July 31, 2015

Mr. Edward Peartree
Director, Office of Defense Trade Controls Policy
Bureau of Political Military Affairs
U.S. Department of State
Washington, DC 20522–0112

ATTN: ITAR Amendment—Revisions to Definitions; Data Transmissions and Storage

Dear Mr. Peartree,

We write to raise concerns about the proposed rule change to the definition of defense services in Section 120.9 of the International Traffic in Arms Regulations (ITAR) as proposed in the Federal Register on June 3, 2015. While we recognize that the proposed new definition is an improvement over the April 2011 rule, we believe the new rule exempts from U.S. control a dangerous amount of U.S. private security, military and police training activity abroad, raising potentially serious problems for U.S. foreign policy and the protection of human rights.

Since the wars in Afghanistan and Iraq began, there has been a huge increase in the number of U.S. private military or security companies operating around the world. As Ann Hagedorn indicates, these companies do "everything from police training, intelligence analysis and logistics support to border patrol, drone operations and weapons procurement and maintenance." They provide these services as part of U.S. government funded contracts as well as part of foreign government funded contracts. In some cases, they also provide assistance to foreign security forces that have a record of repressing their citizens and engage in serious corrupt practices.

In order to minimize the risk of U.S. private individuals or companies participating in activities that may be harmful to U.S. foreign policy and national security interests, the U.S. government has required a broad set of controls on U.S. private security contracts activities abroad since the 1970s. As stipulated in the current ITAR 120.9, any U.S. individual or companies that wants to provide military training to foreign forces or assist foreign persons in the operation, use, maintenance or manufacture of a U.S. defense article (weapons and military equipment controlled by the State Department) must first receive U.S. government approval. This regulation has been a useful tool for stemming irresponsible U.S. private training to foreign security forces before it happens and for holding U.S. companies to account for related illegal activity.

However, the State Department's new proposed rule exempts many of these activities from U.S. control. Specifically, it allows U.S. private security companies to provide many types of military and police training that could substantially improve a foreign security unit's use of force or effectiveness without U.S. government approval. According to the proposed rule, it seems a U.S. company could deliver military training on issues such as operational tactics, logistics, intelligence operations, communication and leadership with no U.S. oversight as long as the company don't deliver training on the "employment" of a defense article. Similarly, a U.S. company could provide "law enforcement, physical security, or personal protective services" if they do not involve the use of a U.S. defense article.

The proposed rule also allows U.S. private security companies to furnish assistance on U.S. arms and military equipment in a couple of cases. It appears that private companies could provide training to foreign security forces on tens of thousands of the military items, such as unarmed military utility helicopters and military vehicles, the administration recently moved from State to Commerce Department control as part of its "Export Control Reform Initiative." Although in some cases the Commerce Department has required U.S. approval for the provision of technical assistance on these Commerce-controlled military items, it does not have a similar general requirement to approve U.S. company training on these military items.

The proposed new rule also distinguishes between training on the basic operation of a defense article and the employment of a defense article without defining these key terms. Absent greater clarity on the scope of these terms, these provisions will be impossible to enforce as it will be difficult to prove a willful violation of U.S. law. Moreover, training on defense articles previously approved for export may occur even if a significant time period has elapsed since the approval of the export. As a result, a private security company could provide training without a license to a previously friendly government that has undergone a regime change adverse to U.S. interests.

Taken together, these de-controls on U.S. private security company training activities open a significant window of possibility for such companies to engage in activities that could be dangerous to U.S. interests. Intentionally or unintentionally, a U.S. private company could increase the effectiveness of a foreign fighting force's capabilities to carry out serious human rights violations. If a company's actions go serious wrong in a country, the United States could be drawn into taking sides in an armed conflict.

For these reasons, we urge you to modify the proposed rule change so that the definition of "defense service" is not limited only to those instances where training involves the "employment" of a defense article. More specifically, we encourage you to amend 120.9 (a)(3) to say the following: "The furnishing of assistance (including training or advice) to a foreign person, regarding of whether technical data is used, whether in the United States or abroad, in the employment of a defense article or related to the use or possible use of force, including any training or advice related to law enforcement, personal security, or military activities." The State Department should also delete Note 5 proposed in ITAR 120.9 (a).

We also encourage you to remove the "basic operation" exemption from proposed §120.9(a)(3), maintain the exemption at current ITAR 124.2 and provide a definition of "basic operation" in that section to eliminate any ambiguity about the term. The State Department should also consider setting a time limit on the use of the exemption to help ensure that training is not provided to foreign security forces that have become more repressive over time. Furthermore, the State Department could clarify that its adoption of the term "employment" in proposed 120.9(a)(3), rather than "use" in current 120.9(a), is not meant to narrow the definition of "defense service," but rather is intended to be coterminous with the current definition.

We believe these suggested modifications would help ensure proper U.S. government oversight of the growing U.S. private security industry and protect U.S. foreign policy and human rights interests. These suggestions also ensure that the State Department is following the overall U.S. security sector assistance policy, namely to promote "transparent and accountable oversight of security forces, rule of law, transparency, accountability, delivery of fair and effective justice, and respect for human rights."

We look forward to your response. Please contact Colby Goodman, senior research associate at the Center for International Policy, at colby@ciponline.org for more information or with questions.

Thanks you for your attention on this important matter.

Sincerely,

Colby Goodman, Center for International Policy
Adam Isacson, Washington Office on Latin America