From: Umanos, Henry [mailto:humanos@generaldynamics.com]
Sent: Monday, December 19, 2011 4:01 PM
To: DDTC Response Team
Subject: Regulatory Change -- Treaties

Please find below our comments on the ITAR Proposed Rule listed in the Federal Register, Vol. 76, No. 225, specifically page 72251 regarding Canadian Exemptions, §126.5 wherein the proposed rule states:

§ 126.5 Canadian exemptions.
(a) *Temporary import of defense articles.* . . .
(b) *Permanent and temporary export of defense articles.*
Except as provided in Supplement No. 1 to part 126 of this subchapter and for exports that transit third countries, Port Directors of U.S. Customs and Border Protection and postmasters shall permit, when for end use in Canada by Canadian Federal or Provincial governmental authorities acting in an official capacity or by a Canadian-registered person for return to the United States, the permanent and temporary export to Canada without a license of unclassified defense articles . . . .

Current Exemption.

(b) Permanent and temporary export of defense articles. Except as provided below, the Port Director of U.S. Customs and Border Protection and postmasters shall permit, when for end-use in Canada by Canadian Federal or Provincial governmental authorities acting in an official capacity or by a Canadian-registered person or return to the United States, the permanent and temporary export to Canada without a license of defense articles . . .

Please note the highlighted section, substitutes the word "for" rather, than the current "or" (see the Current form of the exemption in the text box.) This proposed change, we believe, is a mistaken edit. If adopted, the proposed change limits the use of the exemption exclusively to the Canadian Federal or Provincial governmental authorities, and limits the use of the exemption by other Canadian-registered persons **SOLELY** to "defense articles and defense services [that] will be returned to the United States." It is our understanding that this was not the intent of this change, but rather that Canadian-registered persons may also make permanent and temporary export of defense articles except as provided by Supplement No.1 to part 126.

In order to maintain the current intent of the exemption, we recommend the proposed rule, to read as follows:

> . . . or by a Canadian-registered person, or return to the United States, . . .

Please contact me should you have any questions.

Regards,

GENERAL DYNAMICS CORPORATION

Henry A Umanos
Director, Trade Licensing & Compliance
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Kathleen L. Palma
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U.S. Department of State
Office of Defense Trade Controls Policy
PM/DDTC, SA-1. 12th Floor
2401 E Street, NW, (SA-1)
Washington, D.C. 20037

December 20, 2011

Subject: Regulatory Changes—Treaties

Reference: Public Notice: 7683

Dear Mr. Shotwell:

The General Electric Company, acting through its GE Aviation business unit (GE), submits the following comments for the referenced proposed ITAR changes implementing the Defense Trade Cooperation Treaties with Australia and the UK. We share the Department's goal to facilitate defense trade between our closest allies and appreciate the opportunity to comment on the proposed implementing regulations.

As written, GE would likely opt to continue operating under licenses rather than use the §§126.16 or 126.17 exemptions for the following reasons:

- The exclusion carve outs in Supplement No. 1 undercut practical use of the exemptions; and
- The exemption administrative and record keeping burden exceeds requirements for working under a valid license.

COMMENTS AND SUGGESTED CHANGES TO §§126.16 and 126.17

1. Definition of Intermediate Consignee in §§126.16 and 126.17 (a)(1)(iv). It is unclear what is meant by the phrase "**but who does not have access to such defense articles**", specifically for hardware shipments. In some cases, intermediate consignees are responsible for packing, unpacking, inspecting, or other logistics activity requiring physical access to the defense article. Similarly, Customs officials may order the "physical manipulation" of a package or container to carry out entry validation, counter-drug operations, contraband or hazardous material inspection. The Department should further clarify what constitutes "access to such defense articles"?

2. Australia and UK Community Membership. It is difficult to assess the exemption fully without understanding the membership process. The Department should post a proposed rule in the Federal Register providing exporters an opportunity to assess the regulatory burden and provide formal feedback on the Approved Community membership process. The Department should consider the following recommendations for the membership procedure:

a. Allow on-line registration rather than paper submission.

b. Ideally, requestors should be able to complete the on-line form and receive receive approval in a single business day.

c. Automatically include foreign subsidiaries and affiliates of U.S. companies who maintain current ITAR registration. The proposed rule already includes U.S. registered companies as "Authorized Exporters" and members of the "United States Community". Our assumption is that membership in the "United States Community" is predicated on maintaining a robust internal compliance program for each subsidiary (foreign and domestic) listed in the §122.2 registration statement. By extension, foreign subsidiaries and affiliates of registered parties should be extended the same level of trust as their U.S. counterparts.

3. Reexports and Retransfers. We recommend that the Department reconsider excluding the §§126.16 and 126.17 exemptions from §123.9(e). It is unclear why items exported pursuant to the treaty exemptions warrant different treatment than items exported under any other valid export authorization (e.g., license or other exemption).

   It is counterintuitive that an item exported under a DSP-5 would be eligible for the §123.9(e) exemption in the first instance, but ineligible for the exemption once it has been transitioned to the §§126.16 or 126.17 Defense Trade Cooperation Treaty exemptions.

   At a minimum, the Department should permit reexports and retransfers between and among the governments of Australia, Canada, the UK and U.S. and members of the Approved Communities (i.e., US/UK/AU Community members and Canadian-registered persons).

