July 6, 2015

Sent via email to: publiccomments@bis.doc.gov and DDTCPublicComments@state.gov

Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce
Room 2099B
14th Street and Pennsylvania Avenue NW
Washington, DC 20230

and

Office of Defense Trade Controls Policy
Directorate of Defense Trade Controls
Bureau of Political Military Affairs
Department of State
Washington, DC 20522

Subjects: RIN 0694-AG47 - Export Administration Regulations (EAR): Harmonization of the Destination Control Statements

and RIN 1400–AC88 International Traffic in Arms Regulations (ITAR): Revision to the Destination Control Statement

Dear Sir or Madam:

The Computing Technology Industry Association (CompTIA) is a non-profit trade association serving as the voice of the information technology industry. With approximately 2,000 member companies, 3,000 academic and training partners and nearly 2 million IT certifications issued, CompTIA is dedicated to advancing industry growth through educational programs, market research, networking events, professional certifications and public policy advocacy.

Thank you for the opportunity to provide comments on these proposed rules which would revise the destination control statement in the Export Administration Regulations (EAR) and International Traffic in Arms Regulations (ITAR) to harmonize the statement required for the export of items subject to both sets of regulations.

The proposed revised EAR/ITAR Destination Control Statement (DCS) is: "These items are controlled and authorized by the U.S. Government for export only to the specified country of ultimate destination for use by the end-user herein identified. They may not be resold, transferred, or otherwise disposed of, to any other country or to any person other than the authorized end-user or consignee(s), either in their original form or after being incorporated into other items, without first obtaining approval from the U.S. government or as otherwise authorized by U.S. law and regulations"

We note that the proposed DCS includes the phrase: "for use by the end-user herein identified." Currently, commercial and shipping invoices do not require the identification of an "end-user." They generally identify intermediate and ultimate consignees, and bill-to parties. In many cases, it may be (i) impractical or impossible to identify all potential end-users or (ii) contrary to existing customer confidentiality agreements. This is particularly true in the case of shipments of spare parts and accessories, which are delivered to warehouses and distribution centers overseas (identified, for example, as the ultimate consignee on an export license) for eventual use by many potential customers (identified as end-users) in a country or region. Also, due to the frequent need to rebalance global stock levels, an item may be further reexported to another country with a completely different set of end-users.

The U.S. Census Bureau recognized these difficulties when it modified the recently added data element "Ultimate Consignee Type" to contain an "Other/unknown" option, in response to industry comments. See 15 C.F.R. 30.6(a)(28).

We would like BIS and DDTC to clarify whether the use of the term "end-user" in the proposed language implies the creation of a new regulatory requirement to identify all potential end-users on all documents for which a DCS is required.

Further, the EAR proposal changes the scope of the documents requiring a DCS under the EAR. Currently, EAR 758.6 includes "the invoice … bill of lading, air waybill, or other export control document that accompanies the shipment from its point of origin in the United States to the ultimate consignee or end-user abroad."

The proposed EAR rule would change the DCS requirement to apply to "the commercial invoice and contractual documentation, when such contractual documentation exists, whenever items on the Commerce Control List are exported", but without any limitation to documents that accompany the goods. CompTIA members are not supportive of the addition of "contractual documentation" which is undefined, requires clarification, and should be limited to documents that accompany the shipment should the Department of Commerce pursue this proposal. One CompTIA member estimates that in its current state the proposed requirement would require amendments to more than 650,000 master agreements, statements of work and purchase orders.

Should the Department of Commerce insist on retaining "contractual documentation" in the final rule, CompTIA proposes that the DCS be included with contractual documentation *when such contractual documentation accompanies an export to the ultimate destination and ultimate consignee*, as follows:

> The exporter shall incorporate the following information as an integral part of the commercial invoice ~~when such contractual documentation exists~~ which accompanies a physical shipment from its point of origin in the United States to the ultimate consignee or end-user abroad.

The proposed rulemaking requires a DCS to be included whenever any item on the CCL is exported. Because exports are defined to include both tangible and intangible transfers, this requirement can be construed to require the DCS to be included on both physical shipments as well as intangible transfers (*e.g.*, when software is downloaded). CompTIA proposes that the requirements should be limited to physical (tangible) exports only.

