The Boeing Company
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August 6, 2012

Hillary Hess
Director, Regulatory Policy Division
Office of Exporter Services
Bureau of Industry and Security
U.S. Department of Commerce, Room 2099B
14th Street and Pennsylvania Avenue NW
Washington, DC 20230

Subject: **RIN 0694-AF65**

Reference: **Proposed Revisions to the Export Administration Regulations: Implementation of Export Control Reform; Revisions to License Exceptions After Retrospective Regulatory Review**

Dear Ms. Hess:

The Boeing Company ("Boeing") welcomes the opportunity to comment on the referenced proposed revisions to the Export Administration Regulations ("EAR"). We commend the continued efforts of the Administration to implement comprehensive export control reform. We support the proposed rule's efforts to streamline the export process, while still maintaining appropriate national security controls, including the following:

- Broadening EAR license exceptions to be consistent with license exemptions under the International Traffic in Arms Regulations ("ITAR"), as well as streamlining and updating regulatory language. Harmonization of these two sets of regulations is a welcome step that will increase industry's regulatory understanding, thereby strengthening compliance.

- Expanding License Exception GOV to apply to the provision of items to U.S. Government contractors acting on behalf of the U.S. Government under specified conditions. Because the eligible items are for ultimate government end-use, this will eliminate administrative licensing burdens and unnecessary delays for both government and industry. Expanded use of this license exception will streamline exports to our armed forces overseas.

- Extending the two-year validity period of Commerce licenses to match State's four-year period. This harmonized validity period will ease administrative licensing burdens for both government and industry.

- Modifying the *de minimis* percentage to a uniform 25 percent rule for re-exports of "600 series" items to all countries, except those subject to a U.S. arms embargo, which would continue to be subject to a zero percent rule. This addresses our previously-stated concern with different *de minimis* values for current Commerce Control List ("CCL") items and new "600 series" products.

As the Bureau of Industry and Security ("BIS") notes, both government and industry will need to adjust licensing and compliance procedures to implement the transition of certain items from the United States Munitions List ("USML") to the CCL. We have provided detailed comments on the proposed transition of timing in our response to the Directorate of Defense Trade Controls' ("DDTC") Proposed Rule on the Export Control Reform Transition Plan. Given the interrelationship between the transition plans of the two agencies, we provide our comments to DDTC as an Attachment (A) to this letter.

In addition, Boeing provides the following comments and recommendations that we believe would improve the proposed rule by BIS.

I. Transition Timing

Once a revised category rule is published as a Final Rule, industry will need to undertake many activities including updating design, engineering, and manufacturing systems and databases, modifying compliance process, writings, and trainings, remarking large numbers of parts and associated documents, and coordinating with numerous suppliers. This is a significant undertaking that could take a substantial period of time. In the interest of a smooth transition period for both government and industry, we ask BIS and DDTC to reconsider the proposed rules for the acceptance of new license and agreement applications during this transition period.

Recommendation:

- A six-month period between USML Category publication dates and effective dates. This would provide both government and industry with an additional period of time to prepare for final rule implementation. DDTC would continue to accept applications for "600 series" items during this period.

- A comprehensive transition period of two years for each USML Category, beginning with the effective date of that USML Category's final rule. During this two-year period, DDTC and BIS would both be allowed to accept applications and approve licenses for "600 series" items. DDTC authorizations for "600 series" items would expire two years after the effective date of the respective Category's final rule.

While not germane to this proposed rule, it is widely recognized that a crucial aspect of the success of this two-year transition period will be the ability of the Automated Export System ("AES") to accept both ITAR and EAR nomenclatures and authorizations when using the system to record shipments of "600 series" items.

II. Congressional Notification

We continue to strongly support the President's Export Initiative and the Administration's Export Control Reform proposals. However, we must raise certain questions regarding a proposed transition rule that establishes a Congressional Notification requirement for USML items approved for transfer to the "600 series". As a threshold matter, the Export Administration Act ("EAA"), as currently authorized by the International Emergency Economic Powers Act ("IEEPA"), does not specifically authorize the Congressional Notification requirements, as proposed. That stated, we acknowledge the discretion of the Department of Commerce to craft regulatory language to implement such a requirement in the interests of national security, should it choose to do so. Given that the intent and purpose of the Administration's export reform efforts to transfer certain items from the USML to the CCL, with the concurrence of Congress under the Arms Export Control Act's 38(f) provision, is predicated on the premise that these items are not of critical importance to U.S. national security, we strongly urge removing the need for the Congressional notification requirement.

