

# Defense Trade Advisory Group

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## **WORKING GROUP 4 COMMON CARRIER DEFINITION**

Plenary Session

October 25, 2018



# Agenda

- Working Group Members
- Task Description
- Issues/Practices
- Research
- DDTC Specific Questions
- Recommendations
- Questions



# Working Group 4 Members

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- **Gregory Creeser – Chair** - ITC Strategies
- **Alexis Mitchell** - Lockheed Martin Corporation
- **Dan Perrone** - Raytheon Company
- **Kim Pritula** - National Shooting Sports Foundation
- **Debbie Shaffer** - L3 Integrated Systems



# Task Description

- Several US regulations and international standards currently define the term, “**common carrier**”, within the international trade community generally as a legal term that refers to carriers who offer transport services to the general consumer or public business.
- The Federal Aviation Administration and the international terms found in INCOTERMS provide a baseline and coordinated standard for defining the term.



# Task Description – cont'd

From DDTC's perspective:

1. Is a standard definition of "Common Carrier" required?
2. If not required, is it useful in the licensing process?
3. What are the advantages and disadvantages of using a standard definition?
4. Please provide a proposed definition of Common Carrier.



# What are the Issues?

- Currently confusion exists regarding who needs to be listed/identified on a DDTC license or General Correspondence (GC) request (collectively referred to as a “**DDTC Authorization**”) from a transportation perspective.
- Who can/can’t handle/move Defense Articles if they are not identified on a DDTC Authorization?
- Transportation process can be extremely complex involving numerous parties – some are on DDTC authorizations, some are not.



# Law and Regulation – AECA & ITAR

- AECA

22 USC § 2778(g)(2) The President shall require that each applicant for a license to export an item on the United States Munitions List **identify in the application all consignees and freight forwarders involved in the proposed export**

22 USC § 2778(g)(9)(D) the term “**party to the export**” means—

(i) the president, the chief executive officer, and other senior officers of the license applicant;

(ii) the **freight forwarders or designated exporting agent of the license application**; and

(iii) any **consignee** or end user of any item to be exported

- ITAR 126.7(e)(2)

Special Definition. For purposes of this subchapter, the term “party to the export” means:...

(2) The **freight forwarders or designated exporting agent of the applicant**;

(3) any **consignee** or end-user of any of the items being exported



# Current Guidance - DDTC Licenses

- DSP-5
  - Block 18: “...do not include banks or **common carriers** unless they are involved in the transaction (e.g., brokering...or the Letter of Credit specifies that the bill of lading state that they are a party to the transaction...”
  - Block 21: “A U.S. consignor and/or freight forwarder...will participate in the delivery to...common carrier...”
- DSP-61
  - Blocks 20 and 22: Do not include...**common carriers** unless there is a bill of lading involved that specified “To order of the...carrier.”
- DSP-73
  - Block 18: “...do not include banks or **common carriers** unless they are involved in the transaction (e.g., brokering...or the Letter of Credit specifies that the bill of lading state that they are a party to the transaction...”
  - Block 21: “When...delivering...directly to a common carrier...enter “Same as Block 5.” (Applicant)





# Current Practices/Concerns

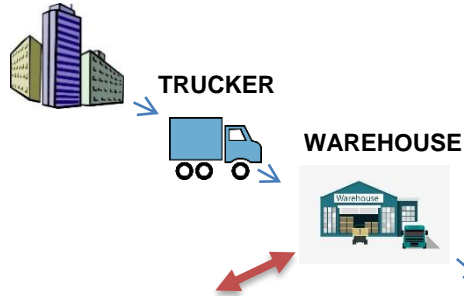
- Verbal guidance is consistently given that “common carriers” do not need to be identified/listed on DDTC Authorizations.
- Existing written guidance is inconsistent/conflicting.
- Voluntary Disclosures have been filed for omission of common carriers.
- Independent Auditors have issued “findings” when common carriers are not on a DDTC Authorization.
- U.S. Customs has required common carriers be added to licenses

What is a common carrier? No existing definition.



