

Defense Trade Advisory Group (DTAG) Plenary Meeting Minutes
September 26, 2019 (1:02-3:20 pm)
Meeting held at 1777 F Street, NW, Washington, DC 20006

Agenda:

- Welcome and introduction
- Consent Agreements: Compliance Measures Working Group
- DDTC Authorizations Involving Third Party Technical Data/Proprietary Data Working Group
- U.S. Industry Involvement in International Cooperative Programs Working Group
- Wrap-up

Introductory Remarks by Ms. Andrea Dynes, DTAG Chair

Ms. Andrea Dynes, DTAG Chair, brought the meeting to order at 1:02 pm, and welcomed the public. Ms. Dynes was joined on the podium by Mr. Tom Donovan, DTAG Vice Chair, and Ms. Sandra Cross, DTAG Recorder. Ms. Dynes provided an overview of the agenda for today's meeting. Today's meeting will present the DTAG Working Groups' reports and recommendations on the three topics identified in the tasking letter issued June 7, 2019 by the Department of State (as reflected in the above Agenda). The DTAG Working Groups' oral presentations and "White Papers" (to be supplied later) will provide an overview of the efforts undertaken to address the topics, issues considered, and recommendations.

Ms. Dynes provided an overview of the DTAG Charter including its description of its duties to advise on defense trade regulations. She noted that on multiple occasions the DTAG has briefed the Department of State on recommendations for changes to the International Traffic in Arms Regulations (ITAR) section 126.4 exemption and thanked the Department of State for the April 2019 issuance of the revised section 126.4 exemption. The DTAG hopes that this revised ITAR exemption relating to shipments "by and for" U.S. Government agencies will result in efficiencies for all parties involved.

Written comments from the public were received by the Department of State prior to the Plenary meeting as permitted by the Federal Register Notice announcing the Plenary meeting. These comments were shared with the DTAG and were considered by the appropriate Working Group(s) as they prepared the recommendations for today's Plenary. The DTAG members introduced themselves. Ms. Dynes thanked the DTAG for their efforts.

Ms. Dynes introduced Mr. Michael Miller, Acting Deputy Assistant Secretary (DAS), for the Directorate of Defense Trade Controls (DDTC) who provided remarks to the DTAG membership and audience. The DDTC employees who were in attendance also introduced themselves.

Remarks by Mr. Michael Miller, Acting Deputy Assistant Secretary of State for DDTC

Welcome

Mr. Miller welcomed the audience and expressed his appreciation for the time and efforts of the DTAG. He stated that previous recommendations by the DTAG involve topics that DDTC is not

able to act on immediately; however, those ideas are leveraged when DDTC is able to develop and implement changes. For example, the Plenary session from last Fall included recommendations regarding the “Five Eyes” countries. Those previous efforts have helped to influence DDTC thinking and will become evident in areas such as the Defense Export Control and Compliance System (DECCS) under the leadership of DDTC’s Chief Information Officer, Karen Wrege.

Mr. Miller was pleased that all four DDTC Directorates (Licensing, Compliance, Policy and Management) were attending the Plenary. DDTC will schedule a follow-up meeting with the DTAG leadership to review the topics and recommendations presented today.

Update on Personnel

Mr. Miller provided an update on recent personnel changes to include reminding the audience of the leadership change with Assistance Secretary for Political-Military Affairs, R. Clarke Cooper now being in place. An announcement related to the Deputy Assistant Secretary for the Office of Regional Security and Arms Transfers (RSAT) is expected soon. Mr. Miller will remain in an acting capacity for the Directorate of Defense Trade Controls (DDTC) only. DDTC has hired a new Director of Management and is awaiting the start date for this individual. As announced, Under Secretary for Arms Control and International Security Andrea Thompson will be departing from the Department of State soon.

Policy Topics

The National Security Presidential Memorandum (SPM-10), which updated the U.S. Conventional Arms Transfer (CAT) Policy, and the corresponding 2018 Implementation Plan is operating in the background. There are 28 different taskings under the Implementation Plan which generates a lot of work for those that are supported by DDTC. Some of the efforts relating to these taskings include:

- The updates to ITAR § 126.4 is now complete;
- Another area of focus is the work to modernize the International Traffic in Arms Regulations (ITAR) and its U.S. Munitions List (USML). There will be another round of revisions to the ITAR coming soon (*additional details provided below*);
- Offsets is another focus area of the CAT Policy. DDTC has been supporting the U.S. Government Inter-Agency Offsets Working Group on this topic to discuss offsets and offset issues;
- The Department of State is also looking to expand financing options for exports, with a \$8 billion in foreign military financing assistance fund requested;
- In addition, to help keep the U.S.’s foreign allies’ priorities in focus, the Department of State is working with the Department of Defense (DOD) to identify country capabilities. There are additional interagency efforts on-going to expedite those priorities; and
- The Defense Security Cooperation Agency (DSCA) lowering its surcharge rates for FMS sales is an example of such efforts.

