June 13, 2011

Department of State
Directorate of Defense Trade Controls
Office of Defense Trade Controls Policy
ATTN: Regulatory Changes- Defense Services
SA-1, 12th Floor, Washington, D.C. 20522-0112
ATTN: Charles Shotwell

Subject: Comments regarding 76 FR 71 (April 13, 2011) Notice RIN 1400-AC80, regarding proposed revision to the Definition of Defense Service and the Addition of §120.38 Definitions of Levels of Maintenance

Dear Mr. Shotwell:

The Aerospace Industries Association (AIA) appreciates the efforts put forth by the U.S. Department of State, Directorate of Defense Trade Controls (“DTC”), regarding regulatory changes to clarify the definition of defense service and welcomes the opportunity to comment on the proposed change.

§120.9

1. §120.9(a)(3) includes as a defense service training of foreign units or forces in the “employment of defense articles”, which we are interpreting as referring to the training of foreign units or forces in the use of defense articles by those foreign units or forces. If such interpretation is not correct, we recommend the department provide further clarification in the final rule about what is intended by “employment of defense articles.” We also suggest that DTC consider reinstating the modifier “tactical” before “employment,” as had originally been considered. The use of the word “tactical” reinforces and clarifies the context of 120.9(a)(3) as applying to services rendered to foreign units and forces, which may be useful in light of the more general references in this section to “foreign person” and “foreign persons.”

2. Despite the language in §120.9(a)(1) excluding furnishing of assistance using public domain data from the definition of a defense service, it is unclear in the revised regulatory proposal whether performing Intermediate Level Maintenance using public domain data, such as certain MIL handbooks or MIL SPECS is considered a defense service, since the maintenance level activity is within the scope of a defense service, but if public domain data is used, the activity is excluded by the language is 120.9(a)(1). We suggest this be further clarified in the final rule.

3. While the Supplementary Information preamble to the proposed rule identifies DTAG comments reviewed and accepted or not accepted within the language of the proposed regulatory changes, including “incorporated”, “integrated” and “installed”, we strongly recommend inclusion of the definitions and explanations included in Supplementary
Information be included as ITAR Regulatory Definitions, to avoid confusion with vernacular use of those terms.

4. §120.9(b)(1) excludes training in the basic operation (functional level) or basic maintenance of a defense article, but it is unclear whether the performance of basic maintenance on a defense article by a U.S. person on behalf of a foreign person is also excluded or would be considered a defense service. Since the outsourcing of maintenance activities, particularly for military aircraft, is now commonplace, we respectfully request this be fully addressed in the final rule to clarify whether the §120.9(b)(1) exclusion applies to performance of basic maintenance on behalf of a foreign person, or only applies to the training of the foreign person in the performance of basic maintenance.

5. §120.9(a)(1) specifically excludes the use of ‘public domain data’ as being a defense service; however, §120.9(a)(2), (3) and (4) include no such exception for public domain data. Was this an oversight or intentional omission by the department? We request the department’s intentions be clarified in the final rule.

6. A notable example of defense services used by the DDTC in past speaking engagements is pulling public domain data from multiple sources and providing to a foreign person, which may or may not include commentary or explanation regarding the interpretation, meaning, or intent of the public domain data. Based on public domain data being excluded in §120.9(a)(1), we request clarification as part of the final rule.

7. DDTC needs to clarify the use of the word “integration” as used in Part 120.9(a)(2) and/or specifically enumerate in 120.9(b) that “defense services” does not mean activities to ensure compatibility, secure, load or install cargo that is subject to the EAR for stowage in spacecraft or other aircraft, vessels or vehicles, which themselves are subject to the ITAR.

8. Changes to 120.9(a)(2) should focus on the nature of the integration activity and not on the part being integrated. Under the proposed rule a U.S. person could help integrate a foreign control list article without providing a defense service because these parts are not controlled by the ITAR or the EAR unless they enter U.S. jurisdiction.

9. §120.9(a)(3) - refers to “employment” of defense articles. The term commonly used throughout the ITAR is “use” and for that reason we recommend that “use” be maintained for purposes of consistency, or alternatively that how “employment” differs from “use” be addressed.

