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November 21, 2014

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

Subject: **Request for Public Comment on the Recordkeeping Requirements of the Export Administration Regulations, RIN 0694-AG30**

Reference: **Federal Register/ Vol. 79, No. 190/ Wednesday, October 1, 2014/ Proposed Rules**

Dear Mr. Emme,

The Boeing Company ("Boeing") appreciates the opportunity to comment on the recordkeeping requirements of the Export Administration Regulations ("EAR"). This is a timely effort given the increased number of items and exporters operating under Commerce jurisdiction as a result of Export Control Reform. Accurate recordkeeping is necessary for the Bureau of Industry and Security ("BIS") to perform its compliance function. However, the current regulations are overly broad and outdated, which creates a significant burden on exporters. As business practices and technology have evolved so should the recordkeeping requirements. Below, Boeing recommends principles we believe should guide the recordkeeping revision effort, specific recommended text changes, and responses to the specific questions posed in the Request for Public Comments.

Recommended Recordkeeping Principles

1. Only those records that document the essential information relating to the export or re-export should be required to be kept, namely: commodity information, including classification, end user(s), end use, parties, destinations, and restrictive trade practices or notices from BIS. These are the same information areas required on a license application.

2. As information is more digitized and centralized, the standard for recordkeeping should predominantly consist of the retention of essential information and data elements, *rather than the types of documentary media* (e.g., notes, correspondence, contracts)

3. Requirements for original documents or for manually signed documents should be eliminated. Original records converted into a different, but still reproducible format, such as PDF format, should be acceptable. This format is acceptable for SNAP-R records.

4. AES records should be sufficient for No License Required items classified as EAR99 or only controlled for Anti-Terrorism ("AT") reasons as these represent the lowest level of risk. This change would enable compliance efforts to focus on items of true national security significance.

5. To the extent possible, records required by BIS to be maintained should align with records that exporters generate pursuant to compliant activities.

6. Once revised, the updated requirements should be incorporated into all other parts of the EAR that touch on recordkeeping. Two sections that arose in our review are Parts 748.11(b) and 748.9(c)(1).[1]

Recommended Text Changes

1. Part 762.2(a)(1) and (2), *Transactions subject to this part.* This section should predominantly describe the information that exporters must be able to produce rather than a strict list of types of records to keep. Suggested text:

(a) Records required to be retained
The records required to be retained under this part 762 include the following:
...
(2) Records that will completely identify:
a. item(s);
b. end user(s);
c. end use(s);
d. parties to the transaction;
e. destination;
f. essential correspondence; and
g. restrictive trade practices or boycotts described in part 760 of the EAR.

2. Part 762.2(b)(1), *Records retention references.* Given that the list of 53 additional areas of the EAR that relate to recordkeeping is already subject to the caveat, "include, but are not limited to", delete this list and state that additional areas of the EAR may require recordkeeping as well. Suggested text:

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[1] 748.11(b) Submission of the Statement by Ultimate Consignee and Purchaser
.... The applicant must receive the *manually-signed original* within 60 days from the date the original is signed by the ultimate consignee. The applicant must, upon receipt, retain *the manually-signed original,* and both the ultimate consignee and purchaser should retain a copy of the statement in accordance with the recordkeeping provisions contained in part 762 of the EAR.

748.9 (c)(1) License applications supported by an Import Certificate or End User Statement
You may submit your license application upon receipt of a facsimile or other legible copy of the Import Certificate or End-User Statement, provided that no shipment is made against any license issued based upon the Import Certificate or End-User Statement prior to receipt and retention of the *original statement* by the applicant.

(b) Additional records retention requirements
Other parts, sections, or supplements of the EAR also require the retention of records or contain recordkeeping provisions that must be considered in addition to the requirements of this Part.

3. **Part 762.2(c), *Special recordkeeping requirement.*** This section was applicable to exports following the lifting of comprehensive sanctions on Libya in 2004. The situation in Libya has changed dramatically since then obviating the need for these provisions, which should be deleted.

4. **Part 762.4, Original Records Required and Part 762.5, Reproduction of Original Records.** These sections seem to mirror the requirements of the International Traffic In Arms Regulations ("ITAR"), specifically Part 122.5. We recommend adopting that ITAR text, included below for your convenience. We believe that it is more streamlined and would result in alignment between the two sets of regulations. The aforementioned ITAR provision states in pertinent part:

> Records in an electronic format must be maintained using a process or system capable of reproducing all records on paper. Such records when displayed on a viewer, monitor, or reproduced on paper, must exhibit a high degree of legibility and readability. (For the purpose of this section, "legible" and "legibility" mean the quality of a letter or numeral that enables the observer to identify it positively and quickly to the exclusion of all other letters or numerals. "Readable" and "readability" means the quality of a group of letters or numerals being recognized as complete words or numbers.) This information must be stored in such a manner that none of it may be altered once it is initially recorded without recording all changes, who made them, and when they were made. For processes or systems based on the storage of digital images, the process or system must afford accessibility to all digital images in the records being maintained. (22 C.F.R.§ 122.5)

5. **Part 772, "export control documents" definition**. As explained more fully below, the current definition does not clearly define the records related to the physical export by shipment or hand carry that must be retained.

