

The following DTAG Working Group submits the attached report showing our track changes to the proposed ITAR §120.9 language and the associated presentation which was presented at the July 7, 2010 Plenary:

Members

- Tom White – Lockheed Martin
- Debbie Shaffer – Southwest Research Institute
- Janet Rischel – Bell Helicopter
- Christine McGinn – Cobham Corporate North America, DTAG Working Group Chairperson
- Spence Leslie – Tyco International
- David Isenberg – Norwegian Initiative on Small Arms
- Jeremy Huffman – Huffman Riley Kao
- Greg Hill – DRS Technologies
- Tim Hein – ATK
- Jahna Hartwig – Johns Hopkins University Applied Physics Laboratory
- Chuck Graves – Day & Zimmerman Inc.
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- Greg Bourn – Finmeccanica North America
- Lisa Bencivenga – Lisa Bencivenga LLC
- Jerald Beiter – Booz Allen Hamilton

§ 120.9 Defense Service

(a) *Defense service* means:

(1) The furnishing of assistance (including training) using U.S. origin technical data controlled under this subchapter (see § 120.10), to foreign persons (see § 120.16), 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 (see § 120.6); or

(2) The 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) or the Commerce Control List (see 15 CFR § 774) into an end item (see § 121.8(a)) that is controlled as a defense article on the USML; or

(3) Training or providing advice to foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad by any means including correspondence courses, classroom instruction, conduct or evaluation of training and training exercises, in the tactical employment of defense articles, whether or not the transfer of U.S. origin use of technical data is involved in the training or advice; or

(4) Conducting direct combat operations of a military function for -or providing military intelligence services to for a foreign person.

(b) A *defense service* is not:

(1) Training in the basic operation (function) or basic maintenance of a defense article; or

(2) Mere employment of a US ~~person~~ citizen by a foreign person; or

(3) Testing, repair, or maintenance of an item under the regulatory jurisdiction of the Department of Commerce, Bureau of Industry and Security which has been integrated or installed into a defense article; or

(4) Providing law enforcement training, physical security or personal protective training, advice, or services to or for a foreign person, to include fixed site security and personal protective services, that does not involve the use of or transfer of technical data controlled on the U.S. Munitions List ~~USML; (USML);~~ or

(5) Providing assistance (including training), or providing training in: medical, finance, logistical (less maintenance), or other administrative support services to or for a foreign ~~government person or~~ military.



**Defense Trade Advisory Group
(DTAG)**

**Plenary Session
*07 July 2010***

Working Group 1

Team Members

- Tom White – Lockheed Martin
- Debbie Shaffer – Southwest Research Institute
- Janet Rischel – Bell Helicopter
- Christine McGinn – Cobham Corporate North America / Chair
- Spence Leslie – Tyco International
- David Isenberg – Norwegian Initiative on Small Arms
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WG 1 Task

- Review of proposed change to definition of "Defense Services" - §120.9
 - Intent to remove the requirement under §124.1
 - Establishes U.S. origin technical data as defined under §120.10 as part of definition
 - Redefines §120.9(a)(2)
 - Differentiate between installation and integration
 - Military training or advise involves a defense article or war fighting techniques
 - Adds §120.9(a)(4) to include direct combat or intelligence services

§120.9 (a)(1)

Defense Service means:

- As proposed by DDTC:
 - (1) The furnishing of assistance (including training) using U.S. origin technical data controlled under this subchapter (see § 120.10), 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; or

§120.9 (a)(1)

Defense Service means

- DTAG Recommendation:
 - (1) The furnishing of assistance (including training) using U.S. origin technical data controlled under this subchapter (see §120.10), to foreign persons (see §120.16), 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 (see §120.6); or

Comments

§120.9(a)(1)

- “...using U.S. origin technical data controlled under this subchapter....”
 - Eliminates requirement under 124.1 to obtain an MLA or TAA when relying on public domain information:
 - “The requirements of this section apply whether or not technical data is to be disclosed or used in the performance of defense services described in §120.9(a) of this subchapter (e.g., all the information relied upon by the U.S. person in performing the defense service is in the public domain and is otherwise exempt from the licensing requirements of this subchapter pursuant to §125.4 of this subchapter.”

