DTAG Defense Services Working Group - White Paper - Draft 03/04/18

I. Introduction and Executive Summary

The DDTC tasking for this working group was as follows: "DDTC requests DTAG identify key areas of concern with the proposed definition in 80 Fed. Reg. 31525 (Jun. 3, 2015). Please include any aspects of the proposed definition that would constitute positive change, and make recommendations as appropriate."

The defense services working group members are listed below, with asterisks next to the names of the working group co-chairs:

Matt Aljanich - Modern Technology Solutions
Bryon Angvall*
Bryce Bittner - Textron
Greg Bourn - Johns Hopkins University APL
Dava Casoni - USC
Rebecca Conover - Intel
Jarred Fishman - Booz Allen Hamilton
Greg Hill - DRS
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Peter Lichtenbaum* - Covington & Burling
Christine McGinn - InterGlobal Trade Consulting
Mary Menz - Harris Corporation
Dan Pickard - Wiley Rein
Dale Rill - Honeywell
Gretta Rowold - Langley Law Group
Bill Schneider - International Planning Services
Heather Sears - Johnson Control
Olga Torres – Torres Law

The guiding principles for the working group's analysis were as follows:

- Account for both U.S. government and industry equities
- Address the most important issues
- Focus on feasibility and simplicity, not perfection
- Distinguish 126.1 countries, for which broader controls are appropriate than for other countries
- Avoid redundancy with controls imposed by other U.S. laws and regulations, such as the Export Administration Regulations (EAR) administered by the Commerce Department. A list of such laws and regulations is provided in Appendix A.

The main findings of the working group were as follows:

- The defense services definition should be structured as a "Catch and Release" provision, with a relatively broad scope given to the definition of defense services, and specific services then excluded by exception from the definition. This approach reflects the difficulty of developing a precise definition of the defense services that are necessary to cover from the standpoint of U.S. national security, while it is relatively easier to define the services that do not present U.S. national security issues.

- There should be a very broad scope of defense services, or "Catch", for countries listed in Section 126.1(d)(1) (Belarus, Burma, China, Cuba, Iran, North Korea, Syria, and Venezuela), given the significant national security concerns that the U.S. government has identified relating to these countries.

- For all other countries, it is appropriate to control under the ITAR only those services that involve the use of technical data controlled on the U.S. Munitions List and subject to U.S. jurisdiction. If services do not involve the use of ITAR technical data, it is less likely that they present material national security concerns. To the extent that the use of technology controlled under the Export Administration Regulations (EAR), such as the "600-series" controls on defense technology, presents a national security concern, it is appropriate for the Commerce Department to consider this issue and address it through EAR revision.

- For countries other than those listed in Section 126.1(d)(1), it is appropriate to exclude certain services from control. For example, such services include organizational-level maintenance, and the installation of items into a defense article or the installation of a defense article into another item. These activities are unlikely to present national security concerns when they are provided to countries other than those listed in Section 126.1(d)(1).

II. Background - Current Rule and DDTC 2015 Proposed Rule

The current definition of defense services is broadly stated. Section 120.9 defines a defense services to exist if a U.S. person engages in any of the following:

(a) *Defense service* means:

(1) The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;

(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

(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.)

(b) [Reserved]

Section 124.1 further explains that:

> The requirements of this section apply whether or not technical data is to be disclosed or used in the performance of the 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 or is otherwise exempt from licensing requirements of this subchapter pursuant to § 125.4 of this subchapter)." Thus, Section 124.1 provides that defense services are controlled even if the U.S. person does not rely upon on any ITAR technical data, and indeed even if the U.S. person relies solely upon public domain data.

Section 126.11 provides as follows:

> The performance of defense services on behalf of foreign governments by retired military personnel continues to require consent pursuant to part 3a of this title. Persons who intend to export defense articles or furnish defense services should not assume that satisfying the requirements of this subchapter relieves one of *[sic]* other requirements of law.

In June 2015, DDTC proposed to revise the Section 120.9 definition as shown below. See 80 Fed. Reg. 31525 (June 2, 2015).

