August 1, 2012

To: publiccomments@bis.doc.gov
DDTCResponseTeam@state.gov

From: waroot23@gmail.com

Subject: Revisions to License Exceptions RIN 0694-AF65

The subject June 21 proposed rule provides an excellent opportunity to up-date and reconcile numerous lists of bad guys and good guys.

Who Are the Bad Guys?

Under the proposed rule, the EAR would identify 65 bad guys:

5 E1;
20 D1 not E1 or Macau, which is part of PRC;
13 D2, D3, & D4 not E1, D1, or Macau;
15 Computer Tier 3 not D1, D2, D3, D4; and
12 proposed 740.2(a)(12) not E1, D1, D2, D3, D4, or CT3

ITAR identifies only 24 countries subject to extra restrictions, all in 126.1 and proposed 740.2(a)(12) (Yemen was removed from 126.1 on July 3). The ITAR 24 comprise:

11 UN Security Council arms embargoes (Cote d'Ivoire, Democratic Republic of Congo, Eritrea, Iraq, Iran, Lebanon, Liberia, Libya, North Korea, Somalia, Sudan);
2 U.S. arms embargoes (Burma and China) (removal of Burma might now be under consideration; legislation limits changes the Administration could make in China controls);
4 Denial policy and no stated exceptions (Belarus, Cuba, Syria, Venezuela) (legislation limits changes the Administration could make in Cuban controls); and
7 Stated exceptions from a denial policy (Afghanistan, Cyprus, Fiji, Haiti, Sri Lanka, Vietnam, and Zimbabwe) (when ITAR is revised to recognize the recent designation of Afghanistan as a non-NATO ally, it would be reasonable to consider removing it from 126.1).

Sierra Leone is subject to restrictions on arms exports pursuant to a Federal Register Notice of February 7, 2007. But Sierra Leone restrictions are not yet mentioned in ITAR.

It is **recommended** that the seven 126.1 countries with stated exceptions from a denial policy be removed from the EAR 740.2(a)(12) list of countries subject to an "arms embargo."

ITAR does not use the words "arms embargo" as applying to them. No special EAR restrictions would be needed to permit case-by-case review under EAR of "600 series" items similar to existing ITAR case-by-case review to these countries.

The 41 countries subject to EAR restrictions but not to ITAR restrictions comprise:

14 Hold-overs from the Cold War (Armenia, Azerbaijan, Cambodia, Georgia, Kazakhstan, Kyrgyzstan, Laos, Moldova, Mongolia, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan);

8 ITAR non-NATO allies (Bahrain, Egypt, Israel, Jordan, Kuwait, Morocco, Pakistan, and Taiwan) (also see comments on Afghanistan above)

14 Countries removed from Country Groups D2,3,4 long ago but still in Computer Tier 3 (Algeria, Andorra, Angola, Bosnia & Herzegovina, Comoros, Djibouti, India, Kosovo, Macedonia (Former Yugoslav Republic of), Mauritania, Montenegro, Serbia, Tunisia, Vanuatu); and

5 Middle East (Oman, Qatar, Saudi Arabia, United Arab Emirates, and Yemen) (note recent removal of Yemen from ITAR 126.1 and close U.S. relationships with Saudi Arabia and Qatar)

I it is **recommended** that EAR remove special restrictions on the 41 countries not restricted in ITAR.

This would move the 14 Cold War hold-overs from D1 to Country Group B. They would thereby become eligible for LVS, GBS, and TSR. They would also be relieved from D1 restrictions in various other License Exceptions and from direct product of U.S. technology controls. This would leave only five countries in D1 Belarus, Burma (unless ITAR restrictions removed as part of the current easing of sanctions), China, Iraq, and Libya. The five omit Vietnam, as being one of the 126.1 countries with stated exceptions rather than an arms embargo. The five also omit North Korea, because E1 subjects it to greater restrictions than does D1. Macau should also be removed from D1, because it is part of China.

This would remove D2, D3, and D4 entries for all but the following six ITAR 126.1 countries: Belarus, Burma (unless ITAR restrictions removed as part of the current easing of sanctions), China, Iraq, Lebanon, and Libya. The six omit Afghanistan and Vietnam, because 126.1 states exceptions to their denial policy and because Afghanistan is now a major non-NATO ally. The six omit Cuba, Iran, North Korea, and Syria, because of greater E1 restrictions. D2, D3, and D4 have very little impact on License Exceptions or license requirements. Indeed, there may be no need to continue any of the D Country Groups, because the remaining countries therein would be subject to controls related to 740.2(a)(12), as revised per an above recommendation.