ITAR Updates

DDTC believes the recent update of § 126.4 is important to the U.S.’s partners and allies. It allows for expanded capability to include permanent exports and adds coverage for contractors

participating in international arrangements. The updates to § 126.4 occurred about 6 months ago. DDTC will look at the data to see how it is being used and hopes to be able to gauge its impact on industry.

DDTC is conducting an ongoing review of the USML. Categories IV and XV are being discussed with interagency stakeholders. USML Cat XVI is under consideration. There will be two sets of reviews for USML Categories V, X and XI as well as VI, VII, VIII and XX. Recent modifications to USML Category XI(d) for military electronics edited the controls over certain software and lower level capable radars.

DDTC is also working on the on-going “ITAR Reorganization”. The first notice related to reorganizing the ITAR went to the Office of Management and Budget (OMB) and is going through inter-agency review. The reorganization will be in phases. The first will address Part 120 and consolidate definitions into one part of the ITAR. The second rule will address Parts 123, 124, and 125. That rule will address the updates to the licensing processes to accommodate the future licensing one-form. The changes will also integrate aspects of the Agreement Guidelines into the ITAR. This will result in shortening the Agreements Guidelines a bit. The second rule will also consolidate the license exemptions, which currently appear in different parts of the ITAR. A third phase of the reorganization will be to address Parts 122 and 127.

DDTC is also working on an “end-to-end encryption” rule similar to the provision found in the Department of Commerce’s Export Administration Regulations (EAR) rule. This encryption rule will address the storage of unclassified data and what constitutes an export when in electronic form. DDTC recognizes that industry would like these rules to be harmonized.

DDTC Offices

Defense Trade Controls Licensing (DTCL) is working on improving internal processes for licensing. It is creating guidance for licensing officers and undertaking the review of cases that were returned without action (RWA) to identify consistency in the reasons for the RWA as well as with provisos to insure consistency. Many areas can be automated; however, adjudicating licenses requires human analysis which cannot be automated.

Defense Trade Controls Compliance (DTCC) has seen a steady increase in registrants. It is working through pending voluntary disclosures; roughly 440 voluntary disclosures have been filed this year. DTCC recently concluded an administrative settlement with Darling Industry, Inc. In addition, this week the Consent Agreement involving L3Harris Technologies, Inc. was published. All the settlements are viewed as an important part of DDTC’s role to strengthen the U.S.

A debarment announcement covering several individuals was published earlier this year. Mr. Miller indicated that this type of announcement is expected to continue in the future.

Defense Export Control and Compliance System (DECCS)

DDTC is making progress in launching DECCS. Mr. Miller expressed his pleasure with the efforts with DECCS which will ultimately allow industry to work with DDTC through a single

portal. Testing of the system is on-going. Mr. Miller asked that Ms. Karen Wrege, DDTC's Chief Information Officer say a few words on the progress of launching the system.

Ms. Wrege reported that the DECCS system is officially under testing with 15 companies starting this week. They are testing the licensing submission process and registration. Ms. Wrege noted the past work with DTAG on several topics, including the suggestion that DECCS allow companies to segregate employees/users and the licenses to which they can access. DECCS will allow the company's administrator to segregate employee users into different groups with different access controls.

Ms. Wrege also reported that testing starts tomorrow and lasts for 2 weeks. There will be another round of testing to address bugs identified during this initial testing period. Ms. Wrege reminded testers to only use test data for the testing period and not company data. The second round of testing will likely be held in November. Deployment is expected to be near December 31 but may be a few days off due to the nature of how software development and deployment works. Ms. Wrege thanked the DTAG for all their inputs to help with the implementation of DECCS.

Q&A Session:

- *Andrew Parr AT&T*, inquired about the comment by Mr. Miller regarding the pending notice with OMB and asked if it related to end-to-end encryption. *Mr. Miller response*, Correct.
- *Mr. Parr* continued and added a comment about the debarred parties notice referenced by Mr. Miller. He noted that sometimes there is no or little information about the individuals listed; therefore, there is no way to verify if a "Robert Anderson", for instance, is the same "Robert Anderson" on the debarred parties list or someone else. *Mr. Miller* allowed Jae Shin, DTCC Director to respond. *Mr. Shin response*, DDTC acknowledged the challenge and indicated that DDTC tries to track the listed individuals and provide as much information as possible when it is available.

Consent Agreements: Compliance Measures Working Group Presentation

Ms. Andrea Dynes introduced the Consent Agreements: Compliance Measures Working Group chaired by Mr. Daniel Perrone and Mr. Josh Fitzhugh. Mr. Fitzhugh was unable to attend the Plenary; Ms. Sarah Banco from the Working Group (WG) will support the presentation. A copy of the slide presentation can be found on the DDTC webpage (under the *About DDTC* tab, look for DTAG).

