

COMMITTEE ON INTERNATIONAL TRADE

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Mr. Robert Kovacs
Managing Director of Defense Trade Controls
U.S. Department of State
PM/DDTC, S.A.-1, 12th Floor
2401 E Street, NW
Washington, D.C. 20037

Dear Mr. Kovacs:

As the Chair of the New York City Bar Association Committee on International Trade, I am writing to express concern about a new operating policy adopted by the Response Team of the Directorate of Defense Trade Controls ("DDTC"). Recently, the DDTC Response Team has informed one of our members that it has adopted an operational policy that it will not respond to inquiries from external legal counsel unless counsel identifies all parties to the proposed or actual export transaction and specify the defense article, data or service involved. When informed that counsel had inquiries not related to a specific transaction for a client, the DDTC Response Team still refused to answer the question. Our Committee has learned from other trade associations that they have encountered a similar problem with the DDTC Response Team.

This is of concern to the Association's members for several reasons. First, counsel are often retained by exporters to assist in developing and enhancing export control policies and procedures to ensure compliance. To that end, the DDTC Response Team was established to provide responses to a full range of defense-related inquiries to those advising the trade industry in an effort to: (1) reduce caseload of the DDTC from responding to *all* industry questions in a comprehensive advisory opinion; and (2) to assist the industry with defense-related trade solutions which protect U.S. national security in an

efficient, timely manner. These objectives to maximize efficiency are thwarted by the DDTC's refusal to communicate with external counsel, even when counsel seeks guidance on an inquiry not related to a specific client transaction. By refusing to answer questions without full disclosure, the DDTC aggrandizes the number of advisory opinions it must issue which could have been easily answered verbally in expedient manner. Moreover, by declining to answer questions, the DDTC Response Team is also undermining efforts to ensure compliance and forcing counsel to try to obtain information from other DDTC licensing or compliance officers who may or may not take the time to answer such general questions. Thus, the new policy hinders and impedes exporter efforts to comply with the International Traffic in Arms Regulations ("ITAR").

Second, the requirement to disclose confidential client information undermines the long-standing principle of attorney-client privilege which allows the client to obtain the advice necessary to acquire a general understanding of applicable laws and regulations, which in this particular area, involve applying a highly complex regulatory scheme to the import or export of sophisticated technology, data and services. Any inaccuracy could result in a national security threat to the U.S., thus it should be the mandate of your office that the DDTC Response team to make every effort to communicate and assist the trade industry with accurate compliance and respect confidentiality of client names where reasonably unnecessary to give guidance on a defense-related issue. The goal of the export community is common to that of the DDTC, accuracy of compliance. Lawyers must obtain a waiver of privilege from a client prior to disclosing such specific information. Third, to the knowledge of the Committee, no other agency involved with international trade laws and administration has adopted a similar policy. So far as we are aware, other such traderelated agencies recognize the value of allowing importers and exporters to seek guidance on laws and regulations that are not only extremely complex, but constantly evolving to protect our national security. The lack of ability to seek general guidance is in conflict with the statement on DDTC's website that the purpose of the Response Team is to field basic process and status questions and to assist exporters in identifying what the need to do to get answers to more complex questions.

Fourth, while DDTC has begun offering ITAR training to the public; attorneys, consultants and forwarders are barred from attending such training seminars, as only registered ITAR companies (i.e., registered ITAR exporters, manufacturers and USML-brokers) are permitted to attend. This prohibition form ITAR training also extends to companies that have just begun the preliminary stages of planning to make commitments which may engage such parties in ITAR-related export activities. As a result, companies who are new to ITAR exporting and their counsel have no effective avenue to have questions of general applicability answered. The DDTC is not only refusing to provide guidance to new ITAR exporters and their counsel, but the DDTC is denying them access to critical compliance information at ITAR training seminars. Only by opening a dialogue with new ITAR exporters and their counsel can the DDTC strengthen compliance efforts and accuracy. We hope the DDTC will recognize the benefit of granting such parties access to ITAR training, particularly in light of the fact that the DDTC has adopted this new policy which exacerbates the lack of practical guidance for new ITAR exporters and their counsel.

The New York City Bar Association's Committee on International Trade thus believes this new policy hampers exporters and their attorneys from obtaining a full understanding of the ITAR laws and regulations and ultimately, weakens exporter compliance with the ITAR jeopardizing U.S. national security interests. Therefore, we urge you to reconsider this new policy in light of the aforementioned concerns.

Respectfully submitted,

Helena D. Sullivan, Chair International Trade Committee New York City Bar Association