

Public Comments to Interim Final Rule 81 FR 35611

International Traffic in Arms: Revisions to Definition of Export and Related Definitions

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July 5, 2016

C. Edward Peartree
Director, Office of Defense Trade Policy
Department of Defense Trade Controls
2401 E Street, N.W.
12th Floor, SA-1
Washington, D.C. 20522

Dear Mr. Peartree

The Aerospace Industries Association appreciates the opportunity to provide comment on the change to section 125.4(b)(9) of the ITAR and section 740.9 of the EAR, which will allow for authorized retransfer and reexport of data received under that exemption, as well as the addition of authorized foreign person employees to the approved recipients. However, section 125.4(a) does not permit the application of the (b)(9) exemptions for activities in countries identified in section 126.1. There are some situations where it would be advantageous for the U.S. Government and U.S. exporters to utilize the exemptions outlined in (b)(6) – for example, to allow transfers to US persons or foreign person employees supporting the USG in counties listed in section 126.1. This would eliminate the need obtain authorization for those transfers through General Correspondence requests.

Recommendation: Specifically, AIA recommends that language be added to section 125.4(b)(9) as follows –

(vi) Notwithstanding paragraph (a) of this section, use of this exemption is authorized for exports to proscribed destinations under §126.1 of this subchapter if the export is in support of a contract with, or written direction by, an agency of the U.S. Government.

Best Regards,
Remy Nathan
Vice President – International Affairs
Aerospace Industries Association



Request for Comments: “ITAR Amendment - Revisions to Definition of Export and Related Definitions (RIN1400-AD70)”

Email to DDTCPublicComments@state.gov

Airbus Group is pleased to offer the following comments to the proposed Amendment related to the Revisions to Definition of Export and Related Definitions:

§ 120.51 Retransfer

Retransfer is defined as a change of end use or end user of a Defense Article within the same foreign country.

Retransfer of a Defense Article can occur while the end use or end user stay unchanged, such as the temporary retransfer of a Defence Article to a separate legal entity in the same country for the purpose of testing.

Proposed change:

*A retransfer is a change in end use or end user or **temporary transfer to a third party** of a Defense Article within the same foreign country.*

§ 123.28 Scope of a license

The scope of a license is defined as “*for the item(s), end-use(s), and parties described in the license application and any letters of explanation*”.

We would like to emphasize that it is critical, in order for the foreign parties to comply with the terms of the license, and in particular to conduct reexport and retransfer and abide by the scope of the authorized end use and end user, that all the terms be included in the license approval itself. The foreign parties do not have access to “letter of explanations” and other side documents which may have been submitted by the U.S. Applicant.

We encourage DDTC to ensure that all the terms that are binding onto the foreign parties be explicitly included in the license approval itself and not to rely on the U.S. applicant to communicate those terms separately. Similar situation under the EAR, where BIS has not been including the approved end use in the BIS licenses and is relying on the U.S. applicant to communicate the information to the foreign parties, has proven to be impossible to manage, as the U.S. applicant rarely communicate the additional information necessary to assess correctly the scope of the license.

The same comment applies to Agreements.

Proposed changes:

§ 123.28

*Unless limited by a condition set out in a license, the export, reexport, retransfer, or temporary import authorized by a license is for the item(s), end-use(s), and parties described in the license application ~~and any letters of explanation~~. **The U.S. applicant must inform the other parties identified on the license of the license’s scope and of the specific conditions applicable to them.***

§ 124.1 e)

*Unless limited by a condition set out in an Agreement, the export, reexport, retransfer, or temporary import authorized by a license is for the item(s), end-use(s), and parties described in the license application ~~and any letters of explanation.~~ **The U.S. applicant must inform the other parties identified on the license of the license's scope and of the specific conditions applicable to them.***

§ 124.16 removed and replaced by 126.18 d)

We welcome this change which will streamline the implementation for DN/TCN nationals of NATO, European Union, Australia, Japan, New Zealand, or Switzerland employed in the European Union.

The exemption use the term “reexport” which implies that the foreign party is receiving the Technical Data and then “reexporting” it to its DN/TCN. This means that only employees who have the same nationality than their employer can receive Technical Data directly from , or interact with, the U.S. exporter, and then the employer reexports (without additional authorization) to its DN/TCN who are nationals of NATO, European Union, Australia, Japan, New Zealand, or Switzerland.

This would unintentionally create discrimination between those employees who are nationals of the country of their employer and who can interact directly with the U.S. exporter and those employees who are DN/TCN eligible for 126.18 d) and cannot interact directly with the U.S. exporter.

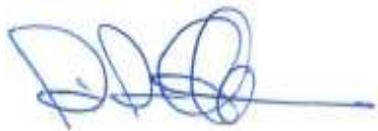
124.16 used the term “authorized access” and thus did not delineate a difference of treatment between the employees who are of the same nationality as their employer and the DN/TCN eligible to 124.16. We recommend that the same notion be implemented for 126.18 d).

Proposed changes:

*(d) Notwithstanding any other provisions of this subchapter, no approval is needed from the Directorate of Defense Trade Controls (DDTC) for the **export or reexport** of unclassified defense articles or defense services to individuals who are dual national or third-country national employees of a foreign business entity, foreign governmental entity, or international organization, that is an authorized end user, foreign signatory, or consignee.*

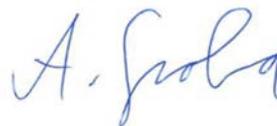
For further information, please contact Corinne Kaplan at 703 466 5741, or corinne.kaplan@airbusna.com.

Respectfully,



Pierre Cardin

SVP, Group Export Compliance Officer



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July 5, 2016

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VIA EMAIL to DDTCTPublicComments@state.gov

RE: ITAR Amendment—Final Revisions to Definitions

Dear Mr. Peartree:

On June 3, 2016, the U.S. State Department, Directorate of Defense Trade Controls (“DDTC”) published an interim final rule soliciting comments on revisions to the definition of export and related definitions in the International Traffic in Arms Regulations (“ITAR”). This letter provides our comments in response to the rule.

Consistent with other Export Control Reform changes, DDTC stated that a “major purpose of this rule is to harmonize the ITAR with the EAR.” We thank DDTC for its continuing efforts to harmonize the two sets of regulations as well as to provide more guidance to industry on DDTC’s interpretation of the ITAR. We appreciate DDTC soliciting comments on the interim final rule and thank you for your consideration of our comments.

COMMENT 1 (Definition of Release and “Theoretical and Potential Access”)

DDTC added the definition of release to “harmonize with the EAR, which has long used the term to cover activities that disclose information to foreign persons.” DDTC’s comment on the revised definition of export, Section 120.17, states the following:

If a foreign person views or accesses technical data as a result of being provided physical access, then an “export” requiring authorization will have occurred and the person who provided the foreign person with physical access to the technical data is an exporter responsible for ITAR compliance.

In a final rule published concurrently on June 3, 2016, BIS described the exact same definition of “release” as follows:

A foreign person's having theoretical or potential access to technology or software is similarly not a "release" because such access, by definition, does not reveal technology or software.¹

In draft charging letters related to consent agreements, DDTC has taken the position that access is sufficient to constitute an export.² DDTC descriptions contained in these charging letters have suggested that the possibility that a foreign national could have accessed an item – without evidence that the foreign national actually accessed technical data – was sufficient to constitute a violation of the ITAR.

These charges within consent agreements have had significant ramifications for compliance programs. For example, many companies will submit 126.1 or 127.12 reports in situations in which they cannot prove, or that it would be extraordinarily resource intensive to prove, that a foreign person *did not* access technical data on a company's information technology ("IT") network. This has driven significant resources into the disclosure process governing IT network activities, burdening both the companies involved and DDTC.

With this background in mind, it would be extraordinarily helpful to industry if DDTC would confirm that it agrees with the BIS comment above. Conversely, to the extent that DDTC continues to believe that "theoretical or potential access" is sufficient to constitute an export in the context of ITAR licensing and Section 126.1 and 127.12 reporting, it would be important to understand that as well. Absent further guidance or clear standards from DDTC, regulated companies may take divergent approaches to this issue in view of the latest guidance in these rules, with some companies continuing to treat theoretical or potential access as an export, while other companies transition to the view articulated by BIS above. **We respectfully request that DDTC clarify in the final rule that its approach aligns with BIS's, specifically that theoretical or potential access to technical data is not a release.**

COMMENT 2 (Country of Birth as a Factor in Licensing)

In December 2007, DDTC published a *Federal Register* notice that stated DDTC considers country of birth a factor in determining nationality.³ This has led to a range of vexing issues for the regulated community, causing U.S. companies to seek information on country of birth from employees and partners and bringing conflict of law issues between the ITAR and foreign privacy and employment laws. DDTC took a step toward attempting to address these issues with the implementation of 22 C.F.R. § 126.18.

The new DDTC definition of "export" in Section 120.17 explicitly limits deemed exports to countries of past or present citizenship or permanent residency:

¹ 81 Fed. Reg. 35,586, 35,592 (June 3, 2016).

² See, e.g., Draft Charging Letter to General Motors Corporation and General Dynamics Corporation, p. 15, Charges 94-147, available at https://www.pmdrtc.state.gov/compliance/consent_agreements/pdf/GeneralMotorsCorp_DraftChargingLetter.pdf.

³ 72 Fed. Reg. 71,785, 71,786 (Dec. 19, 2007).

Any release in the United States of technical data to a foreign person is deemed to be an export to all countries in which the foreign person has held or holds citizenship or holds permanent residency.

This appears to indicate that DDTC will not consider country of birth as a factor in license applications, suggesting to the regulated community that it does not need to factor that information into compliance programs, licensing strategies, or internal investigations. Nevertheless, we note that Revision 4.3 of the Agreement Guidelines refers to country of origin or birth as a consideration when vetting dual- and third-country nationals. **We respectfully request that DDTC confirm in the final rule that country of birth is no longer a factor in determining nationality for licensing purposes, thus eliminating any remaining ambiguity on this point, and revise the Agreement Guidelines accordingly.**

COMMENT 3 (Definitions of “Required” and “Directly Related”)

Historically, the EAR and ITAR have both used the term “required” in relation to the concept of technical data. The EAR defined the term “required,” but the ITAR did not, creating potential confusion and inconsistency in determining what constitutes certain kinds of technical data. In its June 3 final rule,⁴ BIS revised the definition of “required” in Section 772.1, and included the words “peculiarly responsible” in the definition. BIS also provided guidance on the phrase “directly related to.”

“Required” and “directly related to” have long been problematic phrases in attempting to construct compliance programs that draw bright lines around what is, and what is not, technical data under the ITAR. There are a multitude of problems associated with this language that have driven companies to spend significant resources trying to implement reasonable and defensible tests and procedures for defining and applying these rules to particular types and categories of structured and unstructured data in hard copy and electronic form. As a consequence, the agencies efforts to further refine these terms is most welcome.

