokering activities related to such articles or services.</p> <p>(c) Requests shall identify the article or service, and include a history of the product's design, development and use. Brochures, specifications and any other documentation related to the article or service shall be submitted in seven collated sets.</p> <p>(d)(1) A determination that an article or service does not have predominant civil applications shall be made by the Department of State, in accordance with this subchapter, on a case-by-case basis, taking into account:</p> <p>(i) The number, variety and predominance of civil applications;</p> <p>(ii) The nature, function and capability of the civil applications; and</p> <p>(iii) The nature, function and capability of the military applications.</p> <p>(2) A determination that an article does not have the performance equivalent, defined by form, fit and function, to those used for civil applications shall be made by the Department of State, in accordance with this subchapter, on a case-by-case basis, taking into account:</p>	<p>subchapter), as well as for brokers who are engaged in brokering activities related to such articles or services.</p> <p>(c) A Commodity Jurisdiction request shall identify the article or service, a history of the product's design and development (including the original design intent, and the use(s)). Brochures, specifications and any other supporting documentation related to the article or service shall be submitted in seven collated sets.</p> <p>(d)(1) A determination that an article or service does not have predominant commercial purposes shall be made by the Department of State, in accordance with this subchapter, on a case-by-case basis, taking into account:</p> <p>(i) The number, variety and predominance of commercial purposes;</p> <p>(ii) The nature, function and capability of the commercial purposes; and</p> <p>(iii) The nature, function and capability of the military purposes.</p> <p>(2) A determination that an article does not have the performance equivalent, defined by form, fit and function to those used for commercial purposes shall be made by the Department of</p>	
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<p>(i) The nature, function, and capability of the article;</p> <p>(ii) Whether the components used in the defense article are identical to those components originally developed for civil use.</p> <p>NOTE: The form of the item is its defined configuration, including the geometrically measured configuration, density, and weight or other visual parameters which uniquely characterize the item, component or assembly. For software, form denotes language, language level and media. The fit of the item is its ability to physically interface or interconnect with or become an integral part of another item. The function of the item is the action or actions it is designed to perform.</p> <p>(3) A determination that an article has significant military or intelligence applications such that it is necessary to control its export as a defense article shall be made, in accordance with this subchapter, on a case-by-case basis, taking into account:</p> <p>(i) The nature, function, and capability of the article;</p> <p>(ii) The nature of controls imposed by other nations on such items (including Wassenaar Arrangement and other multilateral controls), and</p>	<p>State, in accordance with this subchapter, on a case-by-case basis, taking into account:</p> <p>(i) The nature, function, and capability of the article;</p> <p>(ii) Whether the components used in the defense article are identical to those components originally developed for commercial use.</p> <p>NOTE: The form of the item is its defined configuration, including the geometrically measured configuration, density, and weight or other visual parameters which uniquely characterize the item, component or assembly. For software, form denotes language, language level and media. The fit of the item is its ability to physically interface or interconnect with or become an integral part of another item. The function of the item is the action or actions it is designed to perform.</p> <p>(3) A determination that an article has significant military or intelligence purposes such that it is necessary to control its export as a defense article shall be made, in accordance with this subchapter, on a case-by-case basis, taking into account:</p> <p>(i) The nature, function, and capability of the article;</p> <p>(ii) The nature of controls imposed by other</p>	
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<p>(iii) That items described on the Wassenaar Arrangement List of Dual-Use Goods and Technologies shall not be designated defense articles or defense services unless the failure to control such items on the U.S. Munitions List would jeopardize significant national security or foreign policy interests.</p> <p>(e) The Directorate of Defense Trade Controls will provide a preliminary response within 10 working days of receipt of a complete request for commodity jurisdiction. If after 45 days the Directorate of Defense Trade Controls has not provided a final commodity jurisdiction determination, the applicant may request in writing to the Director, Office of Defense Trade Controls Policy that this determination be given expedited processing.</p> <p>(f) State, Defense and Commerce will resolve commodity jurisdiction disputes in accordance with established procedures. State shall notify Defense and Commerce of the initiation and conclusion of each case.</p> <p>(g) A person may appeal a commodity jurisdiction determination by submitting a written request for reconsideration to the Managing Director of the Directorate of Defense Trade Controls. The Directorate of Defense Trade Controls will provide a written response of the Managing Director's determination within 30 days of receipt of the appeal. If desired, an appeal of the Managing</p>	<p>nations on such items, including Wassenaar Arrangement and other multilateral controls; and</p> <p>(iii) That items described on the Wassenaar Arrangement List of Dual-Use Goods and Technologies shall not be designated defense articles or defense services unless the failure to control such items on the U.S. Munitions List would jeopardize significant national security or foreign policy interests.</p> <p>(e) The Directorate of Defense Trade Controls will provide a preliminary response within 10 working days of receipt of a complete request for commodity jurisdiction. If after 45 days the Directorate of Defense Trade Controls has not provided a final commodity jurisdiction determination, the applicant may request in writing to the Director, Office of Defense Trade Controls Policy that this determination be given expedited processing.</p> <p>(f) State, Defense and Commerce will resolve commodity jurisdiction disputes in accordance with established procedures. State shall notify Defense and Commerce of the initiation and conclusion of each case.</p> <p>(g) A person may appeal a commodity jurisdiction determination by submitting a written request for reconsideration to the Managing Director of the Directorate of Defense Trade Controls. The Directorate of Defense Trade Controls will</p>	
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<p>Director's decision can then be made directly through the Deputy Assistant Secretary for Defense Trade Controls to the Assistant Secretary for Political- Military Affairs.</p>	<p>provide a written response of the Managing Director's determination within 30 days of receipt of the appeal.</p> <p>If desired, an appeal of the Managing Director's decision can then be made directly through the Deputy Assistant Secretary for Defense Trade Controls to the Assistant Secretary for Political- Military Affairs.</p>	
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§120.6 Defense article.