Background of the tasking:

- Consent Agreements entered by the State Department and Respondents outline remedial measures required to enhance compliance programs. State/DDTC seeks to enhance the effectiveness of remedial measures prescribed in Consent Agreements. Compliance remedial measures identified in Consent Agreements vary and often include appointment of a Special Compliance Officer (SCO) or Internal Special Compliance Officer (ISCO), classification reviews, institution of "cradle-to-grave" electronic export compliance tracking system, training, comprehensive audits, and onsite USG reviews.

The WG tasking summary:

- DDTC requests the DTAG to review Consent Agreements from the past eight years and identify additional compliance remedial measures and/or areas for possible improvement to compliance programs.

Key items discussed:

- Mr. Perrone acknowledged this was an incredibly substantial subject. The WG was made up of industry representation and counsel that had worked at several companies previously under Consent Agreement.
- Mr. Perrone provided the audience with the methodology and approach of the WG. The WG reviewed Consent Agreements from the last 8 years (15). From this review, the WG identified six generally consistent areas of remedial actions. The WG did not review those Consent Agreements that were fines only as they did not have remedial actions.
- The WG broke into 6 subteams to review each element of the Consent Agreements and discussed the intent and the implementation of the Consent Agreement to analyze whether it accomplished what DDTC intended. Each subteam was asked to:
 - Review remedial actions;
 - Investigate and make determinations of effectiveness; and
 - Identify areas of opportunity.
- 6 remedial action areas:
 - Audit
 - Internal “Lookback” Reviews
 - Program Enhancement
 - Automation
 - Monitorships
 - Onsite Reviews (DDTC onsite reviews)
- Areas not reviewed (length of the Consent Agreement, the size of the fine, the status reports submitted to DDTC, and resource reviews)
 - These details were recognized as part of the internal negotiation between the company and DDTC and the DTAG did not have sufficient insight into these areas. Therefore, the WG will not speak about these subjects.
- Also noted was the L3Harris Consent Agreement that was released the week of the plenary. It was not reviewed as part of this effort.
- Key themes addressed by the WG
 - The WG focus was to make sure all the parts of the Consent Agreement fit and worked together to generate the DDTC desired outcome.
 - Each company is unique and that global trade programs are most effective when they fit the company size, business model and make-up.
 - Ultimately, finding a balance between a ‘boiling the ocean’ approach and the understanding that the Department doesn’t know what it doesn’t know when they enter a Consent Agreement is the desired outcome of the WG.
 - Throughout the presentation, the WG provided recommendations for DDTC to help drive the right balance with each respondent company under a Consent Agreement.
 - The themes that emerged from the WG’s review resulted in recommendations:

- Updating existing DDTC compliance program guidance to more practically describe ITAR requirements and acknowledge a risk-based approach.
 - Providing specific guidance on remedial actions to the appropriate persons, such as monitors, audits/auditors, and onsite reviews for greater transparency, targeted implementation, and efficiency.
 - Connecting remedial actions to failures that brought about the CA or prevent violations that may result from specific weaknesses identified leading up to the CA.
 - Viewing remedial actions holistically to ensure they align and are collectively achievable.
- Mr. Perrone and Ms. Banco went through each of the remedial action areas in more detail.

Remedial Action Area 1 - Audit:

- The WG discovered that most Consent Agreements have an audit requirement; with most requiring 2 audits. The language surrounding the audit requirement was relatively standard.
- The time frames associated with the audit(s) varies but generally, DDTC requires an audit within the first 6 months of the Consent Agreement.
- It was further noted by the WG that the findings of the audits and any recommendations for improvements had to be approved by DDTC.
- Opportunities for improvement and recommendations:
 - Establish guidelines to standardize audit expectations. Details on what an audit should cover and how to select the auditor.
 - Establish guidance for the auditors themselves on the audit requirements. Some companies picked an auditor who was not best suited for the audit scope.
 - Allow for more time to develop the audit plan and do the first audit; 6 months is not enough time.
 - Focus on major areas of improvement for the company, keeping it to a smaller number of substantive recommendations to focus on for improvement; moving forward rather than backward-looking fixes.
 - Bring company leadership into the discussion on changes they want to achieve for their company.

Remedial Action Area 2 – Internal “Lookback” Reviews:

- 10 out of the 15 Consent Agreements reviewed had a “lookback” requirement. The scopes varied. Six had “classification” and six had “internal resource” reviews. One required “expenditure” review. One required “export process” review.
- The classification reviews varied in scope; the scope of all others was standard.
- It appeared unclear how those classification reviews aligned with the charging letter. On its face, the “lookback” scope was not clear.
- Consent Agreements do not dictate a methodology for the “lookback” reviews. Makes “success” unnecessarily subjective and drives the appearance that the reviews are largely punitive in nature.

- While an appropriate scoped “lookback” review could clearly establish a baseline for ‘way forward’ expectations for long term compliance posture, a non-transparent, broad brush approach that doesn’t seem to align to root cause of failures simply takes away critical resources from arguably more important Consent Agreement tasks.
- Opportunities for improvement and recommendations:
 - Include additional detail in Consent Agreements that could inform industry on best practices/expectations. Limited detail in Consent Agreements does not reveal whether or legal obligation drives the positive outcomes of Consent Agreements.
 - Map findings, root cause, and corrective actions and then use the map to develop remedial actions, including “lookback” reviews.
 - Use lookback reviews to establish baseline for ‘way forward’ expectations for long term compliance posture.