10. § 120.9(a)(4) – This subparagraph would be strengthened if the new language better clarified that the aggregation of public domain information is also not considered to be a defense service. This clarification would also lead to a better understanding of whether the aggregation of public domain information (e.g., “data mining”) could be categorized as an intelligence service and, as a result, become a defense service. Alternatively, this section should provide guidance regarding at what point the aggregation of such information would be considered the provision of an intelligence service and be controlled as a defense service.

11. §120.9(b) – This subparagraph lists five scenarios that fall outside of the definition of defense service. It might add clarity to explain that the purpose of the listing is to provide examples and
create a mechanism for inquiring as to whether or not similar examples also fall outside of the definition of a defense service.

12. §120.9(b)(1) – "Training in the basic operation (functional level) or basic maintenance (see §120.38) of a defense article;" AIA recommends referring to "organizational maintenance" to be consistent with §120.38(a).

13. §120.9(b)(2) excludes the 'mere employment of a US citizen' as a defense service. Is §120.9(b)(2) intended to exclude as a defense service any and all job responsibilities held by the US citizen employee. Or would that US citizen potentially need an export authorization dependent on their job function? Would the DDTC require / allow that individual to register per Part 122 and subsequently grant authorizations? We recommend clarifying or rephrasing 'mere employment'. Also we recommend including 'permanent resident and protected individual' to US citizen.

14. 120.9(b)(3) – The reference to "incorporation" may be confusing, since in its Supplementary Information Section the Department of State makes a distinction only between installation and integration. The term "incorporation" could refer to either installation or integration. We recommend the use of "installation" and "integration" and to include definitions of both terms in the regulation, so that they are easily accessible when reviewing the ITAR.

15. §120.9(b)(5) – "Providing assistance (including training) in medical, logistical (other than maintenance), or other administrative support services to or for a foreign person."

The term "logistical" used in this subparagraph would benefit from some clarification. If DDTC intends "logistical" support services to encompass the broad range of activity commonly referred to as "military logistics," that discipline commonly includes a myriad of strategic support activities, including system readiness recommendations, movement of spares, manpower management, supply support, storage handling, computing support, etc. If DDTC’s intention is to not control the provision of assistance within all aspects of logistics support, no further clarification would be needed. If DDTC intends something different, then we recommend greater definition in this regard.

§120.38

1. The definitions for organization-level, intermediate-level, and depot-level maintenance would benefit from further refinement. In addition to defining these three terms, the language of the proposed rule appears also to regulate where the maintenance may take place and who may perform it. We recommend that the definitions focus solely on defining the three levels of maintenance. Any guidance offered on the personnel or location of different levels of maintenance should be offered by example, and be qualified (e.g., "typically performed by" or "typically performed at").
2. Clarification should be provided as to what constitutes a “line replaceable unit” (LRU). We generally believe this term to mean the item is “plug and play” to the defense article, and can be removed and replaced without taking the item out of service, on a flight line, in the case of aircraft, as an example.

3. In order to compare and clearly identify which maintenance activities are identified within each of the defined levels in §120.38, we developed a chart that would provide our members practical guidance should this language as drafted be promulgated as final rule (Attachment 1). Based on the chart, we have the following comments:

   a. If Level 1 type of servicing is performed at a maintenance facility off the equipment (Level 2) by a person of higher technical skill (Level 3), we believe this still constitutes Level 1 service and request that be clarified in the final rule.

   b. Since some activities (e.g. calibration) are specifically identified in multiple levels of maintenance, and the current definition associates them with levels based on whether performed “on equipment”, or “off equipment”, we submit that the on or off equipment criteria is not the only valid indicator of whether the activity is organizational or intermediate level activity. While that may have been indicative of the technical extent of the activity in the past, defense articles are now produced to minimize time the equipment is out of service, including the use of modular design, more LRU’s, etc. and believe the indicator of whether the maintenance level is organizational or intermediate should be based on the technical extent of the activity itself, versus whether conducted on or off equipment. It would be contrary to logic that an LRU pulled off and replaced on the flight line would be Level 1 Organizational Maintenance but if the same LRU were removed in a maintenance shop and replaced it would then become Intermediate Level Maintenance.