4. We recommend deleting §§126.16 and 126.17 (g)(1) in its entirety. Should the Department not accept this recommendation, we suggest the following (changes in **RED**):

   "(1) An exporter authorized pursuant to paragraph (b)(2) of this section may **export marketing related technical data for** a defense article to the Government of (Australia or United Kingdom) if that exporter has been licensed by the Directorate of Defense Trade Controls to export (as defined by §120.17 of this subchapter) the identical type of defense article to any foreign person."

   The language at §§126.16 and 126.17 (g)(1) appears to duplicate similar controls available in subsection (f), which describes the process for identifying approved end use operations, programs and projects. However, should the Department decide to retain the subsection, we recommend further clarifying that the limitation applies only to marketing related technical data. Without this change, the subparagraph appears to broadly prohibit all marketing related information, regardless of jurisdiction. Such a broad-based prohibition is analogous to the former §126.8 subsection governing certain proposals involving the sale of significant military equipment and would appear to overreach the scope of the International Traffic in Arms Regulations.

5. We recommend deleting §§126.16 and 126.17 (g)(4) in its entirety. Should the Department not accept this recommendation, we suggest the following addition (changes in **RED**):

   "(4) Defense articles specific to developmental systems that have not obtained written Milestone B **(or foreign equivalent)** approval from the Department of Defense **(or foreign**

equivalent) milestone approval authority are not eligible for export unless such export is pursuant to a written solicitation or contract issued or awarded by the Department of Defense **(or foreign equivalent)** for an end-use identified pursuant to paragraphs (e)(1)."

The language at §§126.16 and 126.17 (g)(1) appears to duplicate similar controls already available in subsection (f), which describes the process for identifying approved end use operations, programs and projects. The suggested addition of the phrase "or foreign equivalent" expands the scope of the exemption to include non-U.S. developmental programs.

6. Recommend revising the note in §126.16(h)(7)(i) as follows (**changes in RED**):

"Note: For purposes of paragraph (h)(7)(i)-(iv), per Section 9(9) of the Australian Implementing Arrangement, "ADOD Transmission channels" includes electronic transmission of a defense article and transmission of a defense article by an ADOD **(or Approved Australian or U.S. Community Member)** contracted carrier or freight forwarder that merely transports or arranges transport for the defense article in this instance.)"

The proposed change will permit the use of carriers or freight forwarders operating under a direct contract with an Approved Australian or U.S. Community Member, which is a possibility particularly under Performance Based Logistics-type contractual arrangements requiring contractors to assume full and complete responsibility for product life cycle management.

Finally, we recommend an equivalent note be added to §126.17(h)(7)(i) to ensure consistency between the exemptions.

7. We recommend the following change to §§126.16 and 126.17 (h)(8) (change in **RED**):

"US Persons registered, or required to be registered, pursuant to part 122 of this subchapter and Members of the Australian/UK Community must immediately notify the Directorate of Defense Trade Controls of any actual or proposed sale, retransfer, or reexport of a defense article or defense service on the U.S. Munitions List originally exported under this exemption to any of the countries listed in 126.1 of this subchapter, ~~any citizen of such countries~~, or any person acting on behalf of such countries, whether within or outside the United States."

The suggested deletion is consistent with the new exemption available in §126.18, governing intercompany and intergovernmental transfers to dual and third country national employees.

8. We recommend deleting §§126.16 and 126.17 (j) in its entirety on the basis that current ITAR marking and legend requirements in §123.9(b) and §125.6 provide adequate controls. Additionally, the proposed rule imposes an unacceptable administrative burden on the exporter. For example, all IT systems that currently automatically apply a standard ITAR legend will require reprogramming to accommodate the new exemption marking, which will result in increased operating costs and will take considerable time to implement.

The Department should give exporters a 1 year grace period to make any required changes to internal procedures and IT systems.

Finally, a program security classification guide (SCG) is typically the governing authority for marking classified information. As such, the proposed ITAR marking for classified information risks conflicting with the SCG for no apparent compliance advantage.

9. We recommend deleting §§126.16 and §126.17 (l) in its entirety. We believe that current ITAR record keeping requirements found in §122.5, §123.22 and §123.26 provide adequate controls and that the proposed rule imposes an unnecessary administrative burden on the exporter for little to no gain. At GE, we have developed automated record keeping tools that will require significant reprogramming to accommodate unique exemption requirements. These IT systems changes will undoubtedly require a substantial financial investment and take time to implement. The Department should give exporters a 1 year grace period to make any required changes to internal procedures and IT systems.

   Please see our comments for proposed changes to §123.26 below, which apply equally to the exemption record keeping requirements.

10. Fees and Commissions. We recommend further clarifying that the obligation to submit a Part 130 report is contingent upon meeting the requirements in §130.9. In other words, the Department should clearly state that a negative Part 130 report is not required.

11. Congressional Notification. We recommend that the Department consider completing Congressional Notification as a component of the process for identifying approved end use operations, programs and projects enumerated in §§126.16 and 126.17 (f). This change will reduce the burden on exporters and eliminate redundant process steps for using the exemption.

COMMENTS AND SUGGESTED CHANGES TO §123

1. Change Note to paragraph §123.9(a) as follows (changes in **RED**):

   "Note to paragraph (a): In making the aforementioned determination, a person is expected to **know the circumstances of a transaction. For the purposes of this subchapter, knowledge of a circumstance (the term may be a variant, such as "know," "reason to know," or "reason to believe") includes not only positive knowledge that the circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence. Such awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person's willful avoidance of facts."**

   This suggested change is consistent with the definition of "knowledge" found in EAR Part 772 and is well-known in the international trade compliance community. In contrast, the proposed rule lacks regulatory specificity. The requirement to review "all information" in the public domain as well as information available from other parties to the transaction appears to exceed due diligence obligations. Our proposed change emphasizes the obligation of the exporter to understand and take action based on a set of facts made available in the normal course of business.