Because DDTC did not provide corresponding guidance on these terms, the regulated community will almost certainly use BIS’s guidance to continue to create reasonable interpretations of these phrases in the context of complex business operations. To the extent DDTC does not agree with these interpretations and subsequently proposes different interpretations, it will create difficulties within compliance programs once any such changes are announced. **As a consequence, we respectfully request that DDTC confirm in the final rule that it agrees with the interpretations of these terms provided by BIS or identify any differences. We also encourage DDTC to continue and prioritize the difficult work of attempting to further define these terms with as much specificity as possible in the near future as part of its ECR efforts.**

⁴ 81 Fed. Reg. 35,596-35,598 (June 3, 2016).

COMMENT 4 (Activities That Are Not Exports, Reexports or Transfers)

We recognize DDTC's commendable progress towards aligning the ITAR with the EAR. Although the revised definitions of "export," "reexport," and "transfer" are helpful in this regard, **we respectfully request that DDTC also provide a list of activities that are not exports, reexports, deemed reexports, or transfers, particularly to the extent that DDTC interprets any scenarios differently than BIS does.**

* * * *

Thank you again for the opportunity to provide comments. We hope that these are helpful. We would be happy to discuss any comments in more detail at your convenience.

Sincerely,

A handwritten signature in blue ink, appearing to read "Thomas J. McCarthy", with a large, stylized flourish extending to the right.

Thomas J. McCarthy

Anne E. Borkovic

Johny Chaklader

Amanda Lowe (summer associate, not admitted to practice)

1 July 2016

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Via Email: DDTCTPublicComments@state.gov

ATTN: ITAR AMENDMENT – FINAL REVISIONS TO DEFINITIONS

Dear Mr. Peartree

BAE Systems plc (BAE Systems) offers the following comments on the Interim Final Rule implementing revisions to the definition of “export” and related definitions in response to the request from the Directorate of Defense Trade Controls (DDTC) contained in the June 3, 2016 Federal Register notice.

1) Summary:

BAE Systems appreciates DDTC’s efforts to respond to industry comments, provide additional clarity to definitions in the ITAR and harmonise certain terms with their use in the Export Administration Regulations (EAR). BAE Systems respectfully requests that DDTC consider our comments below and provide further clarity to specific aspects of the definitions and ensure consistency with other parts of the ITAR and DDTC Guidelines for Preparing Agreements.

2) Comments on Changes within the Scope of the Interim Final Rule

- A. Policy on export/reexport based on past citizenship under §§ 120.17(b)/120.19(b). The June 3rd Federal Register notice states that disclosing technical data to a foreign person is an export or reexport to all countries in which the foreign person “has held” or holds citizenship or permanent residency. DDTC should consider additional guidance clarifying whether it intends to capture renounced citizenships and eligibility for citizenship that has not been exercised within the definitions of export and reexport.
- B. Clarify comment on intermediate consignees in relation to § 120.51. DDTC responded to a comment asking whether the definition of “retransfer” means that “authorizations will no longer be required for transfers to subcontractors or intermediate consignees within the same country” on p. 35614, stating that “providing a defense article to a subcontractor or any party not explicitly authorised, for additional processing or repair is a change in

end user and end use of a defense article.” This response appears to capture intermediate consignees in addition to subcontractors under the definition of an end user. We believe redefining end user to include intermediate consignees who are not ultimate end users could be confusing and lead to unintended breaches. To avoid this, we urge DDTC to separately add subcontractors and intermediate consignees to the definition of retransfer to be consistent with other State Department use of end user and end use.

- C. Scope of licenses and agreements under §§ 123.28 and 124.1. DDTC has added language to clarify the scope of licenses and agreements which incorporates the license application materials. New section 124.1(e) states that agreements are limited to the information described in the agreement, license, *and any letters of explanation (LOE)*. Applicants often do not share license application forms, supplemental material or LOEs with non-US foreign parties, and non-U.S. companies normally are limited in their ability to view or confirm information outside of the issued license, GC or Agreement. DDTC either should include all relevant information in the final authorisation documents or should add a parallel provision requiring the exporter or reexporter to inform authorised parties what the scope of the licence entails, including information set out in LOEs that might change the scope or provisions of a license or agreement. DDTC also should set out such an affirmative obligation in a proviso or in standard authorisation text requiring the exporter to share relevant authorisation details with foreign parties.
- D. Inconsistent use of “regular employee” in §§ 125.4 and 126.18. BAE encourages DDTC to make regular and consistent use of the defined term “regular employee” in its rules and state clearly where there is a departure and why. In § 120.39, regular employee is defined as an individual permanently and directly employed by a company *or* an individual in a long term contractual relationship hired through a staffing agency. However, DDTC has inserted additional modifying language to “regular employee” in the final interim rule and other places in the ITAR. For example, in the revised § 125.4(b)(9)(iii), DDTC requires that an employee, including foreign person employees, be “directly employed by” a U.S. person. Similarly, in § 126.18(d)(1), the new rule refers to “bona fide regular employees *directly employed by* the foreign business entity...” (we recognise that this language appeared in the earlier § 124.16). The use of “foreign person employee” in lieu of regular employee, or of “directly employed by” in relation to a regular employee is confusing and can come across as excluding regular employees in a long-term contractual relationship from these sections of the ITAR. Furthermore, the Agreements Guidelines on page 41 distinguish between “non-regular contract employees” hired through staffing agencies, who cannot use § 126.18, and “bona fide regular employees” and § 120.39 employees, who can use §126.18. Adding the modifier “directly employed by” into § 126.18 could then be read to exclude contract labour and directly conflict with the Agreements Guidelines and the definition of regular employee

in § 120.39(a)(2). We recommend consistently using “regular employees” and removing the use of “directly employed by” and “bona fide regular employees” across the ITAR.

3) Comments on Items Left Outside the Scope of the Interim Final Rule

- A. Remaining definitions from June 2015 Proposed Rule. BAE Systems encourages DDTC to move quickly to issue a final or interim final rule addressing the remaining definitions, in particular “defense services,” and comments on the proposed rule. The Bureau of Industry and Security has moved ahead with corresponding changes to the EAR, and the harmonising goals of Export Control Reform would be best served by bringing the two sets of regulations into alignment.
- B. Impact of definition changes on Part 130. DDTC has now clarified the scope of the meaning of “export,” to exclude the terms reexport and retransfer. It would be helpful for DDTC to clarify the impact of this change on certain existing uses of those terms in the regulations. For example, Section 130.2 defines an “applicant” to be a party which applies for certain licenses or approvals for “export of defense articles or defense services.” As the clarified definition does not include “reexport” or “retransfer,” we seek clarification on whether it is DDTC’s intent to no longer require Part 130 reporting for license or approval applications for the reexport or retransfer of ITAR technical data, defense articles or defense services under Section 123.9(c). If the intent is to continue requiring Part 130 reporting for reexports and retransfers, we urge DDTC to consider amending Part 130 to reflect exports, reexports, and retransfers.
- C. Release of Object Code. In the commentary of the rule, DDTC rejected a comment requesting that the transfer of software object code to a foreign person should not constitute an export. We appreciate DDTC’s intent to protect sensitive items and software. Alternatively, we urge DDTC to consider treating object code as a defense article, as opposed to technical data. As object code is not human readable, a person is not able to glean any technical data or source code from the object code simply by observing it; thus no technical data is released. This interpretation would benefit industry as mere access to object code would not constitute a release of technical data and therefore would not be an export, while continuing to treat the transmission of ITAR-controlled object code to third parties as an export, retransfer or reexport, as appropriate.

We hope that you will consider these comments and recommendations to the final revisions of the definitions.

Thank you for your consideration.

Sincerely yours,



Joyce W. Remington
Group Deputy Head of Export Controls,
Licensing & Policy



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5th July 2016

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United States of America
DDTCTPublicComments@state.gov

ATTN: ITAR Amendment--Final Revisions to Definitions

Dear Sir,

I write to you on behalf of the Export Group for Aerospace, Defence & Dual-Use (EGADD), which is a not-for-profit making special interest industry group, focusing exclusively on all aspects of export and trade control compliance matters, and is the only dedicated national industrial body in the UK dealing exclusively with export and trade control issues. EGADD operates under the joint auspices of ADS Group Ltd (ADS), British Marine, the British Naval Equipment Association (BNEA), the Society of Maritime Industries (SMI), and TechUK.

This is in response to opportunity that the US Department of State announced on 3rd June 2016 (www.gpo.gov/fdsys/pkg/FR-2016-06-03/html/2016-12732.htm) for comments to be made on the definition amendments interim rule that are being introduced into the International Traffic in Arms Regulations (ITAR), and to come into effect on Thursday 1st September 2016.

We have been watching from the UK as the plans have been announced and progressed for the on-going overhaul of US export controls with considerable interest, and are now delighted that these efforts have progressed so far. We have always strongly supported the plans for the proposed reforms, from the viewpoint of UK Industry, and are aware that other Industry trade bodies, across Europe (and we are convinced further afield), have equally been watching what has been happening with ECR in the US with equally great interest.

On behalf of UK Industry we would like to submit the following comments and observations to you, for your consideration. As we indicated at our meeting in London with Brian Nilsson, and other senior figures in the DDTC, on Thursday 28th January 2016, we very much welcome the opportunity not only to present our views face-to-face, but also to comment on any proposals which are being published for consultation.

We trust that the DDTC will be receiving informed and constructive technical input and considered views on the series of questions and queries that it has posed in this consultation exercise, such as to have the answers that it needs and has sought.

DDTC has added language to clarify the scope of licenses and agreements which incorporates the license application materials. New section 124.1(e) states that agreements are limited to the information described in the agreement, license, *and any letters of explanation (LOE)*. However, it is unfortunately still the case that the ITAR does not explicitly require the exporter to provide a copy of the licence, though they are now obligated at least to provide the reference (123.9(b)(1)). Applicants often do not share license application forms, supplemental material or LOEs with non-US foreign parties, and non-US companies normally are limited in their ability to view or confirm information outside of the issued license, GC or Agreement. So it would be very helpful to see language which required the exporter to provide all relevant documentation, including provisos, to the consignee(s) and end users, and a similar requirement for retransfers and reexports - and, in the case of classified provisos, to inform the consignee that they exist. DDTC either should include all relevant information in the final authorisation documents or should add a parallel provision requiring the exporter or reexporter to inform authorised parties what the scope of the licence entails, including information set out in LOEs that might change the scope or provisions of a license or agreement. In our considered view DDTC also should set out such an affirmative obligation in a proviso or in standard authorisation text requiring the exporter to share relevant authorisation details with foreign parties.

