DTAG Defense Services Working Group - White Paper

I. Introduction and Executive Summary

The DDTC tasking for this working group was as follows: "At the February 1, 2018 plenary, the Defense Services working group provided a final white paper on their findings. In that white paper they had a number of recommendations for future definitional work in Section VI, specifically identifying five (5) topics for further study/development. Given the limited time between this tasking and the May 10 plenary, DDTC is requesting information from the DTAG on any of those 5 topics."

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
Michelle Avallone – Columbia University
Jim Bartlett – Full Circle Compliance
Bryce Bittner - Textron
Greg Bourn - Johns Hopkins Univ. APL
Dava Casoni – Univ. Southern California
Giovanna Cinelli – Morgan Lewis
Rebecca Conover - Intel
Michael Cormaney – Luks & Cormaney
Greg Creeser – Int'l Trade Compliance Strategies
Jarred Fishman - Booz Allen Hamilton
Jeremy Huffman - Huffman Riley
Laura Kraus – Airbus-OneWeb Satellites LLC
Rob Lawson – General Electric
Peter Lichtenbaum* - Covington & Burling
Christine McGinn - InterGlobal Trade Consulting
Mary Menz - Harris Corporation
Jeff Merrell – Rolls Royce
Michael Miller – Univ. of Central Florida
Ari Novis – Pratt & Whitney
Brandt Pasco – Pasco Associates
Dan Pickard - Wiley Rein
Gretta Rowold - Langley Law Group
Bill Schneider – Int'l Planning Services
Heather Sears* - Johnson Control

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

- Further refine the scope of terms included in the definition of defense services proposed by DTAG in February 2018;

- Address issues related to the definition of defense services that remain unanswered;

- Focus on feasibility and simplicity, not perfection; and

- 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 ("WG") were as follows:

- The term "combat operations" must be clearly defined in the ITAR. The WG arrived at a working draft definition, but recommends further collaboration between DTAG and DDTC on this issue.

- The term "use of technical data" as included in the defense services definition proposed by DTAG in February, may be too broad, such that limiting language would be appropriate. The WG suggested possible corresponding changes to address this issue.

- DDTC began the process of revising definitions of "public domain" and "fundamental research" in 2015. Without knowing DDTC's current position on these terms and understanding the potential interplay among them and the "defense service" definition, DTAG encourages DDTC to work with DTAG to move forward with the process it started to revise these definitions.

- Restrictions precluding retired uniformed service personnel from accepting compensated positions with foreign governments are already addressed in the ITAR in Section 126.11 and part 3(A) and should remain independent from the definition of defense services. Rather, a cross-reference to §126.11 should be added to the definition of defense services.

- EAR 600-series items are and should remain outside the scope of the ITAR and the defense services definition, unless DDTC or BIS identify in the future compelling national security concerns warranting such application.

II. Proposed Definition of "Defense Services"

This is the definition of "Defense Services" proposed by the working group to DDTC on February 1, 2018, with any changes from this working group incorporated in italics.

(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 *traceable* 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 *government*, 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 § 120.54. 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) Assisting or training a foreign person based solely on knowledge, training, education or work experience that cannot be traced to U.S.-origin technical data;

(4) 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;

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

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

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

(8) 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).

Note 3: The term "traceable" requires that the use of U.S-origin technical data be established based on specific evidence.

Note 4: Please refer to 22 C.F.R. 3A and 22 C.F.R. § 126.11 for guidance related to the employment of retired uniformed service personnel by foreign governments.

III. Combat Operations

In February 2018, DTAG proposed that the "Defense Services" definition include the following clause: (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).

For the May 2018 plenary, the WG began work towards a proposed definition of "combat operations" by compiling definitions of related terms from a variety of sources including prior DTAG work, defense industry websites and the following:

A. Varied Standard/Online Dictionaries

- **Logistics:** detailed coordination of a complex operation involving many people, facilities, or supplies.
- **Strategic:** relating to the identification of long-term or overall aims and interests and the means of achieving them.
- **Tactical:** relating to or constituting actions carefully planned to gain a specific military end.
- **Operational:** engaged in or relating to active operations of the armed forces, police, or emergency services.
- **Cyberwarfare:** the use of computer technology to attack information systems for strategic or military purposes.
- **Electronic warfare:** the military use of electronics to prevent or reduce an enemy's effective use and to protect friendly use of electromagnetic radiation equipment.

B. DoD Dictionary of Military and Associated Terms

- **Logistics:** Planning and executing the movement and support of forces.
- **Tactical level of warfare:** The level of warfare at which battles and engagements are planned and executed to achieve military objectives assigned to tactical units or task forces.
- **Strategic level of warfare:** The level of warfare at which a nation, often as a member of a group of nations, determines national or multinational (alliance or coalition) strategic security objectives and guidance, then develops and uses national resources to achieve those objectives.
- **Operational level of warfare:** The level of warfare at which campaigns and major operations are planned, conducted, and sustained to achieve strategic objectives within theaters or other operational areas.
- **Cyberwarfare:** [not defined in the DoD dictionary]
- **Electronic warfare:** Military action involving the use of electromagnetic and directed energy to control the electromagnetic spectrum or to attack the enemy.