# Transportation Complexity

EXPORTER

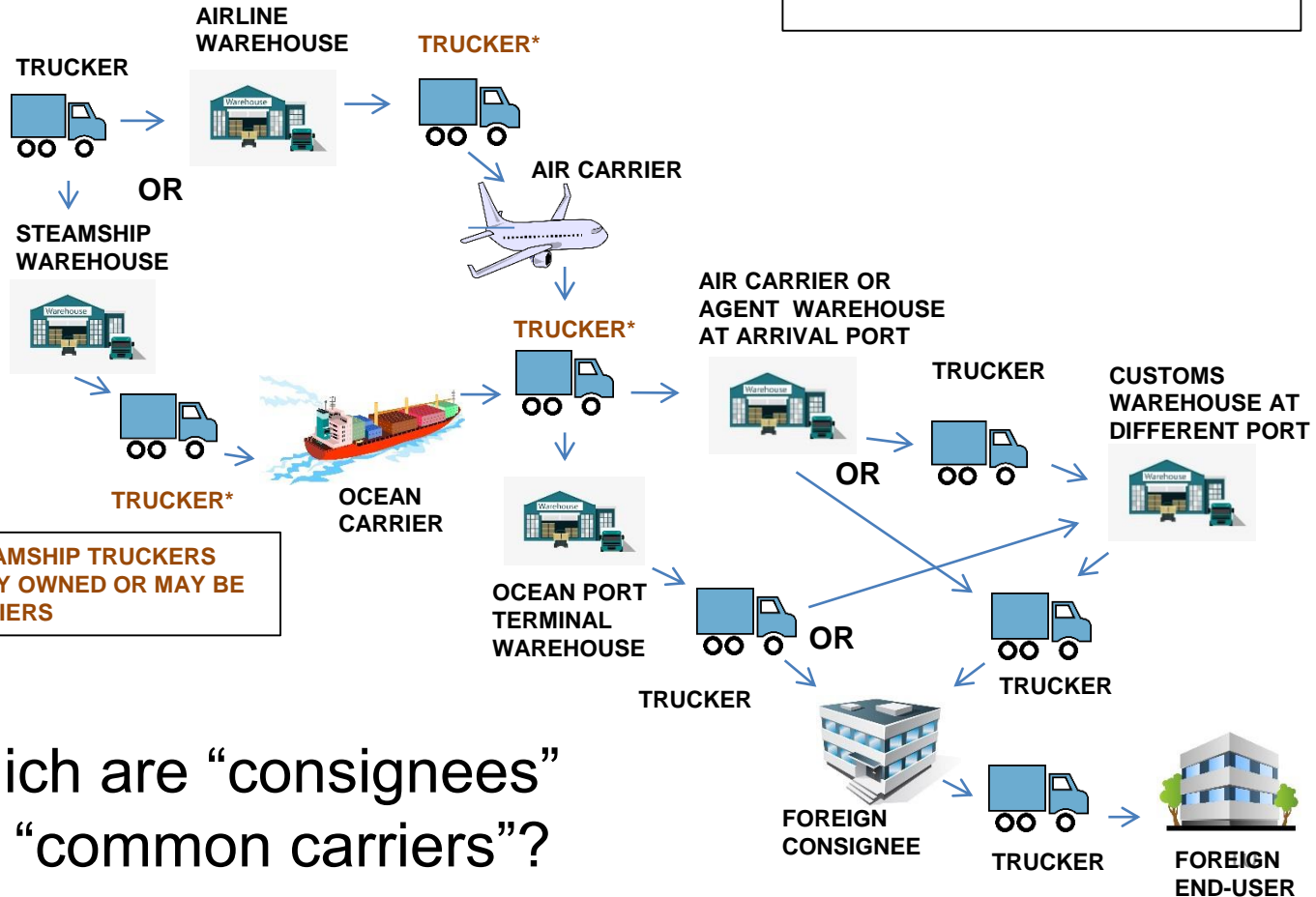


**Other potential issues:**

- USPS as export carrier
- Post delivery transfers or re-transfers – which parties to be listed on authorization?

**TO:**

- Freight Forwarder (FF) Warehouse
- FF Contracted Warehouse
- Consolidation Warehouse
- 3<sup>RD</sup> Party Logistics Co.