Current Definition	Proposed Change	Rationale/Comments
<p>Defense article means any item or technical data designated in §121.1 of this subchapter. The policy described in §120.3 is applicable to designations of additional items. This term includes technical data recorded or stored in any physical form, models, mockups or other items that reveal technical data directly relating to items designated in §121.1 of this subchapter. It does not include basic marketing information on function or purpose or general system descriptions.</p>	<p><i>Defense article</i> means any item and its related technical data (See §120.10) controlled on the United States Munitions List (USML). See §121.1 of this subchapter. The policy described in §120.3 is applicable to designations of defense articles and services. The term <i>defense article</i> does not include basic marketing information on function or purpose, general system descriptions, or certain parts, components, and accessories as described in §121.1 of this subchapter. The term <i>defense article</i> does not include items fabricated solely for fundamental research purposes, provided that all of the information about the item would normally be published and shared broadly within the scientific community.</p>	<p>DTAG tightened the definition to clearly state Defense Articles include any item and related technical data on the USML. Added caveat to exclude items fabricated solely for fundamental research when all of the information will be published and shared.</p>

§120.9 Defense service

Current Definition	Proposed Change	Rationale/ Comments
<p>(a) <i>Defense service</i> means:</p> <p>(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, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;</p> <p>(2) The furnishing to foreign persons of any technical data controlled under this subchapter (see § 120.10), whether in the United States or abroad; or</p> <p>(3) Military 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. (See also §124.1.)</p> <p>(b) [Reserved]</p>	<p>(a) <i>Defense service</i> means:</p> <p>(1) The furnishing of assistance (including training) to or for the benefit of foreign persons, whether in the United States or abroad, in the design, development, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of U.S. or foreign defense articles even if such assistance is based on information in the public domain, as defined in §120.11, or otherwise authorized for export. (See also §124.1) The conduct of fundamental research using only public domain information does not constitute a defense service.</p> <p>(2) Military training of foreign units and forces, regular and irregular, in the use of U.S. or foreign defense articles, including formal or informal instruction of foreign persons in the United States or abroad. (See also §120.17)</p> <p>(b) [Reserved]</p>	<p>The additional language referencing §120.11 and §124.1 strengthens and clarifies the definition by noting that assistance based on technology in the public domain can be a defense service.</p> <p>The addition of the fundamental research explanation provides consistency with the existing and proposed fundamental research references in the ITAR. The added language explains that services falling under the definition of fundamental research do not constitute a defense service.</p> <p>Removal of previous “(a)(2)” - it was removed all together because as currently written, the definition encompasses any exchange of technical data, which overtakes the numerous exemptions and licenses that authorize export of technical data. With the addition of the reference to § 124.1 in part (a)(1), this section is confusing and does not add any guidance beyond what is already in (a)(1) and § 124.1.</p> <p>A definition for military training and advice was added in an effort to be consistent with §124.1.</p>

Current Definition	Proposed Change	Rationale/ Comments
		<p>The phrase in the current definition within (a)(3) "... or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice ..." are examples of exports and are entirely captured under §120.17. In the interest of strengthening the definition and providing clarity to the readers, the phrase is replaced with reference to the definition of an export at §120.17.</p>

§120.10 Technical data.

Current Definition	Proposed Change	Rationale/ Comments
<p>(a) Technical data means, for purposes of this subchapter:</p> <p>(1) Information, other than software as defined in §120.10(a)(4), which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions and documentation.</p> <p>(2) Classified information relating to defense articles and defense services;</p> <p>(3) Information covered by an invention secrecy order;</p> <p>(4) Software as defined in §121.8(f) of this subchapter directly related to defense articles;</p> <p>(5) This definition does not include information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or information in the public domain as defined in §120.11. It also does not include basic marketing information on</p>	<p>Technical data means, for the purposes of this subchapter:</p> <p>Information that is required for the design, development, production, manufacture, assembly, operation, repair, maintenance or modification of defense articles or that is listed in the USML. This includes information in both tangible and intangible form.</p> <p>(1) The term "technical data" includes:</p> <p>(a) Classified information related to defense articles and defense services;</p> <p>(b) Software as defined in §120.XX of this subchapter that is specially developed, configured or modified for a defense article;</p> <p>(c) Operational systems measurements (e.g. operating frequencies, flight profiles, radar cross sections etc.)</p> <p>(2) The term "technical data" does not include:</p> <p>(a) Information related to standard parts, components, accessories and attachments that are the performance equivalent to those used for commercial applications (e.g., fasteners,</p>	<p>Clarification of the definition is required to remove some of ambiguity and to limit control to the technical data which is of concern to the USG. This includes clarifying that the measured end item performance of the defense articles are controlled (e.g. operating frequencies, flight profiles, radar cross sections, etc.) even if unclassified. A number of exclusions are also recommended as a means by which to define "required" in the first sentence.</p> <p>Substituted "commercial" for the term "civil" in order to be consistent with §120.3.</p>

Current Definition	Proposed Change	Rationale/ Comments
<p>function or purpose or general system descriptions of defense articles.</p> <p>(b) [Reserved]</p>	<p>sealants, raw materials, hydraulic systems, wiring harnesses, brackets, etc.) and that are based on industry and government published standards/specifications;</p> <p>(b) Information in the public domain as defined in §120.11;</p> <p>(c) Information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities;</p> <p>(d) Top-level requirements related to form, fit or function;</p> <p>(e) General descriptive information such as block diagrams, schematics, and parts or components lists;</p> <p>(f) Marketing information on form, fit, function or general system descriptions of defense articles.</p>	

§120.11 Public domain.