Taking into account the above terms, the WG's understanding of DDTC's intent that "Defense Services" preclude activities that may bear on U.S. national security while balancing the need to craft a definition that is sufficiently narrow and clear to facilitate compliance, the WG drafted several different possible Combat Operations definitions. For example, the WG weighed whether combat operations should include tactical, strategic and operational activities or only a subset of these activities. Should it include "cyber" activities or should these be covered elsewhere in the ITAR? Further, were each of these terms sufficiently clear that one could comply without requiring additional definitions? The WG reviewed each possible Combat Operations definition in the context of the DTAG proposed Defense Service definition. After discussion, the WG decided to propose revisions to the Defense Service definition presented in February 1, 2018 to appropriately confine the reach of the combat operations prong.

Accordingly, the WG presented the following updated clause (a) to the DTAG's proposed Defense Services definition, with underlines to indicate changes from the February 2018 version:

(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 <u>traceable</u> 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 <u>government</u>, 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* §<u>120.54</u>. *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.

Narrowing clause (a)(2) to foreign "governments" as opposed to "persons" helped to reduce the concern that compliant companies would be forced to seek licenses for assisting colleagues in areas that present no national security concern. Nonetheless, the WG remained concerned that the draft Combat Operations definitions we considered were still not sufficiently tailored to reach activity of DDTC concern but not unnecessarily overreach innocuous activity, at a high compliance cost to industry.

At the time of the May plenary, the WG arrived at the following working draft:

> **"Combat Operations"** means planning or conducting offensive or defensive actions taken with the intent of (i) defeating an adversary's military or other hostile forces or (ii)

executing an attack on the United States. Combat Operations include strategic, tactical, or operational actions, whether related to military, paramilitary, terrorist, law enforcement, intelligence, cyberwarfare or electronic warfare operations.

The WG agreed that this working draft needs additional review and recommends DTAG be tasked to:

- Engage in dialogue with DDTC on "Combat Operations" activities DDTC believes need to be prohibited.

- Continue to work on the Combat Operations definition with input from DDTC on the working draft.

IV. "Use of Technical Data"

DTAG's proposed "Defense Services" definition: "Assisting or training a foreign person…in the development, production…of a defense article … , **using** [identifiable] **U.S.-origin technical data.**"

While DTAG proposed the limitation of the control to situations involving the use of technical data, the WG had concerns that this term is rather broad and could be misinterpreted by industry and/or the U.S. government. Two specific issues are as follows:

- The term could lead companies to control employees simply based on their knowledge of technical data, rather than based on the activities that the employees actually undertake with the foreign person (i.e., whether the employee is actually using technical data in his/her interactions); and

- Due to the breadth of the term, absent clarification, the term could be burdensome for companies, limit their ability to involve engineers in important work, and foster misunderstandings between industry and U.S. enforcement agencies

As such, the WG made the following recommendations:

- Traceable. Adding the word "traceable" to the proposed definition of defense services, as follows: "Assisting or training a foreign person (see §120.16) in the development, production … of a defense article (see §120.6), using *traceable* U.S.-origin technical data …" And adding "Note 3: The term "traceable" requires that the use of U.S.-origin technical data be established based on specific evidence." The WG believes this additional requirement of traceability will limit the application of defense services to information which cannot be directly linked to U.S.-origin technical data.

- Knowledge. Adding another release to the proposed definition of defense services as follows: "(b)(3) Assisting or training a foreign person based solely on knowledge, training, education or work experience that cannot be traced to U.S.-origin technical data." The WG is concerned that employees will be controlled for having knowledge, skills, etc. without regard to whether such knowledge, skills, etc. are ITAR controlled or

utilized. As such, the WG believes this release is important to ensuring that the defense services control does not unnecessarily impact the employability of U.S. Persons, especially abroad.

V. Public Domain/Fundamental Research

To address this tasking, the WG reviewed the June 2015 proposed definitions of "public domain" and "fundamental research" as well as DTAG's proposed definition of "defense service" from the February 1, 2018 Plenary and DTAG's "Fundamental Research" white paper from the May 9, 2013 Plenary. Although the WG agreed that revising the June 2015 proposed definitions of "fundamental research" and "public domain" was outside the scope of this tasking, the WG recognized that the definitions of "fundamental research" and "public domain" are critically important and additional clarity with regards to the scope and application of these definitions is needed. However, the WG concluded that the definition of "defense service" is not the appropriate forum in which to define or clarify the scope of "fundamental research" or "public domain".