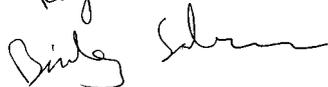
DDTC invited comments on the interim final proposals set out in 81 FR 35611 of 3rd June 2016. EGADD has two more general and generic comments and observations to make.

Firstly, in 120.51, DDTC has proposed a new definition of 'retransfer', ie a change in 'end user' or 'end use'. DDTC asserts that this definition covers transfers to subcontractors or other parties not explicitly authorised, on the basis that these are changes in end user or end use. Neither 'end use' nor 'end user' are defined in the ITAR; consequently, the reader is left to assume that they carry the common sense meaning of the 'ultimate' disposition of an item, excluding its movement before (or after), if the ultimate disposition is unaffected. We fear, therefore, that this language constitutes a compliance violation waiting to happen.

Furthermore, we believe that this language is inconsistent with that in 123.10, dealing with non-transfer and use assurances, as well as the DSP-83 form and guidance themselves, which clearly differentiate between 'end users' and 'consignees'. We, therefore, urge that the new definition is amended on the following lines: 'A retransfer is a change in end use, end user or consignee, of a defense article within the same foreign country'.

Secondly, while we welcome the consolidation of 124.16, dealing with NATO plus Dual and Third Country Nationals (DTCNs), into 126.18, and while we welcome also language that makes it clear that the provision applies to all types of authorisation, and not just to agreements, we are not happy to see the provision in (d)(4), which requires the DTCNs concerned to sign an NDA unless the relevant transfers are authorised by an Agreement. As we read it, this means that NATO plus DTCNs will have to sign an NDA for access to articles covered by a licence. DDTC will not have forgotten that the exemptions progressively introduced for DTCNs were motivated at least in part by concerns among America's allies about the potential impact of US regulations on domestic anti-discrimination law. We believe that a requirement for DTCNs to sign NDAs potentially comes within the scope of the UK's Equality Acts (www.legislation.gov.uk/ukpga/2006/3/contents and www.legislation.gov.uk/ukpga/2010/15/contents), and possibly also of the Data Protection Acts (www.legislation.gov.uk/ukpga/1998/29/introduction and www.dataprotection.ie/docs/Data-Protection-Acts-1988-and-2003:-Informal-Consolidation/796.htm). Unless, therefore, there is convincing evidence that the previous provision (which places the responsibility for signing the NDA on the employer, as in 126.18(c)(2),) has resulted in identifiable damage to the security of the United States, we urge that it is retained, or, better still, dropped altogether, as of negligible utility.

Thank you in advance for your consideration of these comments. If you have any questions about this correspondence please contact me.

Regards


Brinley Salzman - Secretary, EGAD

June 30, 2016

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Washington, D.C. 20522

ATTN: Mr. C. Edward Peartree

SUBJECT: ITAR Amendment – Revisions to Definition of Export and Related Definitions

Dear Mr. Peartree:

Northrop Grumman Corporation (NGC) wishes to thank the Department of State for the opportunity to submit comments in review of the Interim Final Rule (RIN 1400-AD70) regarding Revisions to Definition of Export and Related Definitions. In response, NGC provides the following recommendations:

- Revise §126.18(a) to remove references to §124.16: Based upon the consolidation of §124.16 & §126.18 into one exemption, the reference to §124.16 under §126.18(a) is no longer accurate.
- Revise §120.17(a)(2) to state “Releasing or otherwise transferring technical data to a foreign person in the United States (a “deemed export”) or abroad.” As written, the statement implies that only transfers to foreign persons that occur in the United States constitute an export. This change will provide clarity to the reader that the transfer of technical data to a foreign person, regardless of location, constitutes an export.

Should clarification or subsequent technical discussions be necessary, please contact either Benjamin Meyer at Benjamin.meyer@ngc.com, (703-280-4052), or myself at thomas.p.donovan@ngc.com, (703-280-4045).

Sincerely,

Thomas P. Donovan
Director, Export Management
Global Trade Management

July 5, 2016

U.S. Department of State
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Subject: Raytheon Company Comments on Proposed Revisions to ITAR Definitions

Ref: 81 Fed. Reg. 35,611 (June 3, 2016)

On June 3, 2016, the Department of State requested comments from the public on (1) updates and changes to definitions in the ITAR of “export,” “reexport,” “retransfer,” “release;” (2) new sections of the ITAR on the scope of licenses, releases of controlled information, and “exports” of technical data to U.S. persons abroad; and (3) the treatment of foreign dual and third country national employees within one exemption.

The Department of State indicated it would accept comments from the public on the interim final rule until July 5, 2016. Below please find comments from Raytheon.

I. COMMENTS ON THE PROPOSED DEFINITION OF “EXPORT”

The current proposed definition of export includes a definition of “deemed export” under Part 120.17(b), which defines “deemed export” as:

Any release in the United States of technical data to a foreign person is deemed to be an export of all countries in which the foreign person has held or holds citizenship or holds permanent residency.

We understand this definition is meant to encompass exports to all countries in which the foreign national holds or has held citizenship or holds permanent residency. Raytheon requests clarification on a few points below.

1. How extensively is an exporter required to inquire as to a foreign national’s past citizenships or permanent residencies? Is a reasonable level of diligence sufficient? If so, can DDTC so indicate in the preamble of the final rule?
2. Is an exporter required to inquire into citizenships a foreign national has renounced? For example, if a person formally (in writing) renounces citizenship from one country (e.g., China) upon receiving U.S. citizenship will DDTC still consider that foreign national’s former Chinese citizenship?
3. Which citizenship controls (for purposes of DDTC authorizations) where a foreign national has multiple citizenships?

Raytheon Company Comments on Proposed Revisions to ITAR Definitions

July 5, 2016

Page 2 of 2

4. Does DDTC consider country of birth alone sufficient to establish a particular nationality for ITAR purposes? (i.e., will DDTC consider a person born in a particular country as a national of that country, even if the person does not hold citizenship or permanent residency status in his/her country of birth?)

II. COMMENTS ON PROPOSED EXEMPTIONS UNDER PART 126.18

The proposed exemptions under Part 126.18(d) include, in part, reexports of “unclassified defense articles or defense services to individuals who are dual national or third-country national employees of a foreign business entity, foreign governmental entity, or international organization . . . when such individuals are . . . (5) [n]ot the recipient of any permanent transfer or hardware.”

Raytheon requests DDTC include clarifying language regarding the intent under paragraph (5) cited above. Specifically, did DDTC intend to include a requirement that the eligible individuals in this part can only receive temporary hardware transfers or receive hardware a temporary basis? Or, did DDTC intend that if the reexport was to an individual person that person should be separately authorized by name or controlling entity on the agreement?



June 16, 2016

Rob Monjay
Regulatory and Multilateral Affairs (RMA)
Directorate of Defense Trade Controls
(202) 663-2817

Subject: ITAR Amendment—Final Revisions to Definitions {81 FR 35611-35617}

Dear Mr. Monjay,

I understand you are the person within DDTC that is directly involved with the subject amendment to the ITAR. I also understand it is your position that the revision to 22 CFR 125.4(b)(9) published at 81 FR 35617 “did not expand the scope with respect to USG contractors other than allowing foreign persons who are authorized to access technical data in the U.S. to receive that same technical data when temporarily travelling abroad. This just puts U.S. and foreign staff on the same footing when it comes to overseas travels. If the USG contractor is authorized under the current text, the rules should be same under the text that was published and will be effective September 1st.”

I respectfully submit that, in fact, the revision to 22 CFR 125.4(b)(9) published at 81 FR 35617 *does* expand the scope of 22 CFR 125.4(b)(9), and that this expansion is appropriate and desirable, as it benefits the U.S. Government in practical situations. Using a hypothetical export of Technical Data from the U.S. to a U.S. Government contractor servicing equipment owned by the U.S. Government in a foreign country, we can see that there is an expansion in the scope of 22 CFR 125.4(b)(9):

Assume

1. Company A and Company B are both U.S. companies, and they have no foreign subsidiaries.
2. The U.S. Government (specifically, the U.S. Military) deploys ITAR-controlled equipment manufactured by Company A to a foreign country as part of a military operation.
3. Company B has a support contract with the U.S. Government to support the equipment manufactured by Company A.
4. A U.S. citizen employee of Company B is in the foreign country and is supporting the equipment in #2 above.
5. A U.S. citizen employee of Company A, located in the United States, needs to send Technical Data related to the equipment in #2 above to the employee of Company B, located in a foreign country as described in #4 above.
6. Assume there are no other hindrances to using license exception 125.4(b)(9), e.g.: 125.1(b).

Analysis—Before September 1, 2016

Recitation of 125.4(b)(9) before September 1, 2016

Technical data, including classified information, and regardless of media or format, sent or taken by a U.S. person who is an employee of a U.S. corporation or a U.S. Government agency **to a U.S. person employed by that U.S. corporation** or to a U.S. Government agency outside the United States. This exemption is subject to the limitations of § 125.1(b) of this subchapter and may be used only if:

- (i) The technical data is to be used outside the United States solely by a U.S. person;
- (ii) The U.S. person outside the United States is an employee of the U.S. Government or is directly employed by **the** U.S. corporation and not by a foreign subsidiary; and
- (iii) The classified information is sent or taken outside the United States in accordance with the requirements of the Department of Defense National Industrial Security Program Operating Manual (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case the latter guidance must be followed).

125.4(b)(9) before September 1, 2016 does NOT authorize this hypothetical export of Technical Data

The hypothetical export of the Technical Data is **NOT** authorized by 125.4(b)(9) because the employee of Company B is not an employee of “a U.S. Government agency outside the United States,” and Employee B is not an employee of “**that** U.S. corporation,” as the word “that” refers back to the exporting Company—Company A. Rather, Employee B is an employee of **a different** U.S. corporation.

Analysis—After September 1, 2016

Recitation of 125.4(b)(9) after September 1, 2016 per 82 FR 35617

Technical data, including classified information, regardless of media or format, exported, reexported, or retransferred by or **to a U.S. person**, or a foreign person employee of a U.S. person travelling or on temporary assignment abroad, subject to the following restrictions:

- (i) Foreign persons may only export, reexport, retransfer, or receive such technical data as they are authorized to receive through a separate license or other approval.
- (ii) The technical data exported, reexported, or retransferred under this authorization may only be possessed or used by a U.S. person or authorized foreign person. Sufficient security precautions must be taken to prevent the unauthorized release of the technical data. Such security precautions may include encryption of the technical data; the use of secure network connections, such as virtual private networks; the use of passwords or other access restrictions on the electronic device or media on which the technical data is stored; and the use of firewalls and other network security measures to prevent unauthorized access.
- (iii) The individual is an employee of the U.S. government **or is directly employed by a U.S. person** and not by a foreign subsidiary.
- (iv) Technical data authorized under this exception may not be used for foreign production purposes or for defense services unless authorized through a license or other separate approval.
- (v) Classified information is sent or taken outside the United States in accordance with the requirements of the Department of Defense National Industrial Security Program Operating Manual (unless such requirements are in direct conflict with guidance provided by the Directorate of Defense Trade Controls, in which case such guidance must be followed).