Specific issues identified in the Request for Public Comments

1) **How have the current recordkeeping requirements of the EAR positively or negatively affected organizations? Quantitative analyses on this topic would be beneficial.**

Boeing maintains contracts with record management services across the globe to comply with record keeping requirements. As current recordkeeping requirements are overly broad, this imposes a significant resource burden without a specific corresponding compliance benefit. Costs associated with EAR recordkeeping requirements include supplies, labor, IT, and database maintenance expenses for preparing, compiling, and filing export documentation in hard copy

and electronically as well as payments for records management services for storage and eventual disposition of hardcopy files.

2) **Are there any recordkeeping provisions or references to documents that are out of date? Are there provisions in the recordkeeping requirements that should be updated to take into account technological changes in how business is conducted and records are maintained?**

EAR Part 762.2(a)(1) refers to the definition of "Export control document" in Part 772. The definition focuses on export license applications and specific forms and activities associated with physical exports. The current text does not clearly define records related to the physical export transaction by shipment or hand carry. This results in overly broad records retention. Further clarity in the definition of required records will increase compliance and promote greater efficiency.

Boeing recommends the following revisions to the definition of "export control documents" (new text in *italics*)

> … Electronic Export Information (EEI) on the Automated Export System (AES) *Internal Transaction Number (ITN) or exemption from AES filing legend used* in connection with *U.S. exports subject to the EAR submitted by exporters and agents pursuant to the export clearance requirements of Part 758 of the EAR; the commercial invoice submitted by exporters and agents used for export transfer declarations to any non-U.S. country;* dock Receipt, bill of lading *or other equivalent shipment lading document* submitted by exporters and agents *used for export shipments to any non-U.S. country; power of attorney granting U.S. agent use and application for U.S. export shipments to any non-U.S. country on behalf of Principal Party in Interest …*

Outdated language does not accommodate integrated express carriers such as FedEx, DHL and UPS that do not issue bills of lading but instead generate package labels that are used as "Shipment Lading Documents". The "Shipment Lading Document" includes the ITN or exemption from AES filing legend, the Destination Control Statement, any applicable 600 or 500 series ECCN and any applicable Government Furnished Equipment ("GFE") document statement required on the traditional bill of lading or dock receipt.

Further, Boeing believes that AES retains the required data elements, so that when reference to ITN or exemption from AES filing legend is retained, along with the other documents listed above, an adequate record of export declaration is available for use by enforcement authorities.

3) **Should the recordkeeping provisions make transactional distinctions on when records should be created or maintained? For instance, should intangible transfers of technology or software be treated differently than tangible exports or re-exports for record creation and record retention purposes? Or would it be preferable to avoid making distinctions in order to have more clear and concise requirements?**

Recordkeeping for individual transactions such as technology transfers made during collaborative discussions between U.S. and non-U.S. design partners is must be carefully considered. A practical approach to technology transfer recordkeeping is the documentation of the time span over which intangible exports were made pursuant to the authorization or the period during which access was provided to information systems. An alternative approach could be to assume that intangible technology exports take place during the entire period authorized by the license or other authority.

4) **Would it be efficient to make a distinction in Part 762 between provisions that require the *maintenance* of records created in the ordinary course of business as opposed to those that require the *creation* of records for export control purposes that would not otherwise be created in the ordinary course of business?**

As stated above, we believe that, to the extent possible, required records should align with records that exporters generate pursuant to compliant activities.

5) **Are there any record creation requirements in the EAR that should be reviewed or revised?**

All sections of the EAR that deal with recordkeeping should be reviewed and revised based on the principles established in a revised Part 762 to ensure consistency. For example, if electronic records are acceptable instead of hard copies or originals this should be reflected in other recordkeeping sections.

6) **Are there any recordkeeping requirements under U.S. or other law that would serve as good examples for the EAR?**

Elements of the updated ITAR recordkeeping requirements could be considered for harmonization to the extent possible.

Thank you for considering Boeing's input. Please do not hesitate to contact me if you have any questions or need additional information. I can be reached at 703-465-3505 or via email at christopher.e.haave@boeing.com.

Sincerely,

Christopher E. Haave
Director, Global Trade Controls