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Ms. Hillary Hess, Director
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-AG32, Revisions to Definitions in the Export Administration Regulations

Reference: Federal Register/ Vol. 80, No. 106/ Wednesday, June 3, 2015/ Proposed Rules

Dear Ms. Hess,

The Boeing Company ("Boeing") appreciates the opportunity to provide comments to the Bureau of Industry and Security's ("BIS") Proposed Rule on definitions in the Export Administration Regulations ("EAR"). Clear definitions are critical for understanding regulatory requirements so we applaud the effort by BIS and the Directorate of Defense Trade Controls to both clarify and harmonize definitions in the EAR and the International Traffic in Arms Regulations ("ITAR"). Updated definitions and clarifying notes will facilitate accurate interpretations and strengthen compliance.

BIS states that most of the proposed changes seek merely to clarify and update definitions without impacting scope. Boeing does perceive scope change in some areas discussed below which are potentially very significant. This Proposed Rule covers areas that are key to determining export requirements. We have endeavored to work through scenarios and consider potential impacts during the sixty day comment period. Given the breadth of the proposed changes, Boeing recommends that definitions change be issued in an Interim Final Basis with at least 60 days to submit additional comments.

There are many welcome changes in these proposed definitions. We'd like to specifically thank BIS for proposed amendments to the scope sections of the EAR to update and clarify the application of controls on electronically transmitted and stored technology and software. At Boeing we believe this will enable industry to apply a wider range of international network and data storage solutions, reducing cost and compliance risk.

Additional positive developments:

- The proposed note to 743.3(b)(3) that distinguishes information from "technology";
- Addressing internet postings in 734.7(a)(4);
- Replacing "software" with "source code" in 734.13;
- Numerous small changes to "release" in §734.2(b)(3) that increase clarity, for example using "source code" instead of "software", adding "subject to the EAR", and clarifying that "technology" must be revealed to have "release";
- Deleting the reference to specific CCL categories in the definition of "required"; that reference led to mistaken assumptions that the "required" concept did not apply to all "technology" ECCNs, which it does as confirmed in the March 25, 2014 Advisory Opinion;
- Incorporating the permanent employee Advisory Opinion Guidance into §734.20.

Areas where we have questions or recommendations are detailed below.

1. <u>Not Subject to the EAR, §734.3 (b)(3)</u>

The proposed Note to paragraph (b)(3): *"Except as set forth in part 760 of this title, information that is not within the scope of the definition of "technology" (see § 772.1 of the EAR) is not subject to the EAR"* is a helpful addition. Given this note, however, it is confusing that the term "information" is used in the text of the control instead of "technology": "(b) The following items are not subject to the EAR: (3) **Information** and "software" that: …" (emphasis added). Clarification is required whether "information" is used because Part 760, *Restrictive Trade Practices, or Boycotts*, controls information that does not meet the definition of "technology".

2. <u>§734.7 Published</u>

Boeing notes the slight change in wording regarding placement in libraries. The current wording is "Ready availability at libraries open to the public or at university libraries." The proposed text, shown below, refers to libraries "that are open and available to the public". The term "open" now applies to university libraries – but many of these have entry controls requiring a student or faculty badge for safety reasons. Clarification is required whether such university libraries would still qualify as "open to the public".

3. §<u>734.13 Export</u>

- <u>Services under the EAR</u>

It is a longstanding principle of the EAR that services are not *per se* exports, rather one must consider whether such services involve a transfer of "technology". Defense services are exports in the ITAR as stated in §120.17 Export, section (a)(5). This difference can be confusing for exporters that previously dealt only with the ITAR. Boeing recommends that the

BIS principle be added to the regulations in §734.13(a)(5), which is the EAR counterpart to §120.17(a)(5). The proposed language below tracks the ITAR language:

> **§734.13(a)(5) Performing a service, on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad, is not *per se* an export under the EAR, unless such service involves release of "technology" or "software", as described in §734.15.**

- Permanent residents and protected individuals

The reference to permanent residents and protected individuals, which is in the current regulatory text at 734.2(b)(2)(ii), was not included in 734.13(a)(6), which deals with the release of decryption keys to foreign nationals in the United States. The reference does appear in the counterpart to this section, 734.18(a)(2), *Activities that are not export, reexports, or transfers*. For consistency Boeing recommends including the reference (bolded and underlined below) in both the section describing what is an export (734.13) and the section describing what is not an export (734.18).

