

DEFENSE TRADE ADVISORY GROUP  
September 8, 2017 Plenary Session  
Working Group 5 White Paper  
**10-Year Standard for Agreement Expiration Date**

Deputy Assistant Secretary of State for Defense Trade Controls, Brian H. Nilsson, provided the Defense Trade Advisory Group (DTAG) a letter on June 12, 2017 which included 5 topics that the Directorate of Defense Trade Controls (DDTC) would benefit from input and industry insight. Working Group 5 was tasked with exploring the topic of a standard expiration date for all types of agreements. Specifically, “*DDTC requests DTAG’s assessment, including a cost-benefit analysis, of DDTC standardizing the expiration date for all new agreements to a fixed 10 year period from the date of initial approval.*”

After initial discussions within the Working Group, the DTAG membership approached DDTC to expand the tasking to include a review and analysis of specific time-limit requirements associated with agreements identified in §124.4, §124.5, and §124.6, which will also impact specific clauses under §124.12(b) and §124.14(f). DDTC agreed to the task expansion. The remainder of this White Paper outlines the background relative to the subject, the methodology utilized by the Working Group and the final recommendations for both tasks.

#### **WORKING GROUP MEMBERS**

- Michelle Avallone, Columbia University
- Michael Cormaney, Luks Cormaney LLP
- Greg Creeser, International Trade Compliance Strategies
- Sandra Cross, Huntington Ingalls Industries
- Tom Donovan, Northrop Grumman Corporation
- Cindy Keefer, BAE Systems, Inc.
- Angie Noll, Knights Armaments

#### **BACKGROUND**

DDTC is considering a 10-year fixed standard for agreement expiration dates. DDTC further clarified that it is considering to have agreements automatically default to a ten year expiration from the date of issue.

#### **CURRENT STATE**

Expiration dates for agreements are set forth in Section 3.1 of the Guidelines for Preparing Agreements (GFA).

- Section 3.1a states that proposed expiration dates cannot exceed 10 years in duration.
- Section 3.1b further directs the proposed expiration month to coincide with a table based on Registered Company Name.

<u>Month of Expiration</u>	<u>Registered Company Name</u>
January	D, X, Y and Z
February	S and C
March	A and M
April	G and V
May	H and T
June	B and Q
July	N and F
August	L and W
September	U and P
October	R and I
November	O and E
December	J, K and all Numbers

The current state and guidelines in the GFA were designed “to avoid an overwhelming number of proposed amendments for extensions at the end of the calendar year” (GFA, page 17).

### **APPROACH RELATED TO INITIAL TASK**

- The Working Group conducted a review of regulatory or legal requirements (AECA, ITAR, Guidelines) that may have an impact or dictate the current expiration structure. Additionally, the Working Group reviewed past DTAG recommendations to DDTC.
- The Working Group analyzed the impact (cost/burden) of expiration dates that are no longer aligned to a common date. Moreover, the analysis included whether a 10-year duration for an agreement is appropriate. That is, what will be the impact of agreements approved for less than 10-years, more than 10-years or for agreements that have no set duration time period.
- The Working Group considered the impact of the regulatory and broader industry environment on agreement durations.
- Lastly, the Working Group made one assumption with regard to a 10-year standard which encompassed the notion that amendments would also default to a 10-year expiration date from the date of issuance.

### **ANALYSIS**

The Working Group’s review of the AECA uncovered no explicit language that requires specified expiration dates for agreements. Furthermore, the ITAR does not require a specified expiration timeframe. The Working Group determined that agreement durations and expirations are stipulated primarily in the Agreement Guidelines or other procedural guidance. For example:

- Guidelines for Preparing Agreements (Revision 4.4b)
- 78 FR 22740 and 61750 Amendment to the ITAR: Initial Implementation of ECR
- DDTC web notice published on October 9, 2015: [http://www.pmdtc.state.gov/documents/IndustryNotice\\_ECRTransitionPlan.pdf](http://www.pmdtc.state.gov/documents/IndustryNotice_ECRTransitionPlan.pdf)

The Working Group concluded that changes to a 10-year standard expiration appear within the control of DDTC.

