United Technologies Corporation
1101 Pennsylvania Avenue, N.W.
10th Floor
Washington, D.C. 20004-2545

United Technologies

Submitted Via Email

December 1, 2014

Mr. Steven Emme
Regulatory Policy Division
Bureau of Industry and Security
Room 2099B
U.S. Department of Commerce
Washington, D.C. 20230

Attn: RIN 0694-AG30

Re: Request for Public Comment on the Recordkeeping Requirements of the Export Administration Regulations (79 Fed. Reg. 59166, October 1, 2014)

Dear Mr. Emme:

United Technologies Corporation ("UTC")[1] appreciates the opportunity to submit these comments in response to the Bureau of Industry and Security's ("BIS") advanced notice of proposed rulemaking concerning the recordkeeping requirements of the Export Administration Regulations ("EAR"). The notice seeks public comment on ways to improve the record retention and record creation requirements of the EAR to reduce unnecessary burden, increase clarity, address changes in technology and data management, and maintain the tools necessary for compliance with and enforcement of the EAR. The notice is part of BIS's retrospective regulatory review being undertaken pursuant to Executive Order 13563.

UTC strongly encourages BIS's comprehensive review and, ultimately, revision of the recordkeeping requirements in Part 762 and associated sections of the EAR, which have not been systematically reviewed or amended since the mid-1990s, to take account of profound changes over the past two decades in the business and information technology ("IT") environment in which global companies operate. The increased use of virtual modes of communication and collaboration – such as email, mobile messaging, web-based portals, networked share drives, enterprise resource planning, and engineering and manufacturing systems – has enhanced greatly the ease and frequency of information sharing and, as a result, the volume and variety of digital records that are created. Digital records management and

[1] UTC is a global, diversified corporation based in Hartford, Connecticut, supplying a broad range of high technology products and services to the aerospace and building systems industries. UTC's companies are industry leaders, among them Pratt & Whitney, Sikorsky, UTC Aerospace Systems, UTC Building & Industrial Systems, which includes Otis and UTC Climate, Controls & Security, and United Technologies Research Center. With 2013 revenues of $62.6 billion, UTC is the 19th largest U.S. manufacturer and 45th largest U.S. corporation.

storage present significant challenges and associated costs,[2] and the IT landscape is continuing to evolve in new directions such as cloud computing.

In today's electronically interconnected business environment marked by thousands of daily interactions with a global customer and supply base, UTC finds the current recordkeeping framework of the EAR to be outmoded, hard to understand, and difficult to apply. The record retention requirements are exceptionally broad in scope and undifferentiated in their application to transactions subject to the EAR. The requirements in Part 762 could be read to require retention of virtually all tangible and intangible records generated in the normal course of business, whether those records are directly related or ancillary to a regulated transaction. The recordkeeping provisions also make no distinction based on the nature of and/or the authorization requirements for transactions subject to the EAR, applying equally to tangible and intangible transactions as well as license required and no license required transactions.

UTC believes the recordkeeping framework can be simplified and streamlined to be more targeted and less burdensome on industry, while balancing BIS's interest in ensuring the preservation of records that establish the essential facts about a regulated transaction needed for compliance and enforcement of the EAR. Restructuring the recordkeeping requirements also is consistent with the Administration's Export Control Reform agenda, and its stated goal of strengthening national security and the competitiveness of U.S. manufacturing and technology sectors by focusing on current threats and the changing technological landscape.

Comments Relating to Scope (Part 762.1)

The scope of transactions subject to Part 762 encompasses all exports of commodities, software and technology from the United States, including items classified as EAR99 or controlled only for antiterrorism reasons. Covered transactions also include any known reexports, transshipment, or diversions of items exported from the United States that remain subject to the EAR. The structure of the requirements means the same expanse of records defined in §762.2(a) must be retained for exports and reexports from abroad of EAR99 and AT-controlled items, eligible for NLR to most of the world, as for transactions involving more highly controlled items subject to authorization requirements. This greatly amplifies the recordkeeping burden on regulated parties, especially with regard to the massive volume of intangible transactions and associated electronic communications involving NLR technology.

We recommend BIS make distinctions in the recordkeeping requirements based on the nature of the transaction subject to the EAR. Export and reexport transactions that are not subject to authorization requirements, including based on the general prohibitions, should not warrant the same level of recordkeeping as transactions subject to a license or license exception. As described below, we suggest an approach to recordkeeping that moves away from identifying the universe of types of documents that must be retained and instead focuses on retaining records that allow the essential details of a regulated transaction to be identified.

---

[2] For the aerospace population alone at UTC (nearly 100,000 mailboxes), we estimate storage requirements to be roughly 100 terabytes per year for retaining copies of all emails. Storage costs may exceed $3M per year.

We also recommend that BIS clarify the intent of §762.1(a)(3) relating to exports to Canada, and whether such exports to Canada for end use in Canada or the United States are within the scope of §762.1.

Comments on Record Retention (Part 762.2(a) and 762.3)

The current architecture of Part 762 is based on identifying the types of records that are included and excluded from the record retention requirements. Section 762.2(a) specifies an affirmative list of records that must be maintained, culminating with a catch-all entry for "other records" pertaining to transactions within the scope of the EAR, while §762.3 sets out a laundry list of records that are exempt from retention requirements, many of which have no connection to transactions subject to the EAR. This architecture is overly broad and inefficient, potentially capturing records that are not directly relevant or necessary to recreate the essential elements of a regulated transaction. It is also impractical to sustain, given the constant evolution of technological tools that enable global business transactions and, thus, of the types of records that relate to those transactions.