Because the proposed rule's language on this subject matches the parallel provision in the ITAR, the dollar value thresholds for triggering Congressional Notification for EAR applications would not be based on the dollar value of the EAR license application itself. Instead, the dollar value thresholds would be based on the ***contract value*** under which the EAR-controlled exports occur.

In the context of Boeing's business, a single contract will consist of the sale of a number of full aircraft platforms (*e.g.*, Boeing's Apache attack helicopter) along with various spare parts and components of the platform for maintenance purposes. In such situations, the relevant ITAR application will normally require Congressional Notification due to the high dollar value of the contract. Under this proposed rule, a companion EAR license application for spare parts/components supporting the same contract would make this application subject to a second, identical Congressional Notification requirement. Because of the extensive time required for the process, this double notification requirement would represent both a significant competitive disadvantage for the U.S. defense industry, and an unnecessary regulatory burden for both government and industry. Because Congress will have been notified of the sale of the ITAR platform, we see no reason for a subsequent notification for the export of the supporting spare parts/components.

Recommendation: We recommend removal of the Congressional Notification language from the BIS proposed rule. Should the Commerce Department decide to move forward with such a requirement, we recommend that the provision be amended so as to base the notification requirement on the dollar value threshold of the ***license application***, rather than the dollar value of the contract itself.

III. License Exceptions

BIS states that in revising exceptions, it seeks to create equivalent EAR authorizations to correspond to existing ITAR authorizations as well as to clarify the language. Our suggestions below seek this same objective.

License Exception TMP

The proposed TMP exception, in 740.9(a)(14), restates the current one-year limitation on the duration that items can be abroad under TMP, with anything longer requiring a BIS license. DSP-73 authorizations under the ITAR are currently valid for four years and can be renewed before expiration without returning the item to the U.S. In many cases, this duration is critical to support program marketing and production activities and facilitate the use of Government-Furnished Equipment. This is an example of a perhaps unintentional rollback of controls in the movement of items from the USML to the CCL.

Recommendation: "600 series" items exported under TMP should be allowed to remain outside the U.S. for four years and be eligible for repeated renewal, consistent with the current ITAR standard for items exported under a DSP-73 authorization.

License Exception RPL

As proposed, section 740.10 (a)(3)(ii) of the EAR allows a minimum level of parts to be held abroad which is a positive change from the prior prohibition on any held spares. However, very few aviation items meet the proposed dollar threshold of $500, making the exception of limited value to our industry. To resolve this and avoid large accumulations of stock, the value limit could be raised or, for higher dollar value items, a limit imposed on item quantity (two or three) rather than item value. Also in this section, the term "per shipment" is used where the ITAR uses "per transaction". The EAR phrasing implies that one shipment of several purchase orders is not allowed. We frequently receive small orders from the same end user and bundle them in the same shipment for cost savings. We provide separate invoices, but they are shipped together. Finally, the second part of section 740.10(a)(3)(ii) of the EAR, beginning with "Replacements may be exported to replace spare parts...", deals with replacements rather than spares held abroad and should not be subject to value limitations. To avoid confusion, we suggest that this section should constitute a separate paragraph within the text, with a clear statement that replacements are not subject to a value limit.

Recommendation: Increase the value limit for spares held abroad to $2500 or, alternatively, enact item quantity limits (*i.e.,* two or three) for higher dollar value items, rather than item value limits. Replace "per shipment" with "per transaction". Separate the section dealing with replacements into a separate paragraph and add a sentence stating that replacements are not subject to a value limit.

License Exception GOV

- Exports, re-exports and transfers made for, or on behalf of, the U.S. Government

As proposed, Section 740.11(b)(2)(iii)(E) of the EAR authorizes exports to implement or support a program directed by the Secretary of Defense, with the *concurrence* of the Secretary of State, to build the capacity of a foreign government's national military forces so that they can conduct *counterterrorist operations*....or to support the U.S. Armed Forces [italics added].

As a practical matter, it is not clear how an exporter will know whether there has been concurrence between the Departments of Defense and State and who is responsible for seeking concurrence. Additionally, *counterterrorist operations* could be interpreted broadly or differently amongst exporters and regulators. Therefore, a clarification for what is considered in scope for this term would be helpful.

Recommendation: Provide detail on the responsibility for determining and notification to industry of concurrence between the Secretaries of Defense and State in this section. Define or clarify what is within the scope of counterterrorist operations.