   Additionally, the phrase “in direct support of end user units or organization” does not encompass the full range of maintenance activities performed. For example, suppose a foreign contractor operates a rotatable pool of equipment with which multiple end users are supported. The foreign contractor enters into separate commercial maintenance agreements for I-Level and/or D-Level support of its rotatable pool. These activities would not be in direct support of the end users.

   c. Since all maintenance activity except that identified as Organizational Level requires a Technical Assistance Agreement, as long as the regulatory definition of Organizational Maintenance is clear for purposes of determining what is excluded as a defense service, we are unclear as to why the regulations contain the details on Intermediate and Depot Level Maintenance, unless the Department inserts a clarification that some Depot Level Maintenance is to the same level of detail as the manufacturing of the defense article (e.g. board level repair) that may require a Manufacturing License Agreement, so potentially the Depot Level Maintenance definition should include activities that constitute production/manufacturing of the part or component that require a Manufacturing License Agreement.
Additionally AIA recommend that the exclusion related to “modification, enhancement upgrade or other form of alteration or improvement that enhances the performance or capability of the defense article” be referenced in subparagraph (b), as well, to prevent the possibility of misinterpretation by personnel involved in activities impacted by these definitions.

d. In the definition of Depot Level Maintenance, the terms “extensive equipment” and “higher technical skill” are judgmental and subjective, and should be further clarified with definitions and examples. For example is “higher technical skill” equivalent to a certified technician versus an engineer, or are both considered “higher technical skill”?

e. We are concerned there appears to be some inconsistency in the type of service identified with the various levels of maintenance, e.g. as long as the activity can be performed “on equipment” potentially less activity is authorized for intermediate than for organizational maintenance.

f. Enhancements are excluded from Depot but not from other levels of maintenance, and we believe further clarification is required. Over a long product life cycle for defense articles, multiple Component Improvement Programs (CIP) may be offered, and can be performed at each level of maintenance; therefore, we recommend the department include enhancements that do not improve military capability other than to enhance part life cycle, reliability or increase time between maintenance cycle checks as permissible at all three levels of maintenance, consistent with the activities identified within each level.

Revisions to §124.2(c)

§124.2(c)(3) of the ITAR as currently written appears to authorize the provision of Depot Level Maintenance to NATO and NATO countries, Australia, Japan, and Sweden without a TAA. We recommend this be further clarified in FAQs, and if not the intent of the Department, revise the language in the section to align with the proposed definitions.

AIA supports this initiative to review the ITAR’s treatment of defense services to enhance the support to allies, and requests the above clarifications and additions to assure use by U.S. applicants consistent with the Department’s intent.

Sincerely,

Remy Nathan
Vice President, International Affairs
Aerospace Industries Association

Attachment 1: Maintenance Definitions Chart
<table>
<thead>
<tr>
<th>Level</th>
<th>Organizational</th>
<th>Intermediate</th>
<th>Depot Level</th>
</tr>
</thead>
<tbody>
<tr>
<td>Service</td>
<td>Repair, inspection, servicing, calibration, testing, lubricating and adjusting equipment, replacing minor parts, components, assemblies and line-replaceable spare or units</td>
<td>Calibration, repair or testing and replacement of damaged unserviceable parts, components, or assemblies</td>
<td>Inspection, calibration or repair, including overhaul, reconditioning and on-to-one replacement of any defective items, parts or components; and excluding any modification, enhancement upgrade or other form of alteration or improvement that enhances the performance or capability of the defense article</td>
</tr>
<tr>
<td>Where Performed</td>
<td>“on-equipment”</td>
<td>“off-equipment”</td>
<td>“on-or-off equipment”</td>
</tr>
<tr>
<td>Who Performs</td>
<td>End-User unit or organization</td>
<td>Designated maintenance shops; mobile teams in direct support of end-user units or organizations</td>
<td>Major repair facility, shipyard or field team with extensive equipment and personnel of higher technical skill in direct support of end-user units or organizations</td>
</tr>
</tbody>
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