

Defense Trade Advisory Group Plenary Minutes
Wednesday, July 7, 2010

DTAG Chairman George “Sam” Sevier called the meeting to order at 1:30 PM and welcomed the attendees to the public Plenary. He expressed his appreciation at having been selected as the new Chairman and introduced Ms. Joyce Remington as the new Vice Chair. Mr. Sevier introduced Mr. Robert S. Kovac, Managing Director, Office of Defense Trade Controls (DDTC) and Designated Federal Officer for the DTAG.

Mr. Kovac welcomed all to the first plenary of 2010/2011, in particular the new DTAG members. He offered a brief history of the DTAG, which was established in February 1992 pursuant to the Federal Advisory Committee Act (FACA), renewable every two years. In April 2010, the charter was renewed and extended for two additional years. The operating model continues to evolve. The model for the last two years was for documents to be posted for review on the DDTC website prior to the Plenary, with the Assistant Secretary having provided to the DTAG the topics for review. Previous taskings included the US/UK and US/Australian defense cooperation treaty, changes to the U.S. Munitions List, ITAR definitions, Part 129 brokering and Section 126.4 exemptions by or for the USG. The brokering draft is ready for proposed rule publication by the end of summer, while the exemption for USG exports is on a similar track. For this meeting, the DTAG was asked to review and comment on three taskings: a re-look at the definition of defense services; a special exemption for the export of components and spares without a license to support previously exported U.S. origin end items; and a new entry addressing the “see through” rule or process.

Mr. Kovac introduced the new DTAG Chairman Mr. Sam Sevier and Vice Chair Ms. Joyce Remington. He also thanked outgoing DTAG Chairman William Schneider for his many years of service and contributions to the U.S. Government and the DTAG and other committees. Mr. Kovac closed by thanking all for coming and looked forward to continuing participation by all.

Mr. Sevier commented that Assistant Secretary Andrew Shapiro would be arriving momentarily but prior to his arrival, he wanted to outline the procedural issues as to how the Plenary would be conducted. The Working Group chairs would brief three reports and then the DTAG at large would vote on the proposals outlined in the reports. The results of the voting would be included in the Minutes which the DTAG chairman would sign and provide to DDTC as the official record. Questions and comments during the Plenary session would also be noted in the minutes. Participants were asked to identify themselves as DTAG members or public attendees and state their names. If time ran out, written questions were to be sent to Mr. Terry Otis, the DTAG Recorder, (terry.otis@itt.com) and those questions would be part of the record. The questions had to be received by Mr. Otis by Friday, July 16.

Presentation by Assistant Secretary for Political Military Affairs Andrew Shapiro

Mr. Shapiro thanked Mr. Sevier, the DTAG Chair, and Ms. Remington, the Vice Chair, and the returning and new DTAG members. He said there were more applications than ever before for DTAG positions and the State Department and White House review sought to ensure that the full diversity of export players was represented. The DTAG used to be more Beltway focused and did not adequately represent the large, medium, and small defense companies from all categories of the Munitions List. The new members reflected this broader group, plus the academia, think tanks, consulting services and outside counsel.

Assistant Secretary Shapiro expressed special thanks to outgoing DTAG Chairman William Schneider, noting his long service to the U. S. Government on the DTAG and other bodies, and complimented his ability to pull together DTAG members and provide top-notch products and advice.

Mr. Shapiro emphasized that this Administration is carrying out its commitment to making long overdue improvements to export controls and said the Bureau of Political-Military Affairs remains committed to partnering closely with industry on export control reform.

Mr. Shapiro noted that at the last DTAG Plenary he spoke to the Administration's commitment to export control reform. The U.S. system is the most robust in the world but it was designed during the Cold War for a bi-polar world and a different economy. When the current system of export controls was developed, weapons development was done by "national champions" and was zealously controlled; weapons systems were exported as finished products and in some cases, export versions; "specifically designed for military use" really meant the item was for exclusive use by the military; commercial systems at the time had marginal military use, and "military systems" were high technology, employing the most advanced technologies available at the time.

The realities at the time resulted in the U.S. having the two control systems we live with today – the ITAR and the EAR.

Much has changed since then. The defense industry and defense companies are now global, as is the competition. Solely national markets are insufficient to support development and production costs. Civil markets have adopted many technologies once considered to be military only. With the fall of the Berlin Wall what also fell was the consensus that made previous export control systems work. The world has changed, but export controls have not.

The U.S. has one of the most stringent export control systems in the world. But as Defense Secretary Gates said in his April speech, being stringent is not the same as being effective. Now there are no longer clear-cut distinctions between military and commercial technologies, and the effectiveness of unilateral controls has been eroded by increased foreign availability. The current U.S. system, based on risk avoidance, has become increasingly cumbersome and inadequate.

The U.S. has two major control lists administered by two different departments; three primary licensing agencies with no overall coordination and often no access to the others' decisions; a multitude of overlapping and duplicative enforcement agencies; and multiple separate IT systems. One agency has no licensing IT system at all.