> (a) Defense service means:
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> (1) The furnishing of assistance (including training) to a foreign person (see § 120.16), whether in the United States or abroad, in the production, assembly, testing, intermediate- or depot-level maintenance (see § 120.38), modification, demilitarization, destruction, or processing of a defense article (see § 120.6), by a U.S. person or foreign person in the United States, who has knowledge of U.S.-origin technical data directly related to the defense article that is the subject of the assistance, prior to performing the service;
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> Note 1 to paragraph (a)(1): ''Knowledge of U.S.-origin technical data'' for purposes of paragraph (a)(1) can be established based on all the facts and circumstances. However, a person is deemed to have ''knowledge of U.S.-origin technical data'' directly related to a defense article if the person participated in the development of a defense article described in the same USML paragraph or accessed (physically or electronically) technical data directly related to the defense article that is the subject of the assistance, prior to performing the service.

Note 2 to paragraph (a)(1): U.S. persons abroad who only receive U.S.-origin technical data as a result of their activities on behalf of a foreign person are not included within paragraph (a)(1).

Note 3 to paragraph (a)(1): Foreign person employees in the United States providing defense services as part of Directorate of Defense Trade Controls-authorized employment need not be listed on the U.S. employer's technical assistance agreement or receive separate authorization to perform defense services on behalf of their authorized U.S. employer.

III. DTAG Comments on 2015 Proposed Rule

As noted, DDTC requested that the DTAG provide comments on the 2015 proposed rule, including both elements that would constitute positive change and key areas of concern.

A. Positive Elements

The DTAG working group identified the following positive elements of the 2015 proposal:

- The 2015 proposal recognized that since 2011, DDTC has expressed the consistent view that "the scope of the current definition is overly broad, capturing certain forms of assistance or services that no longer warrant ITAR control."

- DDTC acknowledged the relevance of technical data to the existence of a defense service, in some circumstances. Specifically, DDTC proposed that certain activities (e.g., testing, and intermediate or depot-level maintenance) are not a defense service if performed by a person who does not have knowledge of U.S.-origin technical data directly related to the defense article that is the subject of the assistance or training or another defense article described in the same USML paragraph prior to performing the service.

- DDTC distinguished Section 126.1 countries from other countries, proposing to apply significantly broader defense services controls against such countries. See proposed 120.9(a)(5).

- DDTC proposed to limit the application of defense service controls to "maintenance" activities; specifically, DDTC excluded organizational-level maintenance from these controls.

- DDTC proposed not to control training in the "basic operation of a defense article authorized by the U.S. government for export to the same recipient."

- DDTC excluded from defense services control "the installation of any item into a defense article, or the installation of a defense article into any item".

- DDTC confirmed that the mere employment of U.S. persons by a foreign person does not result in the provision of a defense service, unless the terms of the definition otherwise apply.

B. Key Concerns

The DTAG working group also identified several concerns with the 2015 proposal, including the following:

- The proposal was long and complicated, which would make it difficult to integrate into corporate compliance programs and training.

- In proposing to base the defense services control on a U.S. person's "knowledge" of technical data, DDTC focused on the U.S. person's past access to technical data. However, the working group was concerned that it would be difficult to confirm whether an employee had had past access to relevant technical data.

- National security concerns do not warrant broadly controlling services relating to the "integration" of a defense article to all countries, where no U.S. technical data is used in the service, given the impact of such broad controls on the U.S. defense industrial base.

- DDTC did not address so-called derivative data, i.e. the requirement that non-U.S. items "produced or manufactured" from U.S. defense services must be treated as subject to the ITAR. The breadth of this control, when combined with the breadth of the proposed defense services control, would continue to deter non-U.S. companies from hiring U.S. employees, contrary to the U.S. and allied interest in defense cooperation.

- DDTC proposed to apply the defense services control to foreign persons located in the United States, yet the mechanism for such foreign persons to apply for ITAR licenses is unclear. Moreover, this proposal could require non-U.S. companies to apply for ITAR licenses in order to provide services to themselves, i.e. where two employees travel to the United States and engage in discussions with each other while there.

