



Uncomplicating Regulatory Complexity:

Developing an Effective and Practical Export Licensing Strategy

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Presented by:

Adam Munitz, FH+H Law Firm

Katherine "Kitty" Pongratz, Optics 1, Inc. (Safran)



Meet the Panel



ADAM MUNITZ

*Partner, FH+H Law Firm,
International Trade +
Transactions Practice Co-
Chair*

*amunitz@fhhfirm.com
(o): 703-590-1234*



**KATHERINE "KITTY"
PONGRATZ**

*Director, Contracts & Intl
Trade Compliance, Optics 1,
Inc. (Safran)*

*katherine.pongratz@optics1.com
(d): 603-945 3727*

Export Licensing 101

- **Export Classification**
 - **Bureau of Industry and Security (BIS)** for Export Administration Regulations (**EAR**) & Commerce Control List (**CCL**) controlled items (15 CFR Part 774)
'Decision Tree Tools' (BIS webpage: <https://www.bis.doc.gov/index.php/export-control-classification-interactive-tool>)
 - **Directorate of Defense Trade Controls (DDTC)** for ITAR items controlled under the United States Munitions List (**USML**) (22 CFR Part 121)
'Order of Review' tool (based on 22 CFR 120.11) on DDTC webpage: (**currently offline**)
https://www.pmdrtc.state.gov/ddtc_public?id=ddtc_public_portal_dt_order_of_review
- **The Export Licensing Analysis**
- **Export Licensing Vehicles (DDTC-Specific)**
 - DSP-5 - Permanent Export of Unclassified Defense Articles and Related Unclassified Technical Data (22 CFR Part 123)
 - DSP-73 - Temporary (not permanent) export of controlled goods regulated by DDTC (22 CFR Part 123)
 - DSP-61 - Temporary import of unclassified articles or hardware (22 CFR Part 123)
 - TAA - Providing a defense service to a foreign person, an authorization to manufacture defense articles abroad, or to establish a distribution point abroad for defense articles of U.S. origin for subsequent distribution to foreign persons. (22 CFR Part 124)
Export License Application Roadmap
 - MLA - (22 CFR Part 124)
- **Export License Provisos**

Common Licensing Pitfalls

- Review your export classifications and then review them again!
 - One of the most common bases for an RWA is an incorrect export classification.
 - Make sure that your proposed export classifications are deliberate and supported by either a thorough self-classification or a CJ/CCATS.
 - No guessing! Better to spend the time vetting an export classification in advance than to lose time addressing an RWA
 - Example of TAD Commodity Jurisdiction

Example: Enhanced Clip-on Thermal Imager (ECOTI)

- Clips onto a Night Vision Goggle (NVG)
 - NVGs work by sensing small amounts of visible light and electrically amplifying that light into a characteristic glowing green image.
- ECOTI has an ITAR controlled thermal imager
 - Thermal imaging is the process of converting infrared (IR) radiation (heat) into visible images
- Considered highly sensitive technology by DDTC and the DoD
- Categorized as USML category XII(c)(1): Imaging systems or end items, as follows: . . . (iii) Having an infrared focal plane array or infrared imaging camera, and specially designed for a military end user.
- Is further classified as “Sensitive Military Equipment” (SME)



Example:

Increased Situational Awareness & Threat Detection (TAD)

- Clips onto a Night Vision Goggle
- Includes an EAR controlled thermal imager
- Developed specifically for dual-use application
 - Multiple questions about this declaration from DDTC
 - Had to provide documentation of development intent
 - Had evidence of early strategy as dual-use, design reviews were consistent with this message
 - Had to provide evidence of intent to sell to commercial entities, such as civil agencies and industrial companies (fire detection, hunting, police, etc.)
- Was ultimately categorized as EAR 6A003.b.4.b



Common Licensing Pitfalls, *cont.*

- Do NOT be overly specific when defining your end user
 - Consider defining your end user broadly (e.g., “Ministry of Defense of X Country”). Otherwise, if there is a change to a particular business division, ministry office, or military unit, your license will be invalid and you will have to resubmit an amended application.
 - For DDTC licenses, add “and all locations in [applicable country]” to cover all possible address changes or multiple locations
- Do NOT be overly selective in identifying freight forwarders
 - In the world of international sales, exporters will frequently adjust their freight forwarding strategy and even use different freight forwarders for each export.
 - Accommodate that logistics reality by identifying multiple freight forwarders.
 - Remember: You are not required to use a freight forwarder simply because you list it on your license application.