These are the reasons President Obama initiated a comprehensive review of the overall system of export controls last August. Previous studies by industry, Congress, NGOs, think tanks and the Executive Branch were reviewed. The result was a plan for fundamental reform of the current system intended to build high walls around a smaller yard, focusing enforcement efforts on the crown jewels.

The Administration determined that export reform is required in four primary areas: the control list, licensing policies and processes, enforcement, and information technology. A three phase implementation plan was developed.

Phase I will improve the existing system and take necessary steps to move toward a new and improved system. Specific reform actions already in process will be implemented, and review of new actions will be initiated. Assistant Secretary Shapiro emphasized that the work the DTAG would report on at the Plenary was critical to the success of Phase I.

Phase II requires the Administration to finalize Phase I steps for a new system based on the existing structure.

During Phase III, there will be a transition to a new export control system based on the four primary areas.

Mr. Shapiro reviewed specific objectives for each of the four primary areas.

Control List – the transition to commercial off-the-shelf (COTS) technologies used by the military resulted in friction between the USML and the CCL. Export controls are still based on technologies being developed for the military and only later with commercial applications. The result is a focus on jurisdictional disputes between the lists rather than the more important issue of whether an item should be controlled or how it should be controlled. To overcome this, Phase I will develop independent objective criteria for a tiered control list structure, putting the crown jewels in the top tier and then cascading down the tiers as the technology or product life matures. Phase II will begin screening all currently controlled items on both lists against the criteria to rebuild both lists into identical tiered structures. This will lead to mirrored control lists more focused on key items and technologies predominantly subject to multilateral controls that are clear and easily updated and more easily enforced. Under Phase III, the two lists will be merged into a single control list and a systematic process will be implemented to keep the list current.

Licensing Policies and Process – Currently there are three licensing agencies, each operating under different regulations and procedures and definitions. This stove-piped approach makes it difficult to trace what has been collectively authorized to a specific end-user and, more significantly, what has been denied. To resolve this, Phase I will identify practices, processes and definitions with the aim of publishing regulatory changes that harmonize how business is

done and remove inherent discrepancies and contradictions that currently exist. Phase II will deploy changes in all these areas and further align the systems via policies linked to the new control list tiers. The goal of Phase III is to implement a single licensing agency, assuming the required legislation is passed.

Enforcement – Currently a multitude of enforcement agencies with overlapping authorities exist. There is duplication of resources and insufficient coordination of investigations. Under Phase I an Enforcement Fusion Center is being set up and charged with coordinating and de-conflicting investigations and synchronizing outreach programs. As a single licensing IT system comes on line, the Fusion Center will also screen all license applications.

Under Phase II, outreach, compliance and inspection programs will be harmonized, as well as administrative enforcement procedures and self-disclosure processes. Consolidation of certain enforcement activities into a Primary Enforcement Coordination Agency will occur in Phase III, resulting in a harmonized government-wide enforcement program that will be more capable of enforcing export controls.

IT System – Currently there are a number of IT systems across licensing and enforcement agencies, none of which are truly compatible with the others. Phase I has already completed an initial review to migrate licensing agencies to a common platform for case management. USXports is the platform of choice; DDTC is working with DOD to adopt the application. Following successful deployment at State, other agencies will migrate. A single interface for exporters to use to submit license applications will replace the two different systems used by State and Commerce, and the paper process used by Treasury. By Phase II, all agencies will be using a single system. Under Phase III, the intent is to deploy an enterprise-wide IT system, tracing an export from the filing of a license application until the item leaves the port.

Mr. Shapiro said that export reform is an ambitious undertaking and not something that could be accomplished in a vacuum. Coordination with regime partners was necessary, ensuring them that the U.S. remains committed to multi-lateral controls. Legislation will be required to accomplish some of the objectives. The government must maintain a dialogue with the users of the export control system to ensure striking the right balance between facilitating legitimate business transactions by American companies and protecting technology against diversion and misuse.

Mr. Shapiro said the DTAG would continue to be an important contributor as the move towards export control reform continues. One of the DTAG roles was to help prevent unintended consequences as a result of reform efforts. He looked forward to the working groups' reports on the definition of a defense service, policy on the "see-through" rule, and a licensing exemption for exports of parts and components.

Mr. Shapiro thanked members for their commitment to DTAG, willingness to lend their expertise and for their many contributions to our national security and foreign policy. He said that after having the opportunity to provide the DTAG with the overreaching goals of the Obama Administration's Export Control Reform Initiative, next Mr. Brian Nilsson, Director for

Nonproliferation and Arms Control at the National Security Council would provide an update on where things stand with the reform effort.

