Export Group for Aerospace & Defence

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Office of Defense Trade Controls Policy
US Department of State
Washington, DC, 20522-0112
United States of America

Regulatory Policy Division,
Bureau of Industry and Security
Room 2099B
U.S. Department of Commerce,
Washington, DC 20230
United States of America

Dear Sir,

RIN 0694–AF65 Regulatory Changes — ECR Transition Guidance

As part of the President's Export Control Reform (ECR) Initiative, on 21st June 2012 in the Federal Register (77 Fed. Reg. 37524) and on 25th June 2012 in the US Federal Register (77 Fed. Reg. 37346), the U.S. Department of Commerce's Bureau of Industry & Security, and the U.S. Department of State's Director of Defense Trade Controls (State/DDTC), respectively, issued requests seeking public comment on the proposed implementation plan for defense articles and defense services that will transition from the jurisdiction of the Department of State to the Department of Commerce. The intent of this plan is to provide a clear description of Commerce/BIS's and State/DDTC's proposed policies and procedures for the transition of items to the jurisdiction of the Department of Commerce. The revisions to this rule are part of the Department of State's retrospective plan under E.O. 13563, completed on August 17, 2011. It was requested that any interested parties feed any comments into the US Commerce Department and the US State Department on the proposed regulatory changes relating to the Export Control Reform Transition Guidance, for their consideration, by Monday 6th August 2012.

This response is provided by the Export Group for Aerospace and Defence (EGAD), on behalf of UK Industry. EGAD is a not-for-profit-making special interest industry group focusing exclusively on all aspects of export and trade control matters, and is the only dedicated national industrial body in the UK dealing exclusively with export control issues. EGAD operates under the joint auspices of the ADS Group Ltd (ADS), the British Naval Equipment Association (BNEA), INTELLECT and the Society of Maritime Industries (SMI).

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We have been watching from the UK as the plans have been announced and progressed for the on-going overhaul of US export controls, with great interest. We strongly support the plans for the proposed reforms, from the viewpoint of UK Industry, and are aware that other Industry trade bodies, in other EU Member States (and, we are convinced, even further afield) have equally been watching what has been happening in the US with great interest.

EGAD welcomes the opportunity to comment on the proposed ECR Transition Guidance, as well as the fact that the US Department of State is so actively seeking to amend the ITAR rules.

We feel from the viewpoint of UK Industry that the broad proposals are to be welcomed, in general; however, greater clarity and guidance to assist overseas customers (and US exporters) to continue operating efficiently while embracing a new export control regime is essential, in our view.

For all of its many perceived shortcomings, under the existing ITAR system, at least re-exporters know, with some level of certainty, where they stand on the US-sourced items that they receive, and what they then are allowed to do with them. We fear that the new, post-ECR system offers no equivalent obvious clarity which is in any way comparable to this.

In particular, we see major practical difficulties for foreign companies in classifying legacy items, some decades old, whether in their immediate inventories, or in the hands of end-users where companies may still have responsibilities for repair, support, update and disposal.

Overseas Companies Seeking Control List Classifications

Given the continuing problems which we know that our companies (and, we assume those of other developed nations) have consistently and repeatedly experienced to obtain definitive confirmation from US exporters about the individual control list classifications of items that they receive under the existing system, there is going to be an essential need for the new, even more complex post-ECR US export control system to have to feature some kind of legal obligation on the US exporters to have to provide authoritative and definitive information to their non-US customers as to the control list classification of the items that they are exporting. Indeed, US exporters should not only be required to state the control list category of their export, but also, for a reasonable period (say 2 years), the former USML category, in the case of 600-series items.

Without this legal obligation, there will be even greater uncertainty within the minds of the non-US parties as to the regulations that would apply for the items that they receive. Such an obligation would not be seeking to introduce anything totally revolutionary and new for the US companies concerned, as they already have to inform your own US Immigration & Customs Enforcement authorities on the categorisation of the goods and technology that they are exporting.

Not all overseas companies have the in-house knowledge and expertise to be able to assess jurisdiction for themselves, and assistance to enable them to do so would be invaluable. The risk of legal liability might well result in non-US firms seeking to “play safe” and add to the increasingly common commercial trend for them to “buy American last”, and seeking alternative sources of supply for what they are seeking, which is the complete opposite of what the ECR initiative was intended to achieve.

One possible solution would be:

a. To amend ITAR §123.9.b so it reads

“These commodities are Category xxxxx commodities. They are authorized by the U.S. Government for export only to [country of ultimate destination] for use by [end-user]. They may not be transferred, transshipped on a non-continuous voyage, or otherwise be disposed of, to any other country or end-user, either in their original form or after being incorporated into other end-items, without the prior written approval of the U.S. Department of State.”; and

b. For the Department of Commerce to

- re-affirm the requirement contained in § 758.3 of EAR (please see below); and

§ 758.3 RESPONSIBILITIES OF PARTIES TO THE TRANSACTION

In routed export transactions where the foreign principal party in interest assumes responsibility for determining and obtaining licensing authority, the U.S. principal party in interest must, upon request, provide the foreign principal party in interest and its forwarding or other agent with the correct Export Control Classification Number (ECCN), or with sufficient technical information to determine classification.