2. We recommend removing the term "defense service" inserted throughout §123.9(b) & (c). The existing term "defense article" sufficiently addresses all items subject to the ITAR; therefore, the inclusion of the term "defense service" is redundant as used in the proposed rule.

3. We request the Department reconsider changing §123.26. The proposed re-write imposes a significant burden for the following reasons:

    a. Our existing automated procedures are configured to capture the current mandatory data elements, i.e., description, name of the end user, date and time of export, method of transmission. The new data elements will require us to implement costly changes to automated record keeping systems.

    b. Any change to record keeping procedures will take time to implement. The Department should give exporters a 1 year grace period to make any required changes to internal procedures and IT systems.

    c. Is the intent to require exporters to file an EEI for intangible defense service transactions? This would directly contradict the current language in §123.22, which does not require EEI filings for such transactions.

    d. The proposed rule change appears to require exporters to affirmatively create records involving intangible transactions or in circumstances where records do not otherwise exist.

    Consider the scenario of a field service representative located on-site at a customer's overseas repair facility and responsible for providing maintenance consulting services pursuant to §125.4(b)(2). His duties require almost constant interaction with foreign maintenance technicians involving the transfer of technical data and defense services. The rule change would appear to require the field service representative to maintain a record of each and every conversation or any other intangible interaction, which is completely impractical given the level of daily interactions with the foreign customer.

If you have any questions or require additional information concerning this submission, please contact the undersigned at (202) 637-4206 or by e-mail at: kathleen.palma@ge.com or Mr. Scott W. Jackson at (513) 243-5755 or by email at scott_jackson@ge.com.

Sincerely,

Kathleen L. Palma

Kathleen Lockard Palma
Executive
International Trade Compliance

LOCKHEED MARTIN

December 20, 2011

Via E-Mail (DDTCResponseTeam@state.gov)

Attn: Sarah Heidema
Directorate of Defense Trade Controls
U.S. Department of State

Re: Regulatory Change – Treaties

Lockheed Martin Corporation (Lockheed Martin) is pleased to submit comments on the proposed rule issued by the U.S. Department of State on Tuesday, November 22, 2011 (76 Fed Reg. 225). The proposed rule would, *inter alia*, amend the International Traffic in Arms Regulations (ITAR) to implement the Defense Trade Cooperation Treaty between the United States and Australia and the Defense Trade Cooperation Treaty Between the United States and the United Kingdom (UK) and identify via supplement the defense articles and defense services that may not be exported pursuant to the Treaties.

The United States, Australia, and the United Kingdom are allies with longstanding relationships based on mutual national security, foreign policy, and economic interests and values. Lockheed Martin has been a strong supporter of the U.S. Defense Trade Cooperation Treaties with Australia and the UK and reforming how the United States manages the licensing of defense articles to these close allies.

The Australia and UK Defense Cooperation Treaties are important steps toward modernizing the management of the U.S. export licensing system. Viewed in the context of the Administration's ongoing comprehensive Export Control Reform initiative, the provisions of the Treaties reflect an important evolution in how the United States of America implements a licensing framework focused on moving beyond a transaction-by-transaction approach to a more efficient model that promotes effective collaboration – without sacrificing fundamental security interests.

Lockheed Martin applauds the ongoing effort to transform the current export control system and encourages continued focus on reform initiatives that support critical U.S. Government defense and security programs, strengthen important international partnerships, facilitate defense trade with our close allies and partners, and eliminate export control licensing burdens that make U.S. companies less competitive and cost-efficient. Such an approach not only will be in the national security interests of the United States, but will create jobs at home, encourage state-of-the-art defense research and development, and ensure that the U.S. defense industrial base remains strong and capable of protecting us from future threats and challenges.

Defense cooperation with U.S. allies and between our defense and security forces is increasingly vital to U.S. national security interests. The Treaties are intended to facilitate bilateral

collaboration on important defense and security initiatives. As noted in the past, the effectiveness of the Treaties is largely dependent on the scope of items eligible for export under the terms of the Treaties. The proposed rule includes an extensive exclusion list (Supplement No. 1 to Part 126) – which will apply to items incorporated into larger systems as well (See Sec. 126.17(g)(5)) –that limits the utility of the Treaties to facilitate defense trade. Unfortunately, we expect that many defense articles manufactured or integrated by Lockheed Martin for export to Australia or the UK will not be eligible at this time for consideration under the terms of the Treaties.

The administrative requirements for exporting under the terms of the Treaties may also prove to be quite onerous. Many of these concerns have been pointed out in previous commentary. Accordingly,

Lockheed Martin recommends that the Administration consider implementing a regular review process to evaluate the effectiveness and utility of the Treaties and ensure that the excluded items list is streamlined and administrative requirements are less burdensome over time. In so doing, the Administration can ensure that the Defense Trade Cooperation Treaty between the United States and Australia and the Defense Trade Cooperation Treaty Between the United States and the United Kingdom are more than important symbols of the U.S. commitment to the partnerships with these essential allies and helpful precedent-setting management frameworks. Lockheed Martin is committed to supporting these important relationships and the successful implementation of the Treaties.

