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Ambassador Bonnie D. Jenkins
Under Secretary
Arms Control and International Security
U.S. Department of State

Electronic Submission: www.regulations.gov, Docket DOS-2024-0023

Re: NDIA comments on the proposed rule to revise the definition of defense service and the scope of related controls in the International Traffic in Arms Regulations (DOS-2024-0023)

Dear Ambassador,

The National Defense Industrial Association (NDIA) appreciates the opportunity to provide comments on the proposed rule to revise the definition of defense service and the scope of related controls in the International Traffic in Arms Regulations (ITAR).

NDIA is the nation's oldest and largest defense industry association, representing over 1,700 corporate and over 65,500 individual members from small, medium, and large contractors, a majority of which are small businesses. NDIA members design, manufacture, apply, and maintain the cutting-edge technologies, systems, and platforms that our armed forces rely upon to deter aggression and defend our nation and its interests. As such, our members' professional and informed views on this request for information reflect the complexity and nuance of the issues under discussion.

The strong regional and global networks of alliances and partnerships the U.S. built and maintained since the end of World War II serve as diplomatic and military operational centers of gravity in national deterrence and, should conflict erupt, will help provide our decisive advantage in ultimately prevailing in conflict. As such, facilitating foreign military sales (FMS) modernization and technology integration with allies and partners is one of the five pillars that NDIA has identified is required for a strong, diverse, resilient, ready U.S. defense industrial base (DIB). In NDIA's *2024 Vital Signs Report*, 62 percent of private sector respondents stated that direct commercial sales and FMS were either extremely or very important. Therefore, NDIA appreciates any efforts from the Department of State to promote cooperation and integration with our allies and partners.

General Comments and Recommendations:

The proposed rule adds new language to the definition of a "Defense Service" in Sec. 120.32(a)(2) by including both training and "consulting" as constituting furnishing assistance to foreign persons "regardless of whether a defense article is involved," as described in Category IX of the USML. "Consulting" is not further defined, although the proposed rule provides in the background that:

The Department does not intend to add a new level of control to its existing control of defense services, but rather intends to clarify that it does not treat training to mean only direct instructional activity. The proposed addition would reaffirm that providing tools or means of furnishing training. .is included in the control. Such consulting is not limited to the furnishing of a completed product, but includes assisting in the development of such training.

Without further clarification regarding what activities are controlled under “consulting...regardless of whether a defense article is involved,” the proposed rule may inadvertently create a broad licensing requirement for ordinary business activities that currently do not require prior authorization, including even using public information. For example, U.S. companies that provide standard marketing briefings, which do not include controlled technical data but highlight how U.S. defense products and services could improve a foreign party’s national military capabilities, could be interpreted as constituting “assistance, including training or consulting, to a foreign government. . .that creates, supports, or improves. . .the organization or formation of military or paramilitary forces,” as defined in Category IX(s)(3). Moreover, this new control over “consulting” could control activities of U.S. companies seeking to identify gaps and weaknesses in a foreign partner’s military capabilities even when such briefings are comprised of non-export controlled information and regardless of whether such activities are done for compensation.

We understand that the Department’s intent is not to overturn long-standing U.S. policy and require U.S. companies to obtain a technical assistance agreement before participating in these standard business practices -- whether such engagements are conducted with foreign persons in meetings abroad, at trade shows, or when hosted by US companies at U.S. facilities -- when controlled technical data is not involved. For example, in 2010, as part of the Export Control Reform effort, the Department eliminated standard marketing notification requirements by removing ITAR Sec. 126.8, which required U.S. parties to obtain approval or notify the U.S. government before a “proposal or presentation is made that is designed to constitute the basis for a decision to purchase significant combat equipment, involving the export of an item on the [USML].” However, to ensure that this new proposed regulation does not reimpose unnecessary restrictions on common marketing activities, we recommend the final rule clarify that “consulting” activities do not include these standard business engagements with foreign allies and partners.

Note that Sec. 126.1(e)(1) of the ITAR currently specifies that the furnishing of assistance to countries of concern requires a license or written approval from DDTC. Specifically, Sec. 126.1(e)(1) states: “...no proposal or presentation to sell, export, transfer, reexport, or retransfer, any defense articles or defense services subject to this subchapter may be made to any country referred to in this section (including the embassies or consulates of such a country), or to any person acting on its behalf, whether in the United States or abroad, without first obtaining a license or written approval of the Directorate of Defense Trade Controls.” As proposed, the new “defense service” controls could be interpreted as requiring similar authorizations for all countries.

Accordingly, one potential solution would be for the Department to include language in the new Sec. 120.32(a) that mirrors the language in Sec. 126.1(e)(1) and the former Sec. 126.8 that specifies controlled “consulting” activities does not include the standard business practice of providing proposals or presentations to sell, export, transfer, reexport, or retransfer, any defense articles or defense services, including those designed to constitute the basis for a decision to purchase defense articles, equipment, or services, provided those materials do not contain controlled technical data.