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In addition, the U.S. principal party in interest must provide the foreign principal party in interest or the foreign principal's agent any information that it knows will affect the determination of license authority, see §758.1(g) of the EAR.

- amend **§ 758.6 DESTINATION CONTROL STATEMENT, so it reads** "These commodities, technology or software are ECCN xxxx commodities. They were exported from the United States in accordance with the Export Administration Regulations. Diversion contrary to U.S. law is prohibited."

Also, ideally, there would need to be some form of broad-ranging approach adopted by the US Government, and what is vitally needed is for the US Government to compile and publish on a public domain website a list of items which have been transferred under the ECR initiative from ITAR to the EAR, in order to seek to try to alleviate the administrative burden on companies (both US and non-US) which is going to be created by the re-categorisation initiative. With a published list, for any of these categories of parts transferred to Commerce that have a DTrade-issued DSP5 licence, it may be possible to notify those US parties that these parts/categories have now moved to Commerce. At least then the US supplier would know which of their foreign parties had received goods subject to the ECR.

600-series items and De Minimis Rule

We believe that there is a need for a clear statement from the US Department of Commerce's Bureau of Industry & Security on how incorporation will work for 600-series items. Overseas contractors need to have enough information at their disposal for them to make informed "de minimis" assessments. Any uncertainty on this could result in the US Government being on the receiving end of a veritable tsunami of queries from organisations, especially at the lower tiers, from around the World, who lack the in-house expertise to be able to make such complicated calculations for themselves, and, otherwise would face the herculean task of having to categorise for themselves every single US-sourced line item in their stocks, as well as all spares that they own.

The issue of legacy spares is one where considerable clarity will be needed. Companies need to demonstrate how they have calculated for themselves that they are below the "de minimis" level. We therefore propose that the current guidelines, contained in Supplement No.2 to Part 734 – Guidelines for *DE MINIMIS* RULES, be amended so it offers greater clarity on how to go about this, by including practical examples, FAQs and more definition of terms such as "fair market price", for instance. We also feel that there is a strong need to address the problem of the requirement for a one time report to BIS in the case of a "de minimis" claim involving co-mingled technology (see EAR 734.4(d)(3)). This appears to be quite impractical in the case of re-categorised items, and should be dropped, in our view.

Legacy Items

There are many thousands of "legacy" items currently in circulation around the World, involving vast numbers of components and technical data (much of which is likely to be co-mingled) which have been originally transferred with a relevant licence under the ITAR, which are now going to have to be re-categorised. For many of these items the USML category may not have been provided, and the supplier unable, or unwilling, to provide advice about recategorisation. The scale of this task is enormous and some system and process needs to be adopted to assist non-US customers to undertake it, which seeks to impose the least possible additional bureaucratic burden both on them and on the US exporters and the US Government. Authority for blanket retransfer of, for example, Category VIII(h) items would be helpful.

We suggest, to simplify this assessment, that a list is needed categorising items to be transferred to the CCL by USML category.

EAR and "Defense Services"

Clarification is also needed with regard to the provision of a service by a "US Person" to an overseas customer where this service relates to EAR technology being incorporated into a military platform, unmodified and even sometimes without access to the relevant technical data in relation to the final platform. Is this really, strictly speaking, tantamount to the provision of a "Defense Service", and, thus, subject to the ITAR, as some in the US Government appear to imply? Would it make any difference, in the above scenario if the "US Person" did have access to the technical data in relation to the final military platform? Authoritative clarification on this issue is needed.

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It should be stressed that confirmation of this policy would mean that services provided in support of EAR technology would not only be subject to ITAR themselves, but, pursuant to ITAR 124.8(5), could render the entire foreign product subject to ITAR, a major deterrent to the ECR objective of encouraging more use of US-origin components.

Non-US Companies

Clarification and consistency, especially on definitions, are essential. It is essential for this to be produced, as, otherwise, both Industry and the Bureau of Industry and Security could well face a huge additional, but nugatory, administrative task, if this is not done right. Overseas companies must be given the tools to assist them in verifying the control status of an item in their inventory.

We applaud the State Department's commitment to the proposed control reforms and hope that the above comments may assist the US State Department in its endeavours on this. We strongly believe, however, that without considered support and guidance, some of what is being proposed may be running counter to the fundamental aims and aspirations behind the ECR initiative.

Regards

Brinley Salzmann

Brinley Salzmann - Secretary, EGAD