125.4(b)(9) after September 1, 2016 DOES authorize this hypothetical export of Technical Data

The hypothetical export of the Technical Data is authorized by 125.4(b)(9) because the U.S. Person employee of Company B is an “individual” “directly employed by a U.S. Person” (namely, Company B). The key difference in the wording is the replacement of the words “that U.S. corporation” with “a U.S. Person.”

Thus, the new language DOES expand the scope of 125.4(b)(9) with respect to USG contractors. This is highly desirable as it improves the ability of the U.S. Government to support its internationally deployed equipment, which may be critical to mission success, in a timely fashion.

Sincerely,

VP Business Development
Office of Export Compliance
ITAR Empowered Official

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June 14, 2016

DDTCPublicComments@state.gov
DDTCResponseTeam@state.gov

From: billroot23@gmail.com; tel. 517 333 8707

Subject: ITAR Amendment - Final Revisions to Definitions

The June 3, 2016 ITAR interim final rule uses the term “subject to the ITAR” in 120.17(a)(3) and 120.19(a)(3) to refer to the status of any aircraft, vessel, or satellite. The definitions in the EAR of “subject to the ITAR” and “subject to the EAR” refer to the regulatory jurisdictions exercised by DDTC and BIS. Under this “subject to the ITAR” definition, an Item which ITAR determines to be not controlled, because of either not being on the USML or being eligible for an exemption, would be subject to the ITAR even though that same item would also be subject to the EAR. But the regulatory purpose of the definitions is to provide a basis for determining which agency has jurisdiction for a given item. The only way to achieve that purpose is to change “exercises regulatory jurisdiction” to “controls” in both EAR definitions and to add to ITAR these revised definitions. This would be consistent with 123.8.

The June 3 rule uses the term “technical data” 16 times in 120.17, 120.19, 120.50, and 125.4(b)(9). ITAR “technical data” includes what Wassenaar and EAR call “software” and “technology”; but excludes what ITAR calls “defense services” and what Wassenaar and EAR include in technology. Depending on the context, “technical data” in ITAR, should either be deleted, because of its inclusion in “defense article,” or changed to one of the following:

- (1) software and technology less defense services;
- (2) software and technology (*i.e.*, including defense services);
- (3) technology less defense services (*i.e.*, without software); or
- (4) technology (*i.e.*, including defense services and without software).

The following sentence in the left column on page 35613 of the June 3 rule, under Supplementary Information, concerns when the export of technical data is controlled:

For information to be ITAR controlled, it must be directly related to a defense article or specifically enumerated on the USML, and not satisfy one of the exclusions in 120.10(b).

This sentence is internally inconsistent in the following five respects:

1. “ITAR controlled” information includes defense services as well as technical data;
2. The ITAR definition of “enumerated” in 120.41 Note to paragraph (b) excludes the following 30 catch-all paragraphs, which are now ITAR controlled:
III(d)(3), IV(h)(3, 5, 6, 7, 9, 11, 14, 18, 19, 20); VI(c), (f)(2, 3, 7, 8); VII(g)(2, 8); VIII(e), (h)(3, 4, 5, 6, 11, 14, 15); XII(e); XIII(a); XVI(d); XX(c)
and the following 11 catch-all paragraphs which are proposed for ITAR control:
XII(a)(1, 8), (b)(8)(i), (c)(1, 12, 13, 14, 15, 20), (d)(6); and XVIII(e).

3. The status of technical data directly related to a controlled defense article component which is described on the USML as not only specially designed but also with technically specific characteristics differs from the status of technical data directly related to a catch-all component. Release (b)(4) refers to:

for use in or with both defense articles enumerated on the U.S. Munitions List and also commodities not on the U.S. Munitions List.

The technically defined component would therefore lose its controlled status under those circumstances, whereas the catch-all component would not. It would seem to follow logically that technical data directly related to the technically described specially designed component which had been released from control would also be released from control, whereas technical data for a catch-all component would not be released from control, because such a component was not enumerated.
4. Whether or not technical data for a catch-all component is controlled more restrictively than technical data for a component which is not catch-all, the clearly more restrictive status of catch-all components than non-catch-all components is inconsistent with the technical descriptions in the latter being added because of findings that they are more strategically significant than catch-all. Moreover, non specific components are quintessential examples of what, under the Export Control Reform, should be transferred from the USML to the CCL as not providing the United States with a critical military or intelligence advantage. In other words, there is no apparent justification to include either “enumerated” or “catch-all” in ITAR.
5. “Directly related” is undefined. EAR and Wassenaar use the defined term “required” instead.

Recommendations:

EAR definitions of “subject to the ITAR” and “subject to the EAR”: change “exercises regulatory jurisdiction” to “controls” and add these revised definitions to ITAR 120.

120.1(c)(2) twice and 120.2 first use: change “enumerated” to “listed”

120.2 second use: change “enumerated” to “controlled”

120.6 Defense article

~~Defense article means any item or technical data designated in 121.1 of this subchapter controlled commodity, software, or technology, except for the defense services portion of technology. ... This term includes technical data recorded or stored in any physical form, models, mockups or other items that reveal technical data directly relating to items designated in 121.1 of this subchapter. It also includes forgings, castings, and other ... It does not include basic marketing information on function or purpose or general system descriptions.~~

120.7(b)(2): change “enumerated” to “controlled”

120.9 Defense service

(a) Controlled defense service means the following portion of technology:

(a)(1) ...

(a)(2) ~~The furnishing to foreign persons of any technical data controlled under this subchapter (see 120.10), whether in the United States or abroad; or~~

(a)(3)(2) ...

120.10 ~~Technical data~~ Technology

(a) ~~Technical data~~ Controlled technology means, for the purposes of this subchapter:

(a)(1) Information, other than software as defined in ~~120.10(a)(4)~~ 120.45(f), which is “required,” as defined in (new section using EAR 772.1 definition revised to delete software), for the design, development, as defined in (new section using EAR 772.1 definition), production, as defined in (new section using EAR 772.1 definition), manufacture, assembly, operation, installation, repair, testing, maintenance or modification overhaul, or refurbishing of the controlled commodity or software portions of defense articles or is otherwise specifically controlled in 121.1 of this subchapter. Such information may be either tangible, i.e., technical data, or intangible, i.e., technical service. Technical data may be recorded or stored in any physical form, including models or mockups (but see 123.16(b)(4), 124.2(c)(4)(ii), and 125.4(c)(5)). Controlled technical data or technical service is either “required” for commodities or software controlled in 121.1 of this subchapter or otherwise controlled in 121.1 or 120.9 defense services.

(a)(2) ...

(a)(3) ...

~~(a)(4) Software (see 120.45(f)) directly related to defense articles.~~

(b) ...

120.17 Export ...

(a)(2) Releasing or otherwise transferring ~~technical data~~ technology to a foreign person in the United States (a “deemed export”);

(a)(3) Transferring registration, control, or ownership of any aircraft, vessel, or satellite ~~subject to the ITAR~~ “subject to the ITAR” by a U.S. person to a foreign person.

(b) Any release in the United States of ~~technical data~~ technology to a foreign person is deemed to be an export to all countries in which the foreign person ...

120.19 Reexport ...

(a)(2) Releasing or otherwise transferring ~~technical data~~ technology to a foreign person ... (a “deemed reexport”);

(a)(3) Transferring registration, control, or ownership of any aircraft, vessel, or satellite ~~subject to the ITAR~~ “subject to the ITAR” between foreign persons.

(b) Any release outside the United States of ~~technical data~~ technology to a foreign person is deemed to be a reexport to all countries in which the foreign person ...

120.41 Specially designed

(b) after software insert:

that would be controlled by paragraph (a)

Delete Note to paragraph (b) (definitions of “enumerated” and “catch-all”)

(b)(3)(ii) and (b)(4): change “enumerated” to “controlled”;

120.45(f) Software

Insert following EAR definition at the beginning:

Software means a collection of one or more ‘programs’ or ‘microprograms’ fixed in any tangible medium of expression.

‘Program’ means a sequence of instructions to carry out a process in, or convertible into, a form executable by an electronic computer.

‘Microprogram’ means a sequence of elementary instructions, maintained in a special storage, the execution of which is initiated by the introduction of its reference instruction into an instruction register.

change “enumerated” to “controlled”

change “technical data” to “technology”

120.50 Release

(a) ~~Technical data~~ Technology is released through:

(a)(1) Visual or other inspection by foreign persons of a defense article that reveals ~~technical data~~ technology to a foreign person; or

(a)(2) Oral or written exchanges with foreign persons of ~~technical data~~ technology in the United States or abroad

121.1(b)(3) and (d)(2): change “enumerated” to “controlled”;

121.1 USML technical data paragraphs:

change “Technical data” to “Technology and software”

change “120.10” to “120.10 and 120.45(f)”

change “directly related” to “required”

change “classified technical data” to “classified technology or software”

In 121.1 USML other than technical data paragraphs:

delete all 30 existing and 11 proposed catch-alls on the USML

delete “specially designed” in IV(b) Note 3

change “enumerated” to “controlled” in IV(h)(22) twice, (27), (28) twice, (29);

V(f) Note 1; VII(b), (g)(13); IX(a)(2), (b)(4); X(a)(8) Note 2; XIII(e)(7) Note 2,

(f), (h), (h)(4); XV(e) Note 1; XIX(f)(1) Note; XX(a)(8) Note 2; XXI

122.4(b): change “technical data” to “technology”

122.5(a): delete “of technical data;” (it is included in “defense articles”)

123.1(b): delete “, including technical data,”

(its inclusion in defense articles is apparent in what follows)