> **§** 734.13(a)(6), Releasing or otherwise transferring decryption keys, network access codes, passwords, "software," or other information with "knowledge" that such provision will cause or permit the transfer of other "technology" in clear text or "software" to a foreign national. **This does not apply to persons lawfully admitted for permanent residence in the United States and does not apply to persons who are protected individuals under the Immigration and Naturalization Act (8 U.S.C. 1324b(a)(3)).**

4. §734.13 (a)(6) Clear Text and Release of Decryption Keys, etc.

- Clear text definition

BIS requested input on whether a specific EAR definition of the term "clear text" is warranted. Boeing does recommend including a definition for this term in Part 772 and finds the one cited in the Proposed Rule acceptable, namely:

> ***772.1 Clear text* means information or software that is readable without any additional processing and is not encrypted.**

- Release of decryption keys

BIS also seeks comments on whether the EAR or ITAR formulations are more clear for release of decryption keys, passwords etc. Boeing notes the different standards for release in the two regulations as a potential area for future discussions amongst the agencies. Our comments are limited to maximizing the alignment of words in the two formulations as follows:

EAR §734.13(a)(6) Releasing or otherwise transferring decryption keys, network access codes, passwords, "software," or other information, **or providing physical access** with "knowledge" that such provision will cause or permit the transfer of other "technology" in **"**clear text**"** or "software" to a foreign national.

ITAR §120.17(a)(6) Releasing or otherwise transferring ~~information such as~~ decryption keys, network access codes, passwords,~~ or~~ software, **or other information, or** providing ~~or~~ physical access that would allow access to other technical data in clear text or software to a foreign person regardless of whether such data has been or will be transferred; or

5. **§734.14 Reexport**

The term "deemed reexport" is defined in subparagraph (2) of this section, and is also critical to understanding §734.20, *Activities that are not "deemed exports"*. Given its importance, Boeing recommends including the definition of "deemed reexport" in Part 772 with other EAR definitions.

6. **§734.16 Transfer (in country)**

The proposed text, shown below, implies that a change in end use by the same end user constitutes a transfer (in country) for which, presumably, a new authorization is required. That is not the plain meaning of the current text: "The shipment, transmission, or release of items subject to the EAR **from one person to another person** that occurs outside the United States within a single foreign country" (emphasis added). The proposed text therefore appears to be an expansion of scope. Boeing recommends the following revision:

§734.16 Transfer (in country) Except as set forth in §734.18, a transfer (in-country) is a change in end use or end user of an item **from one person to another person** within the same foreign country.

7. **§772.1 "Technology"**

- General Technology Note and "required"

Boeing is concerned by the removal of references to the General Technology Note ("GTN")[1] in the proposed definition. The GTN is referenced in Wassenaar Arrangement definition of technology:

"Technology"

[1] Supplement 2 to Part 744: *General Technology Note*. The export of "technology" that is "required" for the "development", "production", or "use" of items on the Commerce Control List is controlled according to the provisions in each Category. "Technology" "required" for the "development", "production", or "use" of a controlled product remains controlled even when applicable to a product controlled at a lower level.

Specific information necessary for the "development", "production" or "use" of a product. The information takes the form of 'technical data' or 'technical assistance'. Controlled "technology" for the Dual-Use List is defined in the ***General Technology Note*** *and in the Dual-Use List. Controlled "technology" for the Munitions List is specified in ML22. (emphasis added).*

The GTN contains the "required" concept which is critical for analyzing export requirements. Reference to the GTN or use of the term "required" is not consistent in ECCNs. BIS confirmed in its response to an Advisory Opinion on March 25, 2014 (posted on the BIS website), that "the GTN and the EAR's definition of "required" apply to all references to "technology" in all the ECCNs on the CCL." Accordingly, it is critical to maintain the *Nota Bene* which references the GTN in the "technology" definition, which reads as follows:

N.B.: Controlled "technology" is defined in the General Technology Note and in the Commerce Control List (Supplement No. 1 to part 774 of the EAR).

An alternative means of incorporating the "required" concept into the "technology" definition would be to replace the word "necessary", as currently used, with the word "required". This would harmonize with the proposed ITAR definition, but would not align with the Wassenaar Arrangement definition.

- Note 2 regarding EAR99 "technology"

In addition, Note 2 of the existing definition is also removed as a proposed change. Boeing recommends retaining this note as it provides helpful clarity for how to treat "technology" that is not controlled by a listed ECCN. The existing note reads as follows:

Note 2: "Technology" not elsewhere specified on the CCL is designated as EAR99, unless the "technology" is subject to the exclusive jurisdiction of another U.S. Government agency (see § 734.3(b)(1)) or is otherwise not subject to the EAR (see §734.4(b)(2) and (b)(3) and §§ 734.7 through 734.11 of the EAR).