**Brian Nilsson, Chairman, Director for Nonproliferation and Arms Control,
National Security Council**

Mr. Nilsson thanked the DTAG for inviting him to provide an update on Export Control Reform (ECR). The ECR task force is engaged in a comprehensive review of export controls. The President decided that a dedicated group was needed to work on the issue. GAO, industry, associations, and others had done previous studies with little to show for it from an implementation perspective. This was a different approach, to accomplish a lot in a little time so as to not lose focus or momentum. The team includes representative from eight Departments - Defense, Commerce, State, Treasury, Homeland Security, Justice, Energy, and National Intelligence. Mr. Nilsson introduced the other team members attending the Plenary: Maureen Tucker, Department of State, Brandt Pasco, Department of Homeland Security, Toli Welihozkiy, Department of Energy, Elizabeth Farrow, Department of Treasury and Linda Louri, Department of Defense. State is hosting the team. The report provided to the President in January 2010 offered a three phase approach, which was well received. As a result, the task force was kept together beyond January 2010 so that Phases I and II could be completed by August. Phase III requires the drafting of legislation to create the new agency and will take longer to complete. However, Phases I and II do not require legislation and can be accomplished quickly, leading rationally to Phase III. Last week General Jones addressed the Senate Aerospace Caucus on Phases I and II primarily and was positively received.

Mr. Nilsson said the momentum continues. The Commerce Department published the new encryption regulations last Friday, July 2. The next major step involves moving forward with the dual national policy and Mr. Kovac is working on it, with a draft soon to be forthcoming. Much work remains to be done on interfacing with congressional staff, but Mr. Nilsson indicated he himself had been up to the Hill 18 times since January.

The ECR is establishing an independent set of criteria for the new control list, which encompasses the State and Commerce lists. The "crown jewels" merit the highest tier of control. The next two tiers offer more flexibility for exporters. For example, on the lower tiers, the level of review for finger printing powder is much less than that for a five axis machine, which would be included in a higher tier level.

Mr. Kevin Wolf, Assistant Secretary, Bureau of Industry and Security (BIS) at the Commerce Department and Mr. Kovac are working jointly on the list. The goal is to draw a bright line between the tiers. The effort is using Category VII military vehicles, which correlates to ECCN 9A018(b), because it is manageable, has easily understood components and is not a passionate issue, unlike 12(c). The criteria and bright line are coming soon.

Mr. Nilsson said that sometimes a new article is not clearly EAR so the article is dropped into the ITAR, but not always. And when not dropped into the ITAR, sometimes the article is Commerce controlled but it does not fit neatly into any of the specific ECCNs, so it may end up with few or no controls. The goal is to create a new ECCN for these articles as they are moved

off the ITAR or if there are new technologies that do not fit neatly into an existing ECCN, so they may be placed in a new ECCN. The effort will be to run the new process with Category VII to see how it works. Industry input will be important.

Other items under review are licensing policy, definitions, developing a single form so that State, Commerce and Treasury share one single form. Enforcement terms of reference for the single enforcement coordination agency under Phase I, called the Export Enforcement Fusion Center, are under development. All export enforcement entities and the intelligence agencies are involved. Self Disclosure will be available for companies who have, or think they have, violated the regulations. Phase III will have one enforcement unit, but that requires legislation.

Mr. Nilsson pointed out that USXports, the 2003 licensing system implemented by DOD, took several years to develop. State, Commerce and Treasury are working together on making this the one system of use.

Mr. Nilsson completed his remarks and opened the floor for questions.

A DTAG member thanked Mr. Nilsson for the positive review of the export reform status. He commented that keeping up with technology and keeping the list current would be challenging. He also said that it was not just about identifying and controlling hardware such as armored vehicles, but also about the algorithms, software and other technologies associated with the hardware. In a sense, it was output versus input and the new technology was the input.

Mr. Nilsson responded that controls could be added unilaterally for new technologies and the new ECCN criteria were designed to capture new technology quickly.

A DTAG member asked about the proposed reorganization into one agency and the registration issues. How would that function and who would pay for it?

Mr. Nilsson said that issue was not yet resolved and perhaps registration would depend on the tier in which the product was placed. The thought was to harmonize registration and the higher the tier, the more stringent the requirements. Costs would focus on being budget neutral but the surge on Phase III, especially on the enforcement end of it, might require the ECR to ask for appropriations.

Mr. Kovac added that regarding funding, DDTC is partially funded with legislatively-mandated registration fees for certain activities and that will need to be addressed as well.

A DTAG Member commented on the DDTC licensing system, DTRADE, noting that it took ten years, money and resources to get to where it is today. The proposed new system, USXports, would need time to develop and implement.

Mr. Nilsson said it would take time to coordinate all the parties and activities, but one system was the long term goal for all agencies - Commerce, State, Defense and Treasury.

A public attendee asked how many tiers would be in the new list and what were the criteria?

Mr. Nilsson said there were three tiers. The criteria included many of the same critical elements used today, such as end user and unilateral controls, for example. The criteria details would be completed in the July timeframe.

A DTAG member asked what is a “crown jewel” and what would be the criteria for determining that designation.

