



Proposed Revision of Defense Services Definition May Remove ITAR Controls Imposed on Some University Research

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A recent proposed rule may, if ultimately adopted, remove certain export controls that are currently imposed on some university research. On Friday, May 24, the U.S. State Department's Directorate of Defense Trade Controls (DDTC) published a proposed revision to the definition of "Defense Services" that are subject to control under the International Traffic in Arms Regulations (ITAR).[1] This notice is a follow-on to an earlier proposed revision, published in April 2011, in which DDTC explained that "the current definition of defense services in § 120.9 is overly broad, capturing certain forms of assistance or services that do not warrant ITAR control."^[2]

Universities and other research institutions have long questioned whether performing "fundamental research" with foreign colleagues or foreign students would be considered a defense service controlled under the ITAR, even where that research involved only information that either was already in the public domain or was being developed in the research process and intended for publication. While the definition of "public domain information" includes "fundamental research," and "public domain information" was excluded from the technical data that was subject to ITAR control, it was not clear from those provisions that technical assistance provided to foreign persons in the research process was also excluded from control. In fact, the ITAR specifically requires authorization for the provision of assistance related to defense articles "whether or not technical data is to be disclosed or used in the performance of the defense services . . . (e.g., all the information relied upon by the U.S. person in performing the defense service is in the public domain or is otherwise exempt from licensing requirements . . .)."^[3]

The proposed definition appears to resolve this issue by controlling the provision of assistance related to defense articles to foreign persons "using other than public domain information,"^[4] except in certain limited circumstances. Technical assistance provided using only public domain information would still be controlled if the assistance relates to any of the following:

- Furnishing assistance to a foreign person for the integration of any ITAR- or EAR-controlled item into an ITAR-controlled end item or component.[5]
- Furnishing assistance (including training) in the integration of a satellite or spacecraft to a launch vehicle, including both planning and onsite support, regardless of the jurisdiction of, the ownership of, or the origin of the satellite or spacecraft, or whether technical data are used.
- Furnishing assistance (including training) in the launch failure analysis of a satellite, spacecraft, or launch vehicle, regardless of the jurisdiction of, the ownership of, or the origin of the satellite, spacecraft, or launch vehicle, or whether technical data are used.
- Furnishing assistance to a foreign person in the tactical employment of a defense article.
- Conducting direct combat operations for a foreign person.

If this proposed definition is adopted, performing research that involves only public domain information could still trigger ITAR controls if it involved the use of ITAR-controlled technical data or hardware, integrating a satellite into a launch vehicle, or one of the other bulleted items above. However, other research projects may no longer fit within the definition of defense services under the ITAR.

The May 24 Federal Register notice also included a propose revision to Category XV of the U.S. Munitions List, which sets out the "Spacecraft Systems and Associated Equipment" that are subject to ITAR control.[6] The proposed Category XV continues to cover "research or scientific" satellites, as well as various systems, sub-systems, parts and components for those satellites, if those items have certain parameters or characteristics described in the proposed rule. In addition, the proposed Category XV would cover "Department of Defense-funded secondary or hosted payload, and specially designed parts and components therefor." Universities that perform research in this area may want to closely examine the proposed rule and provide comments on any unintended consequences of the technical descriptions therein.

Public comments on the proposed rule are due not later than July 8, 2013. DDTC generally welcomes both constructive criticism and supporting comments. Supporting comments may be particularly helpful when the changes are presented to Congress.

[1] Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XV and Definition of "Defense Service," 78 Fed. Reg. 31,444 (May 24, 2013), available at <http://www.pmddtc.state.gov/FR/2013/78FR31444.pdf>.

[2] International Traffic in Arms Regulations: Defense Services, 76 Fed. Reg. 20,590 (April 13, 2011), available at <http://www.pmddtc.state.gov/FR/2011/76FR20590.pdf>.

[3] 22 C.F.R. § 124.1(a).

[4] 78 Fed. Reg. at 31,448-49.

[5] The proposed rule distinguishes between “integration” and “installation.” Under that rule, integration would mean “the systems engineering design process of uniting two or more items in order to form, coordinate, or blend into a functioning or unified whole, including introduction of software to enable proper operation of the article. This includes determining where to integrate an item (e.g., integration of a civil engine into a destroyer which requires changes or modifications to the destroyer in order for the civil engine to operate properly; not plug and play).” By contrast, installation would mean “the act of putting something in its place and does not require changes or modifications to the item in which it is being installed (e.g., installing a dashboard radio into a military vehicle where no changes or modifications to the vehicle are required).” See *id.* At 31,449.

[6] 78 Fed. Reg. at 31, 450.

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