The ITAR's "Directly Related" Qualifier – The Importance of Defining the Term

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The Directorate of Defense Trade Controls (DDTC) issued a proposed rule in June to add and revise key definitions within the International Traffic in Arms Regulations (ITAR). This is commonly known as the harmonization rule. In this proposed rule, DDTC suggested a definition for the term "required" to be codified within new ITAR § 120.46.

Defining "required" is a curious proposal because the ITAR has for over thirty years used the relative term "directly related" to narrow its controls over defense services, software, and technical data. Yet, "required" is only used in the context of technical data. Thus, defining "required" would still leave unresolved what constitutes a defense service, software, or technical data that is "directly related" to a defense article.

As background, "directly related" is a material qualifier within the ITAR that is intended to narrow the scope of its definitions. It arose from a court case from the U.S. Court of Appeals for the Ninth Circuit, *United States v. Edler Industries*, 579 F. 2d 516 (9th Cir. 1978). In Edler, the court held that "technical data must relate in a significant fashion to some item on the Munitions List" and that "adequate notice to the potential exporter requires that the relationship be clear." The court concluded that "the [ITAR] prohibits only the exportation of technical data ***significantly and directly related*** to specific articles on the Munitions List." (Emphasis added)

This court case originated under the Mutual Security Act of 1954 – the predecessor to the current Arms Export Control Act (AECA). The court's holding was made in 1978, after the AECA was enacted in 1976. Following the enactment of the AECA, the government engaged in a full review of how it regulates defense trade – similar to the current Export Control Reform initiative. Ultimately, the ITAR incorporated the Edler case's holding by adopting the "directly related" qualifier for both defense services and technical data (including catch-all software).

Stagg P.C. specifically called attention to the "directly related" issue at a recent American Bar Association (ABA) event with senior members of the government, and in its public comments to the proposed rule:

> It is recommended that DDTC define the meaning of "directly related" instead of "required" to ensure common understanding within industry and the government as to what constitutes a defense service, software, or technical data that is "directly related" to a defense article. Although the ITAR is now proposing a definition of required, it is noted that the "directly related" qualifier applies to defense services, software and technical data while required only applies to technical data. A definition for directly related is therefore more appropriate.

Stagg P.C. has previously written at length on some of the recent interpretations that have come from DDTC as to what constitutes a defense service "directly related" to a defense article. For instance, some DDTC officials have suggested that changing the tire on an aircraft that incorporates a mission system is a defense service. Yet, that suggestion would ignore the purpose of the "directly related" qualifier, which is to narrow the otherwise overly broad application of the ITAR's definitions standing in isolation.

White House officials have already built the case that the ITAR needs to clearly describe items it controls by providing positive control criteria and defining key terms. It is time that this policy applies to clearly describe the scope of defense services, software, and technical data in relation to defense articles. This would fulfill the requirement under *Edler* that "adequate notice to the potential exporter requires that the relationship be clear." The solution to this does not exist in the current proposed suggestion of defining "required." However, the ITAR would accomplish this clarity by implementing a clear (and preferably concise) definition of "directly related."

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