Common Licensing Pitfalls, *cont.*

- Do NOT undervalue your exports
 - Frequently, exporters that are uncertain of the value of their exports will endeavor to be as precise as possible and, in the process, will undervalue their exports.
 - Keep in mind that exporters can only export up to the value included on their licenses.
 - Accordingly, where the value is uncertain and cannot be objectively determined, give yourself some cushion in order to avoid a costly and unnecessary resubmission in the future.
- Check, re-check, and triple check TAA hardware tables
 - When submitting TAAs that contemplate associated hardware exports, always check with great care that the TAA contemplates the full scope of hardware to be exported and the correct quantities of hardware.
- Do NOT overlook intermediaries (*see* 22 CFR § 126.13(b))
 - A common mistake is to forget to include in license applications and Letters of Explanation relevant intermediaries.
 - At a minimum, overlooking an intermediary can result in an incomplete application.
 - Failure to reference intermediaries can also be interpreted as fraudulent.
 - Licenses can be amended to add foreign and U.S. **intermediate** consignees (freight forwarders).
 - Overlooking intermediaries is particularly problematic if the intermediary is required to submit a broker license application for the effort.

Common Licensing Pitfalls, *cont.*

- Do NOT use P.O. boxes on applications
 - It may seem obvious, but DDTC has identified this error as a frequent one, and it may result in an RWA.
 - DDTC requires “spelling out” of all acronyms and specific addresses for each party
- Do NOT ask DDTC whether an exemption can be utilized
 - DDTC has provided guidance on its webpage that states that it will not provide exporters with a determination as to whether or not they qualify for an exemption.
 - Maintain records of exemption determination as evidence if ever questioned
- Fully explain the underlying transaction
 - The Letter of Explanation should be as clear as possible and, preferably, should contain headings and subheadings.
 - Flow charts are extremely helpful to the licensing officer and demonstrate a commitment to full preparation and clarity.
 - A Letter of Explanation may not be needed for a follow on transaction for the same product and end customer.
 - BONUS TIP: Clearly identify all actors in the transaction, their role in the transaction, their nationality, and their physical location.

Common Licensing Pitfalls, *cont.*

- Provide contact phone numbers
 - Provide as many contact phone numbers as possible and ensure that they are prominent in the Letter of Explanation, as licensing officers often prefer the efficiency of a phone call to email correspondence.
 - Know when the application is going to be submitted and be ready to pick up the phone when the licensing officer calls (usually within one to two days of the submission date).
 - Remember: licensing officers are strongly encouraged to make contact with the applicant prior to processing an RWA, so making yourself available for a call from the licensing officer may save you from an unnecessary RWA!
- Provide sufficient technical documentation
 - Effective license applications contain attachments with product specifications, which allow the licensing officer to easily connect the proposed export classifications to the hardware/services/information.
 - We have prepared product brochures which provide high level technical information on a single page.
 - Not providing sufficient documentation only makes the licensing officer's job more difficult and can lead to an RWA (especially if he/she cannot reach you via phone).

Common Licensing Pitfalls, *cont.*

- Justify the use of “limited defense service”
 - Ensure that the Letter of Explanation includes a comprehensive description of any limited defense services to be conducted.
 - Explain why the defense services meet the definition of “defense service” under 22 C.F.R. 120.32 and cite 22 C.F.R. 126.1(a) to explain why the defense services are an “exception” to the TAA requirement.
 - Typically, the maximum duration of approved limited defense services is two years or less.
 - The start dates for the training should be included as well as a comprehensive outline of the training to be provided (preferably, a course outline with a detailed description of the content).
- Carefully review 22 C.F.R. 130.2 certifications
 - It is very common for applicants to incorrectly certify under 22 C.F.R. 130.2.
 - If the incorrect box is selected, then the application will be automatically RWA’d because the system does not allow the licensing officer to edit the content of the license application.