Thank you for the opportunity to comment on the proposed rule.

Sincerely,

Gerald Musarra
Vice President
Government and Regulatory Affairs

Saab Systems Pty Ltd
ABN 88 008 643 212

19 December 2011

Our Ref. 000ZIM040

Robert Kovac, Director
Directorate of Defense Trade Controls
2401 E St., N.W., 12th Floor
Washington, DC 20037

ATTN: DDTC Response Team

Regulatory Change – Treaties

Dear Mr Kovac

Saab Systems Pty Ltd welcomes the opportunity to comment on the proposed changes to the International Traffic in Arms Regulation (**ITAR**) to implement the Defense Trade Cooperation Treaty between the United States and Australia (**Treaty**), published 22 November 2011 in the Federal Register [Public Notice 7683] RIN 1400-AC95.

Saab Systems is part of the Australian group of Saab companies, which in turn is part of the global Saab Group. A subsidiary of the principal Saab company in Australia (Saab Technologies Australia Pty Ltd), Saab Systems conducts the significant majority of Saab's Defence-related business in Australia and has extensive experience in operating subject to US defence export controls. Saab Systems is therefore considered best placed to review and comment on the proposed US implementation of the Treaty on behalf of Saab's Australian business.

Please find at Attachment A comments, questions and requests from Saab's business in Australia regarding the proposed changes.

If any clarification is required regarding Saab's submission, please contact the writer on +61 8 8343 3157 or via email andrew.giulinn@au.saabgroup.com.

Yours sincerely,

Andrew Giulinn
Export Control Director, Australian Country Unit, Saab Group

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ATTACHMENT A

Saab Systems Pty Ltd submits the following comments, questions and requests regarding the proposed changes to ITAR on behalf of Saab's Australian business.

1. Potential mismatches with Australian Treaty implementation

The Treaty is being implemented as an exemption to the usual ITAR rules. Proposed Section 126.16(a)(2) indicates that (in general) the Treaty exemption will be available in relation to those USML items that are '*not listed in Supplement No. 1 to part 126, for the end-uses specifically identified pursuant to paragraphs (e) and (f) of this section*'. The paragraphs referred to firstly repeat the text regarding eligible end-uses from the Treaty and then explain how it is to be determined which specific end-uses are covered.

The proposed Australian legislation (the *Defence Trade Controls Bill 2011*) indicates that Australia will keep its own list of eligible items (refer the Section 4 definition of the "Defence Trade Cooperation Munitions List" and also for example Section 5(1)(b)), and identifies eligible end-uses simply by reference to the Treaty (refer for example in Section 5(1)(a)).

The US and Australia are therefore each keeping a list of eligible items, and each identifying the eligible end-uses in its own way. As a result, there is a potential for mismatches between the items and end-uses covered by the US Treaty implementation and the Australian Treaty implementation.

Request: Saab requests further work is done between the US and Australian Governments to ensure that there can be no confusion for industry as to which are eligible items and which are eligible end uses. Saab is making the same request of the Australian Government, through comments to the Australian Senate committee considering the proposed legislation.

2. Marking contracts

Proposed Section 126.16(j)(4) appears to be saying the all contracts for the provision of defense services need to be marked in accordance with the earlier parts of proposed Section 126.16(j). Saab understands that this is intended to implement Sections 10(1)(c)(ii) and (iii) of the Implementing Arrangement. As it stands, Saab is not convinced that the proposed Section 126.16(j)(4) achieves its aim.

Sections 10(1)(c)(ii) and (iii) of the Implementing Arrangement:

- refer to far more than contracts ('invoices, shipping bills or bills of lading') while the proposed Section 126.16(j)(4) only deals with contracts
- does not refer to marking or identifying the contract itself
- deals with situations where it is impractical to mark the defense article/service itself, in which case the article is to be accompanied by documentation, eg the relevant contract, identifying the defense article/service as 'Treaty controlled' (ie not the contract accompanying it)

Saab is comfortable with having the text of a contract identify the relevant items/services and the markings that apply to them, but not with the idea of marking the contract itself.

Also, it appears to be deliberate to restrict the proposed Section 126.16(j)(4) to contracts. It seems to Saab however that, where not practical to mark the item/service, an Invoice, Document Delivery Notice (DDN) or other contemporaneous document will often be a more appropriate mechanism for informing the recipient of the "marking" that applies to the item/service, ie rather than the contract. Sections 10(1)(c)(ii) and (iii) of the Implementing Arrangement support that view.

Request: Saab requests that the proposed Sections 126.16(j)(3)(ii) and 126.16(j)(4) change to require that (in accordance with Sections 10(1)(c)(ii) and (iii) of the Implementing Arrangement), where it is impractical to mark technical data (and for any defense service), the documentation that will accompany the data/service must identify any Treaty-controlled defense data/service by reference to the appropriate identification in proposed Sections 126.16(j)(i) and (ii).

3. Recordkeeping clarification

Proposed Sections 123.26, 126.16(a)(4)(v) and 126.16(l) deal with recordkeeping. Saab understands that, as a foreign holder of US export controlled technology, Saab will have an obligation to record all transfers of that technology to others, whether under DDTC licence or exemption.

Query: Can DDTC please assist Saab in understanding how this is intended to work for a joint/collaborative software development with a shared development environment (or close to real-time transfers between independent development environments) for example with a prime/peer/subcontractor who is also able to receive the technology under licence or exemption? That is, where retransfers of software components are happening all the time, rather than in full and at discrete intervals. Can a single record be created to cover, say, a period, or are detailed log records required?

