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July 6, 2015

Mr. Timothy Mooney
Regulatory Policy Division
Office of Exporter Services
Bureau of Industry and Security
Department of Commerce
14th Street and Pennsylvania Avenue NW
Washington, DC 20230

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

Reference: Federal Register/ Vol. 80, No. 99/ Friday, May 22, 2015/ Proposed Rules

Dear Mr. Mooney,

The Boeing Company ("Boeing") appreciates the opportunity to provide comments on proposed revisions by the Bureau of Industry and Security ("BIS") to the Destination Control Statement ("DCS"). We applaud BIS and the Directorate of Defense Trade Controls ("DDTC") for working together on harmonized DCS text that excludes specific Export Administration Regulations ("EAR") and International Traffic in Arms ("ITAR") language. Boeing recommends that the requirements for placement of the DCS be harmonized as well. These two changes, the harmonization of DCS text and associated requirements, have the potential to greatly reduce the regulatory burden on exporters for physical shipments. In addition, we recommend clarification with regard to EAR99 items, intangible exports, and No License Required ("NLR") shipments, as discussed below.

1. Destination Control Statement and Associated Requirements

Boeing welcomes the proposed harmonized DCS text that excludes EAR and ITAR-specific language and can, therefore, be used for shipments containing items that fall under both regulations. However, requirements for placement of the DCS have not been harmonized, and there is language in both proposals that requires clarification.

For example, the BIS proposal uses the term "contractual documents"' (a term not found in ITAR Part 123.9) with no reference or definition. One could interpret the term to mean the documents that address the legal obligations between the parties

to the transaction, *i.e.*, the governing contract. However, contracts do not travel with shipments. They may have been in place for years and are usually executed before orders are actually shipped. Amending contracts to include a DCS would be both difficult and would not meet the U.S. Government's stated objective of alerting shipment recipients of classifications and requirements.

Another difference in the DCS requirements is that BIS uses the term "commercial invoice" but DDTC uses the term "invoice". For some exporters, the term "invoice" refers to the final billing document that moves electronically, whereas the commercial invoice moves with the freight.

Shipping is a complex process where, notwithstanding regulatory requirements, documents vary by company and by transport mode (*e.g.*, air, ocean, *etc.*). Exporters generate commercial invoices, but freight forwarders and/or carriers generate bills of lading and air waybills. Imposing requirements on exporters that they must then flow to other parties to a shipping transaction adds complexity and compliance risk. Boeing recommends that the regulations not prescribe the specific document that must include the DCS, but instead require that it appear on one document that accompanies the item to the ultimate destination. Which document will contain the DCS should be determined by the exporter in light of its shipping practices. To ensure harmonization, we have recommended this approach to DDTC as well.

Recommendation:
Revise §758.6(a) to simplify the documents required to contain the DCS and to harmonize requirements with the ITAR as follows:

> (a) The exporter **must**[1] ~~shall~~ incorporate the following information as an integral part of ~~the~~ **a document that accompanies the shipment to the ultimate destination (the document can be the** commercial invoice, **packing slip, bill of lading, air waybill, or other shipping or purchase** ~~and contractual~~ documentation**)**, ~~when such contractual documentation exists,~~ whenever items on the Commerce Control List are exported, unless the export may be made under License Exception BAG or GFT (see part 740 of the EAR):

2. EAR99 Items

In the Supplementary Information, BIS states, "Consistent with the current destination control statement provision, this rule would not require an EAR destination control statement for export **of EAR99** items or items exported under License Exception BAG or GFT (emphasis added)". The current text of §758.6(a) references EAR99 items, specifically: "The DCS is required for all exports from the

[1] "must" is used to align with ITAR text.

United States of items on the Commerce Control List **that are not classified as EAR99**, unless they may be made under License Exception BAG or GFT (emphasis added)".

However, the proposed text of §758.6(a) does not mention EAR99 items. Items, "on the Commerce Control List" mean those with a 5-digit ECCN such as 9A991. But, EAR99 is referenced at the end of each entry on the CCL. Therefore, a plain reading could conclude that EAR99 is on the CCL *for this purpose*.

Recommendation:
Retain the phrase "excluding EAR99 items" in the text of §758.6 for maximum clarity.

3. <u>Intangible Exports</u>

The proposed revision to §758.6 requires a DCS, "whenever items on the Commerce Control List are exported". "Items", per EAR Part 772, means, "commodities, technology and software". The current text of §758.6 requires a DCS for all exports from the United States of items on the CCL but also provides that the DCS must be on documents that accompany, "the shipment". "Shipment" is not defined in EAR Part 772. The Merriam-Webster online dictionary definition is:

: A load of goods that are being sent to a customer, store, *etc.*

: The act of sending something to a customer, store, *etc.*

"Single shipment" is defined in Part 772[2] and refers to movement by carrier. Use of the term "shipment" considered with its definition as applying to goods, can lead to an interpretation that the existing DCS requirement applies to physical shipments only. Since the term "shipment" is now removed, it is unclear whether the new DCS provision captures exports of technology in intangible form. Such exports are often made via electronic transmission, in discussions, presentations, *etc.* and not via physical shipments[3].

When technology exports require a license, other EAR requirements serve to notify ultimate consignees of classification and requirements such as Letters of Assurance and license conditions. Clarification of this point is important and can be achieved by qualifying the requirement as covering "tangible" items on the CCL.

Recommendation:

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[2] *Single shipment.* All items moving at the same time from one exporter to one consignee or intermediate consignee on the same exporting carrier, even if these items will be forwarded to one or more ultimate consignees. Items being transported in this manner shall be treated as a single shipment even if the items represent more than one order or are in separate containers.
[3] Of course export of "technology" on tangible media such as CDs would require the use of a DCS.

Revise the text to clarify that only tangible exports are subject to the DCS requirement. Specifically:

> (a) The exporter **must** ~~shall~~ incorporate the following information as an integral part of ~~the~~ **a document that accompanies the shipment to the ultimate destination (the document can be the** commercial invoice, **packing slip, bill of lading, air waybill, or other shipping or purchase** ~~and contractual~~ documentation**)**, ~~when such contractual documentation exists,~~ whenever **tangible** items on the Commerce Control List **that are not classified as EAR99** are exported, unless the export may be made under License Exception BAG or GFT (see part 740 of the EAR):

4. No License Required Shipments

In the Supplementary Information, BIS states that, " . . . in the context of this EAR paragraph "authorized" would also include exports that were designated under No License Required (NLR)". This would be useful information to include in §758.6.

Recommendation:
Promulgate that the term "authorized" would also include exports that are designated under No License Required (NLR) in a clarifying note to §758.6.

Thank you for the opportunity to provide comments. Please do not hesitate to contact me if you have any questions or need additional information. I can be reached at 703-465-3505 or via email at christopher.e.haave@boeing.com.

Sincerely,

Christopher Haave
Director,
Global Trade Controls