DDTC's Arms Export Control Act Problem (In re: ITAR Proposed Rule on Prior Approval for Public Domain Information)

Christopher B. Stagg
Stagg P.C.

June 16, 2015

Client Alert No. 15-06-02

= = = = = = = = =

The Directorate of Defense Trade Controls (DDTC) issued a proposed role on June 3, 2015 to revise how the International Traffic in Arms Regulations (ITAR) treats the placement of information into the public domain. Controversially, this proposed revision would require the prior approval of the U.S. Government before putting any information into the public domain that DDTC may consider to be subject to the ITAR. Public comments to this proposed rule are due by August 3, 2015.

The initial objection to this controversial proposed rule stems from First Amendment concerns that it is a prior restraint on speech and expression. However, we do not have to dive into constitutional law to see significant legal problems with DDTC's proposed rule because it must comply with the statutory requirements of the Arms Export Control Act (AECA). The ITAR cannot amend the AECA, and the ITAR (including DDTC) must act in compliance with the AECA.

In applying the AECA's requirements to the proposed rule, there are significant legal problems for DDTC. Notably, the AECA requires – through a delegation of authority from the President – the Department of State to create a U.S. Munitions List that controls a list of defense articles and defense services. These items are subject to the authority of the AECA, and therefore to the jurisdiction of the Department of State.

This AECA provision addresses creating the U.S. Munitions List. What does the AECA say about *removing* items from the U.S. Munitions List? Section 38(f) of the AECA requires that the Department of State notify Congress at least thirty days before removing any item from the U.S. Munitions List. The ITAR also expressly states this requirement within § 120.4(a).

Now turning to the proposed rule on the public domain definition, ITAR § 120.11(b) would require that the U.S. Government authorize the release of technical data into the public domain. Once authorized by the U.S. Government for release into the public domain, that information would not be technical data and therefore excluded from the definition of defense article in ITAR § 120.6.

As DDTC asserts in proposed ITAR § 120.11, the ITAR would control technical data even when published and publically available unless the U.S. Government approves its release. In proposed ITAR § 120.11(b), the information's status as technical data can be changed by some U.S. Government authorization that would remove its status as technical data.

This provision is invalid because, as noted above, it violates Section 38(f) of the AECA as Congressional notification is required before any item is removed from the U.S. Munitions List. The result of proposed ITAR § 120.11(b) is, in effect, a determination that the controlled technical data no longer warrants export controls under the AECA.

It could be contended that: "It's not a removal, it is defining it out of the ITAR as a defense article, see proposed ITAR § 120.6(b)(3)(i)." This still would violate Section 38(f) of the AECA because DDTC is asserting that it is not dealing with information excluded from the definition of technical data – as the current ITAR is structured – but with technical data. Remember, technical data is also defined as a defense article and thus an item on the U.S. Munitions List.

What DDTC proposes is substantively nothing more than a removal of an item from the U.S. Munitions List. The AECA is clear on the statutory requirements for removals, and that Congress must be notified before any item is removed from the U.S. Munitions List. The federal courts do not grant deference to a federal agency's statutory interpretation where the relevant language from the statute is clear.

DDTC may still nevertheless contend that this really is nothing more than a requirement to satisfy the public

domain definition and therefore it truly is defining out the controlled information from the U.S. Munitions List. As such, this does not require a Section 38(f) notification under the AECA. This argument still fails.

If DDTC were genuinely defining something out of the U.S. Munitions List – like someone can do where specially designed is a criteria for control – then it would not require someone to get the U.S. Government's approval first to do so. To require the government's approval in the first place is to assert that the item is subject to its jurisdiction to begin with.

As an additional point, in practice a Section 38(f) removal can take several years – far more than the thirty days identified within the AECA. Also, to get the removal would mean that either DDTC seeks the removal on its own volition or the item is subject to a commodity jurisdiction (CJ) request. A CJ request can take several months, or years, to decide. An appeal of a CJ can likewise take several months or years.

Given this, the argument that DDTC does not have the statutory authority to carry out its proposed rule because proposed ITAR § 120.11(b) would require Congressional notification strengthens the First Amendment argument. This is because the timeframes involved to seek a removal of technical data from the U.S. Munitions List, by going through a U.S. government agency and then Congress, are insufficient to satisfy a licensing system of prior restraints that requires prompt review times.

It is also debatable whether the Department of State can re-delegate its authority to remove an item from the U.S. Munitions List to the Department of Defense's Office of Security Review or to some other government agency or official. Regardless, even if they could re-delegate this authority, the AECA still requires Congressional notification of any removal.

Finally, DDTC asserted in the preamble to the proposed rule that these proposed revisions are not a "new" requirement but are merely making the requirement more explicit within the ITAR. While it would be interesting to know exactly when DDTC came to this previously non-public interpretation of the ITAR,[1] it is notable here that this interpretation also runs into AECA issues.

Under the current application of the ITAR, information that is in the public domain is excluded from the definition of technical data under ITAR § 120.10(b). At no time is that information given the status as technical data – which is a fundamental difference between the current rule and the proposed one. In this case, prior approval should not be necessary because the AECA only covers those items designated on the U.S. Munitions List. Thus, no prior approval should be required as information in the public domain is not by definition technical data and therefore not subject to the ITAR.

So, while the proposed version would violate the removal notification requirements of the AECA, the current interpretation of the AECA by DDTC to impose a prepublication requirement would appear to also violate the AECA since such a requirement would involve items that are outside its statutory scope. DDTC could always amend the U.S. Munitions List to enumerate an item in the future by using the policy criteria within ITAR § 120.3.[2] However, any information that was placed into the public domain prior to that designation would most likely have been lawfully placed there when it was subject to the Export Administration Regulations (EAR).

[Footnotes on Next Page]

* * * * *

Christopher Stagg is an international trade and regulatory attorney at Stagg P.C. where he advises clients on U.S. export control law, including the ongoing revisions under Export Control Reform. Mr. Stagg was previously with the Department of State where he was deeply involved in revising export control regulations, handling commodity jurisdiction requests, providing the public with regulatory interpretations, and advising the Federal Bureau of Investigation. For more information, please go to www.staggpc.com.

1 In the ongoing litigation in Defense Distributed v. Department of State, there is now some publicly available insight into DDTC's apparent process for licensing exports of information into the public domain via the Internet. According to DDTC, such export applications are reviewed under ITAR § 126.7. To a federal judge, he or she may not understand what this means, but it requires that all the parties to the transaction are identified and there are no proscribed destinations involved. In desiring to post information to the Internet, there is no possible way for an applicant to meet these requirements. The only way then to put technical data into the public domain is to submit a CJ to request its removal from the U.S. Munitions List and, if successful, go through the Congressional notification process. It is also notable that Defense Distributed, through counsel, on January 5, 2015 submitted an advisory opinion request to seek guidance from DDTC as to what procedures are available to publish technical data into the public domain under the ITAR. It is revealing that DDTC has not responded to that request as of June 15, 2015. This indicates that despite DDTC's claim that prepublication approval is not new, DDTC has not established any practical procedures to handle such a prepublication approval requirement.

2 The use of ITAR § 120.3 by DDTC as a "long-arm" provision to question whether any information may be subject to its jurisdiction, even though it is not currently enumerated on the U.S. Munitions List, raises additional constitutional concerns as ex post facto and Fifth Amendment due process violations. By using ITAR § 120.3, DDTC can obtain at least temporary de facto jurisdiction by asserting that items may be determined on the U.S. Munitions List. To then resolve this issue, the private party must submit a CJ request.