4. Intra-Australian Community transfers

Proposed Section 126.16(a)(3) deals with Exports (ie from the US Community to the Australian Community) while proposed Section 126.16(a)(4) deals with Transfers. In its lead-in paragraph, proposed Section 126.16(a)(4) only refers to movement from the Australian Community **to** the US, even though:

- the definition of Transfer (in proposed Section 126.16(a)(1)(ii)) includes movements within the Australian Community; and
- proposed Section 126.16(a)(4)(ii) says that the transferee can be a member of the Australian Community.

Request: Saab requests that the lead-in paragraph to proposed Section 126.16(a)(4) be changed to avoid any future confusion as to whether the section provides for intra-Australian Community transfers.

From: lois.bailey@L-3com.com [mailto:lois.bailey@L-3com.com]
Sent: Wednesday, December 21, 2011 11:25 AM
To: DDTC Response Team
Cc: Stohon, Tony @ CORP - WashOps; DL(WASHOPS) - ILG
Subject: FW: Regulatory Change -- Treaties

To: Department of State – Response Team

The following comments/questions are provided per the notice of proposed rule change posted in the Federal Register, Vol. 76 No. 225, dated 22 Nov 2011:

1. Given that the Australian treaty has not yet obtained final approval, will the proposed rule change be implemented with both sections 126.16 and 126.17? Or will 126.16 be held out until the Australian treaty is finalized?

2. 126.16 (a)(5) and 126.17(a)(5) both exclude exports under FMS, however the UK treaty is inclusive of FMS exports once the initial delivery has occurred. Also it was L3's understanding that the Australian treaty would include FMS exports as a whole. Is this perception of conflict between the treaty language and the proposed rule change correct?

3. 126.16(g) and 126.17(g) allows an authorized exporter transfer defense articles and services to Australia/UK if the identical item has been approved for export to any foreign person however:
    a. Does this "exemption" also have to meet the other conditions such as approved program, approved end use?
    b. There is an inconsistency between the word "exported" in (g) and the word "market" in (g)(1)
        i. Which word is correct?
    c. Clarification is needed for the phrase "identical type" in (g)(1)
        i. "Identical" means exactly the same but "type" means similar
        ii. Can a Model A1 Sonar can be exported under the exemptions if it was previously approved by State for export to Turkey?
            1. If so, the word "type" should be deleted
        iii. Can any model Sonar can be exported under the exemptions if any model Sonar was previously approved by State for export to Turkey?
            1. If so, the word "identical" should be deleted

4. 126.16(i)(2)(i) and 126.17(i)(2)(i)
    a. Does the phrase “written request” mean General Correspondence?

5. Supplement 1 is confusing in the manner USML categories are listed:
    a. USML Category VIII is refers to air, ground, and marine systems when it only covers air
    b. Major USML Category identifiers such as IV, V, VII, etc. should not be used alone. Recommend using the complete USML Category identifier including the proper subcategory such as VIII(a), (b), etc.
    c. VIII(f) is listed as developmental aircraft, engines, etc. as NOT being excluded from eligibility but 126.16(g)(4) and 126.17(g)(4) state that unless they are if not at milestone B unless specifically approved by DDTC.

If further information is required on any of the above please contact me or Tony Stohon, Deputy Director Compliance at (703) 236-2603 or tony.stohon@l-3com.com

Regards,
Lois

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The Boeing Company
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December 22, 2011

Ms. Sarah Heidama
Office of Defense Trade Controls Policy
Bureau of Political Military Affairs
Department of State
Washington, DC 20522

Subj: U.S. Department of State, Notification of Proposed Rulemaking, Implementation of Defense Trade Cooperation Treaties (76 FR 72246).

Dear Ms. Heidama,

The Boeing Company ("Boeing") welcomes the opportunity to provide comments in response to the State Department's November 22, 2011 Notice of Proposed Rule on the Implementation of the Defense Trade Cooperation Treaties. Boeing supports initiatives to strengthen interoperability and collaboration of U.S. forces with its closest allies, and appreciates the U.S. Government's outreach to industry on implementation planning since the ratification of the Treaties.

Both the U.K. and Australian Defense Trade Treaties have the potential to streamline the transfer of defense articles and services from the United States to two of its most critical allies. For certain Boeing programs, the Treaties could provide relief from case-by-case license approvals, thereby reducing the U.S. Government's licensing burden and allowing Boeing to speed exports to close allies. Boeing especially appreciates the advantages the Treaties will offer in the bid phase of a project proposal, with U.S. exporters able to more quickly respond to trusted potential customers in Australia and the U.K. without having to apply for a license. Suppliers in Australia and the U.K. could increase their marketability by becoming Approved Community members, and possibly reduce their compliance costs. The Defense Trade Treaties could also provide significant flexibility once a program is underway; unlike a license authorization, defense articles exported under the Treaties will not be restricted to a specific consignee, end-user, or end-use.

However, there are a number of challenges facing the successful implementation of the Treaties. First, robust industry participation in the U.K. and Australia will be necessary to ensure widespread use of the Treaties, without which their benefits cannot be realized. Boeing urges the signatory governments to continue industry outreach efforts to encourage Approved Community membership and to swiftly address impediments to membership identified through that consultation. Second, and most importantly, our analysis of the proposed exemptions reveals several provisions that

could render Treaty use too costly and cumbersome for exporters and end-users. Among Boeing's concerns:

- Substantial costs and effort that would be associated with the exemptions' current marking and markings removal requirements;
- Lack of substantive details regarding Approved Community eligibility and implementation;
- Verification of ongoing eligibility of Approved Community members;
- The complexity of transactions moving into and out of Treaty eligibility because of an increasingly globalized supply chain, and the resulting erosion of Treaty benefits as compared to traditional licensing.

