

Franklin Vargo

Vice President

International Economic Affairs

June 13, 2011

The Honorable Ellen Tauscher
Under Secretary, Arms Control and International Security
Department of State
Washington, DC 20230

Re: Regulatory Changes – Defense Services

By Email DDTCResponseTeam@state.gov

Dear Under Secretary Tauscher:

The National Association of Manufacturers (NAM) welcomes the opportunity to comment on amendments to the International Traffic in Arms Regulations (ITAR) designed to update the policy regarding defense services.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Our members play a critical role in protecting the security of the United States. Some are directly engaged in providing the technology and equipment that keep the U.S. military the best in the world. Others play a key support role, developing the advanced industrial technology, machinery and information systems necessary for our manufacturing, high tech, and services industries.

We commend the State Department for attempting to clarify the scope of defense service activities that are controlled by the ITAR and for providing definitions for various levels of maintenance. We concur with the Department's conclusion that the current definition of defense services is overly broad, capturing certain types of assistance and services that should not require licensing. The NAM fully supports the Department's stated objectives to reduce licensing inefficiencies and to minimize unintended controls over activities that bear little or no relationship to defense trade control objectives.

Further, we appreciate that the Department is publishing the proposed rule and soliciting further public comment. We are pleased to be able to present our views.

In reviewing the proposed rule, the NAM believes clarifying the scope of defense services that warrant ITAR control is an important step forward in the Export Control Reform Initiative. The proposed amendment could be improved significantly, however, by incorporating a number of further changes. We are confident that our recommendations do not in any way limit the necessary security of sensitive items and activities.

Generally, we recommend greater use of defined terms within the regulation (as opposed to within the supplemental information section) as well as improved clarity in the definitions. We also suggest the Department provide a set of examples or “Frequently Asked Questions” to further illustrate activities that are, and are not, considered defense services under the new definition.

Additional specific recommendations follow.

Part 120.9
Defense service

Exclusion of Data – The Department’s proposal would amend the definition of a defense service, in § 120.9(a)(1), to include furnishing various types of assistance to foreign persons using “other than public domain data.” We believe this definition should be further modified, for many types of data that are not in the public domain, including data restricted for proprietary or contractual reasons and data subject to the Export Administration Regulations (EAR), do not merit control by the ITAR. We recommend that the definition instead refer to “technical data,” as defined in §120.10 of this subchapter, rather than “other than public domain data.”

Integration of Items – In § 120.9(a)(2), the proposed rule would qualify the “integration” of items controlled by the U.S. Munitions List (USML) or Commerce Control List (CCL) into a defense article as a defense service. The amendment draws a distinction between “integration” and the more basic “installation,” which the Department views to have plain meaning. We recommend, however, that the Department include definitions for these terms to avoid confusion and compliance risks. Further, as the definition is currently worded, assistance with the integration of foreign items would not be a defense service because foreign items are not controlled on the USML or CCL. However, as these activities arguably could still be considered to be included within the definition of defense services in § 120.9(a)(1), the rule should be clarified on this point to avoid confusion and compliance risks.

Training of Foreign Units – The proposed rule would also include in its definition of defense services, in § 120.9(a)(3), training or providing advice to “foreign units and forces” in the “employment of defense articles.” In this context, both the term “foreign units and forces” and the term “employment” in reference to the use of defense articles should be more precisely defined.

Activities Not Qualifying as Defense Services – The delineation of the activities that would *not* qualify as a defense service in § 120.9(b) provides helpful clarity and will help resolve a number of difficult compliance scenarios caused by the existing open-ended definition of defense service. To further clarify the Department’s intent, the NAM would recommend a few additional changes.

The Department proposes that the “mere employment of a U.S. citizen” does not constitute a defense service, as outlined in § 120.9(b)(2). The term “U.S. citizen” rather than “U.S. person,” however, may cause confusion and unintended consequences for other individuals, including lawful permanent residents, that are included in the definition of a U.S. Person in §120.15 of the subchapter. Recognizing that the Department’s intent may be to exclude corporations and other business entities from its description, we recommend the Department amend the section to include employment of an individual U.S. person as defined by 8 U.S.C. 1324b(a)(3).

The proposed rule would exclude law enforcement, physical security or personal protective training, advice or services to or for a foreign person “using only public domain data” from the definition of defense services, in § 120.9(b)(4). This description infers that the Department would consider the use of proprietary information to provide these services to merit ITAR control, even though these types of services have traditionally fallen outside the scope of the ITAR. We recommend the Department clarify this point in keeping with current interpretation.

Part 120.38
Maintenance levels

The definition of organizational maintenance in § 120.38(a) is restricted to equipment “assigned to the inventory of the end-user unit.” This requirement would effectively require a company to verify a foreign military’s inventory before performing maintenance on a piece of equipment – a restriction that is not found elsewhere in the ITAR. The current restriction, outlined in § 124.2(a) and § 124.2(c), requires that the defense article for which basic maintenance is provided must be lawfully exported or authorized for export to the same recipient. The NAM recommends amending the definition to reflect the current ITAR.

Given that one goal of the Export Control Reform Initiative is a set of harmonized definitions, the NAM also urges the Department to harmonize this proposal with the definitions of maintenance levels previously published by the Defense Department in DoD Directive 4151.18. Standard definitions in this area would prevent confusion and help industry to better support the U.S. and foreign governments.

Finally, the NAM would like to note that the maintenance level definitions do not provide guidance for intangible maintenance at the organizational (or basic) level. Such activities might include off-the-shelf installations, basic upgrades, basic fixes, and simple modifications to allow for system integration. We encourage the Department to consider specifying that basic maintenance on software is not a defense service.

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Concluding Comments

The NAM wishes to reiterate its appreciation for the initiatives the Department is proposing in these rules. Clarifying the scope of defense services that require a license will contribute toward achieving the President's goal of simplifying export controls while improving national security. We look forward to the Department's careful consideration of our recommendations and stand ready for further discussion of our suggestions.

Thank you again for this opportunity.

Sincerely,

A handwritten signature in black ink, appearing to read 'Frank Vargo', with a long horizontal flourish extending to the right.

Frank Vargo
Vice President, International Economic
Affairs
National Association of Manufacturers