This would move 40 of the 41 non-ITAR 126.1 countries from Computer Tier 3 to Computer Tier 1 (Taiwan is already in Computer Tier 1). This would leave in Computer Tier 3 the following seven ITAR 126.1 countries: Belarus, Burma, China, Iraq, Lebanon, Liberia, and Libya. The seven omit Afghanistan and Vietnam for the same reasons they would be omitted from D Country Groups. Perhaps all seven should also be moved to Computer Tier 1, except to the extent there might eventually be some computers in “600 series” ECCNs. Computers are not now subject to UN controls related to UN Security Council embargoes affecting Iraq, Lebanon, Liberia, and Libya.

Who Are the Good Guys?

27 cooperating governments are identified in existing 740.11(b)(3)(ii) (proposed 740.11(c)(1)) as the 16 in Country Group A1 (14 NATO plus Australia and Japan non-NATO) plus 11 other non-NATO (Argentina, Austria, Finland, Hong Kong, Ireland, Republic of Korea, New Zealand, Singapore, Sweden Switzerland, Taiwan). The 14 NATO omit the following 13 NATO members: Albania, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Iceland, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia.

Three different groups of countries are eligible for TSR on a favorable basis:

1. 1E001 19 countries, of which 13 NATO (Belgium, Canada, Denmark, France, Germany, Greece, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, United Kingdom) and 6 non-NATO (Australia, Austria, Finland, Ireland, Japan, Sweden)
2. 5D001, 6D001, 6D003, 6E001, 6E002, 8D001, 8E001 17 countries, same as 1E001 except for omission of Norway NATO and Australia non-NATO
3. 9D018 and 9E018 30 countries, of which 27 all NATO members and 3 non-NATO (Australia, Japan, New Zealand) (only NATO countries also listed in Country Group B are eligible; but all NATO countries are now listed in Country Group B).

The 36 countries eligible for the 740.20(c)(1) portion of License Exception STA include 26 NATO countries, excluding Albania and the United States, plus the following 10 non-NATO: Argentina, Australia, Austria, Finland, Ireland, Japan, New Zealand, South Korea, Sweden, Switzerland. The (c)(2) portion includes 1 NATO (Albania) and 7 non-NATO (Hong Kong, India, Israel, Malta, Singapore, South Africa, Taiwan).

742.6(a)(2) special RS Column 1 license requirements applicable to thermal imaging cameras 38 countries: NATO 26 (excluding Canada, because of no RS1 license requirement to Canada) plus 12 non-NATO (Australia, Austria, Cyprus, Finland. Ireland, Japan, Malta, New Zealand, South Africa, South Korea, Sweden, Switzerland)

742.6(a)(4) special RS Column 1 license requirements applicable to military commodities 39 countries: same as (a)(2) plus 1 NATO (Canada)

EAR Country Chart Crime Control Column 1, Regional Stability Column 2, and National Security Column 2 license requirements all exclude Australia, Japan, and New Zealand.
CC1 and RS2 exclude all NATO Countries whereas NS2 excludes all except Albania.
NS2 and RS2 exclude 5 non-NATO (Finland, Ireland, Liechtenstein, Sweden, and Switzerland), whereas CC1 does not (Liechtenstein should be treated as part of Switzerland).
NS2 excludes 2 non-NATO (Hong Kong and South Korea), whereas RS2 and CC1 do not.

ITAR 120.31 list of NATO countries omits Albania and Croatia.

ITAR 123.16(b)(10) and 125.4(d) authorize exports to 48 countries:
27 NATO;

16 major non-NATO allies (Afghanistan, Argentina, Australia. Bahrain, Egypt, Israel, Japan, Jordan, Kuwait, Morocco, New Zealand, Pakistan, the Philippines, Republic of Korea, Taiwan, and Thailand);
4 members of the European Union which are not NATO (Austria, Finland, Ireland, and Sweden); and
1 member of the European Space Agency which is neither NATO nor EU (Switzerland)

ITAR 124.15 space transactions to 43 countries: 27 NATO and 16 major non-NATO allies.

ITAR 123.9(e) reexports or retransfers incorporated into foreign defense articles and 129.7(a)(2) brokering activities to 32 countries: 27 NATO and 5 non-NATO (Australia, Israel, Japan, New Zealand, Republic of Korea).

ITAR 124.2(c) training and 125.4(c) response to DOD request for bid to 30 countries: 27 NATO and 3 non-NATO (Australia, Japan, and Sweden).

