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Regulatory Policy Division
Bureau of Industry and Security
Room 2009B
U.S. Department of Commerce
Washington, DC 20230

RE: RIN 0694-AG32 - Comments on Department of Commerce's Revisions to Definitions in Export Administration Regulations

I. Introduction

The Satellite Industry Association ("SIA")[1] hereby submits comments on the revisions to definitions in the Export Administration Regulations ("EAR") proposed by the Department of Commerce's Bureau of Industry and Security ("BIS").[2] SIA appreciates the work BIS has done to implement export control reform and reduce the complexity of the regulations, and the proposed revisions achieve this goal in many ways. SIA has identified some definitions that would benefit from additional clarification or modification to better achieve BIS' goal. Below is a summary of SIA's recommendations.

[1] SIA is a U.S.-based trade association providing worldwide representation of the leading satellite operators, service providers, manufacturers, launch services providers, and ground equipment suppliers. Since its creation twenty years ago, SIA has advocated for the unified voice of the U.S. satellite industry on policy, regulatory, and legislative issues affecting the satellite business. For more information, visit www.sia.org. SIA Executive Members include: The Boeing Company; The DIRECTV Group; EchoStar Corporation; Intelsat S.A.; Iridium Communications Inc.; Kratos Defense & Security Solutions; LightSquared; Lockheed Martin Corporation; Northrop Grumman Corporation; SES Americom, Inc.; SSL; and ViaSat, Inc. SIA Associate Members include: ABS US Corp.; Airbus DS SatCom Government, Inc.; Artel, LLC; Cisco; Comtech EF Data Corp.; DRS Technologies, Inc.; Eutelsat America Corp.; Glowlink Communications Technology, Inc.; Harris CapRock Communications; Hughes; iDirect Government Technologies; Inmarsat, Inc.; Kymeta Corporation; Marshall Communications Corporation.; MTN Government; O3b Limited; Orbital ATK; Panasonic Avionics Corporation; Row 44, Inc.; TeleCommunication Systems, Inc.; Telesat Canada; TrustComm, Inc.; Ultisat, Inc.; Vencore Inc.; OneWeb; and XTAR, LLC.

[2] Revision to Definitions in the Export Administration Regulations, 80 Fed. Reg. 31505 (2015) (proposed Jun. 3, 2015) ("Harmonization Rulemaking").

II. Request for Clarification or Modification

A. Section 734.13 – Definition of "Export"

1. Section 734.13(a)(1) and (2)

BIS proposes to remove paragraph (b) of current section 734.2 and create section 734.13(a)(1) and (2) to consolidate the definitions of "export" and "export of technology and software".[3] The revisions appear to remove the "release of technology or software subject to the EAR in a foreign country"[4] and, as a result, the definition of an export no longer includes disclosing (including oral or visual disclosure) or transferring technology to a foreign person abroad. SIA requests clarification on whether oral or visual disclosures of technology or source code are no longer considered exports or whether they are captured in new section 734.13(a)(1) as a "transmission out of the United States".[5]

B. Proposed Sections 734.13(a)(3) and 734.14(a)(3) Require Clarification

Under proposed sections 734.13(a)(3) and 734.14(a)(3), an export or reexport occurs when a person transfers

> registration, control, or ownership of … [a] spacecraft subject to the EAR that is not eligible for reexport under License Exception STA (i.e., spacecraft that provide space-based logistics, assembly or servicing of any spacecraft) to a person in or a national of any other country.[6]

This definition appears to carve out all satellites eligible for license exception STA from the definition of an export or reexport. If applied as written, a U.S. satellite manufacturer or operator could transfer control of a commercial communications satellite either in-orbit or on the ground in the U.S. to any country other than those included in Country Group D:5, and the transfer would not qualify as an export because commercial communications satellites are eligible for license exception STA. SIA requests confirmation that BIS intended this result.

C. Section 734.13(b) Criteria for Establishing Most Recent Country of Permanent Residency

SIA requests guidance from BIS on how to establish an individual's most recent country of permanent residency. SIA understands that few countries offer "permanent residency" akin to a U.S. green card; therefore, guidance on the types of documents that establish an adequate level of residency would be appreciated.