The WG noted that DTAG's February 1, 2018 proposed definition of "defense service" improves upon the current definition in several ways. First, it removes current section 120.9(a)(2) which is redundant and adds unnecessary confusion to the current definition of "defense service". Second, it ties defense service to ITAR technical data for non-126.1(d)(1) countries. Finally, the WG reiterated DTAG's recommendation from the February 1, 2018 Plenary that new proposed definitions of "public domain", "fundamental research" and "defense service" be reviewed in parallel to confirm that these definitions work together with no unintended overlap or inconsistency.

The WG recommends:

- DDTC move forward with the process it started in 2015 to revise the definitions of "public domain" and "fundamental research".

- When considering revisions to "public domain" and "fundamental research", DDTC retain positive aspects of the June 2015 proposed definitions, such as moving "fundamental research" into its own stand-alone category (2015 proposed rule 120.49). However, there should be a differentiation between publication delays resulting from government access or dissemination controls on research data and delays resulting from reviews to protect proprietary data or patent rights. In addition, DDTC should refrain from imposing a prior approval requirement on "public domain" information similar to that in 2015 proposed rule 120.11(b).

- DDTC harmonize ITAR's definition of "fundamental research" with EAR 734.8, to the extent possible.

- DDTC task DTAG with reviewing and updating its May 9, 2013 proposed definition of "fundamental research".

- DDTC solicit early feedback from DTAG on new proposed definitions of "public domain" and "fundamental research".

VI. 22 C.F.R. 3A, 126.11

DTAG's proposed "Defense Services" definition did not address the requirements contained in 22 C.F.R. 3A or 22 C.F.R. § 126.11 related to employment of retired uniformed services personnel by a foreign government.

The constitutionally-based restrictions that preclude retired uniformed services personnel from accepting compensated positions with foreign governments do not limit the services that can be provided. Instead, as implemented in 22 C.F.R. 3A, these restrictions simply require approval of the Secretary of State. However, if the employment does involve the provision of a defense service, 22 C.F.R. § 126.11 requires DDTC approval in addition to the Secretary of State approval.

The WG evaluated whether this activity -- retired uniformed services personnel serving foreign governments for compensation -- should be expressly included in the definition of defense services as another type of service that requires authorization. Ultimately, the WG determined that it would be best to cross-reference 22 C.F.R. 3A and 22 C.F.R. § 126.11 by adding another note as follows: *"Note 4: Please refer to 22 C.F.R. 3A and 22 C.F.R. § 126.11 for guidance related to the employment of retired uniformed service personnel by foreign governments."*

VII. EAR 600-series

During the December 7, 2017 Plenary, to alleviate U.S. government concerns expressed during our meetings, DTAG proposed a definition of "defense services" that would apply more stringently to §126.1(d)(1) countries. Specifically, DTAG's proposed §120.9(a)(3) would treat a broader set of activities as "defense services" when provided to foreign persons of these countries, when compared to the smaller set of activities that DTAG's proposed §120.9(a)(1) would treat as "defense services" for all countries.

For the May 10, 2018 Plenary, DTAG also considered extending (a)(3) to cover activities related to EAR 600 series items as "defense services," even when no defense articles or ITAR technical data are at issue. Although DTAG believes that DDTC has the statutory authority in 22 U.S.C. §§ 2778(a)(1) and 2794(7) to designate such activities as "defense services," DTAG does not recommend that DDTC do this. Treating activities solely related to 600 series items as "defense services" would undo a major component of Export Control Reform and require industry to obtain ITAR approvals to provide "defense services" for activities that do not involve any ITAR-controlled technical data or defense articles.

To analyze this issue, in early April 2018, the WG first requested and received approval from DDTC to discuss this topic with the Bureau of Industry and Security (BIS) and its Technical Advisory Committees. Next, the WG contacted BIS on April 5, 2018 to request a meeting. Although BIS officials acknowledged the request, they have not yet responded to follow-up requests to discuss the topic.

Next, the WG raised this issue with DDTC officials during a meeting at the State Department on April 23, 2018. During this meeting DDTC questioned whether the agency has the authority to treat activities related to EAR items as "defense services," and indicated that they were not focused on this issue. After the meeting, the WG researched the Arms Export Control Act (AECA) and concluded that sections 2778(a)(1) and 2794(7) authorize the President (i.e., DDTC) to designate anything as a "defense service," without qualification, which would provide authority for DDTC to treat activities solely related to 600 series items as "defense services" if it elected to do so.

Nevertheless, after internal discussion with its members, the WG does not recommend that DDTC treat such activities as "defense services." Doing so would re-subject products, technologies, and software that was intentionally moved from the ITAR to the EAR during Export Control Reform to ITAR control and require industry to obtain ITAR approvals for activities that do not involve any ITAR-controlled defense articles or technical data. Although this would be limited to §126.1(d)(1) countries, the WG believes that the existing controls on 600 series items in the EAR adequately address the risk. The WG believes that the application of defense services should not be extended to EAR 600-series items, unless DDTC or BIS identify in the future compelling national security concerns warranting such application.

Conclusion

The WG 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.