# DTAG TASK 1:  ITAR UPDATE PRIORITIES
*November 2012*

## TASK

Evaluate fifteen (15) tasks identified by DDTC, and recommend the priority order in which they should be accomplished.  Provide rationale for the recommended priorities, taking into consideration the USG actions required to implement the new or revised regulatory change, as well as the current status of each task within the proposed rulemaking administrative process.   Given the U.S. Office of Management and Budget's (OMB) current position, only one proposed rulemaking action can be processed at a time.  DTAG may recommend tasks not already listed, with explanations and rationale for priority.

## WORKING GROUP MEMBERS

Marjorie Alquist – Lord Corporation
Bryon Angvall – Boeing Corp
Lisa Bencivenga – Lisa Bencivenga LLC
Ginger Carney – Global Connections
        Export Compliance
Greg Bourn - Finmeccanica
Dava Casoni – USC Inst for Creative Tech
Rebecca Conover – Intel Corp
Steve Cope – Avon
BJ Demery – Bell Helicopter
Kim DePew – GE Aviation
Barbara Dudas – Northrop Grumman
Andrea Dynes – General Dynamics
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Dana Goodwin – Trade Link Systems
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Christine McGinn – Interglobal Trade
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Beth Mersch – Northrop Grumman
Mike Miller – Univ of Central Florida
Terry Otis – Otis Associates LLC
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Bill Schneider – Internat'l Planning Svcs
George Sevier – Sam Sevier LLC
Olga Torres – Holland and Knight
William Wade - Consultant
Bruce Weinrod – Nat'l Defense Univ

## METHODOLOGY

DTAG formed a Working Group (WG) to assess each task provided by DDTC.  The WG reviewed the tasks and discussed the parameters and methods for setting the priorities.

It was agreed that each task would be rated with a High, Medium, or Low priority by each member of the working group.  That priority would be based on benefit to USG, benefit to industry, while accounting for the extent of the progress already made on the task.

Given the USG's resource limitations, the WG decided only to provide rationale for the top seven tasks on the list.  The WG believes that by the time the USG accomplishes the first seven tasks, priorities on the remaining tasks may have changed, and new tasks may need to be added to the list, thus requiring further prioritization.

The WG briefly discussed additional items that DDTC should consider with respect to new proposed rulemakings to the ITAR.

## PRIORITIZATION OF TASKS

As a result of the voting, the WG agreed to the following prioritization for the task list provided by DDTC:

1. Brokering update*
2. Revised definition of defense services*
3. New definitions for levels of maintenance*
4. Revised definition of public domain*
5. New exemption for replacement parts*
6. Revised definition of technical data
7. License exemption for certain defense articles incorporated into commercial end-items*
8. Updated "by and for" the USG exemption
9. Revise exemptions referring to transshipments
10. Elimination of foreign party signature requirement on TAAs
11. Clarification of records maintenance requirement
12. Revise temporary import license requirements to apply only for those items that are on the USMIL
13. Development of a single form for use by all agencies for the export applications
14. USG program licenses
15. Australia Defense Trade Cooperation Treaty implementation regulations*

**Note:** Task identified above by an asterisk (*) have entered the rule making process (e.g., structured and informal discussion with DTAG; Notice of Proposed Rulemaking published in the Federal register, etc.).

The WG's rationale for the first seven tasks is shown in the following table:

| TASK | LEVEL OF EFFORT | BENEFIT TO USG | BENEFIT TO INDUSTRY/ ACADEMIA |
|------|-----------------|----------------|-------------------------------|
| 1. Brokering update (*proposed) | Task already underway at the administration | Clarity of definition leads to fewer ITAR violations and fewer voluntary disclosures. This may also lead to fewer registrations and fewer applications, freeing up USG time for more complex export compliance issues. Furthers USG goal of interoperability with foreign partners and increases transparency (goals of Export Control Reform). | Clarity of definition leads to fewer ITAR violations and fewer voluntary disclosures. This may also lead to fewer licenseable activities, and improve industry's ability to operate in an international market. |

