NATIONAL ASSOCIATION OF Manufacturers

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August 3, 2015

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

Hillary Hess
Director, Regulatory Policy Division
Office of Exporter Services
Bureau of Industry & Security
U.S. Department of Commerce
Washington, D.C.

Re: Revisions to Definitions in the Export Administration Regulations (RIN 0694-AG32)
Via e-mail: PublicComments@bis.doc.gov

Re: ITAR Amendment—Revisions to Definitions; Data Transmission and Storage (RIN 1400-AD70)
Via e-mail: DDTCPublicComments@state.gov

Dear Mr. Peartree and Ms. Hess:

The National Association of Manufacturers (NAM) welcomes the opportunity to comment on the proposed rules to revise definitions in the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR). The NAM continues to support the President's Export Control Reform Initiative, and we view the harmonization of definitions across the ITAR and EAR as a critical step in the initiative that will encourage consistency of classification and application.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Our members play a critical role in protecting the security of the United States. Some are directly engaged in providing the technology and equipment that keep the U.S. military the best in the world. Others play a key support role, developing the advanced industrial technology, machinery and information systems necessary for our manufacturing, high-tech and services industries.

The proposed rules would amend the ITAR and EAR to update key definitions – including "defense article," "defense services," "technical data," "public domain," "export," and "reexport or retransfer," "peculiarly responsible," "proscribed person," "published," results of "fundamental research" and more – in order to clarify the scope of activities and information that are covered within these definitions, as well as to harmonize the definitions. Additionally, the State Department proposes to create several definitions – including "required," "technical data that arises during, or results from, fundamental research," "release," "retransfer," and "activities that are not exports, reexports, or retransfers" – in order to clarify and support the interpretation of the revised definitions that are proposed in this rulemaking. The State Department also proposes to address the electronic transmission and storage of unclassified "technical data" via foreign communications infrastructure, proposing that the electronic transmission of unclassified "technical data" abroad is not an "export," provided that the data is sufficiently secured to prevent access by foreign persons.

Definition of "Export"

EAR §734.2(b) currently has definitions for export, export of technology or software, and export of encryption source code and object code software. Section 772.1 also defines "export" as follows: "Export means an actual shipment or transmission of items out of the United States." The Commerce Department rulemaking proposes to consolidate the definitions of "export" and "export of technology and software," while moving "export of encryption source code and object code software" to a new §734.13. The State Department proposes to revise the definition of "export" in ITAR § 120.17 to better align with the EAR's revised definition of the term and to remove activities associated with a defense article's further movement or release outside the United States, which will now fall within the definition of "reexport" in §120.19. The proposed rule also explicitly references the new §120.49, "Activities that are Not Exports, Reexports, or Retransfers," which excludes from ITAR control certain transactions identified therein.

Manufacturers are concerned with the proposed wording of the proposed §734.13(a)(6), which is written to include knowledge that "will cause or permit" the transfer of other "technology" in clear text or "software" to a foreign national. The implication of this revision is that management of computer systems by non-U.S. persons would be prohibited if the data is stored in readable form, or "clear text." We encourage the Commerce Department to avoid this result by adopting similar definitions to those found in §734.18(a), §734.18(b) and §734.18(c), as "Activities that are not exports, reexports or transfers." Otherwise, the only efficient way to utilize non-U.S. persons to manage computer systems that contain export controlled data would be to encrypt data files that go into the system and keep them encrypted while in the system. Currently, the Commerce Department allows for a management system where computer administrators don't access/read the data. The implementation of this rule as currently proposed would raise the compliance burden significantly.

In the ITAR definition of "export" in §120.17, we recommend revising §120.17(a)(6) to align the ITAR definition with the EAR definition by incorporating concepts of "knowledge" and "actual transfer" into the definition. Additionally, the proposed definition of "export" adds paragraph (b)(1) to state explicitly that the release of "technical data" to a foreign person is deemed to be an "export" to all countries in which the foreign person has held citizenship or holds permanent residency. This creates a divergence between the ITAR and the EAR, where §734.13(b) codifies a long-standing Commerce Department policy that when technology or source code is released to a foreign national, the export is "deemed" to occur to that person's most recent country of citizenship or permanent residency. Maintaining two different standards increases the regulatory burden on U.S. exporters and is inconsistent with the goal of the Export Control Reform Initiative to harmonize the two sets of regulations. We recommend modifying the proposed revision §120.17 to better align it with the EAR.

Definition of "Required"

We believe the State Department has over-complicated the definition of "required" by adding Note 3 to subsection (a) of § 120.46, providing a proposed definition of "peculiarly responsible." Under the proposal, all technical data peculiar to "the development (including design, modification, and integration design), production (including manufacture, assembly, and integration), operation, installation, maintenance, repair, overhaul, or refurbishing of a defense article" is initially caught, even if they are not responsible for achieving the controlled performance levels, characteristics or functions. Using a catch-and-release approach is potentially confusing for U.S. companies. We suggest the State Department instead more clearly illustrate the definition by providing an example, like that which is provided in the EAR.

The NAM appreciates the opportunity to provide comments on these complex issues. Manufacturers remain committed to working with the Department of Commerce and other U.S. agencies to improve and streamline U.S. export control requirements that will promote U.S. economic, national security and foreign policy interests.

Thank you,

Linda Dempsey

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