Current Definition	Proposed Change	Rationale/Comments
<p>(a) <i>Public domain</i> means information which is published and which is generally accessible or available to the public:</p> <p>(1) Through sales at newsstands and bookstores;</p> <p>(2) Through subscriptions which are available without restriction to any individual who desires to obtain or purchase the published information;</p> <p>(3) Through second class mailing privileges granted by the U.S. Government;</p> <p>(4) At libraries open to the public or from which the public can obtain documents;</p> <p>(5) Through patents available at any patent office;</p> <p>(6) Through unlimited distribution at a conference, meeting, seminar, trade show or exhibition, generally accessible to the public, in the United States;</p> <p>(7) Through public release (<i>i.e.</i>, unlimited distribution) in any form (e.g., not necessarily in published form) after approval by the cognizant U.S. government department or agency (see also §125.4(b)(13) of this subchapter);</p> <p>(8) Through fundamental research in science and engineering at accredited institutions of higher learning in the</p>	<p>(a) <i>Public domain information</i> means:</p> <p>(1) Information that has been published or released in any manner and that is generally accessible or available to the public;</p> <p>(2) Information available through lawful unlimited distribution at a conference, meeting, seminar, trade show or exhibition generally accessible to the public in the United States;</p> <p>(3) Information that has been approved for public release (<i>i.e.</i>, unlimited distribution) by the cognizant U.S. Government agency or the U.S. Department of Defense Office of Security Review, whether or not it has actually been released;</p> <p>(4) Fundamental research as defined by §120.XX of this subsection, or</p> <p>(5) Information that is otherwise generally accessible or available to the public.</p>	<p>Definition is expanded to include all types of lawfully published information (regardless of publication method), and to include certain non-published information that DDTC should have no interest in controlling. In addition, this proposed change moves "Fundamental research" to a separate distinct definition as §120.XX which follows below.</p>

<p>U.S. where the resulting information is ordinarily published and shared broadly in the scientific community. Fundamental research is defined to mean basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community, as distinguished from research the results of which are restricted for proprietary reasons or specific U.S. Government access and dissemination controls. University research will not be considered fundamental research if:</p> <p>(i) The University or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity, or</p> <p>(ii) The research is funded by the U.S. Government and specific access and dissemination controls protecting information resulting from the research are applicable.</p> <p>(b) [Reserved]</p>		
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§120.XX Fundamental Research

Current Definition	Proposed Change	Rationale/Comments
<p>No separate definition for “fundamental research is included in the ITR. At the present it is currently embedded in Public Domain §120.11 which states, as follows:</p> <p>Fundamental research is defined to mean basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community, as distinguished from research the results of which are restricted for proprietary reasons or specific U.S. Government access and dissemination controls. University research will not be considered fundamental research if:</p> <p>(i) The University or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity, or</p> <p>(ii) The research is funded by the U.S. Government and specific access and dissemination controls protecting information resulting from the research are applicable.</p>	<p>§ 120.XX Fundamental Research (a) <i>Fundamental research</i> means basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons.</p> <p>(1) Basic research is a systemic study directed toward greater knowledge or understanding of the fundamental aspects of phenomena and observable facts without specific applications towards processes or products in mind. In basic research, the emphasis is on achieving specified objectives and knowledge rather than on achieving predetermined end results prescribed in a statement of specific performance characteristics. This emphasis applies particularly during the early or conceptual phases of the research and development efforts.</p> <p>(2) Applied research related to the basic research is the systemic study to gain</p>	<p>§120.XX Rationale</p> <p>Current definition of fundamental research elevates form over substance by limiting fundamental research to activities that occur at an institution of higher learning. Proposed change ensures that industrial or proprietary information does not qualify as fundamental research, but that basic research and applied research related to fundamental research articles is not controlled, regardless of where it occurs. Also clarifies the definitions of basic and applied research. Clarifies that certain limited reviews prior to publication do not constitute a publication restriction making the information ineligible for fundamental research exclusion.</p> <p>The definition also raises an issue that should be addressed if this definition passes. We will need a change to 123.16(b)(10) - to allow hardware resulting from fundamental research to be exported under this exemption. This again ties fundamental research to universities.</p>

	<p>knowledge or understanding necessary to determine the means by which the specific basic research objective may be met.</p> <p>(i) Applied research does not include proprietary research or industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary reasons or specific national security reasons.</p> <p>(ii) Applied research does include design, development, and production of articles fabricated solely for fundamental research purposes, provided that all of the information about the article will be published and shared broadly within the scientific community.</p> <p>(b) Research will not be considered fundamental research if the research is subject to restrictions on publication or security review procedures for any purpose other than editorial review, ensuring that the publication would not inadvertently divulge proprietary information provided by the sponsor to the researchers, or ensuring that the publication would not compromise patent rights.</p>	
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§ 120.15 U.S. person

Current Definition	Proposed Change	Rationale/Comments
<p><i>U.S. person</i> means a person (as defined in §120.14 of this part) who is a lawful permanent resident as defined by 8 U.S.C. 1101(a)(20) or who is a protected individual as defined by 8 U.S.C. 1324b(a)(3). It also means any corporation, business association, partnership, society, trust, or any other entity, organization or group that is incorporated to do business in the United States. It also includes any governmental (federal, state or local) entity. It does not include any foreign person as defined in §120.16 of this part.</p>	<p><i>U.S. person</i> means a person (as defined in §120.14 of this part) who is a U.S. citizen or lawful permanent resident as defined by 8 U.S.C. 1101(a)(20) or who is a protected individual as defined by 8 U.S.C. 1324b(a)(3). It also means any corporation, business association, partnership, society, trust, or any other entity, organization or group that is incorporated to do business in the United States. It also includes any governmental (federal, state or local) entity. It does not include any foreign person as defined in §120.16 of this part.</p>	<p>Added words "is a U.S. citizen" to make definition clearer and more accurate.</p>

§120.21 Manufacturing license agreement

Current Definition	Proposed Change	Rationale/Comments
<p>An agreement (e.g., contract) whereby a U.S. person grants a foreign person an authorization to manufacture defense articles abroad and which involves or contemplates:</p> <p>(a) The export of technical data (as defined in §120.10) or defense articles or the performance of a defense service; or</p> <p>(b) The use by the foreign person of technical data or defense services previously exported by the U.S. person. (See part 124 of this subchapter)</p>	<p>An agreement whereby the Directorate of Defense Trade Controls authorizes a U.S. person to grant or license manufacturing rights and/or related manufacturing know-how to a foreign person to manufacture defense articles abroad and which involves:</p> <p>(a) The export of technical data (as defined in § 120.10) or defense articles or the performance of a defense service; or</p> <p>(b) The use by the foreign person of technical data or defense articles previously exported by the U.S. person. (See Part 124 of this subchapter).</p> <p>[For purposes of this definition this does not include those instances where the U.S. person is only granting or licensing the rights for the assembly of defense articles. This level of activity would be subject to a technical assistance agreement. See §120.22]</p>	<p>The recommended rewording:</p> <ul style="list-style-type: none"> • Provides clarification that an “agreement” is an authorization and not a contract; • Deletes the term “contemplates” to minimize confusion; and • Provides clarification that assembly of defense articles is can be accomplished under a technical assistance agreement. • Adds “DDTC” (rather than “State”) so as to be consistent with other references in the TAR to DDTC.

