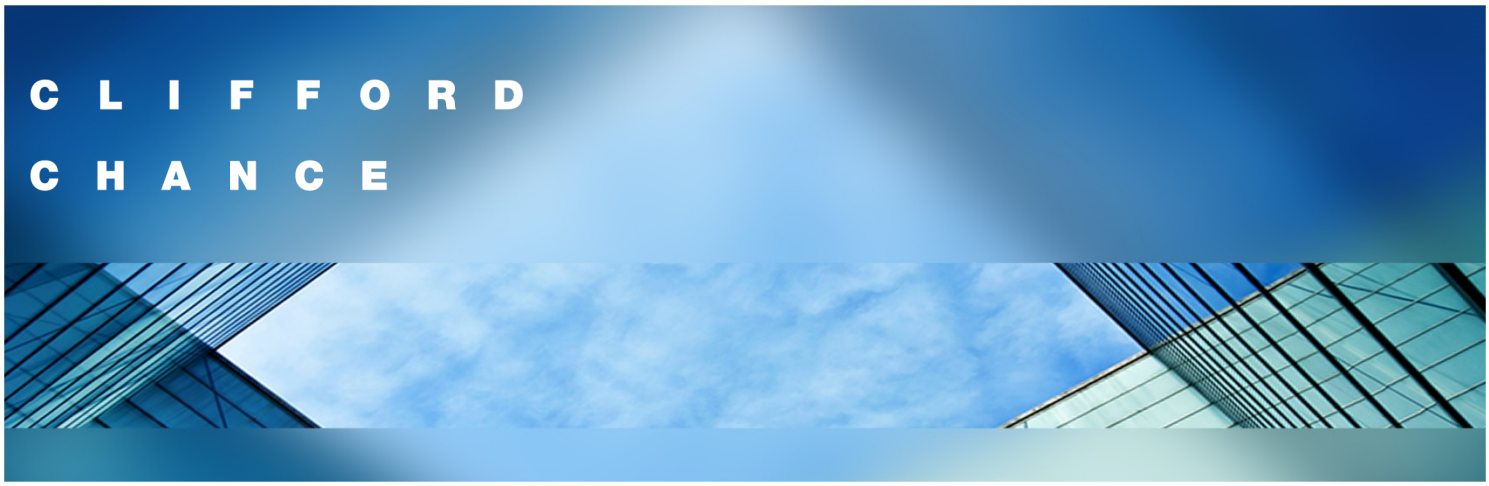

DDTC ADDRESSES US PERSONS PROVIDING DEFENSE SERVICES ABROAD

The United States Department of State's Directorate of Defense & Trade Controls ("**DDTC**") appears to have abandoned its prior effort to comprehensively address the difficult issue of US persons working for non-US companies on International Traffic in Arms Regulations ("**ITAR**") matters through a set of FAQs posted on its website on January 6, 2020. Those FAQs could help non-US defense companies and US persons navigate ITAR compliance in this area.

Under existing ITAR rules, US persons would need to register with DDTC and obtain a Technical Assistance Agreement ("**TAA**") with their employer in order to engage in any role that involves the transfer of defense services to their employer or others – a route that was not considered practical for individual US persons as it would require them to register and get a license. For non-US defense companies, also this posed an ongoing issue for R&D and commercial operations as among other things, they could not risk hiring:

- US engineers to design defense articles,
- US mechanics to fix defense articles, or
- US pilots to teach others how to fly defense articles.

Non-US defense companies that did so risked their products becoming ITAR-controlled through the inclusion of technical data that came from a US person's brain.

The 2015 Proposed Rule

DDTC's prior effort to resolve this issue came in 2015 (80 FR 30001, May 26 2015). The 2015 Proposed Rule was intended to remedy this by removing the licensing requirement for US persons to provide defense services to or on behalf of their foreign employer. However, US persons were still required to register, and the Proposed Rule applied to any commercial activities by a person "who engages in the business of furnishing defense services wherever located." Therefore, the Proposed Rule maintained the individual burden for US persons and did not

address the principal concern of non-US companies – that their products could become ITAR controlled simply because a US person worked on the design.

The January 2020 FAQs

The new FAQs provide that:

1. ITAR registration is not required for provision of defense services outside the US, only for provision of defense services inside the US.[1]
2. ITAR licensing is required for provision of defense services both inside and outside the US, but can be granted as a 126.9 advisory opinion rather than a TAA, Manufacturing Licensing Agreement ("MLA") or DSP-5.[2] This should make it easier to obtain and may open up the possibility for longer duration licenses.
3. Non-US employers cannot be the 126.9 license applicant on behalf of their employees, but can facilitate their employees' submissions by, e.g., providing templates and assisting in bulk submission of the applications. Each individual employee remains the applicant and remains responsible for compliance.[3]
4. DDTC has clarified that a US engineer helping to design a defense article overseas would not result in ITAR control over that defense article even if the US person provides defense services, as long as those defense services are not provided under a TAA or MLA.[4]

This final clarification may effectively resolve the issues with both the existing rules and the 2015 Proposed Rule. If DDTC does not want to control the technology after its incorporation, it can issue a 126.9 authorization for the employee's work and therefore prevent ITAR-control from attaching to the non-US defense article. However, if DDTC wants to control the technology after incorporation, it can reject the 126.9 application and require the employee to submit a TAA or MLA. Although historically DDTC would have required prior registration for this, under their new FAQs they may allow the employee to apply for a TAA/MLA for work outside the US without registering.

What do Defense Companies Need to Know?

These developments should be of interest to both non-US companies and US companies with overseas affiliates. For non-US companies, these changes should allow for smoother R&D and commercial operations with a reduced risk of ITAR-control attaching through even minor involvement of US persons. For US companies with overseas affiliates, these changes should make it more straightforward for US employees to be seconded to non-US affiliates, without necessarily needing to establish a TAA/MLA for them.

However, it is not clear what will happen with existing authorizations for US Person employment abroad. These are often authorized under bulk TAAs between a US parent or staffing agency and the foreign subsidiary or seconded

1 https://www.pmddtc.state.gov/ddtc_public?id=ddtc_public_portal_faq_detail&sys_id=ee8b1df3dbcac0d05564ff1e0f961928
2 *https://www.pmddtc.state.gov/ddtc_public?id=ddtc_public_portal_faq_detail&sys_id=9acc157fdbcac0d05564ff1e0f96190e*
3 https://www.pmddtc.state.gov/ddtc_public?id=ddtc_public_portal_faq_detail&sys_id=e43e95b3db0ec0d05564ff1e0f9619b6
4 https://www.pmddtc.state.gov/ddtc_public?id=ddtc_public_portal_faq_detail&sys_id=8cbf9d77db0ec0d05564ff1e0f9619ad

employee recipient. These agreements should still be valid, and can be updated as necessary, but an additional FAQ on this point from DDTC would provide clarity. In the interim, companies with existing authorizations have the option of contacting their agreement officer for further details or confirmation.

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