Mr. Nilsson said the eight departments had developed the initial criteria, but the final definition was not yet ready. The intent was that “crown jewels” would include weapons of mass destruction and technologies available almost exclusively in the U.S. or provided only to U.S. forces. Again, details would be coming soon.

A DTAG member asked if, when considering definitions, the DTAG task force efforts from last year had been used.

Mr. Nilsson commented that the DTAG efforts from last year were being used, in addition to input from Treasury, BIS, OFAC and others to harmonize definitions.

A public attendee asked if ATF was involved in this effort.

Mr. Nilsson responded that ATF was not involved.

A DTAG member asked if the Congress had been consulted regularly, and what were their thoughts?

Mr. Nilsson responded that the initial reaction was skepticism. It was a challenge, but the key was education on the benefits of the change. So far, there had been a favorable impression on Phases I and II, but concerns on Phase III. The Hill thought that the ECR is going too fast, that legislation was not ready, and that they had many other priorities to deal with, such as health care, financial issues and more. For Phases I and II, the enforcement legislation piece of it had already been incorporated through the Iran sanctions bill which passed, so that had been done, which was good news. The ECR would continue to keep Congress informed.

A DTAG member had several questions:

First, regarding the new temporary “holding” ECCN, would the item be a top tier item until the item had been assessed, and would there be a time line to move the item to the appropriate ECCN?

Mr. Nilsson said that Regional Security (RS) Column 1 type control initially applied, with a sunset date so the holding list did not become a huge list.

Second, is the plan to run Category VII (Tanks and Military Vehicles) through the licensing process to see how it works and, if so, how would that be accomplished?

Mr. Nilsson said there would be a bright line between USML and CCL in the review process. The bright line came first, followed by the tier designation and then the licensing policy linked to tiers. The team would test the process with hard data.

Third, “specifically designed” was a new definition. What would that accomplish and how would it be used?

Mr. Nilsson responded that it was a new term. For example, the technical parameters associated with traveling wave tubes, above a level would be USML and below would not be USML. The positive list would be harder to maintain to keep technical parameters current.

A public attendee said the vast majority, 90 percent, of the list was based on multilateral control lists and the USG had to go to the multilateral regimes to get changes. Getting change was very difficult as consensus was needed. Had the ECR considered Wassenaar and Missile Technology Control Regime and the time and effort to obtain needed changes, and how was that factored into the effort?

Mr. Nilsson acknowledged that without a formal change, the U.S. would continue to adhere to the multilateral regimes. However, they would look at the type of control and licensing mechanism if they could not obtain regime consensus, and consider what other changes could be made and still be compliant.

A public attendee asked if, and how, company proprietary information would be protected under self disclosure by a company.

Mr. Nilsson responded that that was a good point and he would look into it.

A DTAG member said that with one list in Phase III, all items would be placed into tiers. He asked what would happen if something did not fit or there was disagreement on tier placement?

Mr. Nilsson said the Commodity Jurisdiction (CJ) process would be gone, but there would be tier disputes. Tier 1, the highest control, might apply to a product today, but in ten years, the Israelis might have a similar product and the U.S. company could apply for a change from Tier 1 to Tier 2 and move down the level of control. But it could move up, as well. The process would be similar as it is today and the dispute could move up the chain.

A public attendee said he traveled quite a bit across the U.S. and gave seminars. He saw skepticism outside of the Washington, DC area on the ECR effort and heard comments that the timeline was laughable. More realistic timelines would be better received and expectations could be managed.

Mr. Nilsson said the report and timeline went to the cabinet level and the effort was being driven from the top. The aggressive schedule kept everyone focused. If not completed in August, the momentum would keep going.

Mr. Sevier stated to the audience that the next question would be the last one and for those who still had questions, to submit those questions in writing to the DTAG.

A public attendee said that the Gen. Jones speech indicated that the new export control agency would have a Board of Directors. How did that differ from the different department heads today?

Mr. Nilsson said that the Board would have day-to-day involvement. Disputes could get to the Cabinet level on policy issues. The dispute resolution process would go from the assistant secretary, through the secretary and up to the cabinet level.

Mr. Sevier thanked Mr. Nilsson for the update on Export Control Reform and for the Q&A session, and announced a break.

After the break, Mr. Sevier called the meeting to order. Mr. Terry Otis, DTAG member and Recorder, announced that written questions could be submitted to the DTAG through Friday, July 16 and should be sent to terry.otis@itt.com.

Mr. Sevier clarified that although questions could be submitted, there was no guarantee that the questions would be answered, but they would be taken under consideration for their content. They would all be attached as part of the final minutes of the Plenary. Mr. Otis also reminded everyone that any questions or other information sent to him to be made part of the minutes could only be included if it was for public domain use (which the minutes will be), and disclaimers or other limitations that automatically appear on many of the companies letterhead correspondence should be removed.

Mr. Sevier said the three current DTAG Working Groups would each give a presentation of not more than 30 minutes. He introduced Ms. Christine McGinn who reported on Working Group Number 1, whose task was to review and comment on a proposed change to the definition of "defense services" in ITAR §120.9.