Historical aspects relevant to the analysis:

- Agreements in the past were routinely tied to the duration of a business contract and typically had no expiration date identified
- Setting the maximum duration of an agreement to 10 years occurred in the late 1990s
- Expiration timeline methodology migrated from end of calendar year expirations to a designated month based on company name in 2004
- 10-year standard was used as a mechanism to drive rebaseline of agreements and convert to conformed electronic agreements beginning in 2008
- 78 FR 22740 and 61750 specified that agreements impacted by USML category changes as a result of ECR be amended within 2 years
- 2015 DDTC Web Notice specified that agreements impacted as a result of ECR be amended within 3 years

The Working Group analyzed the impact of simultaneous expirations to both the government and industry. However, based on significant activities that have occurred in the government (including Automation and ECR) as well as in the dynamic defense industry environment (e.g., name changes, M&A, other modifications) most agreements have not reached their 10-year expiration dates. The pool by which to conduct impact analysis was too small to adequately draw significant conclusions. Ultimately, it was too difficult to assess the full impact of the current state of expiration dates tied to company name due to lack of available data.

Further, the Working Group's ability to conduct a thorough cost/benefit analysis was also impacted by the low volume of test cases. The Working Group was able to assume some cost benefit would occur by moving to a default expiration. Specifically, it would eliminate potential RWA's or post submittal document modifications due to incorrect dates in transmittal letters and agreements.

The DTAG was polled to determine preference on expiration date. The results varied and generated the following types of response:

- Continue to align with the current state – expiration dates occurring in the same month per the direction in the Guidelines for Preparing Agreements Section 3.1b
- Standardize expiration date to 10 years from date of approval
- Remove the 10-year standardization and allow agreements to remain valid for longer than 10 years
  - Allows for more flexibility for longer duration programs
- No expiration date at all

The majority of responses supported maintaining the current state as directed in the Guidelines from Preparing Agreements. Generally, many of the respondents stated that they use or rely on that common date to provide known common expiration dates which allows for ease of planning, preparation and resource allocation by which to effect the amendments and potentially audit the agreements.

During the Working Group's review, it became difficult to assess the volume of agreements amended solely to extend duration. No known cost/benefit could be identified for issuing agreements with shorter than 10-year expiration dates. However, the DTAG was able to identify potential benefits for longer durations include the cost and burden associated with amending agreements simply to extend a duration.

As part of the polling effort, the Working Group explored a derived observation posed which was why is a duration required in the first place? Agreements will most likely not last to full term of the effort without requiring some type of amendment due to regulatory or other environmental changes (i.e., ECR, scope or party changes). Exports occur under separate licenses for hardware, or exemptions (e.g., §125.4(b)(2)) which are not duration dependent. Ultimately, industry is responsible for ensuring any authorization is valid for use (agreement, license, or exemption).

## **DTAG RECOMMENDATION**

DTAG member feedback favors expirations remain aligned with a common month/date as currently implemented.

- Many companies align key compliance activities with common expiration dates (e.g., agreement audits)
- Easier resource planning and allocation
- Comfort in what is known
- No regulatory requirement to drive a change or apparent cost/benefit

***DTAG recommends agreement expiration dates remain aligned with a common month/date.***

Regarding duration:

- No identified legal or regulatory requirement to limit the duration of an agreement
- No cost benefit to maintaining an expiration
- Environment will likely force amendments
- For agreements that would reach duration, an identifiable burden exists to amend the agreement simply to extend a duration

***DTAG recommends DDTC eliminate expiration dates associated with agreements.***

## **BACKGROUND ON SECONDARY TASK**

The DTAG contacted DDTC and offered to take on an additional task to address time-limit requirements associated with agreements identified in §124.4 - §124.6 (*Note: by default, requires assessment of §124.12(b) and 124.14(f)*) to which DDTC agreed.

## **CURRENT STATE**

The following is an overview of the sections in the ITAR that the Working Group focused on that require a filing action related to agreements.

- §124.4 Deposit of signed agreements with the Directorate of Defense Trade Controls
  - Not later than 30 days after it enters into force
  - If not concluded within one year of the date of approval, must be notified in writing

- §124.5 Proposed agreements that are not concluded
  - Must inform... within 60 days of the date of the decision
- §124.6 Termination of manufacturing license agreements and technical assistance agreements
  - Must inform not less than 30 days prior to the expiration date

**APPROACH RELATED TO SECONDARY TASK**

- The Working Group conducted a review of regulatory or legal requirements (AECA, ITAR, Guidelines) that may have an impact or dictate the filing requirements and structure. This included DDTC discussions on why the deliverables and suspense are required. Additionally, the Working Group reviewed past DTAG recommendations to DDTC.
- The Working Group analyzed the impact (cost/burden) of paperwork requirements, administrative processing, tracking and record keeping.
- The Working Group explored alternative solutions.

