COMMENTS OF THE SATELLITE INDUSTRY ASSOCIATION TO THE DEPARTMENT OF COMMERCE REGARDING CONTROL OF SPACECRAFT SYSTEMS AND RELATED ITEMS THE PRESIDENT DETERMINES NO LONG WARRANT CONTROL UNDER THE UNITED STATES MUNITIONS LIST (USML)

The Satellite Industry Association (SIA), on behalf of its member companies,[1] hereby files its comments in response to the U.S. Department of Commerce interim final rule adding controls to the Export Administration Regulations (EAR) for spacecraft and related items that the President has determined no longer warrant control under Category XV (Spacecraft Systems and Related Articles) of the U.S. Munitions List (USML).[2] 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 almost 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.

SIA appreciates the opportunity to provide additional comments to the Department of Commerce on the new regulations now being implemented for the export of commercial satellites and related items. SIA has long supported rigorous, effective, predictable, and transparent U.S. export control policies and practices, and

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[1] SIA Executive Members include: The Boeing Company; The DIRECTV Group; EchoStar Corporation; Harris CapRock Communications; Intelsat S.A.; Iridium Communications Inc.; Kratos Defense & Security Solutions; LightSquared; Lockheed Martin Corporation.; Northrop Grumman Corporation; SES Americom, Inc.; and SSL. SIA Associate Members include: Artel, LLC; Astrium Services Government, Inc.; ATK Inc.; Cisco; Cobham SATCOM Land Systems; Comtech EF Data Corp.; DigitalGlobe, Inc.; DRS Technologies, Inc.; Encompass Government Solutions; Eutelsat America Corp.; Globecomm Systems, Inc.; Glowlink Communications Technology, Inc.; iDirect Government Technologies; Inmarsat, Inc.; Exelis, Inc.; Marshall Communications Corporation.; MTN Government; NewSat America, Inc.; O3b Networks; Orbital Sciences Corporation; Panasonic Avionics Corporation; Raytheon Space and Airborne Systems; Row 44, Inc.; TeleCommunication Systems, Inc.; Telesat Canada; The SI Organization, Inc.; TrustComm, Inc.; Ultisat, Inc.; ViaSat, Inc., and XTAR, LLC.

[2] *See* Revisions to the Export Administration Regulations (EAR): Control of Spacecraft Systems and Related Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), Interim Final Rule, 79 Fed. Reg. 27,418-27,443 (May 13, 2014) (to be codified at 15 C.F.R. pts. 732, 734, 736, 740, 742, 744, 748, 758, 772, and 774).

appreciates the Department's commitment to continue accepting comments on these new regulations during their implementation period. We continue to see U.S. space leadership and competitiveness as a key national security objective. The reforms to the export control regulations pertaining to satellite technology put in place by the Interim Final Rules published by the U.S. Departments of State and Commerce on May 13 make important and significant progress towards this objective. These reforms will enhance the competitiveness of U.S. companies, bolster their capacity to innovate, and continue to protect technologies critical to U.S. national security. However, SIA and our member companies believe that further adjustments to the details of the regulations are necessary so that they are consistent both internally and externally with other U.S. government policies and processes. The following technical discussion describes several of these adjustments in detail.

Technical Discussion

> ***§ 740.20 License Exception Strategic Trade Authorization (STA).***
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> *(d)* * * *
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> *(2)* * * *Paragraph (viii) is also required for transactions including 9x515 items.*
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> *(g) License Exception STA eligibility requests for 9x515 and ''600 series'' end items.*
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> *(1) Applicability. Any person may request License Exception STA eligibility for end items described in ECCN 0A606.a, ECCN 8A609.a, ECCN 8A620.a or .b, or ECCN 9A610.a or spacecraft described in 9A515.a that provide space-based logistics, assembly or servicing of any spacecraft e.g., refueling).*

SIA proposes a revision to §740.20 paragraph (d)(2) to reflect the changes to the numbering of License Exception STA paragraphs (d)(2)(iv), (v), (vi), and (vii) effected by the June 5th Federal Register notice 79 Fed. Reg. 32441.