**\*AIRLINE OR STEAMSHIP TRUCKERS MAY BE COMPANY OWNED OR MAY BE CONTRACT CARRIERS**

Question: Which are “consignees” and which are “common carriers”?



# Research Approach

- Discussed DTAG Initial Understanding of DDTC Concern
- Reviewed and Identified Existing Published Definitions for Carrier
  - U.S. Code, Code of Federal Regulations, Agency Forms Instructions, Guidelines, Manuals, etc.
  - Advisory Opinions from DTAG Membership
  - Non USG - Open Sources
- Queried DTAG Membership Experience with DDTC Verbal Guidance
- Requested Clarification from DDTC on Reasoning for Tasking and Intended use of the Definition
- Discussed Definitions of Related Terminology (*e.g. Freight Forwarder, Intermediate Consignee*)
- Collaborated to Address the Four Questions posed by DDTC



# Sources Researched

## **AECA (22 USC § 2778)**

- Refers to Freight Forwarders and exporting agents for the applicant

## **International Traffic in Arms Regulations (22 C.F.R. 120-130)**

- Mirrors AECA and references but does not have definition of “Carrier”
- Department of State license instructions or guidelines use the term but do not include a definition

## **Export Administration Regulations (15 C.F.R. 730-780)**

- Defines “*Exporting carrier*”
- Reviewed BIS Advisor Opinions defining Intermediate Consignee and related shipment roles

## **National Industrial Security Program Operating Manual (DoDM 5220.00)**

- Includes a definition of “*Cleared Commercial Carrier*”

## **Security Assistance Management Manual (DoDM 5105.38)**

- Includes a definition of “*Carrier*”



# Sources Researched

**Federal Acquisition Regulations System** (*48 C.F.R. 47.401*)

Defines “U.S.-flag air carrier”

**Federal Aviation Administration** (*Advisory Circular 120-12A*)

Defines and differentiates “Private Carriage” from “Common Carriage”

**Incoterms** (*International Chamber of Commerce*)

Defines “Carrier”

**Interstate Transportation** (*49 U.S.C. 13102(8)*)

Provides a definition for “Carrier”

**Black’s Law Dictionary** (*10<sup>th</sup> Ed. 2014*)

Provides a definition for “Common Carrier” and “Freight Forwarder”

**Business Dictionary** (*Webfinance Inc. 2018*)

Provides definition of “Common Carrier” and “Consignee”

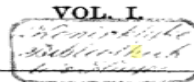


# Common Carrier: Steeped in History

A  
**LAW DICTIONARY,**  
ADAPTED TO THE  
CONSTITUTION AND LAWS  
OF THE  
**UNITED STATES OF AMERICA,**  
AND OF THE  
*Several States of the American Union:*  
WITH REFERENCES TO THE CIVIL AND OTHER SYSTEMS OF  
FOREIGN LAW.  
TO WHICH IS ADDED  
KELHAM'S DICTIONARY OF THE NORMAN AND OLD FRENCH LANGUAGE.  
By **JOHN BOUVIER.**

*Ignorantia terminis ignoratur et ars.—Co. Litt. 2 a.  
Je sais que chaque science et chaque art a ses termes propres, inconnu au commun des hommes.—FLEURY.*

ELEVENTH EDITION, REVISED, IMPROVED, AND GREATLY ENLARGED.



PHILADELPHIA.



# Comic Relief - Common Carrier: 1800's

“One who undertakes for hire or reward to transport the goods of any who may choose to employ him, from place to place.

Duties include:

- Provide careful drivers of reasonable skill and good habits for the journey; **and employ horses which are steady and not vicious, or likely to endanger the safety of the passengers.**

Rights include:

- Demand/receive fare. They have a lien on the baggage of the passenger for fare or passage, **but not on the person of the passenger or the clothes he has on.”**



# Specific DDTC Questions

1. Is a standard definition of “Common Carrier” required?
2. If not required, is it useful in the licensing process?
3. What are the advantages and disadvantages of using a standard definition?
4. Please provide a proposed definition of Common Carrier.