IV. DTAG Working Group

A. Basic Process

The DTAG working group began discussing the defense services issue in summer 2017. The group focused initially on reaching agreement on core principles for its work and identifying the key issues where it was important to achieve reform to the current rule. The working group co-chairs also met with DDTC staff to understand DDTC perspectives. The group presented an update on its work at the DTAG Plenary in September 2017. Following the September 2017 Plenary, the working group formed subgroups to analyze the key issues identified. The subgroups were requested to identify a preferred approach on the issue, along with a potential alternative approach, and to summarize the pros and cons associated with both approaches. The working group then held weekly conference calls to work through the material presented by the

subgroups. The working group also held two more meetings with DDTC to discuss the key issues. The working group also briefed the full DTAG by phone. The working group developed a draft presentation for the February 2018 DTAG Plenary, and met with the full DTAG to go through the presentation and obtain feedback. The working group then presented to the DTAG February 2018 Plenary.

B. Summary of Subgroups' Analysis

1. Employment of U.S. Persons by non-U.S. persons in work relating to defense articles

The team comprised H. Sears, G. Hill, C. McGinn, P. Lichtenbaum, J. Huffman, and O. Torres. The tasking was to suggest changes to the definition of defense services to reduce confusion and existing negative impact on employment of U.S. persons abroad.

The team agreed that the existing definition of defense services negatively impacts employment of U.S. persons abroad, as it: 1) is overly broad; 2) captures activity that does not merit control on the ITAR; and 3) appears to capture mere employment. Also, the team discussed concern about the capture of activities as defense services when based solely on a U.S. person's "knowledge" as compared to ITAR-controlled technical data that is in tangible or electronic form. The team identified the goals as being to narrow the scope of the definition of defense services, clarify that mere employment abroad does not meet the definition of a defense service and eliminate activities based solely on "knowledge" as a defense service. The team reviewed the June 2015 proposed defense services definition. The team agreed with the proposed definition's reference to "U.S.-origin technical data" and liked the exclusions, but considered the exclusions should be part of the actual definition. The proposal was overly complicated and the definition of "knowledge" was too broad.

The subgroup team had the following recommendations for the working group:

- Add a requirement that a defense service must involve the use of U.S.-origin technical data. This eliminates the current controls imposed on U.S. persons working on purely foreign defense programs and the foreign employer fear of "ITAR" taint caused by the mere employment of a U.S. person.

- Consider adding a requirement that a defense service must involve "identifiable" U.S.-origin technical data. This requirement would seek to avoid a defense service control that is based on "knowledge" rather than being tied to ITAR-controlled technical data in tangible or electronic form.

- Eliminate defense services control over instruction in general principles taught in schools.

- Eliminate organizational-level maintenance, installation and maintenance of an EAR controlled item installed on a defense article as defense services. Reduces existing unnecessary controls.

- Eliminate activities by U.S. persons abroad involving DDTC licensed technical data from the definition of defense services. Eliminates unnecessary controls on already licensed technical data.

- Eliminate law enforcement, physical security, personal protective services, medical, logistical, translation, financial, costing, budgeting, legal, scheduling or administrative services from the definition of defense services.

- Add a note clarifying that mere employment abroad is not a defense service. This eliminates existing confusion.

2. Scope of control over non-U.S. made items that may be "produced or manufactured" from defense services under Section 124.8(5)

The team comprised H. Sears, G. Hill, C. Mc Ginn, P. Lichtenbaum, J. Huffman, and O. Torres. The tasking was to suggest changes to the control over downstream products produced as a result of defense services to reduce existing negative impact on employment of U.S. persons abroad.

The team agreed that the existing control over downstream products negatively impacts employment of U.S. persons abroad because all foreign articles produced or manufactured using defense services are now subject to ITAR control. Foreign entities are hesitant to hire U.S. persons because of the ITAR taint caused by the existing definition of defense services and Section 124.8(5). The subgroup's goal was to narrow the impact of Section 124.8(5) on foreign manufactured articles . The team reviewed the June 2015 proposed defense services definition. We agreed with the proposed definition's addition of "U.S.-origin technical data", but otherwise had concerns that the proposal could aggravate this concern, especially with the proposed definition of "knowledge."

Recommendations:

- Add limitation to Section 124.8(5) such that defense services must be peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions described in the relevant USML paragraphs for non-U.S. produced or manufactured articles to be subsequently subject to ITAR control.

3. Military Training

The Military Training sub-group ("MT"), comprised of D. Casoni, J. Fishman, J. Huffman, G. Rowold, O. Torres, reviewed the following sub-tasks:

- Military training: What is the appropriate scope of "military training", currently addressed in Section 120.9(a)(3)? Should the use of technical data be a required element? To what extent should the control apply to training that is normally provided to commercial customers? To what extent should it cover intelligence training?