§120.XX Build-to-print.

Current Definition	Proposed Change	Rationale/ Comments
<p>No definition currently included in Part 120, but the term is used in the following sections of the ITAR: 124.13, 125.4, & 126.5.</p> <p>125.4(c)(1): "Build-to-print" means that a foreign consignee can produce a defense article from engineering drawings without any technical assistance from a U.S. exporter. This transaction is based strictly on a "hands-off" approach since the foreign consignee is understood to have the inherent capability to produce the defense article and only lacks the necessary drawings. Supporting documentation such as acceptance criteria, and specifications, may be released on an as-required basis (i.e. "must have") such that the foreign consignee would not be able to produce an acceptable defense article without this additional supporting documentation. Documentation which is not absolutely necessary to permit manufacture of an acceptable defense article (i.e. "nice to have") is not considered within the boundaries of a "Build-to-Print" data package."</p>	<p>A technical data package (e.g., engineering drawings, electronic data files, product specifications, object code software for numerically controlled machines, and acceptance criteria) which is required to manufacture a defense article without technical assistance. This does not preclude the U.S. party from providing clarification of the requirements of the data package to the foreign person. Build-to-print does not include the release of any information which discloses design methodology, engineering analysis, or manufacturing know-how.</p>	<p>The ITAR currently has defined this term in three different sections (§§124.13, 125.4 and 126.5). The recommendation is to provide one standard definition in Part 120. The basic intent of the definition has been retained with changes made for clarification purposes only. For example, the elimination of subjective phrases such as: "hands-off", "must have" and "nice to have" which cause confusion.</p> <p>Furthermore the definition has been revised to reflect the fact that the exporter can provide clarifications to the data package provided no design methodology, engineering analysis or manufacturing know-how is released. <i>This is based on the fact that even in US defense contractor manufacturing and modification facilities and/or government depots, there is an engineering liaison function between the design departments and the production departments to advise on and clarify engineering documentation questions.</i></p>

§120.XX Build/design-to-specification.

Current Definition	Proposed Change	Rationale/Comments
<p>No definition currently included in Part 120, but the term is used in the following sections of the ITAR: 125.4 & 126.5.</p> <p>§125.4(c)(2): “Build/Design-to-Specification” means that a foreign consignee can design and produce a defense article from requirement specifications without any technical assistance from the U.S. exporter. This transaction is based strictly on a “hands-off” approach since the foreign consignee is understood to have the inherent capability to both design and produce the defense article and only lacks the necessary requirement information.”</p>	<p>Technical data in the form of functional, performance and other requirements and acceptance criteria that are sufficient in detail to enable a foreign person to both design and manufacture a defense article without technical assistance. This does not preclude the U.S. party from providing clarification of the requirements of the data package to the foreign person. A build/design-to-specification package does not include the release of any information which discloses design methodology, engineering analysis, or manufacturing know-how.</p>	<p>The ITAR currently has defined this term in two different sections. The recommendation is to provide one standard definition in Part 120. The basic intent of the definition has been retained with changes made for clarification purposes only. For example the elimination of the phrase “hands-off” to reflect the fact that the exporter can provide clarifications to the date package.</p>

§120.XX Design methodology.

Current Definition	Proposed Change	Rationale/ Comments
<p>No definition currently included in Part 120, but the term is used in the following sections of the ITAR: 124.2, 125.4, & 126.5</p> <p>§124.2(c)(4)(i): "Design Methodology, such as: The underlying engineering methods and design philosophy utilized (i.e. the "why" or information that explains the rationale for particular design decision, engineering feature, or performance requirement); engineering experience (e.g. lessons learned); and the rationale and associated databases (e.g. design allowables, factors of safety, component life predictions, failure analysis criteria) that establish the operational requirements (e.g., performance, mechanical, electrical, electronic, reliability and maintainability) of a defense article.</p>	<p>A set of engineering rules, methods, and procedures that are required to establish the operational requirements (e.g. performance, mechanical, electrical, electronic, reliability and maintainability) of a defense article. This includes the underlying engineering methods and design philosophy that explains the rationale for a particular design decision, engineering feature, or performance requirement. This does not include basic engineering rules, methods, procedures, databases, etc., that are standard industry practice in the design and development of both commercial and military items.</p>	<p>The ITAR currently has defined this term in three different sections. The recommendation is to provide one standard definition in Part 120. The current definition requires clarification so that it is limited to those aspects of the design and development effort that are related to the defense article. Currently, it is excessively broad in scope and implies that every aspect of the design and development effort would be controlled even if it is standard industry practice.</p>

§120.XX Engineering analysis.

Current Definition	Proposed Change	Rationale/Comments
<p>No definition currently included in Part 120, but the term is used in the following sections of the ITAR: 124.2, 125.4 & 126.5</p> <p>§124.2(c)(4)(ii): “Engineering Analysis, such as: Analytical methods and tools used to design or evaluate a defense article’s performance against the operational requirements. Analytical methods and tools include the development and/or use of mockups, computer models and simulations, and test facilities.</p>	<p>The scientific analytical principles, processes and tools used to design and/or evaluate a defense article’s performance against a set of design and operational requirements, including the development and/or use of mock-ups, computer models and simulations, and test facilities.</p>	<p>The ITAR currently has defined this term in three different sections. The recommendation is to provide one standard definition in Part 120. Clarified to reflect the fact that it is the application of the analytical methods and tools that constitute “engineering analysis” and not just the tools and methods.</p>

§120.XX Employee.