Comments

§120.9(a)(1)

- A US Person hired by a foreign person is not performing a defense service under §120.9(a)(1) unless U.S. origin technical data, as defined under §120.10 is used in the performance of the service.
 - DTAG views the change favorably
 - Now excludes use of public domain information

§120.9 (a)(2)

Defense Service means

- As proposed by DDTC:
 - (2) The 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) or the Commerce Control List (see 15 CFR § 774) into an end item that is controlled as a defense article on the USML; or

§120.9 (a)(2)

Defense Service means

- DTAG Recommendation:
 - (2) The 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) or the Commerce Control List (see 15 CFR § 774) into an end item (see § 121.8(a)) that is controlled as a defense article on the USML; or

Comments

§120.9(a)(2)

-for the integration of any item controlled on the USML or the CCL into an end item that is controlled as a defense article on the USML
 - Any “item” on the USML or CCL includes components, parts and accessories
 - Must be integrated into “end item” that is controlled as a defense article on the USML
 - End item (see §121.8(a)) 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.

Comments

§120.9(a)(2)

- DTAG views the change favorably
- Recommends adding definition of integration under Part 120
- Recommend addition of FAQ for additional clarification on integration vs. installation

§120.9 (a)(3)

Defense Service means:

- As proposed by DDTC:
 - (3) Training or providing advice to foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad by any means including correspondence courses, classroom instruction, conduct or evaluation of training and training exercises, in the tactical employment of defense articles, whether or not use of technical data is involved in the training or advice; or

§120.9 (a)(3)

Defense Service means:

- DTAG Recommendation:
 - (3) Training or providing advice to foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad by any means including instruction, conduct or evaluation of training and training exercises, in the tactical employment of defense articles, whether or not the transfer of U.S. origin technical data is involved; or

Comments

§120.9(a)(3)

- Removed:
 - Correspondence courses, classroom
- Changed:
 - From: *Whether or not* use of technical data is involved
 - To: *Whether or not* the transfer of U.S. origin technical data is involved

Comments

§120.9(a)(3)

- DTAG views the change favorably.
- Emphasis on the training of foreign forces – regular and irregular - when it involves tactical employment of a defense article.
- Recommend adding definition of “irregular forces” and “tactical employment” under Part 120.

§120.9 (a)(4)

Defense Service means:

- As proposed by DDTC:
 - (4) Conducting direct combat operations or providing intelligence services for a foreign person.

§120.9 (a)(4)

Defense Service means:

- DTAG recommendation:
 - (4) Conducting direct combat operations of a military function for or providing military intelligence services to a foreign person.

Comments

§120.9(a)(4)

- “Intelligence” considered too vague
- Recommend addition of “military”
 - Military intelligence needs to be defined to more clearly establish what services under this definition are licensable activities/defense services.

§120.9 (b)(1)

Defense Service is not:

- As proposed by DDTC:
 - Training in the basic operation (function) or basic maintenance of a defense article; or

§120.9 (b)(1)

Defense Service is not:

- DTAG Recommendation:
 - No change.

Comments

§120.9(b)(1)

- Basic Operation (function)
- Basic Maintenance
 - Definitions necessary to clarify when it is not a defense service
 - Basic Operation and basic maintenance are not universally understood by industry

§120.9 (b)(2)

Defense Service is not:

- As proposed by DDTC:
 - Mere employment of a US Citizen by a foreign person; or

§120.9 (b)(2)

Defense Service is not:

- DTAG Recommendation:
 - Mere employment of a US person by a foreign person; or

Comments

§120.9(b)(2)

- Changed from US Citizen
- To US Person as defined §120.15

§120.9 (b)(3)

Defense Service is not:

- As proposed by DDTC
 - Testing, repair, or maintenance of an item under the regulatory jurisdiction of the Department of Commerce, Bureau of Industry and Security integrated into a defense article; or

§120.9 (b)(3)

Defense Service is not:

- DTAG Recommendation:
 - Testing, repair, or maintenance of an item under the regulatory jurisdiction of the Department of Commerce, Bureau of Industry and Security which has been integrated or installed into a defense article; or

Comments

§120.9 (b)(3)

- DTAG recommends adding “installed” for additional clarification

§120.9 (b)(4)

Defense Service is not:

- As proposed by DDTC:
 - Providing law enforcement training, advice, or services to a foreign person, to include fixed site security and personal protective services, that does not involve the use of or transfer of technical data controlled on the U.S. Munitions List (USML);
 - or

§120.9 (b)(4)

Defense Service is not:

- DTAG Recommendation:
 - Providing law enforcement, physical security or personal protective training, advice, or services to or for a foreign person, that does not involve the use of or transfer of technical data controlled on the USML; or

Comments

§120.9 (b)(4)

- Removed "fixed site"
- Changed to "physical security"

§120.9 (b)(5)

Defense Service is not:

- As proposed by DDTC:
 - Providing, or providing training in, medical, finance, logistical (less maintenance), or other administrative support services to a foreign government or military.