- 123.1: (b) second use, (b)(2), and (b)(3), change “technical data” to “technology”
- 123.1(c)(2):, change “technical data” to “technology”
- 123.1(c)(5):, delete “or classified technical data” (it is included in classified defense articles)
- 123.3(b):, change “technical data” to “technology”
- 123.10(a): change “classified articles, including classified technical data” to “classified defense articles”
- 123.10(b): delete “, including technical data,”
- 123.16(b)(4): change “technical data” first use to “technology”
change “technical data” second use to “controlled technology”
- 123.20(a): change “articles, technical data, or services” to “defense articles or defense services” twice
- 123.20(c): delete “, technical data,” three times
- 123.22(a): change “technical data and defense services” to “software or technology”
- 123.22(b)(3): change “technical data and defense services” to “software or technology”
- 123.22(b)(3): change “technical data license, agreement, or a technical data exemption” to “license, agreement, or exemption”
- 123.22(b)(3)(i): change “Technical data” to “Software or technology” three times
- 123.22(b)(3)(ii): change “technical data and defense services” to “technology”
- 123.22(b)(3)(ii): change “technical data and services” to “technology”
- 123.22(b)(3)(ii): change “technical data” to “technology” twice
- 123.22(b)(3)(iii): change “technical data and defense services” to “technology”
- 123.22(b)(3)(iii): change “technical data” to “technology” twice
- 123.22(c)(2): change “technical data” to “technology”
- 123.24(b): change “technical data” to “software or technology”
- 123.26: delete: “, including technical data,”
- 123.25: delete “enumerated”
- 123.27(a): change “and certain associated technical data” to “, or software or technology”
- 124.1(a): change
“ . The requirements of this section apply whether or not technical data is to be disclosed or used in the performance of the defense services described in 120.9(a) of this subchapter (e.g., all the information relied upon by the U.S. person in performing the defense service is in the public domain or is otherwise exempt from the licensing requirements of this subchapter pursuant to 125.4 of this subchapter)”
to
“provided that the information relied upon by the U.S. person in performing the defense service is either exempt from the licensing requirements of this subchapter by being in the public domain or being listed in 125.4 of this subchapter or is explicitly identified in the agreement approved by DDTC as requiring a license.”
- 124.2(c): change “technical data” to “software or technology”
- 124.2(c)(4): change “technical data” to “software or technology”
- 124.2(c)(5): change “technical data” to “software or technology”
- 124.2(c)(6): change “technical data” to “software or technology”
- 124.3(a): change “technical data” to “software or technology”

- 124.3(b): change “technical data” to “software or technology”
 124.7(1): change “advanced” to “controlled”
 124.8(5): change “technical data or defense service” to “software or technology” twice
 124.9: change “article” to “defense article” three times in (a)(1), twice in (a)(3), once in (a)(4),
 and once in (b)(3)
 124.10(a): delete “, including classified technical data,” twice
 124.10(a): change “classified articles” to “classified defense articles”
 124.12(a): change “or technical data” to “, software, or technology” twice in (a)(3),
 once in (a)(4), and once in (a)(5)
 124.12(a)(6): after “defense articles” insert “or defense services”
 124.12(b)(3): change “technical data” to “software or technology”
 124.13(b): change “technical data” to “software or technology”
 124.13(c)(1): change “technical data” to “software or technology”
 124.13(c)(2): change “data” to “software or technology”
 124.13(c)(5): change “technical data” to “software or technology”
 124.13(d): change “article” to “defense article”
 124.13(d): change “technical data” to “software or technology”
 124.13(e): change “technical data” to “software or technology” three times
 124.14(c): change “articles” to “defense articles” in (c)(6), (c)(7), and (c)(8)
 124.14: change “article: to “defense article” twice in (c)(8) and once in (d)(2)
 124.14(e)(5): delete “or classified technical data”
 124.14(e)(6): change “, or related technical data” to “, software, or technology”
 124.15(b)(2): change “technical data or services” to “software or technology”
 124.15(c): change “article” to “defense article”
 124.15(d): change “technical data” to “software or technology”

Part 125: change “TECHNICAL DATA” to
 “UNCLASSIFIED SOFTWARE, UNCLASSIFIED TECHNOLOGY,”

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- 125.1, 125.2, 125.3, 125.9: after “Exports” insert “, reexports, or retransfers”
 125.7 after “export” insert “, reexport, or retransfer”
 125.2: change “technical data” to “software or technology”
 125.3, 125.7, and 125.9: delete “classified technical data and”
 125.1 heading: after “Exports” insert “, reexports, or retransfers”
 125.1: after “export” insert “, reexport, or retransfer” in (a) twice, (b), (c), (d), and (e)
 125.1: after “exports” in (d) insert “, reexports, or retransfers”
 125.1: change “technical data” to “software or technology” in (a), (b), (c), (d) twice, and (e)
 125.1(e): change “related to” to “required for”
 125.2 heading: after “Exports” insert “, reexports, or retransfers”
 125.2 heading, delete “classified technical data” to “software or technology”
 125.2: after “export” insert “, reexport, or retransfer” in (a) twice and (b)
 125.2: change “technical data” to “software or technology”
 in (a) three times, (b) twice, and (c) twice
 125.2(b): change “data” to “software or technology”

- 125.3 heading: after “Exports” insert “, reexports, or retransfers”
- 125.3 heading: delete “classified technical data and”
- 125.3: after “export” insert “, reexport, or retransfer” in (a) and (c)
- 125.3(b): change “either for export or reexport after a temporary import” to
“either for export, reexport, or retransfer or for export after a temporary import”
- 125.3(a): delete “, including technical data,”
- 125.3(a) change “commodity” to “defense article”
- 125.3: change “technical data” to “software or technology”
in (a) three times, (b) twice, and (c) twice
- 125.4: after “exports” insert “, reexports, or retransfers” in (a) twice and (b)
- 125.4: change “technical data” to “software or technology”
in (a) twice, (b)(1, 2, 3, 4, 5, 6, 7, 8, 9, 9(i, ii four times, and iv), 10, 10(iii), 11, 12, 13)
- 125.4(b)(2): change “and which meet the requirements of 124.3 of this subchapter” to
“not exceeding the terms of that agreement (see 124.3)”
- 125.4(c): change “Defense services and related unclassified technical data” to
“Unclassified software or technology”
- 125.4(c): change “defense services and technical data” to “software or technology”
- 125.5(a): change “unclassified technical data” to “unclassified software or technology”
- 125.5(a): after “classified defense article” delete “or classified technical data”
- 125.5(a): after “classified defense article” delete “or technical data”
- 125.5(c): change “technical data” to “software or technology” three times
- 125.6(a): after “export” insert “, reexport, or retransfer” twice
- 125.6(a): change “technical data” to “software or technology” twice
- 125.7: after “export” insert “, reexport, or retransfer” in heading and (b)
- 125.7 heading: delete “classified technical data and”:
- 125.7 (a): after “export” insert “, reexport, retransfer,”
- 125.7: delete “classified technical data or other” in (a) and (b)
- 125.9 heading: after “exports” insert “, reexports, or retransfers”
- 125.9 heading: delete “classified technical data and”
- 125.9 first paragraph: after “export” insert “, reexport, or retransfer”
- 125.9 first paragraph: delete “classified technical data or”
- 126 table of contents
- 126.1: change “exports, imports” to “exports, reexports, retransfers, temporary imports”
- 126.18: change “transfers” to “retransfers”
- 126.1 heading: change “exports, imports” to “exports, reexports, retransfers, temporary imports”
- 126.1(a): change “exports and imports” to
“exports, reexports, retransfers, and temporary imports”
- 126.1(a): change “export” to “export or reexport” twice
- 126.1(c): change “Exports” to “Exports, reexports, retransfers,”
- 126.1(c): change “services of a type described on the United States Munitions List (22 CFR part
121)” to “defense services”
- 126.1(c): change “services” to “defense services”
- 126.1(c)(7) Liberia: probable deletion per recent executive order

- 126.1(d): change “Exports” to “Exports or reexports”
- 126.1(e): delete “transfer” in (e)(1) twice and in (e)(2)
- 126.1(f): change “exports and imports” to “exports, reexports, or temporary imports”
- 126.1(f): change “military equipment” to “defense articles or defense services” in (f)(1), (f)(2)
- 126.1(g): change “exports and imports” to “exports, reexports, or temporary imports”
- 126.1(i): change “exports or imports” to “exports, reexports, or temporary imports”
- 126.1(i)(4): change “military equipment” to “defense articles or defense services”
- 126.1(i)(4): change “related” to “required”
- 126.1(j): change “exports or imports” to “exports, reexports, or temporary imports”
- 126.1(j)(2): delete “arms and related materials”
- 126.1(k): change “exports or imports” to “exports, reexports, or temporary imports”
- 126.1(k)(1): change “arms and related materials” to “defense articles or defense services”
- 126.1(k)(2): change “military equipment” to “defense articles or defense services”
- 126.1(k)(4): change “related materiel” to “required defense articles or defense services therefor”
- 126.1(k)(5): change “military equipment” to “defense articles or defense services”
- 126.1(k)(6): change “sales or supply of arms and related materiel, or provision of assistance or personnel” to “defense articles or defense services”
- 126.1(l) Vietnam: probable deletion per recent Executive Order; otherwise, change “exports or imports” to “exports, reexports, or temporary imports”
- 126.1(m): change “exports or imports” to “exports, reexports, or temporary imports”
- 126.1(m)(2): change “export” to “export or reexport”
- 126.1(n): change “exports or imports” to “exports, reexports, or temporary imports”
- 126.1(o) Liberia: probable deletion per recent Executive Order; otherwise:
change “exports or imports” to “exports, reexports, or temporary imports”;
- 126.1(o)(4): change “military equipment” to “defense articles or defense services”; and delete “and related technical assistance and training,”
- 126.1(q): change “exports or imports” to “exports, reexports, or temporary imports”
- 126.1(q)(2): change “exports or imports” to “exports, reexports, or temporary imports”
- 126.1(q)(2): delete “and related technical assistance and training,”
- 126.1(q)(4): change “exported” to “exported or reexported”
- 126.1(q)(5): change “equipment” to “defense articles or defense services”
- 126.1(r): change “exports or imports” to “exports, reexports, or temporary imports”
- 126.1(s): change “exports or imports” to “exports, reexports, or temporary imports”
- 126.1(s): delete “Such exports may meet the licensing exemptions of 123.17 6f this subchapter.”
- 126.1(t): change “exports or imports” to “exports, reexports, or temporary imports”
- 126.1(u): change “exports or imports” to “exports, reexports, or temporary imports”
- 126.1(u)(2): change “military equipment, and related technical assistance and training,” to “Defense articles or defense services”
- 126.1(u)(3): change “exported” to “exported or reexported”
- 126.1(u)(4): change “related equipment” to “required defense articles or defense services therefor”
- 126.1(u)(5): change “Arms and related lethal military equipment” to “defense articles or defense services”
- 126.1(u)(6): change “Other sales or supply of arms and related materiel, or provision of

