
Notifying Congress

By

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[The following is a reprint of an article which appeared in the January/April issue of *Defense Trade News*, the Bulletin of the Center for Defense Trade, U.S. Department of State (pp. 7-9).]

The Arms Export Control Act (AECA) of 1976 requires the President to notify the Congress of certain commercial defense trade export applications prior to their approval. The President's authority has been delegated to the Secretary of State. Sections 36(c) and 36(d) of the AECA specifically delineate which cases submitted to the Office of Defense Trade Controls (DTC) require Congressional notification.

Section 36(c) cases. Section 36(c) generally covers the following two types of license applications:

- All exports of defense articles or services sold under a contract in the amount of \$50 million or more; and
- All exports of Major Defense Equipment (MDE) sold under a contract in the amount of \$14 million or more.

AECA Section 47(6) defines MDE as Significant Military Equipment (SME) having a onetime research and development cost to the U.S. Government of \$50 million or more, or a total U.S. Government procurement cost of \$200 million or more. [The Defense Security Assistance Agency (DSAA) at the Department of Defense maintains a list of the defense articles categorized as MDE.] This definition will also be added to part 120 of the revised International Traffic in Arms Regulations (ITAR) when the final rule change is published in the Federal Register. [For completeness, it should be noted that some retransfers, e.g., sale of U.S. defense articles by the licensed recipient country to another country of MDE [originally] valued at \$14 million or more, or of defense articles or defense services [originally] valued at \$50 million or more must also be notified to the Congress for 30 calendar days prior to DTC approval, pursuant to AECA Section 3(d)(3).]

Section 36(d) cases. Section 36(d) covers the following cases received by DTC:

- All applications for Technical Assistance Agreements (TAAs) and Manufacturing License Agreements (MLAs) involving the manufacture of SME for or in a non-NATO country.

SME is defined in part 120 of the ITAR as articles for which special export controls are warranted because of their capacity for substantial military utility or capability. Articles designated as SME are preceded by an asterisk on the U.S. Munitions List (USML, ITAR Section 121.1). Additionally, all classified defense articles are designated as SME.

The role of Congress. The AECA requires that Congress be notified at least 30 calendar days before the issuance of any license or approval covered by Section 36(c). Though not required by the AECA, DTC will also not issue any agreement notified pursuant to Section 36(d) until 30 calendar days have elapsed since the date of notification. This provides Congress with an

opportunity to review these specific commercial defense transactions. The authority to issue licenses and grant approvals, and the responsibility to notify Congress when required, have been delegated to the Director of DTC.

The AECA provides that licenses for proposed exports covered by Section 36(c) may generally not be issued if, within the 30-day notification period, Congress enacts a joint resolution prohibiting the proposed export. It should be noted that while the 30-day notification is still required, a joint resolution may not be enacted to prohibit issuance of licenses notified under Section 36(c) for export to NATO, any member country of NATO, Japan, Australia, or New Zealand. In such cases, a law specifically prohibiting the export would be required. Similarly, a law would be required to prohibit approval of a case notified under Section 36(d).

The review process for "Hill" cases. DTC is making a concerted effort, especially in light of the difficult economic situation, to be more responsive to the needs of industry in order to enhance U.S. competitiveness abroad. As a result, DTC is focusing on improvements in the timeliness of the licensing review process while still taking into full account U.S. national security and foreign policy interests. These efforts certainly apply as well to the Congressional notification process. Clearly, this is important since while only 60 of the 92,641 applications received in FY91 and FY92 were notified to the Congress, those 60 cases represented approximately \$6 billion in U.S. defense trade. Although only 30 companies submitted those 60 Hill cases, those cases affect hundreds of U.S. subcontractors and vendors.

Despite DTC's best efforts, however, exporters still need to plan on a lengthy review process for cases requiring Congressional notification. Applications that require Congressional notification represent some of DTC's lengthiest cases for three main reasons. *First*, they are often complicated or controversial cases that require extensive interagency review. *Second*, these cases are sometimes submitted before the final contract is completed and signed, resulting in DTC having to hold the case after interagency review until the contract is provided. And *third*, the review process for these cases involves two additional stages not included in the review process for other cases.

