DTAG "THIRD PARTY PROPRIETARY DATA" WORKING GROUP – WHITE PAPER

I. Introduction and Executive Summary

The Directorate of Defense Trade Controls (DDTC) tasked this Working Group as follows:

> *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."*
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> *DDTC requests the DTAG to:*
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> *(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)(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."*

The "Third Party Proprietary Data" Working Group members are listed below, with asterisks next to the names of the Working Group co-chairs:

Bryan Angvall	Independent Contractor
Michelle Avallone	Columbia University*
Bryce Bittner	Textron Inc.
Monica Chavez	Eaton US Holdings, Inc.
Giovanna Cinelli	Morgan Lewis & Bockius LLP
Gregory Creeser	ITC Strategies
Sandra Cross	Huntington Ingalls Industries
Melanie Fujiu	United Launch Alliance, LLC
Candace Goforth	Goforth Trade Advisors LLC
Jay Griffiths	Google LLC
Cynthia Keefer	BAE Systems, Inc.*
Mary Millsaps	Purdue University

Fran Marie Mulla	Moog, Inc.
Steven Pelak	Holland & Hart LLP
Kim Pritula	National Shooting Sports Foundation
Gretta Rowold	Langley Law Group

The key conclusions and recommendations from the Working Group's analysis are:

- The Working Group identified problematic language in the proviso, including ambiguous language that Working Group members interpreted differently. Without additional guidance from DDTC, it is unclear what exporters and re-exporters must do to comply with the proviso.
- Industry and universities are concerned about unauthorized releases of their proprietary technical data/ intellectual property. To address this concern, industry and universities regularly put in place enforceable non-disclosure agreements or include contractual provisions that address the release of intellectual property (including proprietary technical data). The use of such agreements or contractual provisions is widespread and, as a result, legal remedies exist to address unauthorized releases of intellectual property. Since mechanisms already exist to address the release of intellectual property, the Working Group concluded that inclusion of the proviso in export and re-export authorizations is redundant and unnecessary.
- In lieu of including the proviso in export and re-export authorizations, the Working Group recommends that DDTC use alternate options to address its concerns about the unauthorized release of proprietary technical data/ intellectual property. Preferred alternatives include:
  - inserting a general statement similar to §124.8(a)(4) in the ITAR, possibly in §120.5;
  - including a statement similar to §124.8(a)(4) in the Conditions of Issuance section of export and re-export authorizations;
  - including a statement in annual registration letters reminding exporters that they are responsible for obtaining any necessary approvals from third parties prior to exporting third party proprietary technical data/ intellectual property; and
  - posting web-based guidance and conducting additional outreach on this issue for the exporting community.

II. Methodology

The Working Group held weekly conference calls from late June through September, 2019. During the initial call, the Working Group reviewed the tasking and requested additional information from DDTC about the underlying concerns prompting its use of the proviso. The Working Group agreed that such information would help the Working Group focus its analysis and provide recommendations more responsive to DDTC's questions and concerns.

The Working Group then established three informal subgroups, each of which was assigned one of the three questions posed by DDTC. Each subgroup met to discuss their assigned question, identify issues specific to their question, and summarize their conclusions. After all

subgroups had met, the Working Group reconvened to discuss each subgroup's analysis and conclusions and to incorporate additional comments and viewpoints as necessary. In addition, once DDTC provided information regarding the underlying concerns prompting use of the proviso, the Working Group identified the key issues and conclusions it determined to be most responsive to DDTC's questions and concerns. The Working Group presented its analysis and conclusions to the wider DTAG on two separate occasions and incorporated the wider DTAG's comments and viewpoints into the final presentation.

The Working Group summarized the key issues and conclusions in a presentation which it presented to DDTC at the September 26th DTAG Plenary session.

III. Findings

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

The Working Group parsed the proviso language and identified certain problematic phrases in the proviso. The problematic language in the proviso is highlighted in bold and discussed in more detail below.

Proviso: *"**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."*

- **"Prior to the Export"**: If a party is unable to gather the required documentation to show that it has approval to release third party proprietary technical data, the party may not be able to export or re-export under its authorization, or it may be unable to export/ re-export within its planned time frame. As currently written, it is unclear whether a general contractual authorization to release or otherwise share a third party's intellectual property is sufficient to comply with the proviso. As a result, exporters/ re-exporters may seek more specific third party approvals addressing the export or re-export transaction at issue. Obtaining such approvals takes time, especially if the exporter/ re-exporter must seek approvals from multiple sources. In some cases, such as when the source/ originator of the proprietary technical data is defunct, obtaining such approvals will not be possible. If so, inclusion of the proviso puts exporters/ re-exporters at greater of risk of non-compliance even though they may have general or inferred approvals to release third party proprietary technical data from suppliers.
- **"A letter"**: A central concern regarding this phrase is that it is not clear what the letter must say or how many letters must be provided to comply with the proviso. Companies and universities include provisions in contracts that address the release of other parties' intellectual property. Is it sufficient for an Empowered Official to state that a contractual provision permits the release of the third party's proprietary technical data for certain end uses? Must the exporter/ re-exporter include the contractual language upon which it is relying for approval in the letter? Must the Empowered Official provide separate letters for each supplier, end user, or

destination country? Alternatively, if only one letter is required, will a general statement from the exporter/ re-exporter that it has obtained approvals from the sources/ originators of the proprietary technical data suffice, or must the letter include more detailed information regarding which third party intellectual property is to be released and/or the scope or form of the approval? Given the questions raised, the Working Group recommends that DDTC create a template letter(s) specifying the types and specificity of information required to comply with the proviso.