Presentation by Ms. Christine McGinn: Definition of "Section 120.9 - Defense Services" (Tab 1)

Ms. McGinn thanked the participants in Working Group Number 1 for their effort. She said that her Working Group had been tasked by DDTC to comment on a proposed new definition for ITAR 120.9, defense services. Acknowledging that 30 minutes had been allotted for each working group, she summarized the presentation: an initial page recited the DDTC-proposed language, followed by page/s with Working Group recommendation/s. The presentation also included three FAQ examples that could be added to the DDTC website because the Working Group felt the section needed more industry guidance. A summary of terms was added with some new and some re-defined old terms, but each was to be included in Part 120. Finally, a line in/line out paper was included in the package.

Ms. McGinn said that additional FAQs could be submitted and they should be sent to her or to Mr. Otis, the DTAG Recorder, by July 16.

Ms. McGinn proceeded to go through the charts, briefly summarizing the intent on each page, and at the end, opened the floor for questions.

A DTAG member commented that if only “U.S. origin technical data” was controlled under the new definition, then foreign technical data imported into the U.S. that was previously considered ITAR controlled was no longer controlled, and was that the intent?

Ms. McGinn said they would look into that.

Another DTAG member commented that if a U.S. person was developing technical data, was that not, in fact, U.S. technical data? And would that be true even if the U.S. person was not in the U.S. and not using U.S.-origin technical data?

Ms. McGinn replied that that was a good question, and that would be a policy decision.

A DTAG member asked about ITAR 120.9(a)(2), integration of any item in the USML into an end item. Did that mean that integrating a part into an end item was not a service if no technical data was used?

Ms. McGinn thought that this section would hold to the existing definition of an end item.

A public attendee inquired why the group had used “tactical” instead of “strategic” on training and asked why single out the use of the term “tactical”. There were tactical, operational and strategic definitions and they were DOD definitions of long standing and understood by all. He suggested synchronizing USG definitions to avoid potential confusion.

Ms. McGinn responded that the Working Group took the definition from DDTC as presented, and noted that inconsistencies also existed at DOD.

DTAG Chairman Sevier interjected that the DTAG provided industry perspective on the questions submitted by DDTC.

A public attendee inquired about the purpose of the fix. Why were changes being made? The idea was to get out of the business of controlling things that did not need to be controlled. Industry would appreciate additional clarity.

Ms. McGinn said the purpose was to offer increased clarity for industry and to help them with exports.

A public attendee commented it would be helpful to give a definition of what was U.S. origin.

Ms. McGinn agreed that a clarification of what was U.S. origin would need to be provided.

A public attendee asked if the DTAG and the Dept of Commerce Technical Advisory Committee RAPTAC (Regulations and Procedures Technical Advisory Committee) had discussed the use terms in concert with the proposed export control reforms? If moving to one agency and one form, did it not make sense to try and have similar or same terms?

Ms. McGinn responded that the DTAG and RAPTAC had not worked together but Commerce was in concert with Export Control Reform.

Mr. Sevier thanked Ms. McGinn and the Working Group members. He announced that the DTAG members would take a vote on whether to accept or reject the recommendations on defense services. Voting meant that the recommendations would be provided to DDTC as a work product. The DTAG voted to accept the report as given by a show of hands.

Mr. Sevier then introduced Mr. Bill Wade, chairman of Working Group Number 2 on the discussion of a special export exemption.

Presentation by Mr. Bill Wade, "Section 123.28 - Special Exemption for the Export of Components and Spare Parts in Support of Previously Exported U.S. Origin End Items" (Tab 2)

Mr. Wade said his Working Group was tasked to create a new exemption, and they took the draft language suggested by DDTC and modified it. He thanked his team for doing a tremendous job on such short notice, noting that all members had participated fully.

The intent was to create an ITAR exemption to allow for the flow of parts and components to previously approved end users of U.S. end items. The new exemption would allow real time customer (foreign military) support in the follow-on supply of spares while reducing the licensing workload for both DDTC and industry. The exporters had to meet the conditions of the exemption, which included continued eligibility of all parties, obtaining a prior license to export the specific components and parts, and no upgrades in the capability. To avoid diversion and other illegal activities, the type and amount of the exports had to be consistent with normal logistical support for the end item in the customer's inventory and records had to be maintained regarding all exports. Additionally, the total values could not exceed Congressional Notification requirements. An extension of the exemption was recommended for major system sales where a supporting contract under license authorization is established for major subsystems of original end-item. The example used was a spare jet engine sale in support of a foreign military sale (FMS) of fighter aircraft. Often such FMS cases are accompanied by a direct spare engine sale from the engine manufacturer. In this case the engine manufacturer maybe more qualified than the aircraft manufacturer to manage the life-time support of those items, both installed on the original aircraft and the operations and maintenance spares, under the stipulations laid out above. The exporter must have had prior approved authorization to export the items.