**ANALYSIS**

The Working Group’s review of the AECA did not find requirements to notify the USG on agreement status as identified in §124.4-§124.6.

The sections of the ITAR reviewed by the Working Group included:

- § 124.3
- § 124.4
- § 124.5
- § 124.6
- § 124.12
- § 124.14(f)(3)
- § 125.4(b)(4)
- § 123.22

The Working Group concluded that agreement reporting requirements/timelines appear within the control of DDTC.

The Working Group conducted a brief analysis of the volume of paper reporting requirements in the ITAR. Specifically, the Working Group reviewed ITAR §124.4, 124.5, and 124.6 and identified the following specific reporting requirements:

- Signed copies of executed agreements 30 days after it enters into force
- Notification of annual status of unsigned agreements
- Notification of decision not to conclude an agreement within 60 days of the date of decision
- Notification of termination

To assist with understanding the purpose of the paper filings, the Working Group posed the following questions to DDTC:

- What is the purpose (reason) for each notification?
- What is done with the documentation once provided to DDTC?
- What is the agreement approval volume at DDTC?

Answers:

- §124.4 Deposit of signed agreements:
  - Allow for approval of IFO licenses and ensure compliance regarding HW shipment
  - Stored in the case file for review as required
- §124.4 Not concluded status:
  - Ensure industry revisited significantly delayed agreements and updated to DDTC
  - Stored in the case file for review as required
- §124.5 Decision not to conclude:
  - Awareness of status
  - Stored in the case file for review as required
- §124.6 Notice of termination:
  - Mechanism to report the end of execution for an agreement
  - Stored in the case file for review as required

Three year look at agreement approval volume:

	Total New Agreements	Agreements and Amendments
2014	3,440	6,193
2015	2,636	5,378
2016	2,457	4,986
		Source: DTC Licensing, Aug 16, 2017

The filing requirements result in at least one additional document that must be generated (§124.5 Decision not to Conclude) for every agreement. With the vast majority requiring at least two additional documents (§124.4 Execution and §124.6 Termination), the results of which would yield:

- A significant volume of paper notifications
- As many as 5,000 documents generated based upon 2016 New Agreement approvals alone
- Resource drain on both government reviewers and industry
- Recordkeeping requirement growth with each notification
- Inconsistent suspense requirements which complicate monitoring and compliance

Most significantly, failure to comply with the filing requirements is a violation of the ITAR resulting in administrative based disclosures to DTCC. These administrative disclosures represent a significant resource burden on industry and over commitment of DTCC assets to process the disclosures. Attention to these administrative disclosures depletes DTCC focus on other substantive matters.

The DTAG previously discussed the burdens associated with administrative disclosure submissions in the October 29, 2015 Plenary session. Below are two key slides from that presentation. For a copy of the full presentation, see the DTAG section on the DDTC webpage.

## Alternative Processes for Category 3

- Precedent: Alternative to VD for certain Temporary Import Violations - [http://pmddtc.state.gov/licensing/documents/WebNotice\\_TemporaryImportViolations.pdf](http://pmddtc.state.gov/licensing/documents/WebNotice_TemporaryImportViolations.pdf)
- Extend same concept to create options for other Category 3 violations
  - Periodic reports or “binning” of Category 3 violations
  - Report issue in application
  - Notification of corrective action
  - DTCC issue guidance that Category 3 violations do not affect ability to continue with program
  - Remove requirement from ITAR, if no significant USG purpose
- DTCC has ability to rescind a company’s ability to use alternative processes