Remedial Action Area 3 – Program Enhancement:

- Consent Agreements generally have template language that require the respondent to implement “strengthened” compliance policies and procedures within 12 months. The WG questioned the meaning of “strengthened” and whether the 12 months’ time period was practical.
 - No concrete guidance exists from DDTC regarding the types of actions would satisfy the requirement and no clear understanding as to whether the company’s policies were reviewed prior to assigning the remedial action (e.g. direct root cause of a failure to a poorly worded policy).
 - While new policies could likely be published in 12 months, the deployment and implementation of policies could take substantially longer (i.e. what is the intent of DDTC and what does success mean?)
- Opportunities for improvement and recommendations:
 - Consider publishing refined guidance standards on what makes an effective compliance program. Is there potential to align/draw from BIS’s Guidance, OFAC’s Compliance Framework, DOJ’s Guidance on Evaluating Corporate Compliance Programs, etc.?
 - Tie the program enhancements to specific systemic issues that gave rise to the violation(s) and standards in USG guidance that need strengthening. Have conversations with the companies on the issues that arose under the Consent Agreement and exactly what DDTC wants them to focus on and be improved.
 - The 12-month deadline could be extended or parsed into stages.
 - It takes time for companies to digest all remedial measures, direct the first necessary actions, and begin program enhancement. While policies could be drafted in a vacuum, the better process would be to understand where failures occurred and make policies (and other instructions) that fit business process where appropriate.

Remedial Action Area 4 - Automation:

- Not every Consent Agreement included a requirement to establish an Automated Export System. However, when it was required, the language was relatively consistent.

- The inclusion of the Automated Export System requirement did not always seem related to the violations identified in the Consent Agreement.
- Two main permutations of focus were either (1) export life cycle review process and recordkeeping, or (2) access to technical data and the ability to restrict access.
- Automation is an effective tool to drive compliance; however, a one-size fits all approach does not work – innumerable company dependencies will drive where automation is possible and practical and what tools are best utilized.
- Opportunities for improvement and recommendations:
 - Consider mandating a set of requirements based on the company’s charging letter given that a one-size fits all approach is unlikely to be implemented evenly.
 - The Department should acknowledge that automation decisions are driven by numerous factors such as company size, structure, collaboration needs, and business complexity.
 - Tie the automation to specific systemic issues (rather than one-offs) given the time and cost of implementing automation, acknowledging a risk-based approach on business factors is ultimately going to drive where and how a company should automate. The cost of automation implementation can be prohibitive. When specifically tied to a systemic issue and therefore mandated by the Department the cost of implementation should be deducted in full from the penalty.

Remedial Action Area 5 - Monitorship:

- The WG understood that the experience of the Monitors is diverse, and this has led to significantly different Monitor-company relationships, what the Monitor’s perceived remit is, and ultimately varied outcomes in program implementation and overall effectiveness of the Monitorship.
- Opportunities for improvement and recommendations:
 - Establish guidelines to standardize Monitor responsibilities and function. These would not necessarily be required for each Monitor but instead be taken into account when choosing a Monitor in line with the company size, structure, and failures that led to the Consent Agreement. A one-size fits all approach is unnecessary with regard to Monitorships.
 - Monitors should focus on the cultural aspects of the company rather than specific legal or regulatory areas – these are already often covered through mandated audits, assessments, staffing requirements, and DDTC interaction.
 - To that end, it is critically important that the Monitor demonstrate their ability to understand the company’s structure and their mandate to drive long term compliance posture.
 - It would be helpful if Monitors have knowledge of company business (i.e. software development, unmanned, space) as these can drive what compliance solutions are best implemented and how to approach cultural change.

Remedial Action Area 6 – Onsite Reviews:

- All but one Consent Agreement had the requirement for an onsite review.
- In almost all Consent Agreements, the onsite visits by DDTC were mandated as well as two outside audits, several SCO/ICO audits and actions, and other external requirements.

- Any expectations of those visits upfront would be helpful. What is it that DDTC is trying to get from these visits?
- The WG emphasized that managing audits, working the Consent Agreement deliverables, conducting a resource review, and “lookback” review all while doing the daily business of the company can be a challenge.
 - The WG appreciates that DDTC should meet with the company during the Consent Agreement but understanding the objective of the meeting and how it fits into all the other ongoing activities is critical to ensuring the company is allocating appropriate resources to all activities.
- Opportunities for improvement and recommendations:
 - Better understanding of DDTC expectations for visit vs the outside audit, SCO presence, and ongoing reporting to DDTC.
 - Consider looking holistically at all outside requirements and limit to the extent required – appreciating the need for independent reviews, DTAG members who have gone through Consent Agreements experienced that innumerable hours are spent prepping for all outside interactions which could slow the overall program implementation, thus delaying the Department’s main objective of driving a strong long-term compliance posture.
 - Consider publishing a standard agenda for company visits, modified as necessary.
 - Consider DDTC representation at Director/DAS/AS level to focus agenda and provide standard messaging across visits and companies.