- Research: To what extent should the term "military training" apply to training provided to non-U.S. persons in the research and development community, e.g. with respect to the use of defense articles, the sharing of ITAR-controlled technical data, and the creation of ITAR-controlled technical data?

The subgroup canvassed the ITAR and its regulatory history for "military training," and noted provisions that implement the term inconsistently. The term appears intended to capture a conceptually distinct subset of "defense services." Thus, in 1984, for "military training" to constitute a "defense service," a link to a defense article was required but disclosure of ITAR technical data was not. In 1997, the definition of "defense services" was expanded to include "military training." This definition remains in place today.

In 2014, Category IX was expanded without public notice and comment to include "military training" not directly related to defense articles or technical data enumerated [on the USML].

The subgroup noted that many regulations already control services that arguably could be addressed by the defense services definition, but this would result in multiple and potentially conflicting controls on the same activities. See attached Exhibit A for a representative list of these regulations.

<u>Challenges presented with the ITAR's current approach:</u>

- Exporters must review multiple ITAR provisions in order to understand and comply with controls on "military training";

- The Section 124.1 provision does not appear to meet the requirements of the AECA [Items designated as defense articles and defense services "shall constitute the United States Munitions List".] Thus, the legal authority for this provision is unclear.

- The expansion of the "military training" definition to include use of defense articles without release of ITAR technical data, as well as the control of "military training" not using defense articles or ITAR technical data, occurred without public notice and comment.

- Both expansions occurred in provisions outside of the 120.9 definition of "defense services."

- The subgroup understands the U.S. government concern regarding the control of U.S. person activities that help a foreign government set up an intelligence service. The subgroup further noted that the USML already has multiple entries designating certain "intelligence" items as defense articles:

    - Cat. VIII(a)(7)

    - Cat. XI(a)(5)

    - Cat. XI(b)

- Cat. XII Note re: foreign government intelligence and reconnaissance organizations

- Cat. XIII(b)(1)-(b)(4)

- Cat. XV(3)

Suggested approach to remedy these challenges:

- The subgroup could not identify inherently military training, consistent with the scope of the AECA and ITAR, not already covered by other ITAR provisions and that is outside of "training in combat operations." The subgroup also recognized that "combat operations" is not defined. Therefore, the subgroup proposed developing a Combat Operations definition that captures training that is uniquely and inherently military and not otherwise already captured on the ITAR.

- The subgroup noted that proposed new ITAR definitions of fundamental research and public domain may affect defense services control and suggest these proposed definitions should be reviewed in parallel to confirm they work together and there is no unintended overlap or inconsistency among them.

- The subgroup further noted that certain potential defense services are already covered by ITAR §126.11 and 22 C.F.R. Part 3a, as these relate to services provided by former U.S. military personnel. We propose clarifying the interplay between defense services and these ITAR sections.

- To the extent DDTC desires to clarify defense services by end user, the MT subgroup suggests that for training to be deemed "military" training, it should be provided to a foreign "Military End User." As that term is defined in Category XII (which incorporates the intelligence community), it allows for greater regulation and oversight of commercial companies providing specialized training services to foreign intelligence and reconnaissance organizations, in addition to foreign militaries.

4. Integration & Installation

The team comprised B. Angvall, B. Bittner, G. Bourn, R. Conover, and M. Menz.

The tasking was as follows: Should defense services cover work on CCL items installed on USML items or USML items installed on CCL items? How should we distinguish between installation vs. integration? How should we distinguish based on use of ITAR controlled technical data?

The team reviewed the June 2015 proposed defense services definition and agreed with the proposed examples of activities that are not defense services such as:

- "servicing of an item subject to the EAR (see 120.42) that has been integrated or installed into a defense article, or the servicing of an item subject to the EAR into which a defense article has been installed or integrated, without use of technical data, except as described in paragraph (a)(5) of this section."

- "Installation of any item into a defense article, or the installation of a defense article into any item." Installation was defined as an activity that does not require any changes or modification to the defense article, other than fit changes.

- "Plug and play": While "integration" is defined as a defense service, this term excluded "plug and play".

See Note to Paragraph 120.9(a); Note to Paragraph 120.9(a)(2).

