Defense Trade Advisory Group (DTAG)
Licensing Working Group
White Paper
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Purpose / Task:

DDTC's letter of September 14, 2016 requested that the DTAG working groups (Compliance, Licensing, Regulatory/Policy, and Information Technology) to perform the following tasks:

1. Review past DTAG reports on issues previously examined and identify those issues/reports that remain relevant, warrant further DTAG review/update, and should be considered by DDTC for implementation.
2. Identify and recommend to DDTC new issues for DTAG to review.
3. Organize all (past and new) issues into a list of priorities for DTAG action and DDTC consideration.

Working Group Approach:

The DTAG Licensing Working Group's methodology for completion of the tasks was a review of the past DTAG reports of issues related to DDTC licensing and suggested recommendations from that time period. The Licensing Working Group then reviewed current regulations against the past DTAG reports to determine which issues were still relevant and which had already been implemented or were otherwise no longer significant. With regard to identification of new issues for the DTAG to review, research was conducted to gather information from a variety of sources which included: Licensing Working Group/DTAG members, defense exporting companies of all sizes, law firms, non-profit organizations, and universities. A list of new issues was developed from this information and then rated and categorized in order of importance and/or ability to be easily implemented. Recommendations for each issue presented, both new and old, were developed and are articulated within each subject.

126.4 Exemption – Past DTAG Issue

The Licensing Working Group re-identified issues under § 126.4, which also relate to § 125.4, as noted further in this White Paper. Primarily, confusing and ambiguous language exists regarding § 126.4(a), as there are inherent contradictions regarding conditions and requirements, and a lack of clarity regarding scope. Further, § 126.4(c)(3) creates an ambiguous and unnecessary hurdle, regarding the term "urgency" given the context of exports contemplated in connection with this section. Past DTAG efforts and recommendations address these issues and provide a developed starting point for additional DTAG and U.S. Government consideration. Prior recommended draft language offers clear guidance for using the exemption for hardware, technical data and importantly, its usage regarding defense services.

Recommendation:
Prior DTAG recommendations proposed revisions to § 126.4 to address the identified issues and challenges, which include the following suggestions:

- Exemption availability is tied to U.S. Government contracts & U.S. Government approvals
- Exemption requirements and contract terms replace license provisos
- Delete the "urgency" requirement from § 126.4(c)
- Add language requiring U.S. Government to use this section to the greatest extent possible
- Harmonize with Commerce GOV exception
- Clarify to encompass permanent export

The Licensing Working Group believes the following benefits will result from implementation of the recommendations and language modification to § 126.4:

- Supports ECR objectives to promote interoperability and warfighter needs
- Reduces cost to industry, both in terms of reduced registration fees and associated reduction in time for compliance
- Reduces DDTC licensing burden
- Resolves complications with § 125.4(b)(1)

Program License – Past DTAG Issue

The Licensing Working Group re-identified issues under § 126.14, Special Comprehensive Export Authorization. As presently written, the U.S. Government limits comprehensive authorization requests to NATO member nations, and the other identified listed nations - Australia, Japan, and Sweden. Prior efforts to draft language in support of creating the program license structure did not specifically identify qualifying nations. In present form, some nations cooperatively working with the U.S. Government regarding a Major Program, Major Project or Global Project, are automatically excluded from consideration. Although, there may be U.S. Government policy considerations regarding the specific nations included for consideration, the DTAG offers that due to final U.S. Government review and approval under existing usage, a mechanism already exists for the U.S. Government to consider and determine applicability and eligibility. Therefore,

the DTAG recommended the U.S. Government consider all applications for authorization where a cooperative Major Program, Major Project or Global Project exist, and provide authorization only after consideration on a case-by-case basis for the nations involved. Implementation of this recommendation opens up usage for Program License to additional nations, thereby expanding the scope under this section.

Recommendations were also made for the U.S. Government to consider enabling language in the associated Government-to-Government Memorandum of Understandings, Project Arrangements, etc., that describe the cooperative Major Program, Major Project or Global Project – this language would highlight authorization for Special Comprehensive Export Authorization is available upon application. The DTAG believes more widespread usage of Program Licenses could also alleviate some sovereign concerns for signing Technical Assistance Agreements, where no contract exists between sovereign and Industry, thus removing some burden on Industry, confusion on the part of the sovereign, while creating an environment for quicker approval.

Additionally, the application process is presently accomplished via General Correspondence. The DTAG believes that as part of the overall information technology modernization initiatives, consideration for electronic application of program licenses are included. This should result in an easier application, authorization and implementation process.