Congressional notification cases move through three stages in the license review process: (1) DTC and interagency review of the case; (2) interagency review of the Congressional notification letter, and (3) Congressional notification and related handling.

Stage one: DTC and interagency case review. The first stage is identical to that for all "staffed" cases (i.e., cases referred outside of DTC for more detailed technical or policy review). This stage involves (a) initial review in DTC, (b) forwarding for interagency review, with recommendations sent to DTC by all reviewing offices, and (c) final review in DTC, including making a final decision based on the interagency recommendations and preparing the final decision letter as required.

For the 27 percent of DTC's cases that are staffed, the license review process ordinarily ends at this point with either the issuance or denial of the application. For Hill cases, however, the process is only one-third complete.

Stage two: interagency notification review. DTC prepares the Congressional notification letter and obtains interagency approval of the text of this letter in the second stage of the review process. To save time, DTC drafts the notification letter while the case is undergoing interagency review in stage one. However, since the letter is dependent upon the outcome of stage one, DTC does not begin seeking interagency approval of this letter until a final decision has been made in stage one.

DTC seeks interagency approval of the draft notification letter from four offices: the National Security Council (NSC) and the Office of Management and Budget (OMB) at the White House, and the Office of the Legal Advisor (L/PM) and the Office of the Under Secretary for Arms Control and International Security Affairs (A) in the State Department. After obtaining interagency approval of the Congressional notification letter, DTC prepares the final package to be sent to Congress.

Stage three: Congressional notification. In the third stage of the review process, DTC forwards the Congressional notification package to the State Department's Bureau of Legislative Affairs (H), which is responsible for sending the package to the appropriate members of Congress. Once the package is sent to the Congress, DTC waits 30 calendar days. Provided a joint resolution prohibiting the export is not enacted by Congress, DTC may issue the license on the 31st day.

Special tracking of "Hill" cases. In August 1990, DTC created a special tracking system for all "Hill" cases. Upon arrival at DTC and receipt by the appropriate licensing officer, all applications are immediately examined to see if they require Congressional notification. If so, a copy of the case is given to the Special Projects Licensing Officer (SPLO) in DTC's Arms Licensing Division (DTC/ALD), who then sends a letter to the company informing them that the case requires Congressional notification. The SPLO is responsible for tracking "Hill" cases throughout all three stages of the review process to prevent unnecessary delays at any point. The SPLO acts to facilitate the handling of these cases.

Time frames for each review stage. For each stage in the review process, DTC has set time guidelines. For the first stage, DTC seeks to adhere to the time frames established for all staffed cases, whether Hill cases or not. The first stage deadlines, therefore, are not more than 10 business days for initial DTC review, not more than 20 business days for interagency review, and 10 business days for final DTC review. In stage two, DTC has set a deadline of 10 business days for interagency review of the draft Congressional notification letter, and five business days for preparation of the final Hill package. In stage three, the Bureau of Legislative Affairs (H) handles each case as quickly as the individual case and the legislative environment permits. DTC then ordinarily issues the license (or approves the agreement) on the first business day after completion of the 30 (calendar) day notification period.

A joint effort for further gains. In an effort to further reduce the licensing time, DTC is identifying areas in each stage where it can expedite the processing of Hill cases. Likewise, industry can also help facilitate the review of Hill cases. In addition to providing the required information normally submitted with any application, it is recommended that applicants provide a cover letter stating that they believe the attached case requires Congressional notification and why. This letter should also explain the scope of the entire program involved, even if the application is only for phase one of a multiple phase program. It should note delivery schedules, relevant contractual obligations, and any other information that might be useful in the DTC and interagency review process. DTC is considering publishing a suggested cover letter format in a future issue of *Defense Trade News*.

Point of contact. If you have any questions concerning the progress of one of your pending DTC cases that requires Congressional notification, call the SPLO at (703) 875-6641. If your question, however, pertains to specific details in the case itself, please contact the licensing officer handling the case.