Mr. Wade said that Automated Export System (AES) was not ready to implement the proposed exemption at this point in time. Customs needed to make changes to AES so that the necessary data could be entered and the exemption utilized. Currently on AES, only one line was offered for data entry, but two separate entry lines were needed to use this exemption. The exemption must be cited on one line and the license being used to support the exemption must also be entered on another line. So there is a timing issue that would be worked out.

Mr. Wade said that if shipping F-18 or F-16 parts, for example, the exemption should be able to be used for follow-on support for other major subsystems, e. g, radar, and others, if they qualified under the rules laid out by DDTC in the revised Section 123.28. It would allow a subcontractor to get a license and thereafter all parts and components would qualify for the exemption. However, it must be the manufacturer or exporter of the end item, not a sub of sub. And if mistakes were made, DDTC would take away the exemption.

A DTAG member asked how would a subcontractor work that exemption?

Mr. Wade explained the subcontractor would first get a license, then use the exemption. Another example cited was thermal imaging on a tank. The company that made the thermal imaging system would first get a license, then use the exemption to export all components afterwards.

Mr. Sevier commented that this would be very useful for support contracts for airplane spares, for example, on the flight line swapping engines.

Mr. Wade said it would also make it easier for eligible foreign governments to access the U.S. supply chain.

A DTAG member said that exporting the aircraft is one thing, but that others could take advantage of exporting parts and components for the aircraft, even if they were not the original subcontractors.

Mr. Wade said that that was not the case because it was the subcontractor who manufactured the end item component of the aircraft that would obtain the license to export first and be eligible to use the exemption. Additional subcontractors could utilize the exemption only after they first obtained a license to support the end item. The group was trying to figure out how to help subcontractor suppliers take advantage of the exemption.

Mr. Sevier added that the transaction could not exceed the Congressional Notification thresholds. The OEM knew the price, and a big spare engines package could not exceed the congressionally notified amount.

Mr. Wade explained that the end item was a U.S. defense article. Key elements were that it must be an end item and it must be a U.S. manufacturer.

A DTAG member asked about the example of exporting an F-16 radar system. Once a license was obtained, could the exemption be used? The answer was affirmative. But the

presentation chart showed a foreign government end user as the recipient; would that limit recipients to foreign recipients and not cover deliveries to the USG overseas?

Mr. Kovac said that based on DTAG work done last year, ITAR Section 126.4 would cover exports to the USG end users overseas.

A DTAG member asked if DDTC would consider other wording. The term “second exporter” was a confusing term and perhaps a better term could be used, such as sub or supplier, or stating that the second tier was not eligible.

Mr. Wade indicated that the intent was to make the exemption available only to Original Equipment Manufacturers, not to subs or suppliers. The exemption specified OEM because it was their end item.

Mr. Sevier emphasized that it was essential to understand the actual needs of the end user. It was not the intent of the exemption to permit stockpiling, and it was essential to avoid illegal diversion of equipment.

A DTAG member asked what if the shipment was based on a FMS case?

Mr. Wade responded that as long as there was a State Department export authorization, to export the end item, it would qualify.

A DTAG member asked if the exemption would qualify under a FMS export. Mr. Wade indicated that DDTC would have to answer if the exemption could be used for an item exported under a FMS case.

A public attendee asked regarding the license being cited in AES, if the license had expired, would the exemption still be viable?

Mr. Wade explained that a license would expire at the time the original export was fully used or expired based on expiration date, but citing the expired license number to AES would be acceptable. The original license would provide the authority to use the exemption.

A public attendee asked how would users of the exemption avoid using brokers or forwarders engaged in shady activities.

Mr. Wade said that the forwarders must be registered with DDTC and brokers are licensed by Customs and they take a test. But as the exporter and user of the exemption, that party is responsible for knowing all other parties engaged in the export and their eligibility and that was not addressed in this section.

A DTAG member asked if an FMS LOA case number could be used for the exemption in lieu of the license number.

Mr. Kovac said a DSP-94 is a license, but not for FMS exemption shipments. To use this exemption, a license was needed.

A public attendee suggested the word "special" on the exemption be deleted as it was a needless word and it was not special per se. He also recommended that licensed customs brokers should not be mentioned.

Mr. Kovac said the licensed customs broker language was included because that was language Customs preferred when the draft was sent to them for review.

Mr. Sevier stated it was time to vote to accept or reject the proposal. Again, voting meant it would be provided to DDTC as a DTAG-approved ITAR change. By show of hands, the DTAG voted to accept the Working Group's proposal.

Mr. Sevier introduced Mr. Dennis Burnett as the final presenter for Working Group Number 3.