- Elements of "use"

In the Supplementary Information, BIS states that the rulemaking does not propose to change BIS's long standing policy that all six activities in the definition of "use" be present for an item to be classified under an ECCN paragraph that uses "use" in quotation marks. BIS has stressed in outreach programs that elements of "use" are controlled when they are listed without quotation marks or individually as with most 600 Series ECCNs. Boeing strongly recommends adding a Note to the "technology" definition that clearly states this important principle. Our recommendation below is based on BIS's statement in the Supplementary Information:

Note: All six activities in the definition of "use" (operation, installation (including on-site installation), maintenance (checking), repair, overhaul and refurbishing) must be

present for an item to be classified under an ECCN paragraph that uses "use" in quotation marks to describe the technology controlled.

8. 772.1 Peculiarly responsible

Boeing is very concerned with the proposed definition of "peculiarly responsible" which borrows the "specially designed" catch and release construct. Under the proposal, all technology peculiar to the "the "development," "production," "use," operation, installation, maintenance, repair, overhaul, or refurbishing of an item" is initially caught, even if they are not responsible for achieving the controlled performance levels, characteristics or functions. Such technologies would not be considered to be even potentially covered by "required" under the existing text. Furthermore, the releases, borrowed from the "specially designed" definition, do not release the proper technologies from control.

A hypothetical example would be a technology for application of sizing to a carbon fiber satisfying the performance levels of 1C010.b. The sizing does not have any bearing on the fiber properties in the control listing and therefore is not "peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions". This technology would not get picked up by the existing definition. However, under the proposed rule, because the sizing is used in the production of an item subject to the EAR, it is considered to be "peculiarly responsible" and "required" unless one of the exclusions apply. If none of the exclusions do apply, then the sizing gets "caught".

This represents an abandonment of the concept of "peculiarly responsible for achieving the controlled performance levels and functions" and moves the control scope to "peculiar to a controlled item". Boeing believes this to be a far reaching change of philosophy with potentially large licensing impacts. Moreover, the term is not defined in the Wassenaar Arrangement thus potentially leading to an unlevel playing field for U.S. companies.

The production technologies example in the current definition is sufficient to illustrate the meaning of "peculiarly responsible". Boeing recommends that BIS not provide a separate definition for this embedded concept, but rather clarify the existing definition as follows:

> §772.1 *"Required"*. (General Technology Note)—
> As applied to "technology" or "software", refers to only that portion of "technology" or "software" which is peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics or functions. Such "required" "technology" or "software" may be shared by different products. For example, assume product "X" is controlled if it operates at or above 400 MHz and is not controlled if it operates below 400 MHz. If production technologies "A", "B", and "C" allow production at no more than 399 MHz, then technologies "A", "B", and "C" are not ~~"required" to produce~~ **peculiarly responsible for producing** the controlled product "X". If technologies "A", "B", "C", "D", and "E" are used together, a manufacturer can produce product "X" that operates at or above 400 MHz. In this example, technologies "D" and "E" are ~~"required" to make~~ **peculiarly responsible for making** the controlled product and are themselves

"**required" and therefore** controlled under the General Technology Note. (See the General Technology Note.) (emphasis added)

9. §734.20 Activities that are not "deemed reexports"

- Non-U.S. entity obligation for deemed reexport compliance

BIS states that this section merely codifies BIS's interagency-cleared Deemed Reexport Guidance posted on the BIS website. Boeing agrees that the substance of that Guidance is now in 734.20, but the Advisory Opinion was clearly addressed to entities outside the United States with this language: "In general, **you (e.g. an entity outside the United States**) may reexport technology or source code subject to the EAR outside the United States to a dual or third country national without an additional license issued by BIS or the application of an EAR license exception…." (emphasis added). The text in 734.20 does not contain this clarification, which could lead U.S. exporters to believe that they must screen the employees of all recipient companies, even when exporting under an exception or when no license is required. Boeing recommends revising the text as follows to address this:

§ 734.20 Activities **by non-U.S. entities** that are not ''deemed reexports.''

- Territory limitation

With regard to the proposed language in Part 734.20(b), Boeing offers that if a foreign national can receive "technology" or "software" at their office in a Country Group A:5 country, then they should be able to receive the same "technology" when abroad, for example at meetings or while on business travel. Boeing recommends deleting subparagraph (b)(4) or at a minimum revising it to also include countries where the entity conducts official business or operates, which is part of 734.20(c) Release to other than A:5 nationals.

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