BY ONLINE SUBMISSION
(www.regulations.gov)

MATTHEW A. GOLDSTEIN, PLLC
1012 14TH STREET, NW, SUITE 620
WASHINGTON, DC 20005

RE: RIN 0694–AG32 July 29, 2015

PUBLIC COMMENT

This is a public comment to RIN 0694–AG32, as published by the Department of Commerce Bureau of Industry and Security ("BIS") at 80 Fed. Reg. 31,505 (June 3, 2015) (the "Proposed Rule"), titled, "Revisions to Definitions in the Export Administration Regulations."

I. COMMENT ON STATUS OF EXPORT CONTROL REFORM

The Proposed Rule is published as part of the President's Export Control Reform ("ECR") Initiative, which it claims "will enhance U.S. national and economic security, facilitate compliance with export controls, update the controls, and reduce unnecessary regulatory burdens on U.S. exporters."

ECR promised a single export control list, single export control agency, and single information technology ("IT") system. Industry reasonably expected that these changes would update, simplify, and increase efficiency of the system. This would in turn make the system more robust, industry friendly, and better support national security objectives.

Unfortunately, following over half a decade of complex regulatory amendments, ECR has not established a single export control list, single export control agency, or a single IT system. Instead, the reform has vastly increased the complexity of already overly complex regulations. This has significantly increased the compliance burden and costs on industry without the benefits of a single list, single agency, or single IT system.

Concerns with ECR changes in the Proposed Rule are discussed below. Suggested revisions are provided where appropriate.

II. REMOVAL OF SUPPLEMENT NO. 1 TO PART 734

Export compliance professionals and other members of the public look to Supplement No. 1 to Part 734, ''Questions and Answers—Technology and Software Subject to the EAR" ("Supplement No. 1") to determine how to use exclusions for the release of technology at open conferences, publications, educational instruction, and fundamental research under the Export Administration Regulations ("EAR"). It is perhaps the clearest and most useful part of the regulations.

Nevertheless, at page 31,507 of the Proposed Rule, the ECR Task Force proposes to remove Supplement No. 1 and bury it among an increasing archive of web site guidance. The stated agency rationale for this removal is that "[q]uestions and answers are illustrative rather than regulatory and are thus more appropriately posted as Web site guidance than published as regulatory text."

Supplement No. 1 is regulatory - i.e., it is a codified regulation that carries the force of law. The fact that it is also illustrative does not justify its removal from the EAR. To the contrary, industry experience over the years has shown that the illustrations provided by Supplement No. 1 are essential when determining how to apply EAR exclusions to real world situations.

In contrast to the present regulatory status of Supplement No. 1, agency web site guidance is not law and can be changed at any time. Moving Supplement No. 1 to a web site page therefore presents a problem because changes to the substantive scope of the EAR should be made through proposed regulatory amendments subject to public notice and comment. These safeguards are lost if Supplement No. 1 is moved to a web page, outside of the regulations, where agency officials can change it without notice. Accordingly, Supplement No. 1 must not be removed unless all its substantive provisions are adequately incorporated into Part 734 or elsewhere in the regulations.

III. PROPOSED DEFINITION FOR "APPLIED RESEARCH"

"'Fundamental research' means **basic and applied research** in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community, as distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons." National Security Decision Directive 189 (emphasis added).

The definition for "basic research," as listed in Section 734.8 of the Proposed Rule, is the same as that already defined in the EAR Section 772.1, which matches the definition for "basic scientific research" in the Wassenaar Arrangement's General Technology Note.

The is no existing EAR definition for "applied research" in the EAR or the Wassenaar, so the Proposed Rule seeks to add Section 734.8(c)(2) to define "applied research" to mean "the effort that:"

- Normally follows basic research, but may not be severable from the related basic research;

- Attempts to determine and exploit the potential of scientific discoveries or improvements in technology, materials, processes, methods, devices, or techniques; and

- Attempts to advance the state of the art.

This proposed definition does not define what is generally understood to constitute applied research. In applied research, the objective is to gain knowledge or understanding necessary to determine how a recognized need may be met. Such intent is the essence of applied research and what distinguishes it from basic research. However the proposed definition for "applied research" at Section 734.8(c)(2) fails to state that applied research must be for a specific need, end use, application, etc. At best, it is vague in this respect and, as a result, overlaps with definition for basic research. Of course, some research may consist of both basic and applied elements, but the demarcation between the definitions should be maintained.

In addition, the proposed definition is different from the definition set forth in the 2014 Office of Management and Budget Circular A-11, which defines applied research as:

> Systematic study to gain knowledge or understanding necessary to determine the means by which a recognized and specific need may be met.

The OMB definition is used in state and local grants, federal programs (e.g., DoD Budget Category 6.2 Funding), and is used by the National Science Foundation. Accordingly, EAR use of the term should follow the OMB definition.