- assistance or personnel” to “defense articles or defense services”
- 126.1(v): change “exports or imports” to “exports, reexports, or temporary imports”
- 126.1(v)(1): change “Supplies and related technical training and assistance to” to “Defense articles or defense services for”
- 126.1(v)(2): change “Supplies of non-lethal military equipment” to “Non-lethal defense articles or defense services”
- 126.1(v)(4): change “Assistance and supplies provided” to “Defense articles and defense services”
- 126.1 Note: change “exports or imports” to “exports, reexports, or temporary imports”
- 126.4(a): change “, including technical data or the performance of a” to “or”
- 126.4(a): change “export” to “export or reexport” twice
- 126.4(a): change “transferred” to “exported” and change “transfer” to “permanent export”
- 126.4(a) Note: change “rxported” to “exported or reexported”
- 126.4(b): change “export” to “export or reexport”
- 126.4(c): change “export” to “export or reexport” in (c). (c)(1), and (c)(3)
- 126.4(c): change “, including technical data or the performance of a” to “or”
- 126.4(c)(2): delete “or technical data”
- 126.5(d): change “Reexports/retramnsfer to “Reexports”
- 126.5(d): change “Reexport/retransfer” to Reexport”
- 126.5(d) change “reexport/retransfer” to “reexport”
in (d) three times, (d)(1) twice, and (d)(2) twice
- 126.6(a): change “article or technical data: to “defense article” in (a)(1), (a)(2), and (a)(3)
- 126.6(c): delete “or technical data” and change “transferred” to “exported”:
- 126.6(c)(1): delete “, technical data” twice
- 126.6(c)(2) delete “, technical data”
- 126.6(c): change “transfer” to “export” in (c)(3,4, 5, 6(i), and 7(iv))
- 126.6(c)(3): change “defense article and related technical data” to “defense articles”
- 126.6(c)(6): change “transfers” to “exports”
- 126.6(c)(6)(ii): change “Shippers Export Declaration” to “AES EEI”
- 126.6(c)(6)(iii): change “hardware and related technical data” to “defense articles or defense services”
- 126.6(c)(7)(iii): change “In instances when defense service involves the transfer of classified technical data, the U.S. person transferring the defense service” to “The U.S. person exporting classified defense articles or defense services”
- 126.7(a): change “export” to “export, reexport, retransfer, or temporary import”
- 126.7(a): change “enumerated” to “listed” in (a)(3) and (a)(4)
- 126.9(a): change “export” to “export, reexport, retransfer, temporary import,”
- 126.9(a): change “articles or related technical data” to “defense articles or defense services”
- 126.13: change “enumerated” to “listed” in (a)(1) and (a)(3)
- 126.14(a)(1): change “defense articles, defense services, and related technical data” to “defense articles and defense services”
- 126.14(a)(2): change “hardware, technical data, defense services, development, manufacturing, and logistic support” to “defense articles and defense services”
- 126.14(a)(2): delete “and technical data,”

- 126.14(a)(3)(i): delete “, technical data”
- 126.14(a)(3)(ii): delete “technical data and performance of”
- 126.14(a)(4): change “Technical data” to “Software and technology”
- 126.14(a)(4): change “technical data” to “software and technology” twice
- 126.14(a)(4): change “defense articles, defense services, and technical data” to “defense articles and defense services”
- 126.14(b): change “technical data” to “software and technology”
- 126.14(b)(4): change “technical data” to “software and technology”
- 126.14(b)(5): change “non-transfer” to “non-retransfer”
- 126.14(b)(6): change “defense articles, defense services, and technical data” to “defense articles and defense services”
- 126.16(a)(1)(iii): change “120.19” to “120.50 and 120.19”
- 126.16(a)(1)(iv): delete “, including technical data,”
- 126.16(j)(3)(ii): change “Technical data” to “Software or technology”
- 126.16(j)(3)(ii): change “technical data” to “software or technology”
- 126.16(l)(1)(iv): change “Commodity” to “Defense article”
- 126.16(l)(1)(iv): change “commodity, including technical data” to “defense article”
- 126.16(n)(3): delete “or technical data”
- 126.17(a)(1)(iii): change “120.19” to “120.50 and 120.19”
- 126.17(a)(1)(iv): delete “, including technical data,”
- 126.17(j)(3)(ii): change “Technical data” to “Software or technology”
- 126.17(j)(3)(ii): change “technical data” to “software or technology”
- 126.17(l)(1)(iv): change “Commodity” to “Defense article”
- 126.17(l)(1)(iv): change “commodity, including technical data” to “defense article”
- 126.17(n)(3): delete “or technical data”
- 126.18(a): delete “, which includes technical data”
- 126.18: change “transfer” to “retransfer” in (a) twice, (b), and (c)(2)
- 126.18(c): change “transferring” to “retransferring”
- 126 Supplement 1: change “services” to “defense services” 45 times
- 126 Supplement 1: change “related to” to “required for” 26 times
- 126 Supplement 1: change “directly related to” to “required for” XV(f)
- 126 Supplement 1: change “technical data” or “data” to “software or technology” 23 times
- 126 Supplement 1: delete following 15 catch-alls:
 (I to XXI twice, III(d), IV(a.b.d.g), VI cryogenic, VII cryogenic, VIII cryogenic, VIII(a), VIII(e), XII(d), XV(a), XX cryogenic)
 (only the following 3 of these 15 are on the USML: III(d), IV(g) per IV(h)(18), VIII(e))
- 126 Supplement 1: change “described” to “controlled” twice V(a)(13) and V(a)(23)
- 126 Supplement 1: change “articles” to “defense articles” XVII
- 126 Supplement 1: change “enumerated” to “controlled” XXI
- 127.1(a)(1): delete “or technical data”
- 127.1(a)(2): delete “, technical data,” twice
- 127.1(a)(4): change “import” to “temporary import”
- 127.1(a)(4): delete “, technical data,”

- 127.1(a)(5): change “export or transfer” to “export, reexport, or retransfer”
- 127.1(c): delete “, which includes technical data,”
- 127.1(c): change “transfers” to “retransfers” and change “transferor” to “retransferor”
- 127.1(d)(2): delete “, which includes technical data,”
- 127.2(a): delete “transferring,”
- 127.2(a): delete “, technical data,”
- 127.4(a): delete “or technical data”
- 127.4(b): delete “or technical data”
- 127.4(d): delete “transfer,”
- 127.4(d): delete “, technical data,”
- 127.5: delete “technical data or”
- 127.5: delete “or technical data”
- 127.6(b): change “article” to “defense article”
- 127.7(b): change “enumerated” to “listed”
- 127.11(a): change “enumerated” to “listed”
- 127.12(b)(5): delete “transfer”
- 127.12(c)(2)(v): change “hardware, technical data,” to “defense article”

- 128.10: delete “or technical data”

- 129.6(a)(2)(iii): change “enumerated” to “listed” twice
- 129.6(b)(1): change “or transfer” to “reexport, or retransfer”
- 129.8(c)(1)(i): change “enumerated” to “listed”
- 129.8(d)(1): change “enumerated” to “listed”

- 130.8(a): change “defense articles or services” to “defense articles or defense services”

June 17, 2016

To: publiccomments@bis.doc.gov
DDTCPublicComments@state.gov
DDTCResponseTeam@state.gov

From: billroot23@gmail.com

Subject: Revisions to Definitions in the Export Administration Regulations RIN 0694-AG32
ITAR Amendment-Final Revisions to Definitions

Changes in the EAR definitions published, or referred to, in the June 3, 2016 Federal Register are recommended, as follows. Comments below on “subject to the ITAR” and on “classified” and “classification” are also relevant to the ITAR interim final rule in the June 3, 2016 Federal Register with respect to “subject to the ITAR” in 120.17(a)(3) and 120.19(a)(3) and to “classified” in 125.4(b)(9) and 125.4(b)(9)(v) and “unclassified” in 126.18(d).

“Subject to the EAR” is referred to in June 3, 2016 revisions of EAR 734.3, 734.8(a) Note 2, 734.13 three times, 734.14 three times, and 734.17(b). Definitions in 772.1 of “subject to the EAR” and “subject to the ITAR” are based on the regulatory jurisdictions exercised by BIS and DDTC, respectively. DDTC is exercising its regulatory jurisdiction when it makes a CJ determination that a product is not ITAR- controlled. It follows that BIS must then exercise its jurisdiction to determine the EAR-controlled status of that product. But no product should be subject to both ITAR and the EAR. The regulatory purpose of the definitions is to provide a basis for determining which agency has jurisdiction for a given product. In order to achieve that purpose, “regulatory jurisdiction” should be changed to “control” in both the “subject to the EAR” and “subject to the ITAR” definitions. This would be consistent with the word “controls” in the heading of ITAR 123.8 and the word “controlled” in EAR 734.3(b)(1), as follows:

exclusively controlled for export or reexport by the following departments and agencies are not subject to the EAR.

734.7(b) states (underlining emphasis added):

Published encryption software classified under ECCN 5D002 remains subject to the EAR unless it is publicly available encryption object code software classified under ECCN 5D002 and the corresponding source code meets the criteria specified in 740.13(e) of the EAR.

and 740.13(e) refers twice to:

classified under ECCN 5D002

where “classified” means controlled.

But 734.18(a)(5)(i) includes in activities that are not exports, reexports, or transfers, technology or software that is “unclassified” using end-to-end encryption. Here, “unclassified” has the quite different meaning of not security classified.

ITAR uses “classified” to refer to a security classification when it controls classified technical data (which includes software). ITAR controls classified technical data related not only to other

defense articles and defense services but also to 600 series commodities and software. Neither ITAR nor EAR explicitly covers classified technology or software related to non-600 series commodity or software ECCNs.

To change EAR to harmonize with ITAR, “classified” in 734.7(b) and 740.13(e) would have to be changed to “controlled.” However, that would open a Pandora’s box of other EAR uses of “classified” or “classification.” For example, 740.17, re License Exception ENC, uses “classified” 25 times and classification 68 times (including 6 for the second C in CCATS). Changing “classified” to “controlled” would be relatively easy. But there is not a good word to replace “classification.” “Categorization” or “itemization” would be inadequate for ENC purposes, for which down to the paragraph or sub-paragraph may be required.

To change ITAR to harmonize with EAR should, therefore, be examined as easier. Restrictions based on security classification are more restrictive than export control restrictions. Transfers in the United States of security classified information are prohibited from one U.S. person to another U.S. person not cleared to receive that information. Export controls of classified information do not apply to such transfers. That alone suggests the desirability of removing security classification as a basis for export control and replacing it with Notes in both EAR and ITAR to “also see” security classification regulations. That would also resolve the present ambiguity as to whether EAR controls classified technology or software related to non-600 series commodity or software ECCNs.

The following 740.9(a)(3)(i) should be deleted:

Foreign persons may only export, reexport, transfer (in country) or receive such “technology” as they are authorized to receive through a license, license exception other than TMP or because no license is required.