Recommendations by the WG

- The WG acknowledged that there is guidance on compliance programs published by DDTC already on their website; however, refining that guidance to clarify or expand on expectations (as described above) would be helpful.
 - Update existing DDTC compliance program guidance to more practically describe ITAR requirements and acknowledge a risk-based approach.
- Provide guidance on remedial actions, such as monitors, audits/auditors, and onsite reviews.
- Ensure each remedial action corrects failures that brought about the CA or prevent violations that may result from specific weaknesses identified leading up to the CA.
- Look at remedial actions holistically, ensure that they align and are forward-looking, and are collectively achievable with the goal of implementing a sustainable long-term compliance program at the company.

Ms. Dynes noted that effective compliance is becoming more “risk-based” in approach and that similarly DDTC’s Consent Agreements could be tailored in the future to be more reflective of such “risk-based” compliance approaches.

Questions posed to the Consent Agreements: Compliance Measures Working Group.

- *Ms. Marissa Cloutier, DDTC Compliance*, noted that many DTAG members have had experience with past Consent Agreements, and asked if the DTAG Working Group could share which DTAG members contributed to the recommendations by this Working Group. She noted that such information might help DDTC understand the perspectives of the recommendations if they knew which company provided the input. *Mr. Perrone*

Response, the DTAG will summarize that information in the Working Group’s White Paper. *Ms. Dynes Response*, DTAG recommendations are based on the experience of its current members, as the DTAG is unable to query parties outside the DTAG for information given the functioning limitations on the DTAG.

DTAG moved for a vote of approval of the presentation, the vote passed unanimously.

The Consent Agreements: Compliance Measures Working Group “White Paper” will expand on the presentation and will be made available on the DDTC website (under the *About DDTC* tab, look for DTAG).

DDTC Authorizations Involving Third Party Technical Data/Proprietary Data Working Group Presentation

Ms. Andrea Dynes introduced the DDTC Authorizations Involving Third Party Technical Data/Proprietary Data Working Group chaired by Ms. Michelle Avallone and Ms. Cynthia Keefer. A copy of the slide presentation can be found on the DDTC webpage (under the About DDTC tab, look for DTAG).

Background of the tasking:

- Some export and re-export authorization requests may involve proprietary data originating or sourced from a third party. Absent evidence that the third party is aware of the request and concurs with the export or re-export of its technical data/proprietary data, DDTC has sometimes included the following proviso on approved authorizations: “Prior to export, the applicant must upload a letter to the case file signed by an empowered official certifying that the source/originator of the proprietary technical data has concurred in its release by the applicant to the foreign parties on this license.”

The Working Group tasking summary:

DDTC requests the DTAG to:

- (1) evaluate the above approach and proviso language, provide industry perceptions/problems, and where appropriate make recommendations for improvements;
- (2) provide any concerns industry has with other parties exporting or re-exporting their technical data or intellectual property without their knowledge; and
- (3) provide advice on whether the Department should refrain from imposing additional requirements associated with the export/re-export of third party IP, and for non-agreement license and retransfer requests use something similar to the language in ITAR § 124.8(a)(3) which provides: “No liability will be incurred by or attributed to the U.S. Government in connection with any possible infringement of privately owned patent or proprietary rights, either domestic or foreign, by reason of the U.S. Government's approval of this agreement.”

Key items discussed:

- This was a fairly large Working Group (WG) that included large and small companies, law firms and universities. The task was broken down and the WG split into 3 subgroups,

each of which focused on one of the 3 subtasks under the tasking. This was a Catherine Hamilton, DDTC Director of Licensing tasking.

- The WG focused narrowly on the proviso and what should be expected if there is no evidence in the export submittal that the company has approval from the originator of the data to share its intellectual property (IP) with others.
- The WG recommendations are at the end of the presentation.

Sub Task 1 - Evaluate the above approach and proviso language, provide industry perceptions/problems, and where appropriate make recommendations for improvements.