> ***SUPPLEMENT NO. 2 TO PART 748 – UNIQUE APPLICATION AND SUBMISSION REQUIREMENTS***
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> *(y) Satellite exports. (1) A license ~~application~~ to export a satellite controlled by ECCN 9A515.a ~~to~~ for launch in, or by nationals of, a country that is not a member of the North Atlantic Treaty Organization (NATO) or a major non-NATO ally of the United States (as defined in 22 C.F.R. sections 120.31 and 120.32), may require special export controls, as follows~~must include~~:*

(i) A technology transfer control plan approved by the Department of Defense and an encryption technology control plan approved by the National Security Agency, for encryption technology controlled by the NSA~~or drafts reflecting advance discussions with the departments and information identifying the U.S. Government officials familiar with the preparation of such draft plans; and~~

~~(ii) Evidence of arrangements with the Department of Defense for monitoring of the launch activities~~.

(ii) The U.S. person must make arrangements with the Department of Defense for monitoring. The costs of such mandatory monitoring services must be fully reimbursed to the Department of Defense by the U.S. person receiving such services.

~~(2) A license application to export a satellite controlled by ECCN 9A515.a to a country that is a member of the North Atlantic Treaty Organization (NATO) or that is a major non-NATO ally of the United States (as defined in 22 C.F.R. sections 120.31 and 120.32), must include:~~

~~(i) A technology transfer control plan approved by the Department of Defense and an encryption technology control plan approved by the National Security Agency, or documentation from the Department of Defense that such plans are not required; and~~

~~(ii) Evidence of arrangements with the Department of Defense for monitoring of the launch or documentation from the Department of Defense that such monitoring is not required.~~

Note 1 to Paragraph (y): Regardless of a satellite's or spacecraft's jurisdictional status, ownership, or origin, the ITAR controls as a "defense service" the furnishing of assistance (including training) by a U.S. person to a foreign person directly related to (a) the integration of a satellite or spacecraft to a launch vehicle or (b) launch failure analyses. See (See 22 CFR 121, Categories IV(i) and XV(f), and 22 CFR 124.15).

SIA proposes certain edits to Supplement No. 2 to Part 748, which implements "special export controls" (SECs) that apply to exports of EAR-controlled satellites. Public Law 105-261, as interpreted by both the Department of State (DoS) and Department of Defense (DoD) requires that the DoD apply SECs to a very specific subset of satellite exports: those for launch in, or by nationals of, countries that are not U.S. allies. U.S. companies are further required to reimburse DoD for any expenses incurred when implementing SECs required by statute. In addition to the mandatory SECs, DoD has the authority to monitor, on a non-reimbursable basis, other activities carried out under an International Traffic in Arms Regulations (ITAR) license or agreement. SIA would be open to additional regulatory language that acknowledges, but does not expand, the existing legal authority to conduct non-reimbursable monitoring.

As written, however, Supplement No. 2 to Part 748 would apply SECs to many activities beyond those required by Public Law 105-261, inconsistent with both the ITAR and the 2012 Final Section 1248 Report, which was published jointly by DoD and DoS

and is the definitive description of national security risks related to satellite exports.[3] In implementing P.L. 105-261, the ITAR limits these controls to launch-associated activities only:

> [t]he export of any satellite or related item … or any defense service controlled by this subchapter associated with the launch in, or by nationals of, a country that is not a member of the North Atlantic Treaty Organization or a major non-NATO ally of the United States always requires special exports controls…[4]

Similarly, the Final Section 1248 Report expressed that "P.L. 105-261, Section 1514, requires that the U.S. Government monitor and review technical exchanges between U.S. and foreign engineers *that involve launch* of a U.S. satellite by a foreign company."[5]

Because the proposed Supplement No. 2 would apparently apply SECs to exports of all satellites controlled under ECCN 9A515.a, rather than to launch, it would dramatically expand the scope of satellite exports to which these controls would apply. It would also run counter to both BIS's suggestion that Supplement 2(y) "mirror[s]" the revised ITAR § 124.15,[6] and Export Control Reform's goals of harmonization and high walls around a smaller yard.