- DoD directive (certification) requirement

As proposed, in sections 740.11(b)(iii)B - D, the ITAR exemption certification process has been essentially transferred to the EAR. This License Exception GOV revision now adds a requirement to obtain written authorization from the Secretary or agency head (or his/her designee) to use the exception. This is an understandable requirement for ITAR-controlled products, but is not warranted for "600 series" items that have been transferred from the ITAR because they do not warrant a higher level of control. Moreover, the subparagraphs already include a requirement that a contract must exist between the transferor and the U.S. Government agency. The contract presumably identifies the relevant scope of export requirements (*i.e.,* data, services and hardware transfers, end use and end-user). Additional documentation should not be required to verify the information in the contract. Certification represents a significant burden for both the U.S. exporter and the Department of Defense (DoD).

Recommendation: Remove the requirement for a DoD directive from subparagraphs B through D as the contract is sufficient to demonstrate eligibility.

- List of countries eligible to receive the Wassenaar Arrangement's Sensitive List items

Currently, the Foreign Military Sales ("FMS") and DoD exemptions allow exports to all countries except those listed in section 126.1 of the ITAR. Under the proposed rule in 740.11(c), fewer countries are eligible for License Exception GOV, thus increasing the level of control on those items as compared to control under existing ITAR exemptions. Restrictions include exports only to Cooperating Governments or only to STA-36 countries in the case of "600 series" exports. Further restrictions are placed on the items eligible for License Exception GOV stemming from the Sensitive and Very Sensitive List restrictions in Supplement No. 6 and 7 to Part 774 of the EAR.

Recommendation: When the requirements are met to use License Exception GOV, expand the eligible counties to Country Group B.

License Exception STA

- STA restrictions for "600 series" items to foreign parties

License Exception STA, which held great promise when first announced, has been systematically restricted since that time, thereby diminishing the likelihood of it being used in place of export licenses. The latest restriction prohibits License Exception STA use for exports to foreign parties unless they have previously received items under a BIS or DDTC license. These measures seem unnecessary since eligible STA countries are deemed to be close allies and partners. Concerns about exporting to new entities can be solved by screening for parties of concern, a standard practice for all export transactions. An exporter will know the status of entities for which it already possesses licenses. However, an exporter will not know whether any other exporter has previously obtained a license for a particular entity. In the absence of the U.S. Government posting information for every entity, at every address that has been authorized to receive U.S. controlled exports, the result of this proposal will be a massive influx of license applications to BIS for exports to allied countries. Coming in the midst of export control reform transition, we do not believe this proposal bears the scrutiny of cost-benefit analysis.

Recommendation: Removal of this proposal. License Exception STA vetting should be addressed through denied party screening.

In closing, Boeing welcomes the majority of the regulatory changes proposed in this Transition Rule. We hope that our comments and recommendations are helpful, and look forward to continued discussions in these areas. We urge BIS to engage with industry to develop a transition timing plan that allows exporters to digest control list changes, reclassify items, re-mark technical data, revise compliance systems, modify processes, and update employee training.

Thank you again for considering these comments. 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 e-mail at stephanie.a.reuer@boeing.com.

Sincerely,

Stephanie A. Reuer
Director, Global Trade Controls

Attachment: (A) Boeing's Response to DDTC's Proposed Rule on the Export Control Reform Transition Plan, dated August 06, 2012

The Boeing Company
1200 Wilson Blvd
Arlington, VA 22209-1989

August 6, 2012

Ms. Candace M. J. Goforth
Director, Office of Defense Trade Controls Policy
Directorate of Defense Trade Controls
U.S. Department of State
2401 "E" Street, NW
Washington, DC 20037

Subject: "ECR Transition Guidance"

Reference: Federal Register/Vol.77, No. 120/Thursday June 21, 2012
Export Control Reform Transition Plan: Proposed Policy Statement

Dear Ms. Goforth:

The Boeing Company ("Boeing") appreciates the opportunity to comment on the policy changes proposed by the Directorate of Defense Trade Controls ("DDTC") for implementing an Export Control Reform Transition Plan. Boeing reiterates its support for this export control reform initiative.

Boeing has a number of concerns with the proposed rule, principally regarding the timing and scope of the transition period for new export authorizations. We provide the following comments and recommendations for your consideration.

Background

Boeing has developed an extensive network of systems, tools, and processes to ensure compliance with U.S. export control laws and regulations, which include trade compliance infrastructure, as well as engineering and business systems that include and perform compliance functions. This compliance infrastructure includes enterprise-wide procedures for complying with export and import requirements under the International Traffic in Arms Regulations ("ITAR"), the Export Administration Regulations ("EAR") and the Customs Regulations in support of large numbers of exports and imports. Revising this complex network of compliance and business systems to reflect the changes represented by the U.S. Munitions List ("USML") reform initiative will require significant transition costs, which will include design, engineering and manufacturing tools/systems/databases, compliance processes/writings/training, technical data re-markings, product re-classifications, and extensive coordination with suppliers and customers.