Current Definition	Proposed Change	Rationale/Comments
<p>Not specifically defined in ITAR, but referenced in following sections:</p> <ul style="list-style-type: none"> - 122.1(b)(1) [refers to employees of the USG]; - 123.16(b)(7) [refers to 123.16 exemption for civilian employees of USG]; - 123.18 [exemption for civilian employees of USG]; - 124.16 [refers to employees of foreign signatory]; - 125.4(b)(9)(ii) [refers to US person employed by {US corp} overseas and employee of USG]; - 125.4(b)(10) [refers to employees of US institutions of higher learning]; - 127.1(b) [responsibility for violations of employees]; - 128.3(b)(1) [refers to service of process to employee of the respondent]; - 129.3(b)(1) [broker registration requirement exempt for employees of USG]; - 129.3(b)(2) [broker registration requirement exempt for employees of foreign governments]; - 129.3(b)(3) [broker registration requirement and application to employees of banks] - 130.5(b)(2) [refers to "employee of applicant, supplier or vendor]; - 130.6(a) [refers to employee of foreign candidate, committee, political party, political faction or government or governmental subdivision]. 	<p>For the purposes of this subchapter:</p> <p>(a) An <i>employee</i> is a natural person who is hired (directly or indirectly) by another person, company or governmental entity (hiring entity) to perform services (on a full time or part time basis) in exchange for a salary paid by the hiring entity (directly or indirectly) and who performs such services under the direct supervision and control of the hiring entity, and who does not provide such services as part of an independent business. This term includes a "contract employee" hired through staffing agencies or other contract employee providers.</p> <p>(b) A foreign person is considered an "employee" of a U.S. person (hiring entity) when the foreign person is directly hired/fired, paid, insured, and/or promoted exclusively by the US person (hiring entity). The employee need not live in the United States to be employed by the U.S. person (hiring entity).</p> <p>NOTE: The definition of "employee" set forth above is applicable only for purposes of administering and enforcing the requirements of this Part. This definition does not apply to, and shall have no effect on, the determination</p>	<p>Under the AECA and ITAR, the term "employee" appears in several provisions and pertains to both US and foreign governments and US and foreign private parties, but is undefined. The term also appears in DDTC licenses and authorizations, but is undefined. Recently, DDTC has provided guidance on the term "employee" and related licensing requirements, which are incorporated into this proposed definition.</p>

<p>of who qualifies as an "employee" under other laws and regulations (e.g., tax laws, discrimination laws, employment laws, etc.)</p>	
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§120.XX Maintenance.

Current Definition	Proposed Change	Rationale/Comments
<p>The term is not included in Part 120, but referenced in §125.4(b)(5):</p> <p>“Technical data, including classified information, in the form of basic operations, maintenance, and training information relating to a defense article lawfully exported or authorized for export to the same recipient. <u>Intermediate or depot-level repair and maintenance information</u> may be exported only under a license or agreement approved specifically for that purpose;”</p>	<p>(a) “<i>Organizational-level maintenance</i>” is the responsibility of, and performed by, a using organization on its assigned equipment. Its phases normally consist of inspecting, servicing, lubricating and adjusting, as well as the replacing of parts, components and line-replaceable units.</p> <p>(b) “<i>Intermediate-level maintenance</i>” is the responsibility of, and performed by, designated maintenance activities for direct support of using organizations. Its phases typically consist of: calibration, repair, or replacement of damaged or unserviceable parts, components, or assemblies.</p> <p>(c) “<i>Depot-level maintenance</i>” means an activity which is typically required to be performed at a designated facility for the overhaul, upgrading, or rebuilding of parts, assemblies, or subassemblies, and the testing and reclamation of a defense article.</p> <p>For purposes of this definition “organizational-</p>	<p>A new definition is being proposed for inclusion in Part 120. References to the various levels of maintenance activities in both this exemption as well as in provisos have resulted in some degree of confusion. This does not change the coverage of the ITAR.</p>

Current Definition	Proposed Change	Rationale/Comments
	level maintenance” is synonymous with “basic-level maintenance.”	

§120.XX Manufacturing know-how.

Current Definition	Proposed Change	Rationale/ Comments
<p>No definition currently included in Part 120, but the term is used in the following sections of the ITAR: 124.2, 125.4, & 126.5</p> <p>124.2(c)(4)(iii): "Manufacturing Know-how, such as: Information that provides detailed manufacturing processes and techniques needed to translate a detailed design into a qualified, finished defense article."</p>	<p>Information that provides manufacturing processes and techniques required to translate a detailed design into a qualified, finished defense article.</p>	<p>The ITAR currently has defined this term in three different sections. The recommendation is to provide one standard definition in Part 120. The term "detailed" has historically caused interpretation issues and was deleted for clarification purposes.</p>