Specific activities were discussed and categorized to further clarify installation and integration activities as defense services or non-defense services, such as:

- Any installation or integration activity that requires technical data is a defense service.

- Installation of an EAR item on a USML item/system that is "plug and play" is not a defense service.

- Installation or integration of an EAR item onto a USML item that does not require technical data but does require interface with other EAR capabilities on the USML item is licensable under the EAR and not a defense service.

- Installation or integration of an EAR item only that does not involve "600 series" or other controlled technology is not a defense service and captured under EAR controls related to end use and end user.

- Installation and integration activity that does not involve ITAR technical data may be captured under the EAR and may require USG approval for the release of controlled EAR technology. It is unnecessary to classify this activity as a defense service resulting in two (2) licenses.

During review with the entire Defense Services Working Group, the decision was made to propose specific definitions for "Installation" and "Integration" and add these definitions to Section 120 of the ITAR as 120.52 and 120.53.

5. Technical Data

The team comprised M. Aljanich, B. Bittner, D. Casoni, R. Conover, C. McGinn, and G. Rowold. The tasking was as follows: Should defense services include activities that do not rely upon the use of "technical data?"

The team reviewed the June 2015 proposed defense services definition and noted that at that time DDTC proposed to link certain sections of 120.9 directly with technical data. In

section 120.9(a)(1), DDTC stated that that the activities specified would only be ITAR defense services if conducted by persons who have "knowledge of U.S.-origin technical data directly related to the defense article that is the subject of the assistance, prior to performing the service."

Further, DDTC proposed in 2015 that a person would be deemed to have such knowledge if the person "participated in the development of a defense article described in the same USML paragraph or accessed (physically or electronically) technical data directly related to the defense article that is the subject of the assistance, prior to performing the service."

The subgroup agreed that, except with respect to 126.1(d)(1) countries that warrant stricter controls, technical data should be an integral element when determining what activities constitute defense services. The team felt that controlling defense services without a direct link to ITAR technical data would create the following issues: (1) it would continue to be difficult to manage, as companies would not know when they are providing defense services and how to train their employees as to when an ITAR approval is necessary; (2) it could require an ITAR approval in connection with products/technologies that are not subject to the ITAR, e.g., if a company trained a foreign military how to fly a Commerce-controlled ECCN 9A610.a helicopter, this could be construed as "military training" and a defense service even when no ITAR-controlled technical data or defense articles are at issue, and even where the transaction already requires a license from the Commerce Department.

However, the subgroup questioned whether it would be practical to tie technical data to a person's knowledge and whether s/he had accessed the technical data at some point in the distant past. The team discussed how engineers and other employees working on projects over the course of their career often do not know how they know something or where they obtained the specific expertise to complete a task. Rather, the team agreed that it would be simpler to administer and not create significant national security risk if the definition was based on whether the person were using ITAR-controlled technical data to perform the task.

Based on this, the subgroup recommended that DDTC draft section 120.9(a)(1) to cover the enumerated activities as defense services when conducted "using [identifiable] U.S.-origin technical data (see §120.10) or foreign-origin technical data that has been produced or manufactured from U.S.-origin technical data (see §124.8(5))."

The subgroup also recommends that DDTC not link defense services to ITAR technical data in proposed section 120.9(a)(3) with respect to 126.1(d)(1) countries as these destinations warrant additional controls in the interest of national security, and the subgroup supported treating the specified activities as defense services even when ITAR-controlled technical data was not being used.

V. DTAG Proposal

A. DTAG Proposed ITAR Revisions

The working group proposed the following revisions to the ITAR:

DDTC should replace the current text of Section 120.9(a) with the following:

(a) Defense service means where a U.S. person does any of the following:

(1) Assisting or training a foreign person (see §120.16) in the development, production, assembly, testing, intermediate- or depot-level maintenance (see §120.38), modification, employment, integration, repair, overhaul or refurbishing of a defense article (see §120.6), using *[identifiable]*[1] U.S.-origin technical data (see §120.10) or foreign-origin technical data that has been produced or manufactured from U.S.-origin technical data (see §124.8(5)).

(2) Participating in, providing training in, or directing combat operations for a foreign person (see §120.16), except as a member of the regular military forces of a foreign nation by a U.S. person who has been drafted into such forces. See §*[placeholder for definition cite]*. See also §126.11 and 22 CFR Part 3a (performance of services on behalf of foreign governments by former U.S. military personnel).

