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

(Submitted by e-mail on 3 August 2015 *publiccomments@bis.doc.gov*)

Subject: Definitions in the Export Administration Regulations RIN:0694-AG32

Dear Sir/Madam:

I appreciate the opportunity to comment on this rule. After careful review I believe that, as written, the language strictly interpreted has a number of potentially draconian unintended consequences. I would respectfully submit that these need to be addressed before the four questions posed under Request for Comments can be reasonably answered.

General Comments:

Until current export control reform process is completed and the aggregate effects of changes to and interactions between the EAR and ITAR are fully understood the practical effects of either are going to be virtually impossible to assess. This is particularly true of definitions addressed in this proposed rule, whose interpretation affects the rest of the regulations.

Some of the items in the CCL tend to be broadly categorical. Thus, their practical effect depends on the definition of terms used, and specifically on the language of notes, exceptions, and references to other provisions in the definitions. In the process, the goal of a "positive list" has been lost. The current list is "positive" only in the sense that the top level paragraphs specifying the scope of controlled items are nominally positive statements.

The proposed language allows for widely divergent interpretations. The flexibility this affords the government may arguably streamline government export administration. But, I would respectfully submit that the resulting language will make it far more difficult (in some cases, virtually impossible) for US companies, academic researchers, and even citizens in their day-to-day lives to determine what constitutes a violation of the regulations.

Exporters and researchers can always ask the government for guidance. However, daily interactions between US and foreign citizens across a wide range of technical subjects through a wide range of communication modes are pervasive, In a free and open society, companies academic researchers and ordinary citizens should not have to ask the government's

permission to engage in what are otherwise normal and legal day-to-day commercial and scientific activities.

Reliance of the US military on Commercial Off-the-Shelf Technology (COTS) makes it difficult to discern a "bright line" between civil and military technology.

It is a given that the US is part of an international agreement, the Wassenaar Arrangement (WA). While the WA is not a formal treaty organization, the US has both legal and moral responsibilities to conform to its terms and condition.

But, as the saying goes, the devil is in the details. Much of the specific language (particularly in some of the more problematic definitions and notes) does not appear in the Wassenaar. Examples in the EAR are the definitions of "specially designed" and the proposed definition of "peculiarly responsible"). This language is specific to the US. Even when US regulations adopt language verbatim from the WA text, such US-only provisions affect how it is read and enforced.

§ 734.3 Items subject to the EAR.

The effects of this language are heavily modulated by language throughout the proposed rule. The General Comments apply.

§ 734.7 Published.

The provisions of *subparagraph "(4) Public dissemination (i.e., unlimited distribution) in any form (e.g., not necessarily in published form), including posting on the Internet on sites available to the public; "* entails several definitional difficulties. The strict letter of can be met by posting the data on line for an arbitrarily short period of time. (Duration is not a criterion), posting under URL/domain names that are unrelated to or obscure the nature of the content or posting on a site available to the public, but, in an obscure foreign language or in an encrypted form. (I recognize this is legal hair-splitting—and that this is the kind of challenge the government has faced in creating the proposed language.)

The "i.e., unlimited distribution" creates a very large potential loophole. Specifically, would this catch information made available for download on the condition that the person downloading agree to specific restrictions on further dissemination and use of the data as a condition of the download.

Finally, the language does not appear to address the case of information posted by someone other than the rightful owner. This is a common occurrence on the internet, without restrictions that the owner would have placed on further dissemination and use.

§ 734.8 "Technology" that arises during, or results from, fundamental research.

As a general comment, the language proposed for the EAR appears to avoid some of the serious difficulties of the corresponding language in the ITAR. A minor issue is noted in Note 1 to paragraph (a) which reads as follows:

> The inputs used to conduct fundamental research, such as information, equipment, or software, are not "technology that arises during or results from fundamental research" except to the extent that such inputs are "technology" that arose during or resulted from earlier fundamental research.