§120.XX National & Nationality/ Dual National/ Third Country National

Current Definition	Proposed Change	Rationale/Comments
<p>No definition currently included in Part 120, but the term is used in the following sections of the ITAR: § 124.8(5); § 124.15(a) & (c); § 125.1(c); § 125.4(b)(10)(ii); § 125.4(c), (d)(1) & (d)(2); § 126.5(b); § 126.13(a)(4) & (c); § 130.5(a)(1)-(3); § 130.10(b)(2)(ii); Section 3.5 of the <i>Guidelines for Preparing Agreements</i> (Jan. 2009) ITAR § 121.1 (Category XV(f)); § 123.16(b)(10)(i) & (iii); § 124.2(c)(6); <i>National</i>: Not defined. <i>Dual National</i>: Holds nationality from the country of a foreign signatory and one or more additional foreign countries <i>Third Country National</i>: An individual holding nationality from a country or countries other than the country of the foreign signatory to the agreement.</p>	<p>(a) “<i>National</i>” and “<i>Nationality</i>” (1) A “national” of a country is a natural person who is recognized by the government of a country as a national of that country under the domestic laws of that country. (Note: Country of birth and nationality of parent(s) can be significant factors for determining nationality under the laws of many countries.) (2) A natural person’s “nationality” refers to the country or countries of which that person is a citizen and any other country to which that person owes a permanent allegiance. (3) If a person has, in accordance with the requirements of the domestic law of a foreign country, renounced his or her citizenship of that country, then that person is no longer treated as a national of that foreign country for purposes of licensing decisions or other authorizations under this subchapter. With respect to foreign governments that do not recognize renunciation of citizenship or that require the permission of, or acceptance by, the foreign government for renunciation of citizenship, a national will be treated as having renounced that citizenship for purposes of this subchapter if he or she has taken all steps reasonably within his or her control to satisfy the requirements for</p>	<p>Recommendation: Move the definition to an ITAR definition section and revise definition</p> <ol style="list-style-type: none"> Most countries do not distinguish between “nationality” and “citizenship” – the terms are synonymous. <ul style="list-style-type: none"> In the United States, a “national of the United States” is defined in 8 U.S.C. § 1101(a)(22) as either “(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.” Item (B), however, is a very limited category of persons born in outlying U.S. possessions, such as American Samoa and Swains Islands, who are not legally citizens but owe allegiance to the United States. The only way to obtain either U.S. citizenship or nationality is via birth or naturalization. U.S. and international law recognize that every country has the exclusive right to determine which persons are entitled to be its nationals. Other countries are required to recognize such determinations.

<p>renunciation.</p> <p>(b) <u>"Dual National"</u></p> <p>(1) A "dual national" is a natural person who is a national of more than one country. All nationalities of a natural person must be considered for purposes of making licensing determinations or determining eligibility for other authorizations (e.g., exemptions) under this subchapter.</p> <p>(2) For purposes of this subchapter, a dual national having nationality of a country identified in §126.1 will be presumed to retain that nationality until he or she produces documentation sufficient to establish that he or she:</p> <p>(i) has renounced the nationality of that country or,</p> <p>(ii) in accordance with paragraph (a)(3) above, has taken all steps reasonably within his or her control to renounce the nationality. Such documentation would include an acknowledgement from the foreign government of the renunciation of citizenship or a statement made by the dual national under oath describing all steps taken to renounce his or her nationality.</p> <p>(c) <u>"Third Country National"</u> For purposes of this subchapter, a "third country national" is a natural person who is not a national of the</p>	<p>renunciation.</p> <p>(b) <u>"Dual National"</u></p> <p>(1) A "dual national" is a natural person who is a national of more than one country. All nationalities of a natural person must be considered for purposes of making licensing determinations or determining eligibility for other authorizations (e.g., exemptions) under this subchapter.</p> <p>(2) For purposes of this subchapter, a dual national having nationality of a country identified in §126.1 will be presumed to retain that nationality until he or she produces documentation sufficient to establish that he or she:</p> <p>(i) has renounced the nationality of that country or,</p> <p>(ii) in accordance with paragraph (a)(3) above, has taken all steps reasonably within his or her control to renounce the nationality. Such documentation would include an acknowledgement from the foreign government of the renunciation of citizenship or a statement made by the dual national under oath describing all steps taken to renounce his or her nationality.</p> <p>(c) <u>"Third Country National"</u> For purposes of this subchapter, a "third country national" is a natural person who is not a national of the</p>	<ul style="list-style-type: none"> • <i>United States v. Wong Kim Ark</i>, 169 U.S. 649, 668 (1898) (noting "It is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes or persons shall be entitled to citizenship") • Hague Convention of Certain Questions Relating to the Conflict of Nationality Laws, Art. 1, Apr. 12, 1930, 179 L.N.T.S. 101 ("It is for each State to determine under its own laws who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.") (Note: The United States is not a party) <p>3. <u>Expatriation</u>: International and U.S. law clearly recognize that a person has a basic right to renounce his or her nationality (<i>i.e.</i>, the right to expatriation).</p> <ul style="list-style-type: none"> • Universal Declaration of Human Rights, Art. 15(2), G.A. Res. 217A, U.N. Doc. A/810 (1948) (stating that "No one shall be arbitrarily deprived of his nationality or denied the right to change his nationality") • American Convention on Human Rights, Art. 20(3), Nov. 22, 1969, O.A.S. T.S.
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	<p>country or countries to which the export of defense articles, technical data or defense services are authorized, either via a license, Agreement under Part 124 of this subchapter, or an exemption.</p>	<ul style="list-style-type: none"> No. 36 (“No one shall be arbitrarily deprived of his nationality or the right to change it.”) Restatement (Third) of the Foreign Relations Law of the U.S., § 211, Comment d (noting “For a state to impose its nationality on a person against his will, or to insist on a nationality that the individual has renounced, may violate international law”) A U.S. law enacted in July 1868 (<i>i.e.</i>, the Act Concerning the Rights of American Citizens in Foreign States) stated: <ul style="list-style-type: none"> “Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the
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		<p>right of expatriation, is declared inconsistent with the fundamental principles of the Republic.” Rev. Stat. § 1999, 15 Stat. 223 <i>reprinted in part in</i> note to 8 USC § 1481.</p> <ul style="list-style-type: none"> • <i>Afroyim v. Rusk</i>, 387 U.S. 253 (1967) (recognizing the right to voluntarily relinquish citizenship); <p>4. Country of birth is <i>not</i> a reliable surrogate for determining nationality. According to the survey of citizenship laws conducted by the U.S. Office of Personnel Management in 2001, of 43 of 184 countries surveyed use place of birth to determine citizenship rights. <i>See</i> http://www.opm.gov/EXTRA/INVESTIGAT/IS-01.PDF</p> <p>5. The proposed definitions set forth above retain the “long standing” (according to DDTC) policy of considering each nationality of a foreign person when making a licensing determination. However, it improves upon the current policy as follows:</p> <ul style="list-style-type: none"> • Eliminates the ambiguous distinction between “nationality” and “citizenship” and provides a bright line that nationality (as defined under foreign country laws) is the factor used to determine the country or countries of which a person is a national. • Eliminates the generally understood
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		<p>policy that “country of birth” automatically determines nationality, which is not accurate for most countries and is, arguably, a violation of international law.</p> <ul style="list-style-type: none"> • Takes into account concerns expressed by DDTC regarding nationals of ITAR § 126.1 countries and requires nationals of such countries to take affirmative steps to document their renunciation of such nationalities.
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§120.XX Platform.