Recommendation:
As noted above, the Licensing Working Group identified the past recommendations as valid proposals to address existing issues and challenges identified with Program License usage, and believe they form a good starting point for DTAG and U.S. Government consideration.

- Remove country limitations; eligibility based on case by case U.S. Government review
- Expand to all countries where Major Project, Major Program & Global Project are formally agreed between cooperative nations
- Include enabling language in associated MOUs, Project Arrangements, etc., which cover the identified Projects/Programs eligible for authorization
- Develop means for electronic submission as part of overall information technology initiatives

November 2012 DTAG effort – Exemption for the Temporary Exports for Repair/replacement of Non US Manufactured Parts and Components

In recognition of today's global supply chain and that DSP-73s related to these types of transactions are routinely approved, create a new exemption that authorize temporary exports of non US manufactured parts and components to the parts or components non US OEMs or related service center for repair or replacement. Utilize principles from the existing EAR RPL License Exception as a starting point for the new exemption.

Eligible foreign recipients must be broader than OEMs of major assemblies and should include

OEM suppliers who are the original manufacture of the component parts. The exemptions should also allow retransfers within group of Qualified Foreign Recipients (e.g., OEMs, suppliers, service centers)

Potential restrictions on the exemption could include:

- Potentially tie use to previous USG licensing approval (similar to STA)
- Exclude 126.1 & restricted parties
- Restricted scope allowing only "servicing" defense articles abroad on a one-to-one replacement of equal or greater capability
- Not applicable to Technical Data
- 4-yr time limit

Spare Parts Exemption – Past DTAG Issue and New Issue

License applications for spare parts for previously exported platforms are almost always approved. A spare parts exemption would eliminate duplicative work for the USG, as the USG typically has already approved the parts in an appendix to a TAA and/or as part of an overall system hardware license.

Recommendation:
Our recommendation is consistent with the November 2012 DTAG Recommendation. This would enhance industry's ability to support urgent parts requirements for allies supporting US coalition operations, thereby supporting interoperability goals. It will also eliminate the administrative burden for industry to file repetitive licenses for hardware already authorized under an agreement, and will expedite the delivery cycle to customs, thus supporting allied partnership capacity.

Simple Improvements – New Issues

The Licensing Working Group has identified a number of issues that would be simple for DDTC to implement, have no detrimental impact to compliance, and would result in lessening the administrative burden for exporters. These include licensing requirements that could be eliminated or changed with no detrimental impact to compliance and include:

- Eliminate the requirement to return exhausted or expired DSP licenses (e.g., DSP-73s, DSP-61s or DSP-5s for Technical Data exports)
- Work with CBP to implement electronic endorsement of DSP-61 temporary import and DSP-73 temporary export licenses
- Implement a policy that license applications that are submitted "in furtherance of" an approved agreement do not require staffing to other agencies for review or approval (since the overarching Agreement authorizing the export of the hardware already has been reviewed and approved)
- Eliminate the requirement to provide DDTC with notice of the initial export of Technical Data or Defense Services under Licenses/Agreements

- Implementing a practical approach to updating license changes
- Encourage LOs to contact applicant to remedy typographical errors or simple issues before deciding to return the case without action

Proviso Consultation before Issuance – New Issue

Although DDTC has a current process regarding issuance and consistency of provisos applied to approved export licenses or agreements, exporters are still receiving such authorizations with incorrect or inaccurate provisos. Two recent examples of such incorrect provisos are:

- Proviso with incorrect instructions: exporter instructed to contact a person at DOD who had no knowledge of the license or reason for contact

- Proviso with inaccurate information: proviso incorrectly stated MLA hardware allowance was exhausted and no further IFO licenses would be approved until MLA amended

Other types of problematic provisos are provisos that include limitations or conditions that make the license unusable, provisos that narrow the scope of the license making completion of the export transaction difficult or impossible, provisos that reflect misunderstanding by the U. S. Government and/or are inconsistent with requested activity.

Recommendation:
DDTC previously had a process for weekly review of approved licenses including RWAs and provisos. This process resulted in much fewer RWA'd cases, and a significant decrease in needless or incorrect provisos. We recommend that DDTC revisit this process to ensure it is still in use, and that its review methodology can provide consistent results. Such a Proviso Review process would allow discussion among LO's within each licensing team in order to review and verify the scope of "proposed" provisos before license issuance. This would ensure accuracy and consistency in the types of provisos applied to licenses approved for certain export transactions or activities. It would also reduce the burden for both DDTC staff and industry to seek clarification or the added time and effort of proviso reconsideration requests.