This literally nullifies the applicability to “a foreign person employee of a U.S. person,” not only in 740.9(a)(3) but also “an employee of the exporter” in 740.9(a)(4)(ii) and 740.9(a)(5). Moreover, it could be construed to nullify applicability to foreign persons of all TMP and other license exceptions which do not explicitly mention eligibility for foreign persons even if they are not explicitly limited to U.S. persons.

The new 740.9(a)(3)(i) is substantially the same as the portion of the previous 740.9(a)(3)(i)(A) which followed “Because this paragraph (a)(3) does not authorize any new release of technology.” 740.9(a)(3)(i)(A) may have made some sense when it was first added to the regulations. But neither it nor the revised 740.9(a)(3)(i) makes any sense now. Even if “other than TMP” were deleted and there was a clear interpretation that foreign persons are eligible for license exceptions unless explicitly made ineligible, retaining, among “the following restrictions,” a statement revised so as to constitute no restriction would be needlessly confusing.

July 8, 2016

To: Kevin Wolfe, BIS, DOC, GOV

cc: publiccomments@bis.doc.gov
DDTCPublicComments@state.gov
DDTCResponseTeam@state.gov

From: billroot23@gmail.com

Subject: Revisions to Definitions in the Export Administration Regulations RIN 0694-AG32
ITAR Amendment-Final Revisions to Definitions

Thank you for addressing my June 17 comments on this subject during your Wednesday July 6 teleconference. I had recommended:

- (1) “regulatory jurisdiction” be changed to “control” in definitions of “subject to the EAR” and “subject to the ITAR”;
- (2) neither EAR nor ITAR include classified information in export controls; and
- (3) the following 740.9(a)(3)(i) be deleted:
Foreign persons may only export, reexport, transfer (in country) or receive such “technology” as they are authorized to receive through a license, license exception other than TMP or because no license is required.

My understanding of your July 6 remarks is that you saw no merit in recommendations numbered (1) and (2) above and that you did not address recommendation numbered (3). I hereby repeat all three recommendations for the reasons I gave on June 17 plus the following rebuttal to the arguments you used on July 6 in opposing recommendations (1) and (2):

Re (1), you observed that “subject to the EAR” and “subject to the ITAR” have a broader scope than what is “controlled” by EAR or ITAR. The current definitions of these terms serve no useful purpose. They are circular. In effect, they now mean whatever BIS or DDTC asserts is under their respective jurisdictions. DDTC now formally asserts jurisdiction for CJ determinations and is at liberty to revise the USML with entries which overlap the CCL. There is a clear need for BIS and DDTC to work together to determine whether a product is controlled under the ITAR or under the EAR. But an item is neither “subject to the ITAR” nor “subject to the EAR” until it is controlled under one or the other of these regulations. You did not respond to my June 17 comments citing EAR 734.3(b)(1) and ITAR 123.8 as indicating the intent that “subject to the EAR” and “subject to the ITAR” is to differentiate on the basis of “controlled,” rather than “regulatory jurisdiction.”

Re (2), you stated that EAR does not control “classified” information. However, neither EAR nor ITAR includes such a statement. To the contrary, EAR implies EAR control of at least some classified information and ITAR explicitly states that its control of classified information related to EAR is limited to 600 (and 500) series.

My June 17 comments included a citation to 734.18(a)(5)(i), pursuant to which “unclassified” end-to-end encryption activities are not exports, reexports, or transfers, technology or software. This implies, apparently unintentionally, that end-to-end encryption is included in EAR export controls if it is security classified.

USML Category XVII controls:

All articles, and technical data (see Sec. 120.10 of this subchapter) and defense services (see 120.9 of this subchapter) relating thereto, that are classified in the interest of national security and that are not otherwise enumerated on the U.S. Munitions List.

One might argue that “articles” in Category XVII includes “articles” on the CCL, because, in Category XVII, that word is not limited to “defense articles.” However, the definition of “technical data” in Sec. 120.10 (cited as relevant to Category XVII) includes in (a)(2):

Classified information relating to defense articles and defense services on the U.S. Munitions List and 600-series items controlled by the Commerce Control List.

Therefore, the Category XVII coverage of classified technical data relating to the CCL is limited to 600-series ECCNs.

The phrase “otherwise enumerated on the U.S. Munitions List” in Category XVII now includes technical data directly related to the A, B, C, D portions of various 600 series ECCNs specified in the technical data portions of Categories IV, VI, VII, VIII, XI, and XIX. It also includes technical data directly related to 9A515, 9B515, or 9D515 in Category XV. Therefore, despite the 120.10 limitation to 600-series, ITAR also controls technical data directly related to 500-series ECCNs.

The phrase “otherwise enumerated on the U.S. Munitions List” in Category XVII now omits technical data directly related to 600-series ECCNs corresponding to USML Categories V (1B608, 1C608, 1D608); IX (0A614, 0B614, 0D614); X (1A613, 1B613, 1D613); XI (9A620, 9B620, 9D620); XIII (0A617, 0B617, 0C617, 0D617); and XX (8A620, 8B620, 8D620).

Neither Category XVII nor the other USML Categories control portions of 600-series and 500-series software and technology ECCNs not directly related to A, B, C, D portions, such as 9D610.b, 9E610.b, 9D619.b, and 9E619.b. It is also not clear whether it is intended that ITAR control classified technology directly related to portions of 600-series and 500-series ECCNs limited to .y subitems, such as VI (8E609.y), VIII (9E610.y), X (1E613.y), XI (3E611.y), XIII (0E617.y), XV (9E515.y), XIX (9E619.y), and XX (8E620.y).

Your July 6 comments did not address my June 17 recommendation that security classification be removed from both ITAR and EAR export controls. This is because security classification is more restrictive than export controls. For example, a transfer in the United States from one U.S. person to another U.S. person is not subject to U.S. export controls. But, such a transfer involving security classified information would be prohibited unless the recipient had been cleared to receive that information. There is too high a risk that such an exporter, on realizing that export controls do not apply, would proceed with the transfer without first confirming that

July 5, 2016

Mr. Ed Peartree
Director
Office of Defense Trade Controls Policy
U.S. Department of State
2401 E St., N.W.
Washington, D.C. 20037

Re: International Traffic in Arms: Revisions to Definitions of Export and
Related Definitions (*Federal Register* Notice of June 3, 2016; RIN 1400-
AD70)

Dear Mr. Peartree:

The Semiconductor Industry Association (SIA) is the voice of the U.S. semiconductor industry, one of America's top export industries and a key driver of America's economic strength, national security, and global competitiveness. Semiconductors – microchips that control all modern electronics – enable the systems and products we use to work, communicate, travel, entertain, harness energy, treat illness, and make new scientific discoveries. The semiconductor industry directly employs nearly 250,000 people in the United States. In 2015, U.S. semiconductor company sales totaled \$166 billion, and semiconductors are the foundation of the global trillion dollar electronics industry. SIA seeks to strengthen U.S. leadership of semiconductor manufacturing, design, and research by working with Congress, the Administration and other key industry stakeholders to encourage policies and regulations that fuel innovation and drive international competition.

SIA is pleased to submit the following public comments in response to the request for public comments issued by the State Department's Directorate of Defense Trade Controls ("DDTC") on proposed revisions to definitions in the International Traffic in Arms Regulations ("ITAR").¹

I. Introduction

A goal of any regulatory regime should be to streamline and clarify regulations to the greatest extent possible while providing appropriate rules for behavior. The President's Export Control Reform Initiative is an effort to advance that goal. In many respects, the proposed revised definitions put forward by DDTC successfully clarify and streamline the ITAR so as to facilitate understanding and accommodate the realities of technology and the international market.

¹ International Traffic in Arms: Revisions to Definitions of Export and Related Definitions, 81 Fed Reg. 35,611 (Jun. 3, 2016) ("Revised Definitions").

The straightforward and most effective approach to drafting regulations is to define terms consistent with their plain and common sense meaning and then apply clear rules to the defined terms.² The proposed revised definitions of “Export” and “Release” should be clarified to bring those definitions into full conformance with the normal meaning of the terms.

II. Proposed Revised Definition of “Export”

In discussing the proposed revised definition of “Export,” DDTC notes that “the act of providing physical access does not constitute an “export.””³ SIA approves of this clarification and urges DDTC to include that statement in a Note to the new “Export” definition, clarifying that unless a foreign national actually accesses a defense article no “export” occurs.

In addition, and importantly, this same clarification should be made for technical data. Just as providing physical access to a defense article does not constitute an “export,” so too the act of providing electronic access to technical data should not constitute an “export.” In neither instance is any controlled item or technical data actually revealed or made visible to a foreign national. Accordingly, SIA urges DDTC to include in the new Note to the “Export” definition a statement indicating that simply providing electronic access to technical data does not constitute an “export” and unless a foreign national actually accesses controlled technical data no “export” occurs.

Moreover, SIA urges DDTC to clarify the revised definition of “Release” to comport with its statement that “the act of providing physical access does not constitute an “export”” if no actual access occurs.

III. Proposed Revised Definition of “Release”

DDTC states that a definition of “Release” is added to the ITAR in order to “harmonize with the EAR.”⁴ Paragraph (a)(1) of the proposed revised definition of “Release” states that

*Technical data is released through visual or other inspection by foreign persons of a defense article that reveals technical data to a foreign person.*⁵

This definition is eminently reasonable and ties the meaning of “Release” to the plain meaning of that term. It apparently makes clear that a release occurs if and only if technical data is actually revealed to, inspected or accessed by a foreign national. In doing so, the definition achieves the goal of harmonizing the ITAR with the EAR.

² See “Drafting Legal Documents,” found at <http://www.archives.gov/federal-register/write/legal-docs/definitions.html> (“Do not define in a way that conflicts with ordinary or accepted usage. . . . Do not include a substantive rule within a definition.”)

³ Revised Definitions at 35,613.

⁴ Revised Definitions at 35,613.

⁵ *Id.* at 35,616.

In its discussion of the new EAR “Release” definition, the Bureau of Industry and Security notes that

*A foreign person’s having theoretical or potential access to technology or software is . . . not a “release” because such access, by definition, does not reveal technology or software.*⁶

In order to fully harmonize the ITAR “Release” definition with the EAR “Release” definition and give proper meaning to paragraph (a)(1) of the new ITAR definition, DDTC should add a Note to the definition stating that providing theoretical or potential access to technical data does not constitute a “release.” Failure to do so will surely lead to confusion and, potentially, eliminate harmonization of the ITAR and EAR with respect to this term.

DDTC notes that

*The adoption of the definition of “release” does not change the scope of activities that constitute an “export” and other controlled transactions under the ITAR.*⁷

Given that a “release” is, by definition, an “export,” the meaning of this statement is unclear. As noted above, DDTC has made clear that simply providing physical access to a defense article is not an “export.” If that is the case, then consistency dictates that simply providing theoretical access to technical data does not constitute a “release” unless and until actual inspection of the technical data occurs.