- The WG identified several problems with the proviso language:
 - *“**Prior to export**, the applicant must upload **a letter** to the case file signed by an empowered official certifying that the source/originator of the proprietary technical data has concurred in its release by the applicant to the foreign parties on this license.”*
- The WG parsed the language in the proviso and identified certain phrases in the proviso language deemed to be problematic.
- Some of the problems identified resulted from ambiguity in the proviso language.
- The WG worked through the proviso phrase by phrase.
- **“Prior to the Export”**
 - As currently written, if documentation is unavailable, a party may not be able to export/re-export under the authorization.
 - This raised concerns. If a company is not able to gather all the documentation to show that it has approval to release the third party IP or it takes time to gather this information, the company is not able to export under the authorization or may not be able to export within its original timeframe.
- **“A letter”**
 - This phrase raised quite a few questions and concerns. What does the letter have to say? What information is DDTC looking for? Is there a template letter available?
 - Can an Empowered Official (EO) simply state that a contractual document covers the release of approved data? Companies and universities include provisions in contracts which address the release of IP. Can a company attach the contract or is it enough for a company to state that a contract covers the IP sharing?
 - Does everyone need to provide a letter? How many EO letters are needed? One letter per supplier? One letter per license? One letter per country?
- **“Empowered Official”**
 - This also raised questions and concerns. First, the WG noted that this provision is outside the Empowered Official’s normal duties. That is a challenge and has an impact on the EO signing up to this proviso. Second, not all companies have Empowered Officials e.g., foreign parties. In cases where there is no EO, who should sign the letter?
 - Members of the WG interpreted this phrase differently. Some interpreted it as referring to the EO of the exporting company, while others thought the proviso referred to the EO of the supplier/third party company.
- **“Source/ originator of the proprietary technical data”**

- In many instances, a company's export involves a lot of IP and gathering the documentation from the myriad of suppliers is a big task. A defense article can include the IP of a few to several hundred suppliers.
- How far down the supply chain are exporters expected to go with respect to obtaining approvals? Direct contractors only? Subcontractors?
- **“Proprietary Technical Data”**
 - WG assumption: “proprietary technical data” = ITAR technical data.
 - Although this might be obvious, the WG wanted to make sure that everyone was aware of the WG's interpretation of propriety technical data.

The WG reviewed the language of the proviso and interpreted the proviso requirements differently with respect to what was needed to comply with the proviso.

Sub Task 2 - Provide any concerns industry has with other parties exporting or re-exporting their technical data or intellectual property without their knowledge.

- The WG had concerns related to the unauthorized transfer of IP.
- Unauthorized release of IP could create a new competitor or have a financial impact on a company/university.
 - Unauthorized releases of IP impact a company's bottom line.
 - The impact resulting from the unauthorized release of IP would be the same whether the proprietary technical data/IP were released to a U.S. or foreign party. Therefore, these concerns are broader than the export context.
 - With respect to releases of IP to foreign parties, the WG noted that there may be increased difficulty in enforcing contractual obligations against parties outside the U.S. When dealing with foreign release, there may be more costs to enforce IP provisions.
- **Existing Mechanism**: Industry/universities use contractual provisions to address concerns about unauthorized release of proprietary technical data/IP, and the use of these contractual provisions is widespread.

Sub Task 3 - Provide advice on whether the Department should refrain from imposing additional requirements associated with the export/re-export of third party IP, and for non-agreement license and retransfer requests use something similar to the language in ITAR 124.8(a)(4) which provides: *“No liability will be incurred by or attributed to the U.S. Government in connection with any possible infringement of privately owned patent or proprietary rights, either domestic or foreign, by reason of the U.S. Government's approval of this agreement.”*

- If the DDTC concern is unauthorized release of proprietary technical data/IP, legal remedies exist to address this issue (e.g., contractual provisions, enforceable non-disclosure agreements).
- If the DDTC concern is Government liability, a more effective approach may be to include a statement similar to §124.8(a)(4) in the export/ re-export authorization.
- This language can be used in lieu of the proviso.

Recommendations by the WG

Rather than impose a requirement using a proviso, the WG recommends that DDTC use an alternative option to address its concerns. Alternative options for DDTC to consider include:

- **General statement in the ITAR**
 - DDTC is already making alterations to the ITAR and may consider this a good time to make a change and highlight directly in the regulations that the USG is not liable for infringement of privately-owned patent or proprietary rights.
 - A possible location for the statement is §120.5
- **Statement similar to §124.8(a)(4) in the authorization**
 - Could be in “Conditions of Issuance” section.
 - This is the best option for re-export authorizations pursuant to a General Correspondence authorization. Getting foreign parties with no Empowered Official to sign is problematic and it becomes difficult to comply with the authorization.
- **Statement in registration letters**
 - Would serve as annual reminder that exporters are responsible for obtaining approvals from third parties prior to export.
 - DDTC is not liable for 3rd party IP transfer rights.

Questions posed to the DDTC Authorizations Involving Third Party Technical Data/Proprietary Working Group

- No questions posed.

DTAG moved for a vote of approval of the presentation, the vote passed unanimously.

The DDTC Authorizations Involving Third Party Technical Data/Proprietary Working Group “White Paper” will expand on the presentation and will be made available on the DDTC website (under the *About DDTC* tab, look for DTAG).

U.S. Industry Involvement in International Cooperative Programs Working Group Presentation

Ms. Dynes introduced the U.S. Industry Involvement in International Cooperative Programs Working Group chaired by Mr. Nate Bolin and Ms. Debbie Shaffer. A copy of the slide presentation can be found on the DDTC webpage (under the About DDTC tab, look for DTAG).