We also recommend that DDTC consider establishing a process that mirrors the current BIS process. BIS provides the applicant with a copy of all the provisos to be included with the export authorization, and a 24-hour window for the applicant to raise any questions or concerns. This allows for corrections and perhaps reconsideration to be made prior to issuance of the license. This type of process would allow exporters to identify mistakes or inconsistencies in the provisos and work with DDTC to fix the problems before the license is issued and the only recourse to correct the mistake is to submit a proviso reconsideration request.

Modify FMS Exemption – 126.6 – New Issue

We looked at two principal issues that often make it difficult for U.S. exporters to utilize the exemption in ITAR 126.6 for the export of Defense Articles and Defense Services in support of a

U.S. Government-approved Foreign Military Sale (FMS) transaction.

- First, one of the current requirements for using the exemption is that the exporter must verify that the proposed transaction is within the scope of the Letter of Offer and Acceptance (LOA) for the FMS transaction. The LOA, however, is a government to government document to which private entities often do not have access. This makes it difficult to verify LOA coverage for a proposed transaction.

- Second, exports of hardware under the exemption can be made only by the foreign government purchaser or its designated freight forwarder using the DSP-94 process. Several companies explained, however, that there often are urgent situations (e.g., an aircraft on the ground) where the U.S. contractor could more efficiently hand-carry a part to the foreign destination instead of delivering the part to the designated freight forwarder for shipment through the channels outlined in ITAR 126.6.

Recommendation:
Set forth below are suggestions for changes to ITAR 126.6 to simplify the exemption and facilitate its use by U.S. contractors that are supporting FMS sales. The DTAG also recommends that the U.S. Defense Security Cooperation Agency (DSCA) – the agency that implements FMS contracts for the U.S. Government – must be a party of any process to modify the FMS exemption.

- Instead of requiring the U.S. exporter to verify that the proposed Defense Service is within the scope of a valid LOA, the U.S. exporter should be required to verify that the proposed Defense Service is within the scope of a valid U.S. Government contract implementing the LOA. Such contracts define the scope of the approved transaction and should mirror the LOA. U.S. prime contractors would obviously have access to the U.S. Government implementing contracts and could verify the scope of the U.S. Government contract for their subcontractors.

- The portion of the exemption related to hardware shipments could be modified to permit hand carries of Defense Articles in support of FMS contracts rather than requiring all hardware shipments via the foreign government or designated freight forwarder.

- The exemption for provision of Defense Services in support of an FMS contract should be expanded to include foreign participants other than the purchasing government. For example, the purchasing government often outsources repair or maintenance activities for hardware purchased via FMS to in-country contractors. It may be necessary for such contractors to participate in training sessions related to the repair and maintenance of the Defense Articles delivered under the FMS transactions. When this occurs, the U.S. exporter must obtain a separate TAA to authorize the activities, even though the provision of such Defense Services to the foreign government already has been approved as part of an FMS transaction.

- Finally, DDTC should consider expanding the scope of ITAR 126.6 to address “pseudo” FMS cases. These are foreign assistance contacts implemented outside of the FMS

program by government agencies other than DSCA. The ITAR exemption available for FMS programs should also apply to pseudo-FMS programs, since such programs also are reviewed and approved in advance by the U.S. Government.

Broader Cat I, II & III Licenses – New Issue

Categories I, II and III are the last remaining USML categories which have not transitioned under the Export Control Reform initiative. As of this Plenary date and according to licensing statistics provided by DDTC, Category I, II and III licenses number approximately 10,000 out of DDTC's total license caseload of 45,000, or approximately 22% of all license cases. The excessive licensing requirements for exporters of firearms and ammunition are burdensome for an industry of relatively small size compared to other defense industries.

A number of changes over the past several years have increased the complexity of licenses for these categories which directly relates to the increased number of license applications required to be submitted to support exports of these products. It is important to note that the bulk of licenses for Categories I and III are for commercial sales – not military or law enforcement. Exporters are hampered in their ability to respond to market needs because license requirements for these commodities are overly strict thus slowing down exports and allowing foreign competitors to gain sales with their comparable "ITAR-Free" products. This causes an unfair competitive advantage for US exporters without any proportionate benefits to U.S. national security or foreign policy.

DDTC's current policy for firearm and ammunition licenses requires applications to be supported with specific purchase orders. Exporters are not allowed to submit license applications with order forecasts or letters of intent. As stated in DDTC's Guidelines for the Export of Firearm and Ammunition document, "The purchase order must be a firm commitment and not speculative….. Letters of intent or blanket orders are not acceptable." This restricts U.S. exporters from obtaining licenses based on forecasts which would allow exports for a volume of sales with multiple shipments over a period of time. More importantly, this requirement prevents exporters from being able to respond to changing product needs in the foreign market because they don't have sufficient approved licenses on hand with the exact product requested.