IV. ACTIVITIES THAT ARE NOT DEEMED REEXPORTS

The Proposed Rule seeks to codify the Deemed Reexport Guidance posted on the BIS web site, the stated intent of which is to create provisions in the EAR for EAR technology and source code similar to the license exemptions contained at sections 124.16 and 126.18 of the International Traffic in Arms Regulations ("ITAR").

Under the proposed Section 734.20, the release of technology or source code by an entity outside the United States to a foreign national of a country other than the foreign country where the release takes place does not constitute a deemed reexport if a variety of conditions are met, to include:

- The entity is authorized to receive the technology or source code at issue, whether by a license, license exception, or through situations where no license is required under the EAR;

- The foreign national is a *bona fide* regular and permanent employee (who is not a proscribed person under U.S. law) directly employed by the entity;

- Such employee is a national exclusively of a country in Country Group A:5; and

- The release of technology or source code takes place entirely within the physical territory of any such country.

This proposal also seeks to add a definition for "proscribed person" at Section 772.1.

This new decontrol is proposed as an exclusion from EAR control and not as an exception to EAR license requirements. This approach is inconsistent with BIS' stated intent, which is for the EAR to mirror certain ITAR license exemptions. This approach is also likely to create substantial confusion because the requirements of Section 734.20 are more characteristic of a license exception than an exclusion from EAR control.

Exclusions from export controls generally cover straightforward situations that are entirely excluded from regulatory requirements. In contrast to these, the type of decontrol proposed under Section 734.20 requires the presence of several conditions and technology and source code exported under it will apparently remain subject to EAR control. Accordingly, instead of mirroring the relevant ITAR exemptions through a new exclusion at Section 734.20, BIS should consider implementing a new EAR exception at Part 740.

V. DEFINITION FOR "PECULIARLY RESPONSIBLE"

The Proposed Rule seeks to define "peculiarly responsible" based on the catch-and-release structure used for the definition of "specially designed." However, similar to the definition of specially designed, the proposed definition for peculiarly responsible is much too long and complicated.

Industry is still grappling with the definition for specially designed. Instead of duplicating this confusion with another convoluted definition that only a few people understand, BIS should use the generally understood meanings of "peculiar" and "responsible" to form a definition of peculiarly responsible.

For example, Merriam-Webster defines "peculiar" as "characteristic of only one person, group, or thing"; and defines "responsible" as "having the job or duty of dealing with or taking care of something or someone." Considering these definitions, perhaps "peculiarly responsible" can simply mean "an item having a distinctive characteristic that performs a job essential to achieving or exceeding controlled performance levels, characteristics or functions at issue."

VI. PROPOSED EXCLUSION FOR ENCRYPTED TECHNOLOGY

Page 31,509 of the Proposed Rule explains that BIS seeks to add Section 734.18(a)(4) to establish a specific carve-out from the definition of "export" for the transfer of technology and software that is sufficiently protected with end-to-end encryption.

The Proposed Rule further notes, "transfer in encrypted form consistent with the requirements of paragraph (a)(4) poses no threat to national security or other reasons for control and does not constitute an "actual" transmission of "technology" or "software.'"

The proposed text of the new exclusion is as follows:

> **§ 734.18 Activities that are not exports, reexports, or transfers.**
>
> (a) The following activities are not exports, reexports, or transfers:
>
> * * *
>
> (4) Sending, taking, or storing technology or software that is:
>
> (i) Unclassified;
>
> (ii) Secured using end-to-end encryption;
>
> (iii) Secured using cryptographic modules (hardware or software) compliant with Federal Information Processing Standards Publication 140–2 (FIPS 140–2) or its successors, supplemented by software implementation, cryptographic key management and other procedures and controls that are in accordance with guidance provided in current U.S. National Institute for Standards and Technology publications, or other similarly effective cryptographic means; and
>
> (iv) Not stored in a country listed in Country Group D:5 (*see* Supplement No. 1 to part 740 of the EAR) or in the Russian Federation.

Email containing otherwise controlled technology may, without the knowledge of the sender, transit a foreign country's Internet service infrastructure en route to its intended and authorized final destination. Relevant here, the Proposed Rule prohibits storage in a country listed in Country Group D:5 or in the Russian Federation, but it does not define what BIS will consider "storage" on a foreign server or other drive.

Absent some limits on application of the term "storage," the term can reasonably be construed to mean even temporary storage incidental to email routing through foreign servers. Because of this, as literally applied, proposed subsection 734.18(a)(4)(iv) can prohibit encrypted unclassified technical data transmitted by emails if such emails transit servers in a Country Group D:5 country or the Russian Federation. Because email transit routes are generally unknown, companies using the proposed exemption for communications of encrypted technology will face unknown risks of inadvertent violations involving Country Group D:5 countries and the Russian Federation.

* * *

Thank you for your consideration.

Yours truly,

ON BEHALF OF THE FIRM

Matthew A. Goldstein, Principal Counsel
MATTHEW A. GOLDSTEIN, PLLC
1012 14th Street NW, Suite 620
Washington, D.C. 20005
Tele: (202) 550-0040
Email: matthew@goldsteinpllc.com