Specific Comments and Amendment Recommendations:

Comment 1: § 120.11 Order of review.

(d) Defense service. Defense services described in § 120.32(a)(1) are controlled under the relevant paragraph of each USML category that includes defense services “directly related” or “relating” to defense articles as described therein. For defense services described in § 120.32(a)(2) that are not controlled in the defense article-specific defense services paragraphs, see USML Category IX(s)(2) and (3) in § 121.1 of this subchapter.

1. What is the difference between “directly related” and “relating” in the rule? “Directly related” is a commonly used term in the ITAR. “Relating to” is an addition to these proposed rules.
2. Historically, terms in “quotes” were defined terms, but “directly related” and the new “relating” do not seem to have a definition unless that definition is provided elsewhere. DDTC must define these terms.
3. Concur and appreciate the Part 120.11 distinction between defense services described under relevant USML paragraphs “directly related” or “relating” to defense articles as described therein and defense services described in 120.32(a)(2) that are not controlled in the defense article-specific defense services paragraphs.

Comment 2: § 120.32 Defense service.

(a) Defense service means:

(1) The furnishing of assistance, including training or consulting, to foreign persons in the development (including, e.g., design), production (including, e.g., engineering and manufacture), assembly, testing, repair, maintenance, modification, disabling, degradation, destruction, operation, processing, use, or demilitarization of a defense article; or

1. Is the addition of “consulting” meant to capture previously uncaptured activities? It is unclear how training and consulting should be differentiated.

(2) The furnishing of assistance, including training or consulting, to foreign persons, regardless of whether a defense article is involved, as described in USML Category IX(s)(2) or (3) in § 121.1 of this subchapter.

2. Much of the confusion on how the new definitions of defense service should be applied stems from the decoupling of a defense service from a defense article.
3. NDIA appreciates the movement of “military training” from 120.32(a)(2) to USML IX(s)(2) or (3) for clarity.

Comment 3: *§ 121.1 Category IX – Military Training Equipment, Intelligence Defense Services, and Military Defense Services*

(s) Defense Services, as follows:

(2) Assistance, including training or consulting, to a foreign government, unit, or force, or their proxy or agent, that creates, supports, or improves intelligence activities, including through planning, conducting, leading, providing analysis for, participating in, evaluating, or otherwise consulting on such activities, for compensation, except for the following types of assistance:

1. Broad terms such as “creates,” “supports,” or “improves” intelligence activities, void of additional context of what is captured by “intelligence activities,” create a risk that a myriad of non-ITAR services provided to foreign government and national security customers would be captured.
2. A definition of intelligence activities, intelligence purposes, and intelligence operations will be critical to determine whether certain actions are controlled under the ITAR. The following information is provided as context and possible definitions:
 - Intelligence Purposes: Intelligence purposes generally refer to the collection, exploitation, analysis, and dissemination of information for national security, defense, and foreign policy objectives. This includes gathering and processing raw intelligence into actionable intelligence to support decision-making and protect national security interests.
 - Intelligence Activities: Intelligence activities encompass the actions and processes involved in obtaining, analyzing, exploiting, and utilizing information for intelligence purposes. This can include espionage, surveillance, reconnaissance, cryptanalysis, and other covert or overt methods of information gathering.
- This category seems to be limited to “for compensation.” NDIA would suggest defining “for compensation” via a note.

Comment 4: § 121.1 Category IX – Military Training Equipment, Intelligence Defense Services, and Military Defense Services

1. NDIA finds the information provided in the preamble to the proposed regulations to be clearer than what is found in the proposed regulations. Language such as what is found in the following excerpt should be included in the body of the proposed regulations.

The text of proposed paragraph (s)(2) for intelligence assistance uses the same descriptors found in proposed paragraph (s)(3) for military assistance, but also includes “providing analysis for” and “participating in.” The phrase “providing analysis for” is included since conducting an intelligence analysis can provide a critical advantage even without involvement in intelligence collection or other intelligence operations. “Participating in” is included to make clear persons hired and assisting in an intelligence operation on behalf of a designated foreign government, unit, or force, or their proxy or agent, are controlled activities.

Second, including “training or consulting” in the text of proposed paragraph (s)(2) allows the Department to specifically and explicitly describe on the USML the conduct of U.S. persons (or foreign persons in the United States) who furnish any described defense service to enable a foreign government, unit, or force, or their proxy or agent, to conduct intelligence activities themselves. The Department assesses regulating assistance on tactics, techniques, procedures, and other types of training that enables the intelligence activities a foreign government, unit, or force, or their proxy or agent, is consistent with the aims and authority of the ITAR and the AECA.