Current Definition	Proposed Change	Rationale/Comments
Not currently defined.	An upper-level system assembly typically referred to as a vehicle or stationary system (e.g., aircraft, vessel, land vehicle, spacecraft, satellite, ground station, etc.)	Add definition to ITAR Part 120.

§120.XX Software

Current Definition	Proposed Change	Rationale/Comments
<p>Not currently defined except in §121.8(f): “Software includes but is not limited to the system functional design, logic flow, algorithms, application programs, operating systems and support software for design, implementation, test, operation, diagnosis and repair....”</p>	<p>Is a collection of one or more programs fixed in any tangible medium of expression when formatted or modified to machine readable form (i.e. object code) allows the application to function or operate. It is typically a collection of computer programs, procedures and documentation that performs tasks on a computer system. For purposes of this definition “program” is a sequence of instructions to carry out a process in, or convertible into, a form executable by a computer.</p> <p>(a) “Software documentation” is the human-readable information within software routines (e.g., algorithms) that when utilized allows the computer processor to interpret instructions on how to execute the application.</p> <p>(b) Object code or object files are an organized collection of objects or sequences of microprocessor instructions in machine code format. Object code or files are typically produced by a compiler resulting from the processing of a source code file.</p> <p>(c) Source code is any collection of statements written in some human-readable computer</p>	<p>A more comprehensive definition of the various elements that comprise “software” is recommended. This new definition is consistent with that used under the EAR and hence will provide a more common understanding.</p> <p>Consideration should also be given to defining additional subsets such as: embedded data; electronic databases; software control/environment, software interfaces and proactive software.</p> <p>Note: This definition of “software” is one of two submitted for DDTTC’s consideration. The second proposed definition (found in Addendum) is Vice-Chair Sevier’s version, whereas this one was written by the Working Group’s team leads.</p>

Current Definition	Proposed Change	Rationale/Comments
	<p>programming language. It allows the programmer to communicate with the computer. A compiler or processor interprets the source code into object code.</p> <p>Note: Often, software used by industry and government is controlled under the EAR. The source code, developed for the specific operation of a defense article is typically limited for export [by way of provisos and limitations] for release for defense articles which include embedded software.</p>	

§120.XX Space-Qualified.

Current Definition	Proposed Change	Rationale
Not currently defined. Proposed definition taken directly from EAR.	The term " <i>space qualified</i> " refers to products that are designed, manufactured and tested to meet the special electrical, mechanical or environmental requirements for use in the launch and deployment of satellites or high-altitude flight systems operating at altitudes of 100 km or higher.	Add definition to ITAR Part 120.

§120.XX Specially designed.

Current Definition	Proposed Change	Rationale/Comments/ Comments
<p>Not currently defined in Part 120. The MTCR defines "specially designed" as follows: "describes equipment, parts, components or "software" which, as a result of "development", have unique properties that distinguish them for certain predetermined purposes. For example, a piece of equipment that is "specially designed" for use in a missile will only be considered so if it has no other function or use. Similarly, a piece of manufacturing equipment that is "specially designed" to produce a certain type of component will only be considered such if it is not capable of producing other types of components."</p> <p>EAR uses the MTCR definition in the EAR list of Definitions (EAR Part 772).</p>	<p>"Specially designed" means a defense article that has a unique property or properties that distinguish the article for military purposes and that the article has no function other than for a military purpose. For example, a part or component that is "specially designed" for use in a missile will only be considered to be "specially designed" if it has no other function. Manufacturing tooling that is designed to produce a certain defense article will be considered as "specially designed" to produce that defense article only if it is not capable of producing other types of articles.</p>	<p>The two terms: "Specifically designed" and "Specially designed" appear to be used interchangeably with no intention of carrying a different meaning. The Working Group proposes "Specially designed" be used throughout the ITAR for consistency. Note this term will need to replace "Specifically designed" where ever it currently is used in the ITAR. <i>An example of "specifically designed" applies in many cases to production "tooling, jigs and fixtures" which may be materials provided under MLAs or TAAs in "offset" programs.</i></p>

§120.XX Sublicensing

Current Definition	Proposed Change	Rationale/ Comments
None	As used in Technical Assistance Agreements and Manufacturing License Agreements, <i>sublicensing</i> is the authorized retransfer or reexport of U.S. origin defense articles (including technical data) to a third party that is not a signatory to the Technical Assistance Agreement or Manufacturing License Agreement, but whose participation based on the scope of the authorization and work-share requirements, is essential to fulfilling the objectives of the authorization.	The DTAG Working Group proposes removing the term "defense services" for clarification purposes as a US applicant cannot provide defense services to sub-licensee.

§120.XX United States Munitions Import List

Current Definition	Proposed Change	Rationale/ Comments
<p>None, although mentioned in §120.5. Proposed definition from 27 CFR part 447.</p>	<p><i>The United States Munitions Import List</i> (USMIL), 27 CFR Part 447.21, designates those articles subject to controls under 27 CFR Part 447 on permanent importation of arms, ammunition and implements of war administered by the Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives. USMIL articles subject to controls under 27 CFR Part 447, 27 CFR Part 478 on commerce in firearms and ammunition, or 27 CFR 479 on machine guns, destructive devices, and certain other firearms, are subject to the import permit procedures of those regulations.</p>	<p>Add definition to ITAR Part 120.</p>