In order to ensure that the Treaties provide a manageable and cost-effective alternative to traditional ITAR licensing, Boeing's comments below highlight both the important concerns and additional regulatory provisions that could prove challenging under the exemptions. We recommend that the U.S. Government expand its consultations with industry members to ensure workable solutions to these concerns.

The comments below also identify areas of potential confusion or special complexity in the proposed regulations. Boeing suggests that the U.S. Government publish an extensive list of "frequently asked questions" (FAQ) or "Guidelines for Implementation of the Defense Trade Control Treaties," similar to the publications for implementing the Canadian exemption and the guidelines for preparation of Part 124 Agreements. These documents should address uncertainties that may arise regarding the mechanics of the new exemptions and be regularly updated. Identifying a dedicated State Department point of contact for industry questions and concerns would also help to improve broader use of the Treaty provisions and would prove extremely useful to exporters. Finally, Boeing respectfully requests that the U.S. Government ensure that the implementation of the Defense Trade Treaties is closely coordinated with the Administration's Export Control Reform Initiative, and to make certain that any benefits derived from the Initiative are not inadvertently negated by provisions of the Treaties, and *vice versa*.

§§126.16(a)(5) and 126.17(a)(5)

Foreign Military Sales Excepted

- The proposed exemptions state that transactions under the Foreign Military Sales (FMS) program are not eligible for Treaty use, however we believe there is confusion between industry's commonly understood definition and reach of the FMS Program versus that of the U.S. Government. Boeing understands that from the U.S. Government's point of view, FMS sales encompass only the final government-to-government transaction effectuating the export and delivery of an end-item. In an industry context, however, the FMS program is normally understood to encompass the entire program relating to the sale, production, delivery and post-delivery support of the end-item (although hybrid FMS and Direct Commercial Sale (DCS) programs are becoming common.) As these activities are not understood by the U.S. government to be part of an FMS transaction, it appears they *are* eligible for Treaty coverage.

This discrepancy between Government and industry understanding may lead industry to incorrectly believe that a great number of transactions are ineligible for Treaty coverage. Boeing recommends that clarifying language be inserted into the ITAR. The language in Article 3(3) of the U.S.-Australia Treaty provides broader explanations of the FMS process under the Treaty, and may provide useful models for drafting clarifying language.

- The exemptions do not specify how to transition a program that began as an FMS transaction to operation under the Treaties. Further guidance is suggested.

§§126.16(d) and 126.17(d)

Australian Community and *U.K. Community Definitions*

The proposed regulations provide few details regarding the mechanics of the Approved Community concept, raising a number of questions that must be answered for efficient implementation of the Treaties:

- **Will an "Approved Community" encompass an entire company, or only discreet facilities (or parts of facilities) that will handle Treaty defense articles and technical data?** Conflicting information from Australian and U.K. regulators on this matter has led to a lack of understanding about the composition of an "Approved Community." In Australia, for example, the Defence Trade Controls Bill 2011, which implements the U.S.-Australia Defense Trade Treaty provisions, states that "[a] person who is a body corporate may apply to the Minister for approval as a member of the Australian Community" (§ 27(1)). This language suggests that an Australian "Approved Community" is defined as an entire company, and nowhere states that a specific subset of facilities belonging to a company may be designated for Approved Community status. On the other hand, recent presentations from U.K. regulators have indicated that an "Approved Community" in the U.K. may consist of individual facilities, or indeed selected rooms within an individual facility, precluding the need for companies to submit *all* of their facilities to the heightened security and oversight requirements mandated for Approved Community members. Requiring a company to undergo an Approved Community clearance process for all of its facilities will pose significant logistical and cost barriers to Treaty use. Boeing believes that the U.K. approach is the most logical and urges the U.S. Government to work with the governments of Australia and the U.K. to ensure Treaty users retain the flexibility to designate Approved Community facilities.
- **If an Approved Community member's eligibility changes (*i.e*, removal), will U.S. exporters receive notification?** The proposed exemption does not create a mechanism for notifying exporters if an Approved Community end-user has changed its Approved Community status. The lack of such a mechanism would expose U.S. exporters to heightened liability if a company continued exporting defense articles to an end-user that had changed its Approved Community designation unbeknownst to the U.S. party. This would depart from comparable situations in which an end-user becomes subject to a policy of denial; in these instances the U.S. exporter is notified through a public notification in the *Federal Register*. These concerns could discourage Treaty use because of heightened compliance risks and the unpredictability that this problem

would introduce into business considerations. Boeing requests that the U.S. Government identify the Approved Community status change on the DDTC website or in the *Federal Register.*

- **If an Approved Community member's eligibility changes, what happens to the ITAR-controlled defense articles in its possession?** End-users whose Approved Community status changes must be the party held responsible for either returning the defense articles upon notification to the exporter or transitioning those articles to a license upon notification to the U.S. exporter. In such instances, exporters would not be well situated to reclaim defense articles or transition them to a license.
- **If an Approved Community member's eligibility changes without prior notification, will the parties be granted a reasonable grace period to transition to a license authorization?** There may be cases where an Approved Community member decides to discontinue participation in the community, particularly if there is significant cost or effort associated with membership. However, transfers and/or the provision of services might reasonably continue under approved export authorizations. In the event that an Approved Community member changes its status for reasons not related to compliance issues, the U.S. Government should enable a reasonable time (depending upon license approval cycle time) to transition Treaty exports to an appropriate license authorization. Requiring exporters to halt immediately all exports, or retrieve defense articles that have already been shipped, would prove extremely disruptive and costly. Such uncertainty could discourage use of the exemptions.