Application of the Transition Period

Conditions imposed by DDTC for the adjudication of license applications during the transition period are, in our opinion, too restrictive. The proposed rule would impose undue burden on industry. As proposed, the rule requires applicants to not only be aware of items transitioning from the USML to the CCL, but to act upon that awareness in the submission of applications to DDTC, ***literally the day after***

Additionally, imposing 45-day submission and export limits for license applications submitted after publication of the final rule, but before it is actually in effect, will be detrimental to a smooth transition period for either government or industry upon the culmination of the most significant export control reforms in decades. The contrast between this approach and the proposed two-year transition period for licenses in effect at the time of final rule publication is significant.

Similarly, the proposed policy -- beginning with a USML Category's final rule publication date, to Return Without Action ("RWA") any ITAR agreement or agreement amendment that includes "600 series" items and to terminate agreements that include only transitioned items -- represents a complete absence of a transition period for the implementation of these control list reforms. That is, the proposed rule requires applicants to be aware of items transitioning from the USML to the "600 series" the day after the publication of the respective USML Category's final rule. The impact to U.S. export/import activity would be wide-ranging, immediate, and significantly disruptive. In addition to its economic impact, the lack of an appropriate transition period to adapt to new jurisdiction and licensing rules, and to adapt internal corporate compliance processes, tools, and training, could potentially lead to many smaller U.S. suppliers being inadvertently out of compliance this new U.S. export control regime. This restrictive approach to new requests for export authorizations is in conflict with the Transition Rule's acceptance of two years of shared jurisdiction between DDTC and Bureau of Industry and Security (BIS) for "600 series" items for existing license approvals.

The following circumstances will further complicate a company's efforts to quickly comply with a USML Category's final reform rule:

- Applications do not always specifically enumerate all items for which authorization is sought. For example, applications often reference "kits", "assemblies", or "tools and equipment". The requirement to separate ITAR and "600 series" items within such kits or assemblies represents a new level of granularity, to which industry would need time to adapt. In today's environment, companies are allowed, for convenience, to include CCL items on export applications to DDTC that cannot be easily separated from ITAR-controlled items contained in specific "kits" or "lots" of spare parts. These can regularly include EAR99 items for which no license is required. This practice is simpler for exporters, less confusing and time-consuming for Customs officials reviewing shipments and does not change the proper jurisdiction of the items.

- Applications may include items from different USML Categories, and final rules may not be in effect for all USML Categories listed in a request for export authorization.

- In order to avoid unnecessary commercial disruption, the proposed rule's requirement to terminate licenses and agreements that are fully comprised of "600 series" items would need to allow sufficient time for a company to obtain BIS authorizations for these items prior to terminating its ITAR authorizations and allow continued shipment under existing, approved ITAR licenses until the BIS authorizations are in place, in order to reduce program delays.

Recommendations

In recognition of the breadth and complexity of U.S. export control reform, we recommend the following revisions to this proposed rule:

- A six-month period between USML Category publication dates and effective dates. This would provide both government and industry with an additional period of time to prepare for final rule implementation. DDTC would continue to accept applications for "600 series" items during this period.

- A comprehensive transition period of two years for each USML Category, beginning with the effective date of that USML Category's final rule. During this two-year period, DDTC and BIS would both be allowed to accept applications and approve licenses for "600 series" items. DDTC authorizations for "600 series" items would expire two years after the effective date of the respective Category's final rule.

While not germane to this proposed rule, it is widely recognized that a crucial aspect of the success of this two-year transition period will be the ability of the Automated Export System (AES) to accept both ITAR and EAR nomenclatures and authorizations when using the system to record shipments of "600 series" items.

Boeing recognizes that DDTC, and its fellow agencies, BIS and the Defense Technology Security Administration, have invested considerable time and effort in developing a balanced, efficient, and sustainable export control reform program. We highly commend you for these efforts. We share this desire, and it is in this spirit that we provide the recommendations described herein. Again, we thank you for the opportunity to provide these comments.

Please do not hesitate to contact me if you have any questions or need additional information. I can be reached at 703-465-3463 or via e-mail at kent.d.bossart@boeing.com.

Sincerely,

Kent D. Bossart
Senior Manager, Global Trade Controls