§120.XX U.S. Origin

Current Definition	Proposed Change	Rationale/Comments
<p>Not currently defined, but term used in the following ITAR sections: 123.9(e)(1)-(2) (“U.S.-origin components...”); 124.2(c)(1) (“U.S.-origin defense articles lawfully exported...”); 124.13(b) (“The technical data of U.S.-origin to be used in the foreign manufacture of defense articles...”); 124.15(c) (“U.S.-origin satellites...”); 127.1(a)(1) (“...any U.S.-origin defense article or technical data...”).</p>	<p>The term <i>U.S.-origin</i>, when used in reference to a defense article, means an article that is designed, developed, produced, manufactured or generated in the United States. The term <i>U.S.-origin</i>, when used in reference to a defense service, means a service that is furnished by a U.S. person.</p>	<p>Add definition to ITAR Part 120.</p>

Addendum

§120.XX Software: Proposed Definition by Vice-Chair Sevier

Proposed Change

- (a) “*Software program definition data*” – the total software program documentation package which includes high level requirements definition (e.g. Mil-Standard required items, etc.), test requirements, source code documentation, COTS and commercial definitional data and data structure listings and other pertinent software operation and maintenance information.
- (b) “*Software*” – for this regulation, it is defined as an installed program, in machine readable form (object code), that allows processor based equipment to function as they are originally intended to (e.g. compiled/linked binary executables, execution scripts, configuration files, etc.)
- (c) “*Source code documentation*” – human readable documentation of the software routines (algorithms) that are combined to provide the computer processor instructions on how to execute the equipment program. It is a “point-in-time” set of instruction (good for the initial specified functions, only) that guides the functions of the hardware system. If there is a need to modify the system functions or hardware, the existing “source code documentation” would be the starting point for modification, test, trouble shooting, and compiling of a new object code program.
- (d) “*Compiler*” - a language standard (source code standard, e.g. Ada, C++, etc.) COTS software tool that interprets source code into object code.
- (e) “*Object code*” – machine readable form of the original source, e.g. the executable program(s).
- (f) “*Linker*” – a COTS software tool that creates the executable program(s) for the system computer.
- (g) “*Special function data tables/software modules*” – such data tables or data definition may include unclassified or classified comparative information for certain defensive or offensive subsystem use, special operational tracking routines, and/or specific employment techniques for equipment of weapons. They may be embedded in the modular software or read at system initialization and may require specific handling on a case-by-case basis (configuration data – e.g. data files XML, COTS software or applications, etc.).
- (h) “*Test/Analysis software*” – tools that support testing of analysis of software for development, testing, and/or verification. These include simulations, computer models used to verify software operation.

Notes

The present terminology in the ITRAR is a product of the understanding of software architecture (legacy software) and the defense industry development practices that were valid in the 1980s and 1990s (such software was very linear in architecture). Modern weapon system software architecture (now quite modular in structure) and development practices have changed significantly in the intervening years. Using the Air Force and Navy’s Joint Strike Fighter and the Navy’s P-8 programs as examples, the mission system software for both is very modular in structure and uses a number of different processors in their hardware architecture. Additionally, the software incorporates a significant amount of commercial off the shelf (COTS) software and

Proposed Change	Notes
	<p>commercial definitional data and data structures (e.g. XML files, JAVA, etc.). This COTS/Commercial software/data is merged with the system object code at system start up. It is used for cost saving (development time) purposes and is possible because of the significant advances in processor capacity (through put speed and storage).</p> <p><i>The problem with the DTAG team's proposed language for "software documentation" is that it is incomplete and really just a restatement of the definition for "source code". Software Documentation will include "source code" and also include a printed (or other medium) copy of the "object code", but it primarily included the planning, architecture, and other pertinent software program design information.</i></p> <p><i>Additionally, as the modern process of large scale software design/creation includes large quantities of COTS software</i></p>

Proposed Change	Notes
	<p>available as a "free" good from various sources detailed above. The reason that it is important that this is noted is that it comes from the Public Domain and is used in its original form. Thus, the requirement needs to be on the government reviewer to specify any specific items, or areas in the programs source code that need not to be released, or that need special protection.</p>

Current ITAR definitions

The following terms, currently defined throughout the ITAR, should be moved to §120:

Current Definition	Notes
<p><i>Accessories and attachments</i> are associated equipment for any component, end-item, or system, and which are not necessary for their operation, but which enhance their usefulness or effectiveness. (Examples: Military riflescopes, special paints, etc.) (§121.8(c))</p>	
<p>A <i>component</i> is an item which is useful only when used in conjunction with an end-item. A major component includes any assembled element which forms a portion of an end-item without which the end-item is inoperable. (Example airframes, tail sections, transmissions, tank treads, hulls, etc.) A minor component includes any assembled element of a major component.</p>	

Current Definition	Notes
<p>(§121.8(b))</p> <p>An <i>end-item</i> is an assembled article ready for its intended use. Only ammunition, fuel or another energy source is required to place it in an operating state. (§121.8(a))</p>	
<p><i>Firmware</i> and any related unique support tools (such as computers, linkers, editors, test case generators, diagnostic checkers, library of functions and system test diagnostics) specifically designed for equipment or systems covered under any category of the U.S. Munitions List are considered as part of the end-item or component. <i>Firmware</i> includes but is not limited to circuits into which software has been programmed. (§121.8(e))</p>	
<p><i>Forgings, castings and machined bodies</i> Articles on the U.S. Munitions List include articles in a partially completed state (such as forgings, castings, extrusions and machined bodies) which have reached a stage in manufacture where they are clearly identifiable as defense articles. If the end-item is an article on the U.S. Munitions List (including components, accessories, attachments and parts as defined in §121.8), then the particular forging, casting, extrusion, machined body, etc., is considered a defense article subject to the controls of this subchapter, except for such items as are in normal commercial use. (§121.10)</p>	
<p>A <i>part</i> is any single unassembled element of a major or a minor component, accessory, or attachment which is not normally subject to disassembly without the destruction or the impairment of design use. (Examples: Rivets, wire, bolts, etc.) (§121.8(d))</p>	
<p>A <i>system</i> is a combination of end-items, components, parts, accessories, attachments, firmware or software, specifically designed, modified or adapted to operate together to perform a specialized military function. (§121.8(f))</p>	