The ITAR's requirements for documents requiring a DCS, however, would not change, and would continue to apply to the: "bill of lading, air waybill, or other shipping document, and the purchase documentation or invoice whenever defense articles are to be exported, retransferred, or reexported pursuant to a license or other approval under this subchapter." We suggest that, if harmonization is desired, a consistent and clear description of the documents requiring the DCS be adopted into both sets of regulations, and that the requirement be explicitly limited to such documents as accompany the shipment. The proposed formulations would potentially apply the DCS to various contractual documents that will never accompany the shipment of goods, and where the inclusion of a DCS would be counter-intuitive, confusing, and provide no impact on the risk of diversion.

We also question whether the first line of the proposed DCS would always be factually correct. The proposed DCS states: "These items are controlled and authorized by the U.S. Government for export *only to the specified country of ultimate destination* for use by the end-user herein identified". It appears the intent is to advise that the items are to be exported from the United States only to the listed country of ultimate destination – i.e., their first export from the United States. But, as reflected by the second sentence, CCL items may be authorized by the U.S. Government for resale, reexport or transfer to many more countries and end users than identified on a commercial invoice or contract. For example, CCL items that are NLR (no license required) items to most destinations, such as items controlled for antiterrorism reasons (AT1) only, are generally able to be exported and reexported without a license or other U.S. authorization to most countries. An estimated 95% of all U.S. exports are EAR99 or AT only controlled, meaning they can be reexported to any destination except a handful NLR.

While we understand the intent of the first sentence of the proposed DCS, and why it makes sense for an ITAR or EAR license-required export, a strict reading suggests that an item is

authorized under the EAR for export to only the specified country set forth on a commercial invoice. This implies that the particular goods are subject to some sort of inherent restriction due to having been exported from the United States. While this makes sense for items that are subject to ITAR licenses; in many cases involving EAR items, this is simply not true and could confuse foreign customers who are not well-versed in U.S. export regulations and the concept of a "reexport."

The second sentence attempts to address this by including the phrase "or as otherwise authorized by U.S. law and regulations," but this is more likely to cause confusion than the current DCS with respect to items that can be reexported NLR or under a License Exception, and lead recipients erroneously to believe that all US-origin items require a specific reexport license. Some member companies have tried to use phrases in export control contractual clauses that limit reexports "unless otherwise approved in writing by the U.S. government or authorized by U.S. law or regulation", and while such phrases are understood by sophisticated reexporters, they inevitably lead to questions about why a reexport license is required, when no export license was required in the first place.

We applaud the U.S. government's attempt to simplify and improve the export clearance provisions of the EAR and ITAR, but some of the elements proposed for introduction to the EAR are really appropriate only for ITAR or EAR license required/9X515/600 Series shipments. Thus, we see no compelling reason for a change to the current DCS set forth in the EAR and are skeptical that the proposed change would create less uncertainty among U.S. exporters and foreign recipients, nor would it reduce the burden on exporters, improve compliance or ensure the regulations are achieving their intended purpose. For those who find it useful, the current EAR language authorizing exporters to add to the DCS without contradicting the terms is more than sufficient.

Indeed, the proposed change would likely increase the regulatory burden on most U.S. exporters and require expensive structural changes to CompTIA member companies' enterprise software systems from which commercial invoices are generated, without any apparent enhancement to compliance. These burdens would be particularly acute for companies that do not export 9x515 or "600 series" items, and it is perhaps more appropriate that the proposed DCS, if introduced at all, should be limited to 9X515 and "600 series" items, since they are the most likely EAR items that would be shipped alongside ITAR items. While having a secondary DCS for these items would impose a burden on some exporters, this is not likely to affect the majority of exporters of CCL items, since the vast majority of those are AT-Only items or items that can be shipped NLR or under License Exceptions to most destinations. This appears to be a case of harmonization for the sake of harmonization, and would appear to have the potential to create substantial confusion among recipients, impose significant burdens without a correspondingly significant benefit to the government.

Finally, any final rule setting forth changes to DCS requirements should include an implementation period sufficient to allow exporters sufficient time to modify language on commercial invoices and other documentation. While some exporters include a DCS through automated means, such processes do not currently include pre-printing the DCS on contractual documentation much less on software licenses that accompany downloads. As noted above, the volume of documents that would be required to include the DCS is voluminous. As such, CompTIA suggests an implementation period of at least 180 days should the proposed rulemaking be published as a final rule.

Thank you once again for the opportunity to provide comments on these proposed rules.

Sincerely,

Ken Montgomery
Vice President, International Trade Regulation & Compliance