# 1. Is a Standard Definition of “Common Carrier” Required?



## 1. Is a Definition Required?

– If No:

- live with current ambiguity ...
- or an alternative\* - DTAG recommendation

– If Yes:

- what is a common carrier?

\*Alternative: Define who must be identified on a DDTC Authorization



## 2. If not required, is it useful in the licensing process?

May be useful in the licensing process only if it could clarify the existing ambiguity regarding who must be identified on a DDTC Authorization (from a transportation perspective).

And not complicate the current understanding.

In lieu of identifying which entities are required on a DDTC Authorization, a definition of “Common Carrier” would be useful.

### 3. What are the advantages and disadvantages of using a standard definition?



#### Advantages:

- If worded correctly, would clarify existing ambiguity in determining which parties to include in DDTC authorizations
- Resolve potential violations regarding when a transportation party involved in a transaction is not authorized

#### Disadvantages:

- May inadvertently include entities that do not need to be on a DDTC authorization
- May add confusion due to existence of several definitions in other regulations (e.g. SAMM, Defense Trade Treaties, EAR, NISPOM, FTR)
- May be contrary to commonly understood meaning of common carrier which may cause additional violations



## 4. Proposed definition of “Common Carrier”

Proposed standard definition of common carrier – if required:

*“For purposes of the ITAR, a common carrier is an entity that undertakes for hire to physically transport tangible articles (“the goods”) of any who may choose to employ them, from place to place, by any mode.*

*A common carrier is not an agent for the applicant (such as a Freight Forwarder); does not clear Customs on behalf of another (such as a Customs Broker); does not book transportation of the goods on behalf of another; and does not store the goods on behalf of another other than temporary storage necessary as the goods move through the transportation chain. A common carrier is not a consignee.”*



# DTAG Recommendations

1. Do not provide a definition of “common carrier”
2. Instead, provide a positive list of entities that are required to be included on DDTC Authorizations
3. Review and remove old guidance related to U.S. Consignors and Foreign Intermediate Consignees (and common carriers)
4. Provide new guidance regarding entities required on a DDTC Authorization
5. Consider some “Additional Options”

# Definition of Entities Required on a DDTTC Authorization



Stay within the existing law and regulation - “party to the export” means:...

- the **freight forwarders or designated exporting agent of the applicant;**
- any **consignee** or end-user of any of the items being exported

*“For purposes of inclusion on a U.S. Department of State export authorization for the export, reexport, retransfer or temporary export/import of defense articles identified on said license, the following transportation entities should be listed:*

- *The designated freight forwarder or transportation entity acting as an authorized agent for the DDTTC authorization applicant or U.S. Principal Party in Interest (USPPI).*
- *Any foreign intermediate consignee acting in a capacity beyond the mere carriage or transportation of goods.”*



# Additional Options

Remove the requirement to include Freight Forwarders and/or Customs Brokers on DDTC authorizations:

- Unless they are engaged in the transaction in a manner beyond the transportation and clearance of goods (i.e., integration, warehousing, etc..).

Rationale:

- When using an ITAR exemption, exporter can use any carrier
- Not including transportation parties on DTC authorizations does not increase risk of diversion
- BIS does not require “carriers” to be included:

“A freight forwarder or other common carrier that is only playing the role of *carrier* in the transaction would not meet the definition of intermediate consignee and therefore should not be listed on a BIS license application.”

**“The contract of carriage is not sufficient to establish that the carrier is acting as an agent for the principal party in interest for the purposes of the “intermediate consignee” definition.”**



# Additional Options

Create industry standard for “commercial movement of defense articles” and those (carrier/forwarder/broker) certified to meet that criteria are “approved”:

1. Identify requirements for physically carrying defense articles.  
“Authorized Carriers” not needed to be added to DDTC authorizations
2. Establish mutual recognition of an existing program, for example:
  1. U.S. Customs and Border Protection (CBP) Customs Trade Partnership Against Terrorism (CTPAT);
  2. European Commission’s Authorized Economic Operator – safety and security (AEOS);
  3. International Air Transport Association (IATA) Consignment Security Declaration (CSD) program; or
  4. DSS cleared freight forwarder;
  5. A set of standards combining requirements from the above authorizes the carrier.