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[3] *Id*. at 31507.
[4] 15 CFR 734.2(b)(2)(i).
[5] *Harmonization Rulemaking*, 80 Fed. Reg. at 31516.
[6] *Id*.

D. Section 734.14 – Definition of Reexport

Section 734.14 states that a reexport means "an actual shipment or transmission of an item from one foreign country to another foreign country…". As a general request, does this mean that the shipment of a U.S. origin item from a foreign country back to the U.S. does not constitute a reexport?

E. Section 734.15(a)(3) – "Release"

SIA requests BIS to revise proposed section 734.15(a)(3). The new paragraph defines "release" to include

> The application by U.S. persons of "technology" or "software" to situations abroad using personal knowledge or technical experience acquired in the United States, to the extent that the application reveals to a foreign national "technology" or "source code" subject to the EAR.[7]

The relevance of "personal knowledge" or "technical experience" to establishing a "release" is unclear. The essence of proposed paragraph (a)(3) is to capture activities that reveal technology or source code. Rather than introduce vague concepts into the definition, SIA recommends revising the paragraph as follows: "The application by U.S. persons of 'technology' or 'software' to situations abroad that reveals to a foreign national 'technology' or 'source code'."

F. Sending or Taking Technology Overseas for Use by a U.S. Person

Proposed section 734.18(a)(4) states that "sending, taking or storing technology or software" is not an export, reexport or retransfer provided that certain conditions are met, one of which is that the data are secured using cryptographic modules.[8] Proposed section 740.9(a)(3) in turn implies that technology sent in compliance with the requirements of section 740.9 is still an export even if the technology is encrypted.[9] SIA requests clarification as to whether a U.S. person sending or taking technology overseas on an encrypted device for his personal use or use by another U.S. person is engaged in an export.

Secondarily, SIA requests clarification as to whether the release of technology or software to a U.S. person in a foreign country is an export. The definitions of "export" under section 734.13 and of "release" under section 734.15 only address exports and transfers of technology to foreign persons.

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[7] *Id*.
[8] *Id*. at 31517.
[9] *Id*. at 31518.

G. Section 734.18(a)(4)(iv) – Storing Encrypted Technology

In addition to the concerns raised above with new section 734.18(a)(4) is the requirement that the technology is "[n]ot stored in a country listed in Country Group D:5."[10] SIA requests clarification as to the definition of "not stored in". Specifically, is the term meant to cover data that are stored on a network located in a country proscribed in ITAR 126.1 or the Russian Federation? Can a U.S. person still send or take technology that is secured using cryptographic modules to the designated countries if the data are to be used by a U.S. person?

H. Section 772.1 – Definitions

1. "Required" and "Peculiarly Responsible"

BIS has proposed new definitions for "required" and "peculiarly responsible".[11] SIA notes that the definitions inject additional uncertainty into determining how technology or software may be controlled. Furthermore, the example provided in the definition of "required" does not clarify the definition. The example states:

> 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 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 the controlled product and are themselves controlled under the General Technology Note.[12]

In this example, would technology "D" be controlled if technology "E" were not used?

SIA recommends BIS apply the dictionary definition of "required," which includes "needed" or "essential", and remove the example.[13] The dictionary definition will be easier for exporters to implement and therefore is a more effective control.

2. "Technology"

The definition of "technology" provided in proposed section 772.1 carves out "[n]on-proprietary general system descriptions".[14] This carve out implies that general system descriptions that are treated as proprietary are now to be treated as technology controlled under the EAR. This represents a significant expansion in the type of information that qualifies as technology and would increase the regulatory burden on companies in direct contravention to the stated purpose of export control reform. SIA requests that the definition be revised to clarify that

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[10] *Harmonization Rulemaking*, 80 Fed. Reg. at 31517.
[11] *Id*. at 31519-20.
[12] *Id*.
[13] TheFreeDictionary.com, available at http://www.thefreedictionary.com/required.
[14] *Harmonization Rulemaking*, 80 Fed. Reg. at 31520.

general system descriptions do not qualify as technology whether or not they are treated as proprietary.

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SIA appreciates the opportunity to comment on BIS' proposed revisions to the EAR definitions and contribute to BIS' efforts to harmonize and simplify the export control regulations.

Respectfully submitted,

/s/

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