IV. Additional Definitions to be Addressed in the Future

SIA understands that DDTC is continuing to review new proposed definitions for several other important terms. SIA urges DDTC to publish definitions for those important terms as soon as possible. In addition, and importantly, SIA urges DDTC, in developing proposed definitions for those additional terms, to take into account comments submitted by SIA in response to DDTC’s request for public comments on proposed new definitions and proposed revisions to definitions in the International Traffic in Arms Regulations (“ITAR”).⁸

In particular, DDTC should take account of the following points:

A. Separation of Control Elements and Definitions Themselves

The usual and straightforward approach to drafting regulations is to define terms consistent with their plain and common sense meaning and then apply clear rules to the defined

⁶ Revisions to Definitions in the Export Administration Regulations, 81 Fed Reg. 35,586, 35,592 (Jun. 3, 2016).

⁷ Revised Definitions at 35,614.

⁸ SIA, Comments Submitted Regarding International Traffic in Arms: Revisions to Definitions of Defense Services, Technical Data, and Public Domain; Definition of Product of Fundamental Research; Electronic Transmission and Storage of Technical Data; and Related Definitions (Federal Register Notice of June 3, 2015; RIN 1400-AD70) (Aug. 3, 2015).

terms. Many of the definitions proposed by DDTC in June 2015⁹ depart widely from the normal meaning of terms and encompass a variety of operational requirements. It is this distortion of definitions and conflation of definitions and rules that underlie many of SIA's reservations about the proposed rulemakings. Regulation through manipulation of definitions is inherently clumsy and confusing.

In developing definitions, DDTC should separate control elements from the definitions themselves.

B. Definition of "Peculiarly Responsible"

SIA urges DDTC to refrain from including a complicated and convoluted definition of "peculiarly responsible" in the ITAR. The definition of that term can readily be captured by its plain meaning: (i) "peculiar" so as to be special and exclusive and (ii) "responsible" so as to determine or account for.

In its June 2015 notice of proposed definitions, DDTC added a note that technical data is "peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics or functions" if it is otherwise used for the activities enumerated in ITAR § 120.10(a)(1).¹⁰ Note 3 should be clarified to make clear that if technical data is used in or for use in the development or production of both a defense article controlled on the USML and a non-defense article, which is not controlled on the USML, such shared or common technology would not meet the definition of "required" technology under the ITAR. This additional construct for peculiarly responsible would be a welcome change to the ITAR. Application of the proposed definition of "required" and the enhanced meaning of "peculiarly responsible" can be expected to have a constructive and limiting impact on the scope of technical data subject to the ITAR.

C. Introduction of Software Not a Defense Service

Paragraph (a)(2) of the proposed revised definition of "Defense Service" classifies as a defense service the furnishing of assistance in the "integration of a defense article with any other item." The Note to paragraph (a)(2) goes on to state that "Integration includes the introduction of software to enable operation of a defense article..."¹¹

This proposed definition of software "integration" is so broad and ambiguous as to include almost any activity involving software. That is, any activity associated with merely introducing or facilitating the introduction of software into a defense article could be captured by the proposed definition of "integration."

⁹ International Traffic in Arms: Revisions to Definitions of Defense Services, Technical Data, and Public Domain; Definition of Product of Fundamental Research; Electronic Transmission and Storage of Technical Data; and Related Definitions, 80 Fed Reg. 31525 (Jun. 3, 2015) ("ITAR Harmonization Definitions").

¹⁰ ITAR Harmonization Definitions at 31,536.

¹¹ ITAR Harmonization Definitions at 31,534.

In addition, and contrary to a statement in the same Note, there does not appear to be any meaningful distinction for software between “integration” and “installation.” While “installation” is described to exclude the use of technical data, “integration” is defined to include “the introduction of software” regardless of whether technical data is used to do so. On its face, “introduction” is indifferent to the use of technical data, thereby failing for software to provide a basis to distinguish “integration” from “installation.”

Defining integration to include any “introduction of software to enable operation” eliminates the focus on the relationship of the software to the defense article. The software need not be “required,” “peculiarly responsible,” or “specially designed” for the defense article, nor even contribute to the controlled performance levels, characteristics or functions of the defense article for it to be deemed “integrated” into the defense article. Such a definition of “integration” is contrary to the plain meaning of the word and, again, eliminates any distinction between “integration” and “installation” in the case of software.

DDTC should modify the definition of “integration” provided in the Note to paragraph (a)(2) to include only introduction of software “required” for a defense article – i.e., software peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics or functions of the defense article. The introduction of software not peculiarly responsible for the controlled characteristics of the defense article should be explicitly included in the definition of “installation.” By doing so DDTC would give meaning to the distinction between “integration” and “installation” for software and would appropriately classify as a “defense service” only the introduction of software that meaningfully contributes to the controlled characteristics of a defense article.

* * * * *

SIA appreciates the opportunity to comment on the Proposed Revisions and looks forward to continuing its cooperation with the U.S. Government on export control reform. Please feel free to contact Joe Pasetti at SIA if you have questions regarding these comments.

Cynthia Johnson
Co-Chair, SIA Export Control Committee

Mario Palacios
Co-Chair, SIA Export Control Committee

From: [Gina Madden](#)
To: [DDTCTPublicComments](#)
Subject: ITAR Amendment - Final Revisions to Definitions
Date: Tuesday, June 07, 2016 12:46:22 PM
Attachments: [image001.png](#)

I am writing to provide comment to the new proposed language for 22 CFR 120.17(a)(1), (a)(2) and (b) Export.

The current proposed language at (a)(1) states, “An actual shipment or transmission *out of* the United States, including the sending or taking of a defense article *out of* the United States in any manner;” (emphasis mine).

It seems to me that this language is rather ambiguous and could lead to misinterpretation as to whether the transfer of a defense article to a foreign person *within* the United States would be considered an export.

The current proposed language at (a)(2) states, “Releasing or otherwise transferring technical data to a foreign person *in* the United States (a “deemed export”) (emphasis mine).

This language seems to imply that only transfers of technical data to foreign persons *within* the United States are controlled. What about the actual shipment or transfer of technical data *out of* the United States?

The current proposed language at (b) states, “Any release in the United States of technical data to a foreign person is deemed to be an export to all countries in which the foreign person has held or holds citizenship or holds permanent residency.”

I am curious why this language is not rolled into (a)(2) which deals with technical data. New language (b) seems to expand on the thoughts and definition in (a)(2).

My overall concern with the new proposed language primarily in (a)(1) is that it seems to leave gaps which an over-zealous sales person or other well-intentioned individual might see as a loop hole to the export regulations. I can imagine that this new language could result in a dramatic increase of export violations for the transfer of a defense article to a foreign person within the United States. I cannot imagine that is what the Department of State intends to say.

It may be that there is other language elsewhere that addresses the transfer within the U.S. to foreign persons, but do you really want people to have to search through the ITAR to find that, or would you rather have the complete, unambiguous definition in one place so there is no confusion or misinterpretation of the regulations?

Thank you for considering my comments.

Gina

***** Please Note: My office number has changed *****



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Submitted Via Email

July 5, 2016

C. Edward Peartree
Director, Office of Defense Trade Controls Policy
Directorate of Defense Trade Controls
U.S. Department of State

Re: Interim Final Rule; International Traffic in Arms: Revisions to Definition of Export and Related Definitions (81 Fed. Reg. 35611, June 3, 2016)

Dear Mr. Peartree:

United Technologies Corporation (“UTC”) appreciates the opportunity to submit the following comment with regard to the June 3, 2016 interim final rule (“Interim Final Rule”) pertaining to the harmonization of definitions in the International Traffic in Arms Regulations (“ITAR”) and Export Administration Regulations (“EAR”). In the Interim Final Rule, DDTC revised the definition of “export” to more closely align with the EAR definition. With regard to technical data exports, the new language includes “releasing or otherwise transferring technical data to a foreign person in the United States...” DDTC also added a definition of “release” in ITAR §120.50. In its commentary to the proposed rule, DDTC affirmed that the definition of “release” was added to harmonize with the EAR, which has long used the term to cover activities that disclose information to foreign persons. DDTC also explained that its adoption of the definition does not change the scope of activities that constitute an “export” and other controlled transactions under the ITAR. 81 Fed. Reg. 35613-14.

In the Bureau of Industry and Security (“BIS”) June 3, 2016 final rule (“BIS Final Rule”), BIS states in its commentary to the rule, in regards to the scope of the definition of “release” in EAR §734.15, that “a foreign person’s having theoretical or potential access to technology or software is ... *not* a ‘release’ because access, by definition, does not reveal technology or software. A release would occur when the technology or software is revealed to the foreign person.” 81 Fed. Reg. 35592. BIS also added a provision in § 743.15(b) stating that the act of causing a “release” through the use of “access information” or otherwise, to oneself or another person, requires an authorization to the same extent required to export such technology to that person. BIS goes on to comment on various circumstances surrounding access to technology in an electronic environment (e.g., a database) and the allocation of responsibility for providing and using access information.

In the Interim Final Rule, DDTC does not address in its discussion of the definition of “release” the application of the term in the context of technical data or software in the electronic environment, or whether affording a foreign person theoretical or potential access to ITAR-controlled technical data or software in such environments constitutes a “release” and, therefore, a controlled event (export, reexport, retransfer). Although DDTC does not comment on the concept of release or access to technical data in the intangible environment, it does appear to address the principle in relation to the physical environment in its commentary on the definition of “export”:

...while the act of providing physical access {to technical data} does not constitute an “export,” any release of technical data to a foreign person is an “export” and will require authorization.... If a foreign person views or accesses technical data as a result of being provided physical access, then an “export” requiring authorization will have occurred and the person who provided the foreign person with physical access to the technical data is an exporter responsible for ITAR compliance.

81 Fed. Reg. 35613. DDTC’s commentary on the definition of “export” in relation to physical access to technical data appear to align with the views expressed by BIS, but does not explicitly express a position on potential access to technical data in the electronic environment.

The differences in the commentary on the application of these definitions with regard to access to technology / technical data in physical and electronic environments could create ambiguity and lead to diverging understanding within industry of DDTC’s approach on the issue of potential access. UTC believes that DDTC’s final rule would benefit from additional clarification and discussion of the application of the definitions of “export” and “release” to the act of placing and accessing technical data in IT systems and other electronic environments.

* * *

If you have any questions regarding UTC’s comments, please contact the undersigned at 202-336-7467 or peter.jordan@utc.com.

Sincerely,



Peter S. Jordan
Executive Director & Associate General Counsel, International Trade Compliance
United Technologies Corporation