What is more, Supplement 2 would be well in excess of what the DoD and DoS stated in the Final Section 1248 Report would satisfy national security requirements. The Final Section 1248 Report is premised on mandatory SECs' limitation to launch, and only contemplates the expansion of the SEC regime in one specific case (when "U.S. companies provid[e] technical services in support of foreign satellite or launch vehicle development and associated launch operations").[7] Furthermore, the report states clearly that even some activities which DoD is required to monitor "present a very low risk to national security."[8]

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[3] Departments of Defense and State, *Final Report to Congress*, Section 1248 of the National Defense Authorization Act for Fiscal Year 2010 (Public Law 111-84), http://www.defense.gov/home/features/2011/0111_nsss/docs/1248_Report_Space_Export_Control.pdf.

[4] 22 C.F.R. § 124.15(a) (emphasis added). The relevant portion of this § 124.15(a) was not amended by DDTC's Interim Final Rule. See Department of State, Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XV, 78 F.R. 27,180, 27,189.

[5] See 1248 Report, note 3**Error! Bookmark not defined.**, supra at p. ii (emphasis added).

[6] 79 Fed. Reg. 27,418, 27424.

[7] 1248 Report, note 3, supra at p. iii.

[8] Ibid.

To address this issue, SIA has offered a number of mitigating edits above. These edits ensure that, consistent with Public Law 105-261, Supplement No. 2 to Part 748 applies only to the export of satellites for launch in or by nationals of countries that are not U.S. allies. First, SIA proposes the insertion of the phrase "*for launch in, or by nationals of,*" in paragraph (y)(1) to refocus the scope of special export controls on launch activities. Second, SIA proposes the deletion of paragraph (y)(2), which BIS included pursuant to BIS's stated "discretion to require evidence of compliance with special export control requirements in connection with [NATO or non-NATO allies]."[9] But special export controls are *not* statutorily required per paragraph (b) of Section 1514 of Public Law 105-261. This provision of law provides that mandatory special export controls "shall not apply" to satellites exported for launch in or by nationals of countries that are either members of NATO or designated as a major non-NATO ally of the United States. Further, the deletion would not diminish DoD's authority to apply discretionary SECs, as discussed above. It is unnecessary for BIS to create additional requirements in this case.

In addition to realigning the scope of the proposed special export controls, SIA offers several additional edits to address various practical issues. First, as written, the regulation would create multiple impossible circular paradoxes in which different U.S. government agencies require an output of the other's regulatory process as an input for their own process. We propose deleting the word "application" as special export control requirements are generally issued as provisos to a Launch Services Agreement rather than being included in license applications. Companies must submit an approved license number to the Defense Technology Security Administration and National Security Agency, respectively, in order to begin the process of acquiring technology transfer control plans and launch monitoring agreements. Therefore, we propose deleting the word "application" in paragraph (y)(1) and removing the reference to "evidence" of launch monitoring arrangements in paragraph (y)(1)(i).[10] We also propose the insertion of clarifying language at the end of paragraph (y)(1). Finally, NSA-approved encryption technology control plans are only required when the encryption technology at issue is controlled by the National Security Agency. SIA proposes editing subparagraph (i) to clarify this practical issue.

SIA is aware that the deletion of the word "application" may make this section of the regulations at odds with the rest of Part 748 of 15 CFR, which deals specifically with unique application and submission requirements. SIA believes that this conceptual issue is of lesser priority than resolving the practical implications of the use of the word

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[9] See 79 Fed. Reg. 27,418, 27,424.

[10] Issuing special export controls with conditions and provisos would still enable BIS to "confirm that the required approvals from DOD and NSA and … the appropriate monitoring ha[ve] been arranged." See 79 Fed. Reg. 27,418, 27,433.

"application" in paragraph (y)(1), and therefore would strongly prefer that it be deleted, even if this results in the transfer of the special export control regulations to a different Part of 15 CFR. The same argument holds true to removing the reference to "evidence" of launch monitoring arrangements in paragraph (y)(1)(i).

Conclusion

SIA continues to support and welcome the efforts made by the Department of Commerce to reform the regulations for the export of satellite technologies. With these further adjustments, the controls will come closer to meeting the goals of the Administration's Export Control Reform initiative and promoting the international competitiveness of the U.S. space industry.

SIA thanks the Department for the opportunity to comment on these important changes to the CCL, and would welcome the chance to discuss our comments in greater detail should further clarification be required.

Respectfully Submitted,

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