It is **recommended**:

1, References to NATO be standardized:
a. Add 13 or 14 missing NATO members to Country Group A1, 740.11 cooperating governments, and favorable TSR treatment for 1E001, 5D001, 6D001, 6D003, 6E001, 6E002, 8D001, 8E001
b. Move Albania from STA (c)(2) to STA (c)(1)
c Exclude Albania from NS Column 2 license required
d. Remove "also listed in Country Group B" from 9D018 and 9E018
e. Add Albania and Croatia to ITAR 120.31

2. Consider standardizing all favorable treatment for non-NATO countries in both EAR and ITAR to comprise the following 27: Afghanistan, Argentina, Australia, Austria, Bahrain, Cyprus, Egypt, Finland, Hong Kong, India, Ireland, Israel, Japan, Jordan, Republic of Korea, Kuwait, Malta, Morocco, New Zealand, Pakistan, Philippines, Singapore, South Africa, Sweden, Switzerland, Taiwan, Thailand

Perhaps one or more of these 27 was given favorable treatment for historical reasons which are no longer relevant. There may also be reasons for two (or more) levels of favorable treatment, as in STA now.

At least, the following differences might be eliminated or reduced:

1 EAR 13 non-NATO cooperating governments
vs. ITAR 16 major non-NATO allies
(only six on both lists: Argentina, Australia, Japan, New Zealand, Republic of Korea, and Taiwan;
seven cooperating but not allies: Austria, Finland, Hong Kong, Ireland, Singapore,

Sweden (even though Sweden treated favorably elsewhere), and Switzerland; and
ten allies but not cooperating: Afghanistan, Bahrain, Egypt, Israel, Jordan, Kuwait, Morocco, Pakistan, Philippines, and Thailand)

2 17 non-NATO STA
vs. 12 non-NATO thermal imaging and military RS1 special treatment
(11 on both lists: Australia, Austria, Finland Ireland, Japan, Malta, New Zealand, South Africa, South Korea, Sweden Switzerland;
six STA not thermal imaging or military: Argentina, Hong Kong, India, Israel, Singapore, Taiwan; and
one thermal imaging and military not STA: Cyprus)

3 TSR favorable 6 non-NATO Category 1
vs.5 non-NATO categories 6 and 8
vs. 3 non-NATO category 9
(only one in all 3: Japan;
four in Categories 1, 6, and 8 but not 9: Austria, Finland, Ireland, Sweden;
one in Categories 1 and 9 but not 6 and 8: Australia; and
one in Category 9 but not in 1, 6, or 8: New Zealand)

4 NS2 9 non-NATO
vs. RS2 7 non-NATO
vs. CC1 3 non-NATO
(only three in all 3: Australia, Japan, New Zealand:
four in NS2 and RS2 but not CC1: Finland, Ireland, Sweden, Switzerland; and
two in NS2 but not in RS2 or CC1: Hong Kong and South Korea.

5 ITAR (1) 123.16(b)(10) and 125.4(d) 21 non-NATO
vs. (2) 124.15 16 non-NATO
vs. (3) 123.9(e) and 129.7(a)(2) 5 non-NATO
vs. (4) 124.2(c) and 125.4(c) 3 non-NATO
(only two are in all 4: Australia, Japan;
three are in (1), (2), and (3) but not in (4): Israel, Republic of Korea, New Zealand;
one is in (1) and (4) but not in (2) or (3): Sweden;
eleven are in (1) and (2) but not in (3) or (4): Afghanistan, Argentina, Bahrain, Egypt, Jordan, Kuwait, Morocco, Pakistan, the Philippines, Taiwan, and Thailand; and
four are in (1) but not (2), (3), or (4): Austria, Finland, Ireland, Switzerland.

De Minimis

734.3(a)(3) makes controlled U.S. origin items subject to the EAR when incorporated in a foreign-made item. This is either in any quantity if described in 734.4(a) or exceeding *de minimis* levels if described in 734.4(c) or (d).

734.3(a)(3) omits stating that it applies only to U.S.-origin items located abroad. This should be stated to clarify that *de minimis* does not apply to foreign-made items in the United States.

734.3(a)(3) also omits stating that it applies only to foreign-made items which would be "controlled" if exported from the United States. This should be stated to clarify that the United States does not control exports from abroad more restrictively than it controls exports from the United States.

Proposed new 734.4(a)(6) states:

> There is no *de minimis* level for foreign-made items that incorporate U.S.-origin "600 series" items when destined for a country subject to a U.S. arms embargo (see 740.2(a)(12) of the EAR).

The proposed Note to 740.2(a)(12) includes:

> If there are any discrepancies between the list of countries in this paragraph and the countries identified by the State Department as subject to a U.S. arms embargo (in the Federal Register), the State Department's list of countries subject to U.S. arms embargoes shall be controlling.

A July 3, 2012, Federal Register final rule removed paragraph 126.1(u) on Yemen. The amended 126.1 includes 11 countries listed in paragraph (c) as subject to UN Security Council arms (including Sudan, which was added in 2011 by a Federal Register notice). 126.1(a) states that the United States also maintains arms embargoes applying to Burma and China. 126.1 does not use the words"arms embargo" in describing controls on the other 11 countries mentioned as subject to a policy of denial. Of these 11, exceptions from that policy are stated for seven. The four with no stated exceptions are Belarus, China, Syria, and Venezuela. There may be other currently applicable Federal Register notices not now reflected in ITAR. One dated February 7, 2007, concerning Sierra Leone may still be currently applicable.