Standard 127.12 process *always* remains an option

17

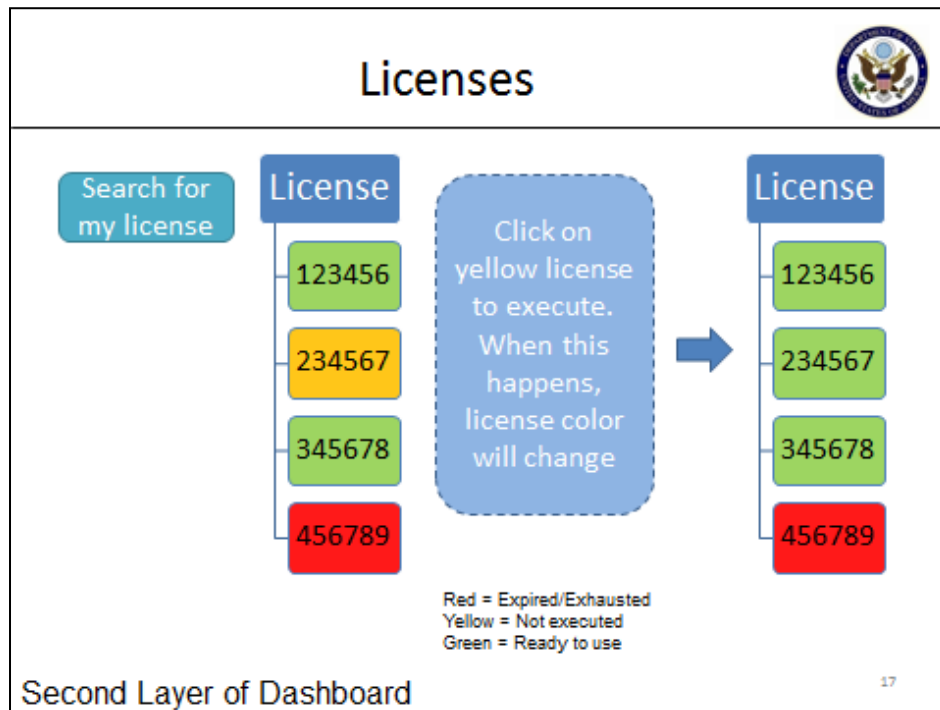
Part 124 - AGREEMENTS, OFF-SHORE PROCUREMENT AND OTHER DEFENSE SERVICES		
§124.1(a) - Requirement to obtain DDTC approval to provide defense services to foreign persons	2	
§124.1(c) - Requirement to obtain DDTC approval for any amendments that change the scope of approved Agreements	2	
§124.2 - Exemptions for training and military service	2	
§124.4(a) - Applicant must file a copy of the concluded TAA or MLA with DDTC not later than 30 days after Agreement enters into force	3	Upload executed agreement to D-Trade with cover letter that explains reason for missed deadline, root cause & corrective action(s)
§124.4(b) - Application must furnish additional information specified in paragraphs (1) - (4) when submitting executed copy of MLA	3	Upload letter with required information to D-Trade - Include reason for missed deadline, root cause & corrective action(s)
§124.5 - Applicant must inform DDTC if a decision is made not to conclude an approved agreement within 60 days of the decision	3	Upload notice with required information to D-Trade - Include reason for missed deadline, root cause & corrective action(s)
§124.6 - Applicant must inform DDTC in writing of impending termination of Agreement not less than 30 days prior to expiration date	3	Upload notice with required information to D-Trade - Include reason for missed deadline, root cause & corrective action(s)
§124.16 - Retransfer authorization for unclassified technical data and defense services to member states of NATO and EU, Australia, Japan, New Zealand & Switzerland	2	

## DTAG RECOMMENDATION

It is the Working Group's recommendation to make agreement reporting/notification requirements consistent with other requirements. Specifically,

- Eliminate §124.4(a) requirement "Deposit of signed agreements" and require the notification of initial export only to be consistent with §123.22(b)(3)(i)
- Eliminate §124.4(a) requirement for notification on "not concluded status" and §124.5" decision not to conclude" to align with §123.22 (c) (3) which states "A license issued by DDTC but not used by the applicant does not need to be returned to DDTC, even when expired."
- Eliminate paper notifications by providing "block checks" in DECCS (addressed in the March 30, 2017 Plenary under IT Modernization)
- Select "Ready to use Tab" for simultaneous notification of initial export
- Select for termination of agreement to satisfy §124.6 "Notice of termination"

***The End State: All potential notification requirements identified under §124.4 - §124.6 satisfied by two "block checks" in DECCS.*** As previously suggested to DDTC during the March 30, 2017 Plenary, DECCS could color-code the approvals. Below is a slide from that presentation. For a copy of the full presentation, see the DTAG section on the DDTC webpage.





## **SUGGESTED FUTURE TOPICS**

In preparing for the Plenary, the Working Group discussed several tangential items that were not directly related to the two tasks and therefore not included in the presentation. The DTAG is providing the following topics for DDTC to consider for future Plenary sessions.

- Waiting for an executed agreement before processing an IFO license/simultaneously authorizing IFO licenses when agreements are approved
- The requirement to execute agreements in general (Signature requirement)
- Expiration dates associated with Technical Data licenses
- Expiration dates for temporary export licenses