GOAL: Industry books shipment with anyone who is authorized, and they will “reject” the load if they are not authorized to move it (similar to what happens today certain hazmat codes). To use non-authorized forwarders, exporter must continue to individually list those forwarders in applications in order to utilize them.

The forwarding/carrier industry is held to a standard to treat these products with the controls they require.





# How can this be implemented?

- Short term
  - Publish guidance on DDTC website
- Long Term
  - Revise guidelines for preparation DSP licenses
  - Revise D-Trade integrated help instructions
  - Amend ITAR to formalize



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Questions?

Thank you



# Sources Researched

## **AECA (22 USC § 2778)**

No Definition of Carrier or Air Carrier but references party to the export

## **International Traffic in Arms Regulations (22 C.F.R. 120-130)**

No Definition of Carrier or Air Carrier. ITAR References:123.25(b); 126.13(b)

No Definition in Department of State License Instruction or Guidelines

## **Export Administration Regulations (15 C.F.R. 730-780) Part 772 - Definition of Terms**

*Exporting carrier – “Any instrumentality of water, land, or air transportation by which an export is effected, including any domestic air carrier on which any cargo for export is laden or carried.”*

## **National Industrial Security Program Operating Manual (DoD 5220.00-M), Appendix C**

*Cleared Commercial Carrier – “A carrier authorized by law, regulatory body, or regulation to transport SECRET material and has been granted a SECRET facility clearance.”*

## **Security Assistance Management Manual (5105.38-M) Glossary**

*Carrier - “A military or commercial ship, aircraft, barge, train or truck, or a commercial transport company that moves material from one location to another.”*



# Sources Researched

## **Federal Acquisition Regulations System 48 CFR 47.401**

*“U.S.-flag air carrier means an air carrier holding a certificate under section 401 of the Federal Aviation Act of 1958”*

## **Federal Aviation Administration (*Advisory Circular 120-12A*)**

*“A carrier becomes a common carrier when it “holds itself out” to the public or to a segment of the public, as willing to furnish transportation within the limits of its facilities to any person who wants it.”*

## **Incoterms (*International Chamber of Commerce*)**

*“Carrier – For the purposes of Incoterms 2010 rules, the carrier is the party with whom the carriage is contracted.”*

## **Interstate Transportation 49 U.S.C. 13102(8).**

*Carrier – “The term “carrier” means a motor carrier, a water carrier, and a freight forwarder.”*



# Sources Researched

## **Black's Law Dictionary (10<sup>th</sup> Ed. 2014)**

*Common carrier: A commercial enterprise that holds itself out to the public as offering to transport freight or passengers for a fee. A common carrier is generally required by law to transport freight or passengers without refusal if the approved fare or charge is paid.*

*The definition cites to old sources: Robert Hutchison's A Treatise on the Law of Common Carriers (1882), and Thomas E. Holland's The Elements of Jurisprudence (13<sup>th</sup> Ed. 1924).*

*Freight forwarder: (1865) Maritime law. A person or company whose business is to receive and ship goods for others,. A freight forwarder may be an agent of the cargo's owner or of the carrier, or may be an independent contracting acting as a principal and assuming the carrier's responsibility for delivering the cargo. – Also termed third-party logistical service provider; forwarding agent.*

## **Business Dictionary (Webfinance Inc. 2018)**

*"Consignee" - A party (usually a buyer) named by the consignor (usually a seller) in transportation documents as the party to whose order a consignment will be delivered at the port of destination. The consignee is considered to be the owner of the consignment for the purpose of filing the customs declaration, and for paying duties and taxes. Formal ownership of the consignment, however, transfers to the consignee only upon payment of the seller's invoice in full.*

*"Common Carrier" for Transportation: 'For hire' transporter that (1) serves all customers without discrimination, (2) provides scheduled service to designated points or within a designated area, (3) carries only the type of cargo for which it is certified, and (4) is named as the carrier in the contract of carriage. See also contract carrier.*