Proposed 734.4(a)(6) would not remove, for CCL U.S.-origin items not in the "600 series," the 10% *de minimis* rule for countries in Country Group E1 which are subject to arms embargoes or the 25% rule for other countries subject to arms embargoes. It, therefore, becomes necessary to have a clear dividing line between "600 series" components and non-"600 series" components. For purposes of *de minimis* determinations, such a dividing line would logically be the nature of the foreign-made end-item in which the dual-use U.S.-origin components were incorporated. If that end-item met the definition of a USML or "600 series" end-item, there would be no de minimis level. On the other hand, if the end-item were in normal commercial use, it would not even occur to the U.S. exporter of the components or the foreign manufacturer that the component also was used in a munitions item.

It is **recommended** that:

1 734.3(a)(3) be revised by inserting at the beginning:

> Export from abroad of the following controlled U.S.-origin items incorporated in foreign-made items which would be controlled if exported from the United States:

2 Proposed 734.4(a)(6) be clarified with respect to the countries to which it applies.

Direct Product of U.S. Technology

The proposed rule would remove the following from the denial order text in 764 Supp. No. 1:

> ... this order does not prohibit any export, reexport, or other transaction subject to the EAR where the only items involved that are subject to the EAR are the foreign-produced direct product of U.S.-origin technology.

It is reasonable for controls to be enforced, *inter alia*, by denial orders. However, it is also reasonable to consider why this exception from denial orders now exists. The only basis for U.S. jurisdiction is the U.S.-origin of the technology or software. Compliance with a U.S. prohibition involving a foreign-produced product requires the cooperation of the foreign exporter. 736.2(b)(3)(ii)(A)(1) and (B)(1) are conditions that the technology required an assurance to support either a license application, per 748 Supplement 2 (o)(3)(i), or use of License Exception TSR, per 740.6. However, the foreign exporter might not be the importer of the U.S. technology or software which signed such an assurance. Indeed, the foreign exporter might not even be aware that any U.S. technology or software was involved in the product he wished to export.

It is probable that there would be no comparable direct product restriction in the regulations of the exporter's country. Wassenaar regulations do not include a direct product control. However, the following Wassenaar Munitions List Item 22 .b.1 is similar:

> "Technology" "required" for the design of, the assembly of components into, and the operation, maintenance and repair of, complete production installations for items specified by the Munitions List, even if the components of such production installations are not specified.

The United States has not included WML 22.b.1 in its regulations.

Other problems with the June 21 proposal include:

1 736.2(b)(3)(iv) omits "without a license";

2 Re the 736.2(b)(3)(iv) proposed countries of destination, see above recommendations to reduce or eliminate Country Groups D1, D2, D3, and D4 and to revise the list of countries in proposed 740.2(a)(12);

3 736.2(b)(3)(vi) refers to license exceptions superseding this Prohibition; but the July 23 final rule on UN Security Council arms embargoes includes, in new 746.1(b)(4):

> You may not use any License Exception to export items subject to UN arms embargo controls to countries listed in 746.1(b)(2), except License Exception GOV 740.11(b)(2)(i) and (ii).

The following is **recommended**:

1. Amend existing 746.1(b)(4) to permit license exception(s) in addition to GOV, so that there would be some circumstance(s) in which controls related to arms embargoes could be superseded by license exception(s), as envisaged in proposed 736.2(b)(3)(vi);

2. The "600 series" include the text of WML 22.b.1, revised to insert or "software" after "technology" and to replace the reference to the Wassenaar Munitions list with a

reference to the U.S. Munitions List or “600 series” ECCNs;

3. Either delete 734.3(a)(4) and 736.2(b)(3) or, if continuation of a U.S. extraterritorial control is considered to be necessary:

a Revise the first sentence of 734.3(a)(4) to read:

> Reexports of U.S.-origin technology or software in the form of the direct foreign-made product thereof as described in 736.2(b)(3)

b Revise 736.2(b)(3)(i) to read:

> You may not, without a license or license exception, reexport U.S.-origin technology or software in the form of the foreign-made direct product thereof to a destination in Country Group E:1.

c In 736.2(b)(3)(ii) introductory text, delete “item” and substitute “direct product”

d Revise proposed 736.2(b)(3)(iv) to read:

> You may not, without a license or license exception, reexport U.S.-origin technology or software in the form of the foreign-made direct product thereof to a destination subject to a U.S. arms embargo.