

# Defense Trade Advisory Group



## Export Control Reform

Plenary Session

October 29, 2015



# Agenda

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- Tasking
- Working Group Membership
- Review and Analysis
- Recommendations
- Questions

# DTAG Tasking #4



## Export Control Reform (ECR)

- (i) Research industry's views of the munitions/dual-use split pipeline State has adopted as a result of ECR (e.g., Commerce "600 Series" license requests are sent to State for review and are then circulated for review via the same process used by State to review International Traffic in Arms Regulations license requests).
- (ii) Analyze whether there is greater flexibility for exporters resulting from the transfer of certain items to the jurisdiction of the EAR, including the availability of the Strategic Trade Authorization license exception.
- (iii) Review and identify potential unintended consequences as a result of the publishing of new USML and CCL categories.
- (iv) Identify areas of improvement and/or consideration.

# Working Group Members



## Co-Leads:

Dave Irvine, Northrop Grumman

Krista Larsen, Consulting, KDL Enterprises

Lisa Bencivenga, Bencivenga, LLC

Greg Bourn, Johns Hopkins University APL

Lucia Casale, Klimek, Kolodney & Casale

Sandra Cross, Huntington Ingalls Industries

Dana Goodwin, TradeLink Systems

Greg Hill, DRS Technologies

Alexis Mitchell, Lockheed Martin

Jeff Sammon, Raytheon

George S. Sevier, Sam Sevier LLC.

# Picking up where we last left off....



## DTAG January 2014 Findings

- Temporary destabilization of Industry compliance posture
- Direct and indirect costs associated with implementation of ECR
- Issues with STA
- Management of existing authorizations (TAAs, amendments, transitioning and grandfathering, FMS)
- Destination control statement issues for comingled shipments
- Industry apprehension (Enforcement, Disclosures)



# Analysis of Munitions/Dual-Use Split Pipeline

DTAG Research has identified:

- How State processes Commerce “600 Series” license requests has not been shared with industry
  - DTAG unable to provide feedback
  - No visibility as to where cases are staffed
- Observation that “600 Series” review process is implemented inconsistently and unpredictably as compared to former process
  - Commerce should push back on RWAs
  - No clue in some cases why RWA
  - Industry desires opportunity to respond before RWA
- State of ECR is not complete
  - Has not achieved the “Singles” (agency, regulations, software system, and enforcement authority)



# Result of Munitions/Dual-Use Split Pipeline

- Inconsistencies in interpretation of the regulations in their current state (government regulators and industry)
- General belief that industry is being asked by DOD to revert ECR jurisdictional changes back to the ITAR
  - “See-through” rule is still present
- Under ECR export authorization approval from both BIS and DDTC is often required
- Classification down the supply chain is difficult
  - Foreign end users and supply chain are struggling to obtain consistent and accurate information from US industry



# Result of Munitions/Dual-Use Split Pipeline

- An element of ECR inconsistency is differing interpretations of key definitions
  - Definitions of Equipment and System are not consistently applied
- Application of the catch and release in “Specially Designed” does not yield consistent results
- Broadening of the interpretation of when a defense service is being offered in the case of “600 Series” items and technology
  - Installation vs. Integration applied case by case leads to inconsistent results
  - Industry believes is possible to install or integrate a “600 Series” product without providing a defense service (RWA’s experienced).





# Result of Munitions/Dual-Use Split Pipeline

- Subjective standard is being applied to objective “600 Series”
- Ad hoc recommendations to industry on how to get approvals from either DTC or BIS leads to confusion and inconsistencies across industry
- No method exists to address areas of controversy and disagreements as they occur

# Recommendations Related to Munitions/Dual-Use Split Pipeline



- Enforce the jurisdictional changes as they are currently written in the regulations under the “*positive lists*,” do not allow ad hoc changes
- DDTC can rectify the ad hoc changes by providing and publishing formal interim guidance based on analysis conducted at the time and make that guidance binding until the regulation is changed
- Other agencies adopt this method of adjusting to change real-time (see Census and DHS)



# Final Words On Pipeline

- Bottom line – compliance with ECR is a moving target
  - Differences of interpretation based on best effort are complicating compliance
  - Industry is waiting for a *safe landing* once the inconsistencies are worked out of ECR
- DDTC can halt the growing inconsistencies in the application of the regulation by issuing binding guidance
- If DDTC does not aggressively address much needed clarification or guidance - - higher risk than 4 years ago
- Commerce needs to assertively enforce its positive list



# Analysis of Increased Flexibility for Exporters

## Positives Resulting from ECR

- Ability to close out relevant TAAs and transition to BIS-748Ps (One company closed 42 TAAs)
- Those utilizing STA are enjoying the timeliness of their shipments (examples & recommendations coming up)
- License exception GOV is very useful for the defense industry supporting the USG overseas
- Hybrid approach is a useful tool pending single licensing authority
- “Specially Designed” b2 and b3 releases formerly licensable parts (springs, screws, etc).



# Analysis of Increased Flexibility for Exporters

## Negatives resulting from ECR

- Inconsistencies of interpretation
- Classification is more complex with greater ambiguity
  - Government coming to different conclusions
  - More industry resources required
- Many find STA impractical for “600 Series”, foreign parties (esp. governments) are reluctant to sign the consignee statement
- Disclosing to two agencies of potential violations involving commingled items or technologies increases enforcement risk



# Analysis of Increased Flexibility for Exporters

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## Negatives resulting from ECR

- Requires constant review because of changing technology
- Deemed export licenses from Commerce extremely onerous and review/approval time is extensive



# Final Words on Flexibility for Exporters

- Industry is enjoying some flexibility in the margins of ECR
  - Sometimes “600 Series” licenses are faster to obtain
  - Document requirements are less onerous for BIS licenses
  - Exceptions exist for certain “600 Series” products
- Inconsistencies in interpretations coming from the USG is decreasing flexibility ECR was meant to generate
- Increase usage of STA for “600 Series” by issuing written guidance stating A:5 End User Governments are not required to sign a 740.20(d)(2) Prior Consignee Statement



# Unintended Consequences of ECR Changes

- Different classifications for the same product (industry and government) resulting in inconsistencies
- Increased CBP seizures for items transitioned to the EAR
- Historic design details of older parts used in Maintenance, Repair and Overhaul activities are difficult to locate or are unavailable making classification under ECR near impossible
- Delays in processing of licenses at all points of the license and CJ review process adversely impacts business
- Some products are straddling jurisdictional fence because DCS and FMS





# Unintended Consequences of ECR Changes

- Appearance that provisos are being used to set policy
- Adding a “Mission System” on a commercial aircraft can trigger Congressional Notification
- Inter-departmental coordination needs better boundaries
- If jurisdiction or classification controversy surfaces, DDTC or BIS should make final decision through escalation process.
  - Inform Industry so additional information can be provided.
- Increase USG agency engagement of industry to jointly resolve implementation problems with ECR (Nod to DTAG Recommendations team)

# Areas of Improvement and/or Consideration



- Publish interim binding rules on classification changes until the regulations can be updated (i.e., DHS and Census)
- Continue to evolve the USML to better define technical parameters of the 'positive list' to further establish a bright line
- Consider a parts and components exemption (See DTAG 126.4, December 4, 2009)

# Areas of Improvement and/or Consideration



- During this transition time of adjusting to the changes under ECR, it would be helpful for Licensing Officers to contact industry with questions instead of RWA'ing applications
- Establish a disclosure process where industry can submit one disclosure to both agencies



Thank you

Questions?