In 2013, DDTC Licensing changed the Firearm Guidelines to cease allowing the grouping calibers of similar firearms on one line item in the license application. The caliber grouping practice had been allowed by DDTC for more than ten years prior to the change, and was discontinued without advance notice or industry comment. The effect of this change caused firearms licenses to become significantly larger and harder to manage (e.g. 10 line items became 60-80 line items in a typical application for sporting firearms). This restrictive requirement has been taken another step further in the past few months as DDTC Licensing now requires firearm exporters to also breakout major parts such as barrels and cylinders by caliber on separate line items, which adds another 10-20 line items to a typical license.

Recommendation:

We recommend that DDTC consider a return to previously allowed licensing practices as follows:

- Allow license applications for Categories I, II, and III commodities for commercial/sporting end-use to be supported with forecast orders or letters of intent which anticipate sales over a period of time. This would mirror the BIS process, and provide US exporters significant relief from the current over-licensing situation as well as allowing them to be responsive to foreign commercial market changes. DDTC would retain control and have visibility and insight into the overall export of these products by 1) the quantity of product authorized on the license and 2) the actual export data obtained from the AES system.

- Allow caliber groupings on line items for both complete firearms and major parts. DDTC has continued to accept ammunition license applications with groupings of calibers as this commodity was not included in the 2013 revised guidelines. This change would significantly reduce the number of license applications because each license would have the flexibility to allow the exporter to ship a variety of calibers within a group of products (e.g. 100 hunting rifles with calibers .204 - .338). If DDTC has concerns regarding exports of specific caliber, then we suggest that DDTC require just those specific calibers to be broken out on separate line items and the remaining calibers could be grouped on another line item.

- Allow expiration dates of licenses to extend past expiration date of import permit with the requirement for the foreign party to have an import permit in place prior to export. Exports of firearms and ammunition to OAS countries are guided by the Firearms Convention signed in 1999, which requires an import permit to support exports and specific guidelines for validity periods. However, for non OAS countries, rather than matching the validity of the license to the validity of import license (which is sometimes only 6 months), we recommend DDTC include a proviso that specifies the requirement for a valid import license before export can take place. The exporter would need to obtain the importer's valid permit and maintain it with the records for each license.

Expand 125.4(b)(1) Exemption – Past DTAG Issue and New Issue

Exemption 125.4(b)(1) is used to export technical data pursuant to an "official written request or directive from the U.S. Department of Defense (DOD)." DOD frequently uses this exemption for reasons that also require exporters to discuss the technical data or perform defense services related to the data on behalf of DOD. In order to perform a service or have discussions related to the technical data, DOD must also claim Exemption 126.4(a). If discussions are not initially anticipated or not considered at the time of the initial technical data written request, it results in DoD having to issue two written requests i.e. one for the technical data under 125.4(b)(1) and another for the discussions or services under 126.4(a) related to the technical data. In other words exemption 125.4(b) (1) used for technical data and 126.4(a) used for defense services related to that technical data go hand in hand.

Recommendation:

We recommend DDTC consider amending 125.4(b)(1) to include providing the performance of defense services related to technical data . Amending this exemption would eliminate confusion and the need to reference two exemptions and streamline the exemption process for both DOD and the person making the export.

Improvements to Licensing Process Flow – New Issue

Presented below are several issues and recommendations related to various parts of the overall licensing process flow.

1. Issue – Consistency Among Licensing Officers and Escalation Process for Licensing Issues

Exporters continue to experience inconsistencies among Licensing Officers within the same team. Two similar applications can receive different handling, guidance and results from different LOs. This occurs in cases from same applicant as well as for similar cases from different applicants. One LO may ask for more details, additional or revised documentation, or may even RWA the case when another LO within the same team will approve the application as submitted.

Another area of inconsistency is in providing guidance to different exporters regarding current licensing policies and procedures. For example, an LO may advise one exporter of change of licensing policy regarding a particular commodity, but other exporters are not made aware of the change. These other exporters continue to follow the old policy guidance and therefore are not able to take advantage of changes which may open up export opportunities.