§§126.16(f)(2) and 126.17(f)(2)
Identifying Authorized End-Uses

The proposed exemptions state that programs whose Treaty eligibility cannot be publicly identified "will be confirmed in written correspondence." Further details are needed on how this correspondence will occur and what form it will take. Guidance should explain whether the correspondence will originate with DDTC or require an affirmative inquiry from the exporter, how long the process will take, and to whom the correspondence will be directed. Boeing urges the U.S. Government to structure the notification so as not to create delays or extra steps in the bid process. Requiring companies to send special inquiries on whether projects are eligible may well reduce Treaty participation.

§§ 126.16(i)(2)(i) and 126.17(i)(2)(i)
Transitions

- The procedure for transitioning an existing license authorization to the provisions of the Treaties does not explain how to transition individual parties off a multi-party license. For example, an exporter operating under a license with both U.K. and French signatories may wish to transition the U.K. end-user to Treaty use, while retaining the license for continued exports to France.

- The U.S. Government should notify the U.S. exporter if an end-user applies for a transition from a license authorization to Treaty use. Exporters will require this information for their compliance, record-keeping, and marking purposes.

§§ 126.16(j) and 126.17(j)
Markings

Boeing has significant concerns that an overly-conservative interpretation of the marking requirements under the exemptions could prove especially onerous and severely discourage industry use of the Treaties. The costs associated with attaching the required markings to every defense article would pose an overwhelming disincentive to use of the Treaties exemptions. As currently written, the exemptions *appear to require markings on every individual part, component, and end-item*. In addition, the requirement that Treaty markings be removed whenever articles reenter the United States (even if such transfers are only temporary) presents serious security and logistical challenges. Implementing a process for a company's security organization to remove restricted markings, and then re-affix them when the item is exported again would be tremendously costly and greatly increase compliance risks.

We recognize that the requirement that all defense articles exported under the exemptions be specially marked is included in the language of the original Defense Treaties. However, the requirement as currently written could not be executed by means of any marking process or system currently in general use throughout the aerospace and defense industries. The development and introduction of processes capable of satisfying these marking requirements would prove vastly expensive and extremely complicated. Indeed, in many instances special markings or labels affixed to every individual part of an aircraft or associated system could pose serious foreign object damage (FOD) risks.

We do note that sections 126.16(j)(2) and 126.17(j)(2) state that articles must be individually marked unless "impractable." Boeing believes that a requirement to attach markings to every defense article, no matter how small or insignificant, will be impractable and render industry unable to utilize the exemptions. Given the extensive negative impact on potential Treaty use, it is imperative for the U.S. Government to make clear that where cost, security, or logistical considerations make it impractable to affix markings to individual parts and components, the U.S. Government will permit markings to be made on accompanying shipping documentation or on the packaging of items. Without such flexibility, it is probable that the Treaty exemptions will not be successfully implemented across the three signatory nations. This approach will ensure that all non-U.S. end users of Treaty defense articles are aware of their controlled nature, while providing a less burdensome and costly solution to exporters. This solution more closely tracks the requirements of the ITAR Canadian Exemption (§126.5), which ensures the proper control of ITAR defense articles through documentation and reporting requirements. In order to prevent exports from being held at ports, Customs and Border Protection (CBP) must also be involved in further discussions on the parameters of the marking requirements, and must issue clear regulatory guidance that is easily implemented by industry.

§§ 126.16(l) and 126.17(l)
Record Keeping

Sections 126.16(l)(1) and 126.17(l)(1) state, "[e]xporters shall also maintain detailed records of any reexports and retransfers approved." This could be interpreted as requiring the original exporter to obtain and retain detailed records regarding the transfer of Treaty items to a third party. The provision would be difficult and, in some cases, impossible for U.S. exporters to fulfill. It is unlikely that end-users that reexport or retransfer a defense article will supply the original exporter with internal documentation concerning transactions that are not the responsibility of the exporter. In order to avoid this, it is suggested that the words "any reexports or retransfers" be changed to "their reexports or retransfers."

§§ 126.16(o) and 126.17(o)

Congressional Notification Requirements

It is unclear whether the notification process required under the Treaty will be identical to that required under the normal license authorization process. Because the Treaty only involves exports to two close regime partners, and excludes especially sensitive items through the Exempted Technologies List (ETL), the Treaty meets the intent of the Congressional notification provisions of the law. As the intent of Congress is covered by the ratification of the Treaties and their accompanying implementing legislation, the process employed to manage the notification process should be reconsidered. Department of Defense (DoD) technical review and the executive branch and congressional pre-consultation formalities should be exempted from the present processing arrangements. Such consideration and flexibility should be appropriate for Treaty transactions in support of FMS transactions as well.