§120.9 (b)(5)

Defense Service is not:

- DTAG Recommends:
 - Providing assistance (including training) in, medical, logistical (less maintenance), or other administrative support services to or for a foreign person

Comments

§120.9 (b)(5)

- Deleted "finance"
- Added "or for"
- Changed from "foreign government or military" to foreign person
- Changed to "providing assistance (including training) consistent with §120.9(a)(1)

Additional Comments / Recommendations

- Provide a FAQ section on the DDTC website
 - DTAG WG 1 is currently working on proposed FAQs
- Add definitions in Part 120 for new or existing terms
 - DTAG WG 1 is currently working on identifying terms for inclusion and proposed definitions
- This will include recommendations previously proposed by DTAG



FAQ Example 1

- We are a university, and our fundamental research is excluded from controls under the ITAR. Why are we expected to participate as a signatory to a TAA covering defense services, since defense services only occur when ITAR controls are imposed?
 - Performing fundamental research with a foreign person using only public domain information and/or items subject to the Export Administration Regulations is not a defense service. For example, your group is working on a project awarded by an agency or prime contractor who imposed no restrictions on publication or dissemination, the results of the project will not be considered or treated as "proprietary" to your organization, and you are not using any ITAR controlled equipment or data to perform the research. The working being done under this project is considered to be fundamental research as defined in ITAR 120.11. If all these facts apply to your situation, then you are not providing a defense service and a TAA is not required.

FAQ Example 1

(continued)

- If, in performing your research, you provide foreign persons with assistance as described in ITAR §120.9(a)(1)-(2), that assistance is a defense service subject to the licensing requirements of the ITAR. For example, your organization is part of a collaborative group that includes some members who are not accredited institutions of higher learning (i.e., industry, FFRDCs, other non-profits, etc.). One or more of the collaborators is a foreign person. The project involves fundamental research as defined in ITAR 120.11. However, the non-university parties enjoy no exclusion from ITAR controls. The technical data they produce and use in performing the research is subject to the ITAR. The project therefore includes assistance using U.S. origin technical data. Your participation in that assistance with foreign persons is a defense service subject to the ITAR and a TAA is required. Another example would be a fundamental research project in which your organization uses ITAR-controlled equipment or data to perform the research. While the results of the research may still be considered fundamental research that is public domain information, you must obtain export authorization to provide foreign persons with assistance related to the ITAR-controlled equipment or data used in the performance of the research.



FAQ Example 2

- Is training by a US company on an aircraft under the regulatory jurisdiction of the Department of Commerce, Bureau of Industry and Security on all other particulars of the flight regime and maintenance, other than NVG phases of flight or equipment, i.e., day time flight operations and flight operations at night without and not including NVG a defense service?
 - No, but the NVG training would be a defense service requiring approval



FAQ Example 3

- Is maintenance and technical support on commercial items of a militarized commercial aircraft a defense service, even if the aircraft is utilized in the transport of military VIP for surveillance purposes by a foreign military?
 - No



Summary of Terms Additions to Part 120

- Integration
- Installation
- Irregular Forces
- Tactical Employment
- Military Intelligence
- Military Function
- Basic Operation
- Basic Maintenance

Definitions

Part 120 – Example 1

- Tactical employment of a defense article
 - Carried out in support of a military operation – to achieve a military *strategic* goal
 - Combat tactics – of or occurring at the battlefield
 - Using or being weapons or forces employed at the battlefield

Definitions

Part 120 – Example 2

- **Military Intelligence**
 - Intelligence gathered or learned during a military mission/operation.
 - Assessment of risks associated with friendly and enemy courses of action and act to counter or neutralize identified intelligence threats.