Recommendation:

With regard to inconsistencies in handling license applications, we recommend that DDTC Licensing create more detailed and standardized work instructions for use by all LOs within each licensing team. The work instructions would include specific details on the licenses related to that licensing team, including any unique or particular documentation, information, or process/policy requirements. DDTC's current procedures and instructions allow for the timely approval of the majority of license applications. However, the above described situations indicate that the current procedures allow a level of independent judgment for individual LOs which result in these inconsistencies. For example, a new LO within one licensing team began requiring extensive commodity information for low technology items because he determined this information was required under the general license instructions in 123.1. The level of information requested by the LO had not been required for those license applications for many years. Having standardized work instructions which stated the level of support documents for that low technology item would have provided the LO with better information to process the application, and reduced the added burden on the exporter for an unnecessary requirement. The work instructions would need to be reviewed periodically within the team to ensure consistent application, and to be updated as needed to comply with regulatory changes.

With regard to providing inconsistent guidance to exporters, it is critical that all exporters be

made aware when a license procedure or policy is changed, not just the exporter who happens to speak to the LO, or has a license pending, at the time of change. For example, one exporter is advised that a restricted commodity will now be allowed for commercial sales. That exporter begins making sales and obtaining approved licenses. Other exporters of the same commodity are not aware of the relaxed restriction and lose those sales.

We recommend DDTC consider publishing such changes to license procedures, policies, commodity restrictions on their website. This would ensure consistency of treatment for all exporters, and would prevent one exporter from receiving an unfair competitive advantage over others. Also, it would also save exporters time and effort by providing a source of information to review when initiating an export license application. Often exporters receive RWA'd license applications because they are not aware that a certain item is restricted in certain transactions (e.g. Category I silencers only allowed for export to police and government agencies).

We also recommend that DDTC develop an escalation process for applicants to use when conflicting guidance/handling is identified. This process would be a mechanism to support applicant to escalate issue first to the licensing Team Leader, and then to Director level if resolution is not reached. This would ensure consistency of treatment.

2. Issue – Tracking Application Process:

Within the overall license application process within DDTC, exporters experience occasional delays in applications not being handled in a timely way either in being forwarded to other agencies for staffing, or applications not being acted upon after return from the staffing agencies. At present, the exporter's only recourse is to contact the LO to prod the application process toward resolution. DDTC has internal procedures with timelines for these activities, but this information is not available to exporters.

Recommendation:

We recommend that DDTC create metrics to track movement of application processing to/from staffing agencies and final disposition of the case. Within the new case management licensing system currently being designed, DDTC may be able to create a report that extracts the data regarding the number of days between application receipt and forwarding to staffing, as well as the number of days case is completed (approved, RWA'd, denied) after return from staffing. Such metrics would allow DDTC management to have a view of the movement of license applications throughout the process. This would also allow for recognition of LO's who are processing applications in a timely way versus cases that are not handled within the designated timeline.

3. Issue – License Denials:

When a license application is denied, generally DDTC advises only that the denial is based on foreign policy or national security concerns. This limited information raises questions and/or issues for both exporter and the foreign party, e.g. why was case denied? Is this a long-term situation or something that can be revisited within a few months? Is it a situation the foreign

end user can respond to in-country in order to have the application re-evaluated?

Recommendation:
Understanding that certain details specific to national security or foreign policy reasons for denial cannot be revealed, it would be helpful to have more information about the rationale which resulted in a denial decision. This is necessary in order for the exporter to explain the reason for the denial to the foreign end-user in order to determine whether or not there may be opportunity for continuation of the project or transaction. This information would also be very helpful for the exporter to be able appropriately forecast future business opportunities within the related country.

4. Issue – Overly Restrictive Wording:
For some license applications, DDTC Licensing requires more specific or detailed information to be provided on the application. This restrictive wording can unnecessarily limit the usefulness or scope of the license. For example, some Licensing Officers require exporters to include the specific dates of training to be shown in the license application. The resultant approved license only allows training on the dates specified. If training schedule changes and needs to be rescheduled, license is no longer usable as the exporter will not be in compliance with the specific license authorization.

Recommendation:
We recommend DDTC Licensing relax requirements for overly specific and restrictive descriptions that needlessly narrow the scope of the authorization.

Eliminate Signatures on Agreements – Past DTAG Issue

The existing signature requirements on agreements are extremely time consuming to obtain and it is often difficult to help foreign companies/Governments to understand why the signature is required. Opportunities can be lost due to this lack of understanding and the time involved to execute the agreement.

Recommendation:
Maintain the signature requirement on original / baseline Agreements only and waive the requirement for both minor and major amendments except for Congressional Notification (CN). The goal is to facilitate timely execution of approved agreements and minimize lost business opportunities. This change would be consistent with the EAR and its requirement for the applicant to notify all parties to a license of the scope and conditions for each license.