- **"Empowered Official"**: Members of the Working Group interpreted who this term referred to differently. Some interpreted this as referring to the exporter/ re-exporter's Empowered Official. Others, however, interpreted this as referring to the source/ originator's Empowered Official. Additional guidance from DDTC is needed to clarify which Empowered Official must sign the letter. In addition, the Working Group noted that contractual provisions involving intellectual property may be outside the scope of the Empowered Official's duties. This raises the question of whether the Empowered Official is the appropriate person within the company or university to sign such a letter. Finally, the Working Group noted that non-U.S. companies may not have Empowered Officials. In such cases, who should sign the letter?
- **"Source/ originator of the proprietary technical data"**: In many instances, a party's export/ re-export may involve proprietary technical data from several to several hundred suppliers. These suppliers, in turn, incorporate the proprietary technical data of other third parties into their products. Given the incorporation of third party proprietary technical data at different levels within the supply chain, how far down the supply chain are exporters/ re-exporters expected to go with respect to obtaining approvals? Are exporters/ re-exporters expected to obtain approvals from their direct suppliers only? Must the exporter/ re-exporter's direct suppliers provide documentation or otherwise confirm that they have approvals from their suppliers as well?
- **"Proprietary Technical Data"**: The use of "proprietary technical data" in the proviso raised questions because not all ITAR-controlled technical data is proprietary and not all proprietary technical data is ITAR-controlled. However, the Working Group agreed it is reasonable to assume that "proprietary technical data" means ITAR-controlled technical data for the purpose of this Tasking.

In sum, the Working Group concluded that the proviso language raised multiple questions that require clarification from DDTC. In certain cases, Working Group members interpreted the same language differently. As a result, it is unclear what exporters/ re-exporters must do and/or provide to DDTC in order 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.*

Industry and universities have concerns about the unauthorized release of their intellectual property. Unauthorized releases of intellectual property can negatively affect companies and universities by creating a new competitor in the market and reducing a company's profit or ability to recoup research and development costs. These impacts can be particularly

devastating to small businesses or businesses with undiversified product lines. The Working Group also noted that industry and university concerns about the unauthorized release of intellectual property are broader than the export/ re-export context. The negative impacts that arise from unauthorized releases of intellectual property may occur regardless of whether the unauthorized release is by or to a U.S. or foreign party. That being said, the Working Group agreed that, with respect to unauthorized releases of intellectual property by or to foreign parties, there may be increased difficulty and/or expense in enforcing legal remedies against parties outside the U.S.

As a result of these concerns, industry and universities use contractual provisions or other enforceable agreements, such as nondisclosure agreements, to address the release of their intellectual property. The use of contractual provisions and agreements to protect against the unauthorized release of a party's intellectual property is widespread. Since use of these contractual provisions and agreements is an existing and well-established mechanism to protect against the unauthorized release of intellectual property, the Working Group concluded that inclusion of the proviso in an export or re-export authorization is redundant and unnecessary.

- *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 DDTC's underlying concern prompting the use of this proviso is the unauthorized release of third party proprietary technical data, legal remedies already exist to address this issue, as noted above. As a result, the Working Group concluded that inclusion of the proviso in export or re-export authorizations is not necessary.

Alternatively, if DDTC's underlying concern is the potential for the Government to be held liable for an exporter or re-exporter's unauthorized release of third party proprietary technical data, the Working Group concluded that a more effective approach than using the proviso is to include a statement similar to §124.8(a)(4) in the export/ re-export authorization. Since §124.8(a)(4) is already being used in agreements, including a similar statement in licenses and other authorizations should also be sufficient to address this concern in non-agreement authorizations.

IV. Recommendations

Rather than impose a requirement through the use of a proviso, the Working Group recommends that DDTC use an alternate option to address its concerns. Preferred alternatives include the following:

- **General statement in the ITAR**: As part of DDTC's current "ITAR Reorganization" review, insert a general statement similar to §124.8(a)(4) in the regulations. A possible location for the statement is §120.5.
- **Statement similar to §124.8(a)(4) in the export/ re-export authorization**: A statement similar to that in §124.8(a)(4) could be included in the "Conditions of Issuance" section of an export or re-export authorization. This is the best option for re-export authorizations pursuant to a General Correspondence authorization.
- **Statement in registration letters**: Include a statement in registration letters notifying exporters that they are responsible for obtaining any necessary approvals from third parties prior to exporting third party proprietary technical data. Since registration letters are sent out each year, this statement would also serve as an annual reminder to exporters of this responsibility.
- **Web-based guidance and outreach**: If the DDTC is concerned that certain companies might misconstrue an export or re-export authorization to also include Government authority to release a third party's proprietary technical data, the DDTC should consider providing additional guidance on this issue on its website as well as increasing its outreach and training to the exporting community.