Comment 5: § 121.1 Category IX – Military Training Equipment, Intelligence Defense Services, and Military Defense Services

(s) Defense Services, as follows:

(2) Assistance, including training or consulting, to a foreign government, unit, or force, or their proxy or agent, that creates, supports, or improves intelligence activities, including through planning, conducting, leading, providing analysis for, participating in, evaluating, or otherwise consulting on such activities, for compensation, except for the following types of assistance:

(iv) Information technology services that support ordinary business activities not specific to a particular business sector;

1. “...business activities not specific to a particular business sector...” is vague and confusing. As this is found in the “release” section of the catch and release formula found in IX(s)(2), it is unclear what is intended to be released.

2. A proposed modification to the language “Information technology services that support ordinary business activities and that are not modified or purpose-built for one or more foreign government intelligence, military, or paramilitary end users which provide the techniques, tactics, and procedures necessary to enable the performance of intelligence activities or military operations as defined under this subchapter.”

(vi) Maintenance or repair of a commodity or software.

3. It is assumed that this paragraph does not intend to release maintenance or repair of a commodity or software if such commodity or software is a defense article. NDIA proposes that adding clarification, for example, “... that is not subject to the ITAR.” or “... that IS subject to the EAR.” would be helpful.
4. NDIA would suggest defining “maintenance or repair” via a note since maintenance or repair could lead to basic improvements, quality of life, or otherwise.

Comment 6: § 121.1 Category IX – Military Training Equipment, Intelligence Defense Services, and Military Defense Services

(s)(3) Assistance, including training or consulting, to a foreign government, unit, or force, or their proxy or agent, that creates, supports, or improves the following, other than as specified in paragraph (s)(3)(iv) of this category:

(i) The organization or formation of military or paramilitary forces;

(ii) Military or paramilitary operations, by planning, leading, or evaluating such operations; or

(iii) Military or paramilitary capabilities through advice or training, including formal or informal instruction.

(iv) Assistance in paragraphs (s)(3)(i) through (iii) of this category does not include:

(A) Furnishing of medical, translation, financial, insurance, legal, scheduling, or administrative services, or acting as a common carrier;

(B) Participation as a member of a regular military force of a foreign nation by a U.S. person who has been drafted into such a force (see also § 124.2(b) of this subchapter); or

(C) Training and advice that is entirely composed of general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities.

1. The definition of defense service found in IX(s)(3) does not have any release for information technology services. The release of information technology services should be included here as well.
2. Similar to above, the interpretation of broad terms of creates, supports, or improves may restrict non-ITAR controlled services if used by foreign governments or national security entities to support military operations. What requirements do service providers have to understand if they will be used for intelligence and/or military activities?
3. A definition of military assistance and military operations will be critical to determine whether certain actions are controlled under the ITAR. The following information is provided as proposed definitions:
 - a. Military Operations: Military operations encompass the planning, coordination, and execution of armed forces activities to achieve specific strategic, operational, or tactical objectives. This definition is specific to kinetic military operations and activities. Kinetic military activities/operations are those combat actions that directly involve the use of military force, resulting in physical effects on the environment, adversaries, or operational objectives.
 - b. Military Assistance: These activities are characterized by their direct engagement in military operations, often resulting in tangible effects on the battlefield or in a conflict scenario. Here are some examples that constitute military operations:
 - i. **Use of Force**: Kinetic military activities typically involve the application of force, which may include the deployment of troops, airstrikes, naval engagements, or the use of weaponry.
 - ii. **Combat Operations**: These activities are often executed during combat operations, where military forces engage adversaries directly, aiming to achieve specific strategic or tactical objectives.
 - iii. **Immediate Impact**: Kinetic operations often have immediate and observable consequences, such as the destruction of enemy assets, the capture of territory, or the neutralization of threats.
 - iv. **Types of Operations**: Kinetic military activities can encompass a wide range of operations, including offensive actions (attacks), defensive operations (protection against attacks), and stabilization missions (to restore order in post-conflict situations).

An example of an activity supporting a military end user that would not constitute military assistance would be providing assistance with establishing an IT service not protected by USML-controlled encryptors.



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- c. Category (3), unlike (2), does not seem to be limited to “for compensation.” NDIA would suggest making that clear via a note.
- d. (3)(iv)(A) – NDIA would suggest adding “Furnishing of medical, translation, financial, insurance, legal, scheduling, **Information Technology services, Maintenance or repair of a commodity or software**, or administrative services, or acting as a common carrier;”

Closing

NDIA appreciates the opportunity to present our comments and recommendations for the proposed rule. If you have any questions related to these comments, please reach out to Michael Seeds at mseeds@ndia.org.

Sincerely,

National Defense Industrial Association