Presentation by Mr. Dennis Burnett, ITAR Section 126.20 Policy on the Export and Re-export of Defense Articles Incorporated into Commodities "Subject to the EAR" (Tab 3)

Mr. Burnett thanked the members of Working Group Number 3 for their participation. The focus of his group was to consider the problems of an ITAR part migrated to the EAR commercial side. The Working Group had included four cases on how the proposed new rule would be interpreted specific to the former QRS-11 scenario, the history of which was familiar to Plenary attendees. The QRS-11 was a defense article in the civil supply chain that was integrated into the Integrated Standby Instrument System (ISIS). The proposed section 126.20 was designed for all types of articles, but could not be used when the end item is a USML controlled item (not incorporated or embedded in another item).

The purpose was to apply the rule to similar situations under the new Section 126.20 exemption. As the presentation was lengthy, Mr. Burnett explained he preferred to go directly to the Decision Tree segment of the presentation. The Decision Tree looked at end items and components, but it was not always clear how to classify the item itself. Embedded meant that if a component were taken out, the item would be destroyed. The proposed regulations addressed a defense item incorporated into an end item that was exported under Department of Commerce jurisdiction and if that defense item were removed it would render the end item inoperable.

Mr. Burnett gave as examples that the QRS-11 was an end item, so was an ISIS. Provide power and they perform. With this interpretation, Cases 2 and 3 described in the presentation would be ITAR controlled. Mr. Burnett also discussed another example of the truck axle which was CCL and not an end item. But the oil seal used on the axle was developed for military application to protect against explosives. If the seal were removed it would render the axle inoperable, but since the oil seal was not destroyed by its removal, all components remained subject to the ITAR.

The Working Group offered two alternative proposals to the Section 120.26 language in its attempt to address some of these issues, but acknowledged that it was a complex issue overall.

Other considerations were that “de minimis” did not exist, Regional Security is for Commerce control, DIRCM is an end item as it needs only power, yet it also needs sensors to operate, and the issue of repairs overall is of concern based on the technical data. These need to be addressed but were not part of the tasking.

The DTAG considered could this system be abused? How would this apply to software and materials? Should some materials be excluded? Mr. Burnett said there were other questions to which they did not have precise answers and perhaps software and materials should be excluded or at least reviewed separately.

During the Q&A session, DTAG Chairman Sevier provided some background on the use of the QRS-11 in the early AIM 9 missiles as short-term stabilization for the weapon. The reason that the QRS-11 remained on the USML after it was no longer used in that function in newer AIM 9 missile production was the concern remained that others could use the component in the same function in other, unauthorized such applications. Thus, if someone started purchasing several thousand units, the Government would need to understand their end use. However, when the item is embedded in an authorized non-ITAR end use, the question becomes how best to control the embedded item.

A DTAG member suggested that perhaps they needed to find out what else was necessary to make an item work in addition to power.

A DTAG member asked why software and materials would be excluded. There is already a list of materials that are controlled. How would that list be handled with this exemption? Also, how would software be treated when used to modify a code? The DTAG member said these were brought up just as additional issues to consider.

Mr. Burnett said that there are materials controlled under the ITAR – propellants, explosives, carbon fibers to name a few. With software, one could modify the code and enhance items.

A DTAG member commented that two of the scenarios in the case studies did not meet the common sense test. One was the U.S sale to Thales in Case 3, resulting in a “no”, but the sale to Airbus in Case 2 resulted in a “yes”.

Several in the audience asked if they could comment on the charts before the voting was finalized. Mr. Sevier said the purpose was to vote on the package that afternoon, as presented. Adding suggestions would be done by sending those comments to Mr. Otis or to the chairmen of the Working Groups.

Several also inquired when could the public see the presentations and make comments.

Mr. Kovac said the DTAG Working Group presentations would be posted to the DDTC website right away. Comments must be provided by July 16.

Mr. Sevier asked for a DTAG vote to accept or reject the proposal. By hand count, the proposal was accepted.

Mr. Kovac and Mr. Sevier thanked the DTAG and all those who participated that afternoon.

Adjournment – Mr. Kovac adjourned the meeting at 4:35 PM.

Following the DTAG Plenary, the following comments and questions were sent via e-mail to DTAG Recorder Terry Otis for inclusion in the record:

(Received 7/8/2010)

George/Terry,

Regarding the Export Compliance Reform presentation yesterday, a comment was made by speaker Brian (Nilsson) with respect to ATF not being part of agency teams involved in this effort. Believe this could be an issue with respect to the USMIL. If the ITAR and EAR are combined into a single control list where certain less sensitive commodities/technologies are no longer controlled but are still incorporated into the USMIL, this could drive a significant ATF permit workload increase for permanent imports that are now covered by an ATF exemption. As DTAG members, can we get this message to the Reform work group to ensure the "new" single control list aligns with the USMIL? Thoughts?

Thanks,
Dave.

Dave Bowman
ArvinMeritor
Vice President, Export Compliance

(Received 7/16/2010)

Hi Terry,

I apologize—I should have sent the e-mail below to you rather than going directly through Dennis (Working Group #3 Lead). I know the 16th is the final day to submit the presentations and I wanted to make sure that the revised information in the attached slide was noted. I don't have an exact example that meets the criteria outlined in the slide as originally written—this revised language makes the slide pertinent to actual equipment and situations that exist today. Please note, as indicated below, slide 24 would also need to be modified if my proposed changes are accepted. I can submit a new slide 24 if needed.