(3) Assisting or training a foreign person (see §120.16) of a country listed in § 126.1(d)(1) of this subchapter in the development, production, assembly, testing, maintenance, modification, employment, integration, installation, repair, overhaul, or refurbishing of a defense article.

(b) Release: The following are not covered by paragraph (a)(1):

(1) Assisting a foreign person using technical data subject to the ITAR that was separately authorized by the U.S. government for export or transfer to the same foreign person.

(2) Assisting or training regarding the organizational-level (basic-level) maintenance of a defense article, or regarding the basic operation of a defense article authorized by the U.S. government for export to the same recipient;

(3) The installation of any parts, components, attachments or accessories into a defense article, or the installation of a defense article into an end-item or system.

(4) Providing law enforcement, physical security, or personal protective services (including training and advice) to or for a foreign person;

(5) Providing medical, logistical (other than maintenance), translation, financial, costing and budgeting, legal, scheduling, or administrative services;

(6) Furnishing assistance by a foreign government to a foreign person in the United States, pursuant to an arrangement with the Department of Defense; and

[1] *See* discussion below.

(7) Instruction in general principles, including general scientific, mathematical, or engineering principles commonly taught in schools, colleges, and universities or associated teaching or research laboratories of academic institutions.

Note 1: Performance of services by a U.S. person in the employment of a foreign person is not a defense service, except as defined in Section 120.9(a).

Note 2: Maintenance of an item subject to the EAR that has been installed into a defense article is not a defense service, except as defined in Section 120.9(a).

DDTC should add the following definitions to Part 120:

Section 120.52 Installation

"Installation" means the placement of an item (including any parts, components, accessories or attachments) in its predetermined place without the use of technical data or any modifications to the defense article involved, other than to accommodate the fit of the item with the defense article (e.g., installing a dashboard radio into a military vehicle where no modifications (other than to accommodate the fit of the item) are made to the vehicle, and there is no use of technical data.). The "fit" of an item is defined by its ability to physically interface or connect with or become an integral part of another item (see §120.41). "Installation" is distinct from "Integration" (see §120.53).

Section 120.53: Integration

"Integration" means any engineering analysis (see § 125.4(c)(5) of this subchapter) needed to unite a defense article and one or more items (including parts, components, accessories or attachments). Integration includes the introduction of software to enable operation of a defense article, and the determination during the design process of where an item will be installed (e.g., integration of a civil engine into a destroyer that requires changes or modifications to the destroyer in order for the civil engine to operate properly; not plug and play). "Integration" is distinct from "Installation" (see §120.52).

DDTC should revise Section 124.1 as follows:

Section 124.1: Revise to delete "The requirements of this section apply whether or not technical data is to be disclosed or used in the performance of the 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 or is otherwise exempt from licensing requirements of this subchapter pursuant to § 125.4 of this subchapter)."

DDTC should revise Section 124.8(5) to read as follows (new text shown in underline):

The technical data or defense service exported from the United States in furtherance of this agreement and any defense article which may be produced or manufactured from such technical data or defense service, where such technical data or defense services are peculiarly responsible for achieving or exceeding the defense article's controlled performance levels, characteristics, or functions described in the relevant USML paragraphs, may not be transferred to a foreign person except pursuant to §126.18, as specifically authorized in this agreement, or where prior written approval of the Department of State has been obtained.

B. Explanation of DTAG Proposal

- As discussed above, the proposal follows a "catch and release" format, given the difficulty of achieving a precise definition of defense services.

- The "catch" is narrower when the recipient is not a 126.1(d)(1) person, in order to take into account the heightened national security sensitivity that applies for such persons. For persons other than Section 126.1(d)(1) persons, the control is limited as follows:

  - Limited to services that include the use of U.S. technical data or foreign-origin derivative data, i.e., technical data that is "produced or manufactured" abroad from U.S.-origin defense services or technical data under Section 124.8(5).

  - The working group emphasizes that in order to meet this regulatory standard, it would not be sufficient to determine that the U.S. person had previously had access to controlled technical data and/or had current knowledge of such technical data. Rather, a license would only be required where the U.S. person actually uses controlled technical data to provide the service in question.

