International Trade Alert

Akin Gump
STRAUSS HAUER & FELD LLP

DDTC Publishes New FAQs on Activities by Non-U.S. Persons After the Expiration of an Agreement

April 13, 2020

Key Points

- On March 31, 2020, DDTC published five new FAQs on activities that non-U.S. persons may engage in following the expiration of a Technical Assistance Agreement (TAA) or Manufacturing Licensing Agreement (MLA).
- The FAQs confirm that non-U.S. signatories, sub-licensees and end-users may continue to share technical data for the end-uses approved in the TAA or MLA, but state that additional authorization is required from DDTC to transfer that technical data to any person not previously authorized under the agreement.
- The FAQs also confirm that a defense article that is produced or manufactured under a TAA or MLA may be transferred among the non-U.S. signatories, sub-licensees and end-users for the end-uses that were approved in the TAA or MLA, but state that additional authorization from DDTC is required to continue manufacturing defense articles abroad using U.S.-origin technical data.

Background

The International Traffic in Arms Regulations (ITAR) imposes a requirement that a U.S. person must obtain authorization from the Directorate of Defense Trade Controls (DDTC) to perform defense services for a non-U.S. person. That authorization often includes an agreement between the parties with terms largely dictated by DDTC. Two of the terms required to be included in such agreements are:

> (5) The technical data or defense service exported from the United States in furtherance of this agreement and any defense article which may be produced or manufactured from such technical data or defense service may not be transferred to a foreign person except pursuant to §126.18, as specifically authorized in this agreement, or where prior written approval of the Department of State has been obtained.
>
> and

Contact Information

If you have any questions concerning this alert, please contact:

Kevin J. Wolf
Partner
kwolf@akingump.com
Washington, D.C.
+1 202.887.4051

Thomas J. McCarthy
Partner
tmccarthy@akingump.com
Washington, D.C.
+1 202.887.4047

Anne E. Borkovic
Partner
aborkovic@akingump.com
Washington, D.C.
+1 202.887.4432

Mahmoud Baki Fadlallah
Partner
mfadlallah@akingump.com
Dubai
+1 971 4.317.3030

Steven C. Emme
Senior Counsel
semme@akingump.com
Washington, D.C.
+1 202.887.4368

Robert J. Monjay
Senior Counsel
rmonjay@akingump.com
Washington, D.C.
+1 202.887.4557

(6) All provisions in this agreement which refer to the United States Government and the Department of State will remain binding on the parties after the termination of the agreement.

These and other provisions create confusion regarding the rights of non-U.S. parties to use and share the technical data that they received from the U.S. parties, following expiration of the agreement. Additionally, many non-U.S. companies are uncertain whether they can continue to supply customers with the commodities that they produced using the technical data or defense services provided by a U.S. party, following expiration of the agreement.

DDTC had not previously provided formal public guidance on these issues. Some non-U.S. companies were able to obtain authorization directly from DDTC through a General Correspondence (GC), without the continued participation of a U.S. party, but DDTC did not consistently allow use of this option. Many non-U.S. companies felt compelled to engage their U.S. partner to renew agreements beyond the termination of the U.S. party's participation, ensuring that that their continued use of jointly developed products and technologies remained approved by DDTC.

New FAQs on Activities by Non-U.S. Parties After the Expiration of an Agreement

On March 31, 2020, DDTC issued five new frequently asked questions (FAQs) to clarify the rights and responsibilities of non-U.S. person who received technical data or produced defense articles pursuant to a TAA or MLA that has now expired. These FAQs generally provide that the non-U.S. parties may continue to engage in the activities authorized in the now expired agreement without additional authorization, but there are two significant exceptions. First, non-U.S. parties to an MLA may not continue manufacturing defense articles using U.S.-origin technical data after the expiration of an MLA without additional authorization from DDTC. The FAQs state that the non-U.S. parties can obtain this authorization through a GC, without the U.S. party's participation. Second, the U.S. party must extend the agreement if it will continue to provide defense services.

The following are highlights from the FAQs:

1. Non-U.S. signatories and sub-licensees may transfer defense articles manufactured during the life of a TAA or an MLA among themselves and to the end-users for end-uses authorized under the TAA or MLA. Foreign-origin defense articles produced with U.S. involvement that did not require an agreement do not require DDTC authorization prior to transfer.
2. Non-U.S. parties authorized to receive technical data under a TAA may continue to use and exchange that technical data among the non-U.S. signatories, sub-licensees and end-users after the TAA has terminated or expired.
3. Non-U.S. parties authorized to receive technical data under an MLA may continue to use and exchange that technical data among the non-U.S. signatories, sub-licensees and end-users after the TAA has terminated or expired. Non-U.S. parties may not continue to use the U.S.-origin technical data to manufacture without DDTC authorization, which the non-U.S. party can independently obtain through a General Correspondence.
4. Non-U.S. parties require an authorization from DDTC to transfer a defense article produced or manufactured using technical data or defense services received pursuant to an agreement to a foreign person not authorized to receive it under the agreement. Foreign-origin defense articles not produced pursuant to an agreement

do not require DDTC authorization prior to transfer, even if produced with some U.S. involvement.

5. The parties should address conflicts with respect to intellectual property rights through other legal mechanisms.

Interestingly, not all of the FAQs reference the extension of provisos and retransfer conditions after expiration. For example, they are explicitly referenced in the FAQ regarding transfers of technical data, but not in the FAQ regarding transfers of defense articles. Thus, an open question is whether DDTC intended to lift provisos and retransfer conditions for transfers of hardware, for example, or whether the FAQs were drafted inconsistently, but with the intent that provisos and retransfer conditions apply to all activities discussed in the FAQs after agreement expiration.

Conclusion

Non-U.S. companies and their U.S. partners now have the opportunity to construct their agreement collaboratively and strategically to ensure that it includes all of the activities that the non-U.S. companies plan to engage in once the U.S. partner is gone. It is no longer sufficient for an agreement just to receive approval from DDTC for the U.S. party's participation; it must serve all of the parties' long-term goals. It is important to consider how the end-use is defined, the procedures for terminating the agreement and how the parties will deal with changes in circumstances. For their part, U.S. parties must also now consider whether additional contractual provisions, in the agreement or a separate document, are necessary to account for any ongoing activities, such as royalty payments or additional IP protections.

These new FAQs helpfully clarify the rights and responsibilities of non-U.S. persons who received technical data or defense services from a U.S. person under a TAA or MLA after those agreements expire, but leave some additional open questions that will hopefully be addressed in future updates. Many of the clarifications are welcome and provide flexibility for the non-U.S. persons to manage their activities following the end of the U.S. party's participation. This reflects DDTC's acknowledgment of the emergence of offshore manufacturing and complex international supply chains, even in the context of sensitive defense articles.

akingump.com