Common Licensing Pitfalls, *cont.*

- Carefully review DSP-83s pre-submission
 - Ensure that the name of the end user in Block 3 is the name of the entity and correlates to Block 7.
 - The quantities, article descriptions, and values in Block 5 should align with the license application and, barring some sort of consignee markup, the purchase order/contract. If there is a discrepancy, then it should be explained in the Letter of Explanation
 - Empowered official certifies that he/she has not altered the DSP-83 after it receives from the foreign entity
 - If selling to a distributor, the distributor will not want the value to be listed on the DSP-83 when the end-user signs, it will reveal the markup. In this instance, I ask the distributor to hand write in the value after they receive from the end-user.
 - BONUS TIP: Review the DSP-83 with the end user before it is signed and sealed
- Provide a specific end use
 - The export license application should include a few short sentences outlining the transaction, the parties to the transaction, and the end use with specificity.
 - A similar statement should appear in the contract/purchase order. Licensing officers appreciate this attention to detail.

Common Licensing Pitfalls, *cont.*

- Do not “shop around” for licensing officers
 - Once a license application is received by DDTC or BIS, it is assigned to a specific licensing officer. Applicants are not authorized to request a specific licensing officer and efforts to steer applications to a particular licensing officer are frowned upon.
 - Unfortunately a different licensing officer may be assigned when resubmitting an RWA’d application.
- Do NOT lower your standards for broker license applications (*see 22 CFR 129*)
 - Increasingly, DDTC is treating broker license applications like export license applications and expecting a level of detail that used to be reserved for DSP-5s and DSP-73s.
 - Describe in your application and Letter of Explanation, with as much specificity as possible, the end user, end use, supplier, manufacturer (if different), defense articles, defense article quantities, chain of custody, and export timeline.

Common Licensing Pitfalls, *cont.*

- Do NOT overlook the definition of “Technology”
 - A frequent basis for a BIS RWA is that the export of the specific “Technology” referenced in a license application does not require prior approval. This is due to the fact that the definition of “Technology” varies from one ECCN to another.
 - Always ensure that you are satisfying each component of the “Technology” definition before assuming that its export requires prior approval.
 - The only controls for TAD Technology apply to “development” and “production” technical information. Technology for “use” of the product, such as operations manuals, are EAR99.
- Mind your provisos!
 - Frequently, exporters are so elated to receive their export licenses that they fail to scrutinize the provisos (if any).
 - The provisos may be such that the license is, altogether, rendered ineffective.
 - Application for TAA that allowed for the integration of the ECOTI with Battle Management Systems of certain NATO countries
 - Proviso stated: End use platforms are limited to those of U.S. origin. Authorization for foreign-origin platforms must be the subject of an amendment to this agreement that specifically identifies the platforms.
 - The provisos may require that certain documentation be obtained from the end user and submitted to DDTC/BIS within a certain timeframe.
 - This is true when the purchase order is not specific as to end-use/end-user, for example, when selling to a distributor.
 - As a best practice, have been including end-user statements with every DSP-5 application.
 - Recently DDTC required an end user statement for a DSP-73 which is unusual.

Common Licensing Pitfalls, *cont.*

- Know your exemptions!
 - 22 C.F.R. 123.16 and 15 C.F.R. 740 are full of exemptions that may apply to your export. Make sure to review them before going to the time and effort to develop a license application and before forcing a licensing officer to review it.
 - Typical exemptions used for the ECOTI are:
 - 22 C.F.R. 123.4(a)(1) – ECOTIs sold overseas are returned for repair/replacement and shipped back overseas without a license; and
 - 22 C.F.R 125.4(b)(5) – User manuals for the ECOTI are shipped overseas to a previous foreign customer who needs additional copies without obtaining an export license.
- Don't forget to read the fine print!
 - The exemptions outlined in 22 C.F.R. 123.16 and 15 C.F.R. 740 contain a variety of qualifying conditions and limitations. Be sure to review them, in detail, before exercising an exemption.



Thank you!

We are happy to address any questions or comments at this time.