Background of tasking:

- International cooperative programs and other arrangements enable the exchange of technologies between U.S. government Departments/Agencies and foreign government entities. In many cases, these arrangements allow for partner nations to further share U.S. technologies obtained through the arrangement with their own national industrial base. While 126.4 provides some opportunity for U.S. industry to provide U.S. technology to the foreign government parties “at the direction of the USG,” there are no efficient mechanisms to allow parallel exchanges of technical data between the U.S. industrial base and the partner nations’ industrial base, and thus does not enable critical collaboration at the level where the technical work is being done.

The Working Group tasking summary:

DDTC requests the DTAG to

- (1) identify current challenges to participation in established international cooperative programs and other arrangements;
- (2) recommend potential solutions that would reduce licensing challenges and enhance collaboration among the industrial bases of the participating nations, while preserving the critical task of protecting U.S. technology; and
- (3) recommend where such solutions might be applied more specifically to a smaller set of companies, such as the Five Eyes.

Key items discussed:

- The Working Group (WG) started their work by reviewing the October 2018 DTAG tasking “Defense Trade Between Five Eyes Countries” recommendations (*prior DTAG presentation and white paper can be found on the DDTC website*).
- This prior work kicked off this WG’s efforts to look at opportunities to enhance operations with U.S. allies while reducing the overall licensing burden.
- Taking the concept of known companies within allies’ countries – a circle of trust – and going beyond the recommendations of last Fall.
- The recommendations the last Plenary provided included:
 - Establish an “authorized community” within Five Eyes
 - Create an Exemption (similar to UK OGEL) for exports to authorized community
 - Expand Canadian Exemption to include the United Kingdom, New Zealand and Australia
 - Create retransfer exemption among Five Eyes
- Since last Fall, DDTC published the revised § 126.4 exemption. It has been extremely helpful and is being utilized. This update is enabling many aspects of what the WG will be talking about today. Today’s presentation will build on this exemption’s utilization.
- The methodology utilized by the WG included an extensive review of existing U.S. and non-U.S. laws, practices, and arrangements for International cooperative programs (ICP) involving defense articles and defense services. They analyzed existing DoD and other U.S. agency programs for government sponsored ICPs. The WG examined requirements and limitations under the existing Arms Export Control Act (AECA) structure on what the USG can and cannot do. They reviewed and catalogued potentially relevant ITAR exemptions. Ultimately, they considered a range of options that would not require an amendment to the existing statute or significant changes to existing regulations.
- The WG also referred to key resources
 - [International Cooperation in Acquisition, Technology and Logistics \(IC in AT&L\) Handbook](#), Office of the Under Secretary of Defense for Acquisition, Technology & Logistics
 - Office of the Under Secretary of Defense for Acquisition and Sustainment [website](#)
 - Defense Institute of Security Cooperation Studies [Green Book](#)
 - Third-party studies, such as [research and analysis](#) by the Center for Strategic & International Studies

Tasking 1 - identify current challenges to participation in established international cooperative programs and other arrangements

A - Various existing ICPs provide a strong basis for defense article/defense service cooperation with U.S. allies

- But, the ICP framework is not being fully leveraged to minimize the ITAR licensing burden
 - If the USG and allied government(s) signatories to an ICP are already comfortable with the scope of work and participants, few additional specific ITAR approvals should be required. Agreements were negotiated are understood very well, which identifies known communities, but to add an additional licensing requirement seems unnecessary.
- There is also room to simplify the ITAR approval process for early-stage project work with close allies before an ICP is signed, such as in planning discussions and marketing/proof-of-concept studies. Early stages, difficult to craft the language of an agreement correctly where it could get approved by DDTC.
- ICPs may not always provide for close cooperation on business to business (B2B) or research institution projects, independent of government projects/RFPs. There is often an opportunity for collaboration amongst the industry partners that would require ITAR licensing and getting those in place can be problematic.

B - Issues surrounding new § 126.4 implementation

- Understanding of the new process and rules varies by agency, branch, department level, and within industry
- It is a new process, as such, the rules vary. They vary by agency and branch. Also within the various levels within the departments.
- Burden mainly on industry to try to initiate and “sell” the new exemption as a solution.

C - Limitations in the Arms Export Control Act

- Transfers of defense articles/services contemplated only under Section 38 license/other authorization or Section 38(j) exemption (bilateral agreement, Canada, Defense Trade Cooperation Treaty)
- Congressional notification requirements under Section 3(d)

Tasking 2 – recommend potential solutions that would reduce licensing challenges and enhance collaboration among the industrial bases of the participating nations, while preserving the critical task of protecting U.S. technology

- Below are the recommendations

A - State-led interagency effort to promote new Section § 126.4 by:

- If DDTC is not already doing this, or do more of this, promote the use of the exemption. By doing the below items.
- Educating agencies on best practices for the use of Section § 126.4 through FAQs and briefings to address the different interpretations on how the exemption is to be used and when.

- Conducting recurring “listening sessions” on an interagency basis and/or in cooperation with U.S. industry (such as via the DTAG) to learn what is/is not working with the new process.
- Prioritizing implementation of Section § 126.4 in cooperative projects between close U.S. allies.