In particular, the types of records described in §762.2(a)(2)-(4) (memoranda, notes, and correspondence) and the catch-all provision in §762.2(a)(11) (other records pertaining to covered transactions) are virtually unbounded in scope and could be construed to encompass all records, tangible and intangible (e.g., email and IT system generated metadata files), created in the normal course of business no matter how ancillary to the subject transaction. The ubiquitous use of email and IT systems in today's business environment greatly magnifies the volume of digital records potentially subject to recordkeeping, but which do not add any value in establishing the facts of a regulated transaction. The focus of recordkeeping should be on records directly establishing or pertaining to the export, reexport or transfer itself, as such records contain information on the essential factual elements of the transaction.

We recommend BIS maintain a bounded list of defined "export control documents" to be retained as specified in §762.2(a)(1) and defined in §772, but abandon the affirmative (but essentially unbounded) list of other types of records that must be retained in §762.2(a)(2)-(11)[3] and the separate list of records that are exempt from retention in §762.3. As an alternative, BIS should consider a general requirement that other records be retained sufficient to identify the essential elements or details of a regulated transaction. These data elements may include the date of the transaction, a description of the transaction, including the commodities, software or technology subject to the EAR, the quantity and value of items subject to the transaction, the name and address of all parties to the transaction, etc.

[3] Section 762.2(a)(9), specifying "restrictive trade practice or boycott documents and reports," is redundant as the definition of "export control document" in §762.2(a)(1) includes a U.S. exporter's report of request received for information, certification, or other action indicating a restrictive trade practice or boycott imposed by a foreign country against a country friendly to the U.S., submitted to the Commerce Department in accordance with Part 760 of the EAR.

Comments on Record Retention References (Part 762.2(b))

This subsection of the recordkeeping requirements lists certain other parts, sections and supplements of the EAR that make specific reference to the record retention requirements in Part 762, or that contain additional, specific record creation requirements. We believe it would be more efficient and helpful to the regulated community to make a distinction in 762.2(b) between those EAR provisions that require *retention* of records that are otherwise created in the ordinary course of business, and those provisions that require the *creation* of records for export control purposes that would not otherwise be created in the ordinary course of business. For instance, this subsection references §740.1, Introduction (to License Exceptions), which states that records of transactions involving exports under any of the license exceptions must be maintained in accordance with Part 762. However, several other exceptions referenced in §762.2(b) impose specific record creation requirements (e.g., §740 740.10(c), RPL; §740.13(h), TSU). Still other sections cross-referenced in §762.2(b) make no specific reference to recordkeeping.

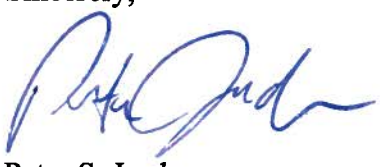
Examples of Other Recordkeeping Requirements

In other export control regimes around the world, the recordkeeping requirements reflect a common policy interest in maintaining records sufficient to determine the essential facts surrounding a regulated transaction. As a reference, we attached the United Kingdom's Export Control Order of 2008, Part 5, Section 29, Record keeping – general (Attachment 1). We believe this approach is more streamlined, efficient, and administrable, while also preserving the tools and information necessary to support compliance and enforcement objectives.

* * *

For additional information, please contact the undersigned at (202) 336-7467 or peter.jordan@utc.com.

Sincerely,



Peter S. Jordan
Director, Senior International Trade Counsel
United Technologies Corporation

Attachment 1

ATTACHMENT 1

STATUTORY INSTRUMENTS

2008 No. 3231

The Export Control Order 2008

PART 5

LICENCES, ETC.

Record keeping – general

29. (1) A person who—

(a) acts under the authority of a general licence granted by the Secretary of State; or

(b) acts under the authority of the Community General Export Authorisation whilst established in the United Kingdom

shall keep detailed registers or records.

(2) The registers or records shall contain sufficient detail as may be necessary to allow the following information, where appropriate, to be identified in relation to each act carried out under the authority referred to in paragraph (1)—

(a) a description of the act;

(b) a description of the goods, software or technology to which the act relates;

(c) the date of the act or the dates between which the act took place;

(d) the quantity of the goods (if any) to which the act relates;

(e) the name and address of the person referred to in paragraph (1);

(f) the name and address of any consignee of the goods to which the act relates or any recipient of the software or technology to which the act relates;

(g) in so far as it is known to the person referred to in paragraph (1), the name and address of the end-user of the goods, software or technology to which the act relates;

(h) if different from the person referred to in paragraph (1), the name and address of the supplier of the goods (if any) to which the act relates;

(i) any further information required by the licence or authorisation referred to in paragraph (1).

(3) The registers or records referred to in paragraph (1) shall be kept—

(a) in the case of a general licence authorising an activity that would otherwise be prohibited by Part 4 of this Order, for at least four years from the end of the calendar year in which the authorised act took place;

(b) in any other case, for at least three years from the end of the calendar year in which the authorised act took place

or for such longer period as may be specified in the licence or authorisation referred to in paragraph (1).

(4) The documents and records to be kept in accordance with Article 21(5) (records of exportation and transfer of listed items within the customs territory) of the dual-use Regulation are the registers or records referred to in paragraph (2)(a) to (i).