| TASK | LEVEL OF EFFORT | BENEFIT TO USG | BENEFIT TO INDUSTRY/ ACADEMIA |
|---|---|---|---|
| 2. Revised definition of defense services | Task already underway at OMB | Clarity of definition leads to fewer ITAR violations and fewer voluntary disclosures. This may also lead to fewer licensable activities and fewer applications, freeing up USG time for more complex export compliance issues. Furthers USG goal of interoperability with foreign partners and increases ability to focus on true areas of concern. | Clarity of definition leads to fewer ITAR violations and fewer voluntary disclosures. This may also lead to fewer licensable activities, and increase industry's ability to sell abroad. A positive list identifies activities that are not defense services. |
| 3. New definitions for levels of maintenance | Task already underway at OMB | Clarity of definition leads to fewer ITAR violations and fewer voluntary disclosures. Furthers USG goal of interoperability with foreign partners. | Proposed defense service rule explicitly excludes "organizational-level maintenance" from the scope of defense services; new definition provides clarity throughout ITAR. Clarity of definition increases industry's ability to comply with ITAR. |
| 4. Revised definition of public domain | Task already underway at OMB | Clarity of definition leads to fewer ITAR violations and fewer voluntary disclosures. Immediate workload reduction for USG regulators processing non-essential license applications and the ability to focus resources on essential license applications in a more focused and time-advantaged processing environment. Companies and academia would have to exercise diligence in confirming that all data used in connection with the service is in fact in the "public domain" as defined by ITAR section 120.11. | The proposed definition reconciles diverse definitions contained in the ITAR and EAR. Since the proposed definition is joined directly to the proposed "defense services" definition, an activity that would otherwise qualify as a defense service under ITAR section 120.9(a)(1), that is based solely upon the use of public domain data, would not in fact constitute a defense service. Companies and academia would therefore not be required to obtain an export authorization (e.g., license, TAA or MLA) to provide such a service to a foreign person. |
| 5. New exemption for replacement parts | Task already underway at OMB | Eliminates duplicative work for the USG, as the USG typically have already approved the parts once as an appendix to a TAA and/or part of the overall system hardware license. Furthers USG goal of interoperability with foreign partners. | This would enhance industry's ability to support urgent parts requirements for allies supporting US coalition operations, thereby supporting interoperability goals. This will eliminate the administrative burden for industry to file repetitive licenses for hardware already authorized under an agreement, and will expedite the delivery cycle to customers, thus supporting allied partnership capacity. |
| 6. Revised definition of technical data | Significant amount of work, but finalized clear definition will help both USG and exporters. Good time to address this definition, as other definitions are being clarified | Furthers USG goal of interoperability with foreign partners, provides clarity in the regulations. | The benefits to the USG regulators, industry, and academia are similar to the benefits realized with the proposed definitions for defense services and public domain. A revised and harmonized definition would add clarity, enhance compliance, and thereby support ECR. |
| 7. License exemption for certain defense articles incorporated into commercial end-items | Task already underway at OMB | Furthers USG goal of interoperability with foreign partners. Lowers the licensing burden for USG. Limits ITAR coverage to where "diversion of the embedded defense article is a realistic and practical concern," thus supporting the ECR idea of focusing effort on greatest risk. Aligns with the Wassenaar treatment of such items. Ensures consistence with USG decisions on QRS-11 case and see-through rule. | The benefits to USG regulators, industry, and academia are similar to the benefits realized with the proposed definitions for defense services and public domain. This may also lead to fewer licenseable activities, and increase industry's ability to sell abroad. Also aligns with the Wassenaar treatment of such items allowing for more consistent treatment across trade regimes. Ensures consistence with USG decisions on QRS-11 case. |

# Additional Tasks

The WG proposes six topics as 'additional tasks'. These are areas where a dialogue between DTAG and DDTC is encouraged; perhaps these can be future DTAG task assignments. All are supportive of transparency in implementation of the regulations, measurability of compliance, and clarity of guidance, which are tenets of Export Control Reform.