B - Create a new exemption to enable transfers in furtherance of International Cooperative Project Arrangements (PAs) or U.S.-foreign ally MOUs (more on this subject presented below)

C - Authorize (via one or more general licenses) activities between U.S. and allied country industries that are routinely approved

D - Establish guidelines and a model ITAR agreement template for international B2B activities supporting allied defense cooperation

Recommendation for new exemption

- The WG identified the coverage of a new exemption of defense articles, technical data, or defense services in furtherance of PAs:
 - Pattern after 126.6(c)
 - Start with “Five Eyes” countries with current PAs or U.S.-foreign ally MOUs
 - Identified and approved industry communities
 - Key Parameters of this exemption:
 - Transfers limited to period of the agreement (PA or MOU)
 - Defense article, technical data, or defense service shall be specifically identified in the agreement
- This exemption will work for those agreements that are already in place. The export must take place during that agreement. The articles must be identified in the agreement.
- Similar to the FMS exemption utilizing the umbrella approval of the agreement as the basis for the export authorization.
- The WG will provide a redline version of the exemption to give DDTC language to consider.
- This would lessen the licensing burden on DDTC.

Tasking 3 – recommend where such solutions might be applied more specifically to a smaller set of companies, such as the Five Eyes

- Recommendations below

A - Develop a “Five Eyes-specific” ITAR authorization to support industry-to-industry collaboration

- Focus on fostering collaboration outside of a government contract
- Could cover early stage, B2B activities, and proposal development
- This goes back to the recommendation from last Fall of dealing with trusted entities.
- Work on existing projects or future projects with trusted allies.
- Key Assumptions

- A community of private sector participants in “Five Eyes” nations exists, and is well known to, and trusted by, the USG and Five Eyes partner governments
- Ultimate end-use must be for participating government(s) and industries within the Five Eyes
- Solution must be less burdensome/onerous than the licensing process

B - General License Option

- Create a General License similar to UK model.
- Look at existing activity that is routinely approved for allies and activity close to the U.S. goals; why not give a general license to allow for easier trade amongst the close knit community.
- Requires an authorization paradigm not currently in the ITAR.

C -Exemption Option

- Develop new ITAR exemption or expand an existing exemption. This is an exemption that would look like a lot like Strategic Trade Authorization (STA) under the EAR. Where there is a known community and known entities with a set list of technologies everyone is comfortable being shared amongst those identified.
- Rather than the many countries eligible under STA, it would limited to the Five Eyes.
- Subject to general requirements and restrictions of current ITAR exemptions (i.e., registration, eligibility requirements, recordkeeping, first-use reporting and §126.1 prohibitions)
- Requirement for an NDA signed by all participants and submitted with first-use notice

Conclusions

- More needs to be done to promote the understanding and use of existing ITAR exemptions, such as Section 126.4 for B2B and cooperative program activities
- The existing network of ICPs and close relationships between “Five Eyes” members provide all needed underpinnings for a general license or exemption for activities in furtherance of closer cooperation between “Five Eyes” countries at the industry and government levels
- Such a general license or exemption would also be readily applicable to other close U.S. allies outside the “Five Eyes” countries
- This Working Group’s White Paper will address these issues and conclusions in more detail and include recommendations and sample language for a Section 126.6(c)-like exemption

Questions posed to the U.S. Industry Involvement in International Cooperative Programs Working Group

- *Cody Varney, Technology Security Associates*, noted that her company is currently working for a NAVAIR program with Australia, a program that is trying to implement § 126.4. They have approached the Navy International Program Office (NIPO) to try to implement the exemption and were not able to get guidance. She endorsed and encouraged DDTC to conduct the outreach to the various agencies in DOD as recommended by the DTAG. She noted that issues exist in other agencies as well. For ICPs between the U.S. and Australia, the industry participants would benefit greatly from

an industry to industry exemption, especially to allow discussions during the R&D phase. Again, she reiterated and supported the DTAG's recommendation.

- *Roger Gross, Australian Embassy* supported the comments made by Ms. Varney.

DTAG moved for a vote of approval of the presentation, the vote passed unanimously.

The U.S. Industry Involvement in International Cooperative Programs Working Group "White Paper" will expand on the presentation and will be made available on the DDTC website (under the *About DDTC* tab, look for DTAG).

Wrap-Up and Concluding Remarks

Ms. Dynes led the **Wrap-Up** discussion.

October 25, 2019 is the deadline for additional Q&A by the public. Such comments should be sent to DTAG Recorder, Ms. Sandra Cross at sandra.cross@hii-co.com. Alternatively, additional questions or comments can be sent to DTAG@state.gov.

DDTC will publish the DTAG presentations, Plenary Meeting Minutes and White Papers on its website in short order.

Plenary Meeting concluded at 3:20 pm.

Meeting minutes recorded by Ms. Sandra Cross.

Approved on October 22, 2019 by:

Andrea Dynes
Chairman