I would respectfully suggest that any information of practical value in current fundamental research was almost certainly the subject and result of earlier fundamental research at some point in time. Thus the language appears to say that the results of ongoing cutting edge fundamental research are not considered technology subject to the EAR, but that information from prior research may be.

This may reflect the premise that technology that has matured sufficiently to be used as the basis for future research warrants control.

§ 772.1 Definitions of terms as used in the Export Administration Regulations (EAR).

* * * * *

Peculiarly responsible.

The definition reads:

> An item is "peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics or functions if it is used in or for use in the "development," "production," "use," operation, installation, maintenance, repair, overhaul, or refurbishing of an item subject to the EAR.

The existing definition of "specially designed" in the EAR has been the subject of much discussion and comment because of its breadth, and the circular nature of the definition when applied to an item specifying "specially designed" as an attribute. Specially designed is currently defined as:

> "As a result of "development" has properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions in the relevant ECCN or U.S. Munitions List (USML) paragraph"

The presumption is that, at some point, the defined term "peculiarly responsible" will be incorporated. If so, as written, it will compound the problem by equating "peculiarly responsible" with "used in". This will be a stunning overreach. From participating in discussions on specially designed, I do not believe this is BIS's intent.

I believe that the intent is a combination of the sense in which Technologies "D" and "E" are deemed "required" in the explanatory note, with an added provision that to be considered peculiarly responsible the item or technology must actually be used in or for production of a controlled item. I would respectfully offer this as a potential way forward.

"Required."

The definition of "required" is clear, and the reference to the GTN helpful. I would respectfully submit that in the example given, Technologies "D" and "E" are peculiarly responsible for the specified performance. This points the way to a much better solution than the language of the proposed rule for which the criteria for "peculiarly responsible" is effectively "used in. . ." (See comment on "peculiarly responsible", above.)

A general comment on Note 1 to the Definition of "required" is that the choice of military aircraft as an example obscures potential difficulties in applying the definitions to the more general case of dual-use civil products. In the broader context, because of the large and growing reliance of the military on COTS, the characteristics and features of controlled products are likely to be quintessentially civil in nature, and less clear.

"Technology"

The exceptions set forth in (b) of this definition are very narrow in scope. I believe that the aggregate effect of the language in this proposed rule would be to capture a standard user's manual for a family of equipment if one of the models exceeded a control parameter on the CCL. (This issue is more problematic for dual-use products, where civil and military variants of products exist. Comments to DDTC on the proposed ITAR rule will address this.)

Commercial practices with regard to this type of technical data vary greatly depending on its perceived value and what the manufacturer's marketing strategy. Manuals may be made available on line for download without restriction; to registered owners of the product, or for a fee.

This is but one obvious example of a myriad of exchanges and transactions that occur thousands of times on a daily basis that the proposed language can be interpreted as bringing making ordinary exchanges of information export controlled. The implied restrictions on oral communications, if applied strictly, pose a potentially serious threat to basic First Amendment rights.

It is not clear how the implied release in the definition of “published” applies here, since “published does not appear in the exceptions in (b).

Closing Observations

The task the government took on in attempting to reform export controls is daunting in the extreme. Considering the results to date, I would respectfully suggest the expectation of effective reform within a legislative framework that is now half a century old, may have been unreasonable. Many of the fundamental concepts that shaped the process, such as the 1976 DSB study, commonly referred to as “the Bucy Report” and the 2009 National Academy Study, Beyond Fortress America sponsored by the National Academies are no longer current. The flaw these and in export control reform generally was to focus on the perceived flaws in the current system.

My personal belief, after over half a century in national security, is that effective reform cannot occur in isolation from the broader range of national goals and objectives. True reform must begin a better understanding, not just of the historical problems of the existing system, but on the purpose of export controls looking outward and ahead.

Again, I appreciate the work represented in this proposed rule and the opportunity to offer comments.

Respectfully submitted,

Alan J. Ramsbotham, Jr.
King George, VA 22485