| ISSUE | DISCUSSION | RECOMMENDATION |
|---|---|---|
| Harmonize updated definitions as they relate to each other in ITAR and EAR. Resolve overlapping, disconnected definitions | There is an overlap between public domain, defense services, fundamental research and technical data definitions. Lack of definitional clarity has led to differing interpretation of these definitions and the interplay of interpretations has a different impact on industry and institutions of higher learning and associated research labs. Taking a step back and looking at the definitions together to clarify their relationship and clean up inconsistencies pave the way for consistency in interpretation, implementation and compliance. | Ensure that definitions are harmonized and deconflicted before final publication. This will preclude multiple revisions of definitions and provide clarity. This increases transparency (a goal of Export Control Reform), and supports harmonization of EAR and ITAR. The WG believes that this task should be considered before the definitions go to final publication, even if the harmonization effort causes a delay in rule publication. |
| Electronic transmission of technical data; use of cloud storage | Electronic transmission of technical data and the use of cloud storage techniques for technical data are not covered in the ITAR. These issues need to be addressed, taking into consideration what electronic data falls under the purview of the ITAR, transmission networks (e.g., national and international), an understanding of cloud storage and cloud computing, and use cases/examples. Industry can provide practical, real-world examples and use cases. | DDTC can assist in review and definition of the issue (scope), provide the relevant definitions, use cases, and recommendations for consideration in the preparation of new guidance or regulation. |
| Reporting Requirements | Reporting requirements are interspersed throughout the ITAR. It would facilitate industry's ability to report properly if the requirements were also consolidated in a single location. | Consolidate reporting requirements into one guidebook. This increases transparency (a goal of Export Control Reform), and supports harmonization of reporting requirements in the ITAR. |
| DN/TCN exemption (126.18) | Use DTAG to analyze the varying implementation questions with regard to the DN/TCN exemption to enhance efficiencies consistent with the objectives of the license exemption. In particular, industry has questions regarding the roles and responsibilities of U.S. and non-US persons in invoking the exemption and documentation requirements (to the extent required). | This project will enhance efficiencies in the utilization of the new license exemption and provide clarity and transparency in the implementation requirements, consistent with the objectives of the new license exemption. |
| Broad-reaching Advisory Opinions which impact definitions | Industry learns anecdotally about Advisory Opinions with broad reach – e.g., instruction using public domain technical data could constitute a defense service and resulting articles could be defense articles. If the intent of the public domain is to create a safe harbor, this carve-out leads to confusion and muddies the concept of public domain. | DTAG strongly recommends that Advisory Opinions with regulatory interpretation, not specific to any one company, be posted on their website. Adds transparency to the export control process, which supports ongoing Export Control Reform effort. |
| Include ITAR citations in USG guidance and a topical index to such guidance | If USG guidance (typically provided separately from regulatory language) is intended to be authoritative, it becomes overly burdensome to monitor and comply if guidance cannot be readily tracked and tied to the implicated code sections. It would facilitate industry's ability to comply if guidance that is intended to be authoritative can be compiled and either codified or at least included in annotation to the code so all authority is consolidated. | Adds transparency to the export control process, which supports ongoing Export Control Reform effort; provides clarity and supports measurable export compliance. |

## SUMMARY OF RESULTS

Since a number of the tasks were already in the proposed rulemaking process, the WG agreed that most of these tasks should continue with a high priority ranking. The Task Team also suggests that prioritization of all tasks be reviewed on a regular basis, perhaps every 6-12 months.  Six months from now, there will likely be changes in many areas: progress in export control reform, completion of tasks, other world issues – all present valid reasons for readdressing the remaining priorities and possibly including additional topics.

Each of the seven highest ranked priorities will provide clarity in the regulations, contribute to fewer licensable activities and reduce violations.  These improvements to the regulations will also help small and medium-sized companies who may lack experience in working with the ITAR to understand compliance requirements more completely. Completion of these tasks supports the principles inherent in the Export Control Reform effort.

To maintain priority among tasks as the exchange between DDTC and OMB progresses, the WG suggests the following simple guidance:  the higher prioritized task always keeps that assigned priority. For example, if Task 1 has been submitted to OMB for their work, DDTC will pick up work on Task 2. When Task 1 returns to DDTC for adjudication of comments or edits, then DDTC sets aside work on Task 2, and Task 1 takes priority.  This way, the higher priority tasks will always take priority and tasks will likely be completed in priority order.

Attachment:

Detailed spreadsheet provided as reference for the above prioritizations. Filename: Priorities Working Spreadsheet.xls