Thank you,

Rebecca J. Conover
Intel Corporation - Global Export Compliance
ITAR Compliance Manager
T: 408-765-0436
F: 408-765-1352

From: Conover, Rebecca J
Sent: Wednesday, July 14, 2010 7:25 PM
To: 'Burnett, Dennis'
Subject: DTAG Working Group #3 - Follow-up

Hi Dennis,

In reviewing the final slides from the DTAG meeting, I want to know if you have considered modifying slide 23 given the fact that the focal plane arrays don't necessarily get destroyed upon removal from a system. Apparently it is more likely in some of the tools than others however it is absolutely feasible to remove the FPA from a tool (it is just unlikely that someone would buy the million dollar tool for one item (the FPA) which is available abroad).

Attached is a sample of how the revised slide would look. Please keep in mind that the subsequent slide would also need to be modified. On slide 24 I don't think the camera would qualify as EAR since the FPA is not destroyed upon removal. This is an important point because it demonstrates the limited applicability of the proposed 126.20 language (without modification).

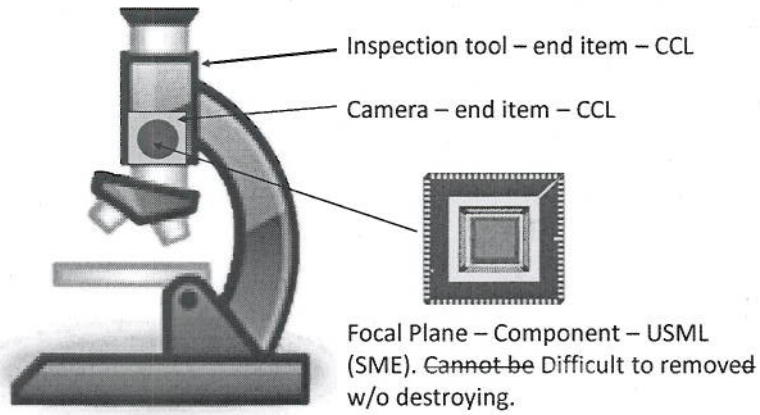
Do you need any input or support from our team to be able to submit the final slides by Friday? Please let me know if I may contribute in any way. After the DTAG meeting I thought we had some open items to address before submitting the final presentation.

Thanks,

Rebecca

Rebecca J. Conover
Intel Corporation - Global Export Compliance
ITAR Compliance Manager
T: 408-765-0436
F: 408-765-1352

How would it apply to an inspection tool incorporating a focal plane array?



Removal of the camera renders the inspection tool inoperable but does not destroy the camera. Removal of the focal plane array renders the camera inoperable and may destroy the focal plane.

1

(Received 7/16/2010)

The following comments on Proposed 22 CFR 123.28 “Special Exemption for the Export of Components and Spare Parts in Support of Previously Exported US Origin End Items” are offered for consideration

1. Unless the current clause 22 CFR 123.17(a) is modified or addressed, we will not be able to use the proposed 123.28 for Category I firearm components and parts. 123.17(a) specifically controls the exemption for firearm components and parts, and would need to be superseded by 123.28. At a minimum, 123.17(a) would need to be modified to allow Category I component and parts to be exported under the conditions of 123.28.
2. The proposed 123.28 does not mention SME (Significant Military Equipment designation) components and parts. Category I Firearms includes under paragraph (g) “Barrels, cylinders, receivers (frames) or complete breech mechanisms....” which are designated as SME. Yet these components would legitimately be a part of the components and spare parts exempted under the proposed 123.28 (e.g. replacement barrels for the French National Police contract for 5000 9mm pistols). SME components and parts should specifically be included in the proposed 123.28. Since the parts and components being exported can provide no upgrade in the capability of the US end item, allowing SME parts to be exempted under 123.28 grants nothing beyond the items that were originally approved for export to that end user.
3. Because the proposed 123.28 exemption is restricted to foreign governments, it will be of limited assistance to the firearms industry. At least half of the exports of firearm components and spare parts is to foreign distributors, dealers, gunsmiths, etc., for repair of US origin items located overseas, or for resale to commercial end-users. Proposed 123.28 could not be used for any of those transactions.

Lawrence G. Keane
Senior Vice President, Assistant Secretary
& General Counsel
National Shooting Sports Foundation, Inc.

(END)

Terry Otis
DTAG Recorder
19 July 2010

SUBMITTED TO THE HONORABLE ASSISTANT SECRETARY OF STATE, Mr. Andrew J. Shapiro

DATED:


BY:

DTAG Executive Secretariat

DTAG Chair



Robert S. Kovac
Designated Federal Officer


George (Sam) Sevier