  - As shown in the proposed text above, the DTAG working group considered a proposal that the control should only apply where the controlled technical data was "identifiable", in order to avoid regulation of U.S. person activity based solely on the knowledge that the individual has in their head. However, other members of the working group, including both co-chairs, considered that this proposal would be difficult to apply in practice, and also could create risks to U.S. national security.

  - The control would only apply to higher-level maintenance services, not to organizational-level or basic maintenance services.

  - Consistent with the DDTC 2015 proposal, the proposed control would not cover "installation" but would cover "integration", with specific definitions provided for these terms.

- As discussed above, a broader "catch" would apply to 126.1(d)(1) persons, and the exceptions in proposed Section 120.9(b) would not apply.

- The working group recommended expanding the existing Section 126.18 exemption, which authorizes technical data transfers by non-U.S. companies to their employees, to address 126.1(d)(1) national employees of U.S. firms. This would address industry concerns about applying a very broad defense services control in the context of individual employees. Such an approach should be developed as part of a broader reform of Section 126.18 to address the current disparate treatment between non-U.S. and U.S. companies, as recommended by a different DTAG working group.

- "Combat operations" – With respect to the proposed Section 120.9(a)(2), DTAG submits that a definition is needed given the potential broad scope of coverage. The working group considered that the U.S. government is best placed to develop the definition. For instance, the U.S. Department of Defense and DDTC could work together to develop a proposed definition. DDTC could then provide a follow-on tasking to DTAG to comment on the proposed definition. The working group identified potential sources for the definition:

    - DoD Dictionary of Military and Associated Terms
    - EAR §744.21 (military deployment)
    - Prior DTAG work

- The proposed defense services controls apply to U.S. persons, and not to foreign persons located in the United States. The working group recognized that activities of foreign persons in the United States may pose national security concerns, but considered that other laws and regulations (e.g., visa restrictions, existing EAR controls, etc.) should be applied in the first instance; the ITAR should only be used if necessary. For instance, as DDTC noted in the 2015 proposed rule, it would be unclear how to license foreign person activities given that non-U.S. persons are not currently allowed to apply for export licenses. The working group suggests that DDTC work with other agencies, including the Justice Department and the Commerce Department, to evaluate how best to proceed with respect to foreign persons in the United States.

- The working group recommended narrowing the scope of control over non-U.S. made items that may be "produced or manufactured" from defense services under Section 124.8(5). Specifically, the control should be limited to situations where defense services were peculiarly responsible for achieving or exceeding the item's controlled performance levels, characteristics, or functions described in the relevant USML paragraphs. This revision would focus the control on situations more likely to implicate U.S. national security interests, and mitigate the impact of the defense services control on the employability of U.S. persons by non-U.S. companies.

- The working group discussed whether to propose that defense services include services related to 600-series items. There was concern that given the substantial extent of defense items transferred to the EAR under Export Control Reform, U.S. national security may warrant control with respect to services relating to such items. Currently,

the EAR contains only very limited controls on services, principally relating to Weapons of Mass Destruction items under the Enhanced Proliferation Control Initiative (EPCI). However, the working group considered that it would be most appropriate for the Commerce Department to consider this issue in the first instance, together with its Technical Advisory Committees. Accordingly, DTAG recommends further work in coordination with the Commerce Department.

- The working group noted that revised ITAR definitions of fundamental research and public domain may impact defense services but are being addressed separately.

VI. Potential Follow-on Work

In the time leading up to the May 2018 Plenary, the working group would be glad to assist with any of the following potential follow-on projects:

- Developing a "Combat Operations" definition, based on U.S. government proposed approach;
- Evaluating appropriate controls on services related to EAR 600 series items, in coordination with the Commerce Department and its Technical Advisory Committees;
- Developing a compliance guideline re the "use of technical data" referenced in the proposed defense services definition, i.e. a guideline for industry and government to ensure alignment on what this term means in practice.
- Considering how any proposed new ITAR definitions of fundamental research and public domain may affect defense services control; and
- Clarifying the interplay between defense services and ITAR §126.11 and 22 C.F.R. Part 3a, as these relate to services provided by former U.S. military personnel.

Conclusion

The working group appreciates the opportunity to contribute to the U.S. government's policy-making on this important issue. We also appreciate the opportunity for in-depth discussion with DDTC staff as we developed this proposal. We hope that the proposal is helpful to the U.S. government.