§126.17(g)(8)

Ineligibility of Items on the EU Dual Use List

The proposed rule prohibits use of the Treaty exemption for transfers of items on the European Union Dual Use List to the United Kingdom. Requiring U.S. exporters to refer to European Union regulations when considering the legality of Treaty exports to the United Kingdom will be burdensome and complicated, especially as the EU Dual Use List is subject to amendment. Boeing recommends that the U.S. Government notify exporters of the list's content and any changes to the EU Dual Use Export List, as opposed to requiring exporters to refer to a third set of laws and regulations.

§ 126.17(h)(7)(i)

Transmission Channels

The proposed exemption states that transfers of Treaty articles to U.K. forces deployed outside of the U.K. must use U.K. Armed Forces "transmission channels." Boeing requests expanded guidance on the definition of such "transmission channels," like that offered in section 126.16(h)(7)(i) of the Australia Defense Trade Treaty exemption.

Once again, we appreciate the opportunity to provide comments on the implementation of the Defense Trade Treaties, and the U.S. Government's outreach to industry to ensure the realization of these important measures. Boeing would like to reiterate our offer to provide any needed assistance or input as the process advances. Please do not hesitate to contact me with any questions or concerns. I can be reached at (703) 465-3505 or via email at stephanie.a.reuer@Boeing.com.

Sincerely,

Stephanie A. Reuer
Director, International, Policy, and Licensing Administration
Global Trade Controls

From: Cross, Sandra R. [mailto:Sandra.Cross@hii-co.com]
Sent: Wednesday, December 21, 2011 2:48 PM
To: DDTC Response Team
Subject: Regulatory Change - Treaties

With regard to the Federal Register Proposed Rule published on November 22, 2011, we submit the following comments to RIN 1400-AC95.

We respectfully suggest the removal of references to 'defense services' in §123.9(b). Defense services do not lend themselves to be exported through a mode of shipment typical to that of a defense article. Defense services are not accompanied by a bill of lading, airway bill or other shipping documents. We believe references to defense articles are sufficient to cover those export controlled activities that transit U.S. Customs and require a bill of lading, airway bill or other shipping documents.

We respectfully suggest the removal of 'time' in §123.26 as a recordkeeping requirement for exemption usage. We realize this is currently in the regulations; however, we believe recording the date of an export activity affected under an exemption is sufficient.

We request additional language be included in §123.26 that clarifies the recordkeeping requirement for Electronic Export Information (EEI) Internal Transaction Number (ITN) is only applicable when filing through the Automated Export System (AES) is appropriate. It is our belief that if the proposed language remains without this caveat, the current practice of exporting technical data under exemptions will not be compliant with this subchapter as technical data currently does not require AES filings. A potential outcome may be exporters being required to file with AES for technical data exports when utilizing an exemption which is contradictory to current practice as well as guidance published by the Federal Trade Regulations on their website's FAQs which exempts AES filings for ITAR controlled technical data:

> *Currently there is no exemption in the FTR that addresses technical data subject to ITAR 123.22(b)(3). However, FTR 30.37(k) should be used in the interim. While this exemption does not specifically pertain to licensed shipments of technical data, this exemption can be applied and is acceptable. The Census Bureau will update the FTR to reflect this exemption.*

Additionally, AES filings do not occur for reexports, transfers or retransfers as the exported item is already in the foreign country and U.S. Customs is not present to effect the movement of the items to their new destination/end-user.

We respectfully request reverting the word 'for' to 'or' in §126.5(b) and maintain the current language found in the ITAR. The highlighted section below was modified in the proposed FRN changes and we believe this change greatly limits the utility of this exemption.

> *Except as provided in Supplement No. 1 to part 126 of this subchapter and for exports that transit third countries, Port Directors of U.S. Customs and Border Protection and postmasters shall permit, when for end-use in Canada by Canadian Federal or Provincial governmental authorities acting in an official capacity or by a Canadian-registered person* ***for*** *return to the United States, the permanent and temporary export to Canada without a license of unclassified defense articles and defense services identified on the U.S. Munitions List (22 CFR 121.1).*

We further request your consideration in including language in §126.5(b) to allow U.S. companies to claim §126.18 coverage when utilizing this exemption or to include language to allow Canadian-registered persons to utilize their TSCP screening program as established in accordance with §126.18. The US Government and the Canadian Government exchanged letters in August of this year identifying that registration with the Canadian Controlled Goods Directorate was sufficient to meet the criteria of §126.18. It should be sufficient for §126.5(b) as well. As currently written, when this exemption is effected, Canadian companies who have established a TSCP screening program are required to maintain their old system of keeping track of its dual and third country nationals as well as the new TSCP screening program.

We believe there are typographical errors in §126.17(l)(2)(i-iv) with references to §126.16 instead of §126.17.

Sincerely,
Sandra R. Cross
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22 December 2011

Ms. Sarah Heidema
U.S. Department of State
Directorate of Defense Trade Controls
Office of Defense Trade Controls Policy
2401 E Street NW, SA-1, Room H1200
Washington, DC 20522-0112

Subject: **RIN 1400-AC95, International Traffic in Arms Regulations: Regulatory Change - Treaties**

Dear Ms. Heidema:

Alliant Techsystems Inc. (ATK) appreciates the opportunity to comment on the subject advanced notice of proposed rulemaking (ANPR) on revisions to the ITAR to implement the U.S. – Australia and U.S. – U.K. Defense Cooperation Treaties. The implementation of the Treaties is long overdue and a major step forward to fostering greater cooperation within our industrial bases of these strategic allies.

To follow are ATK's comments and recommendations:

- §§123.26

  Part of the requirement for exemption recordkeeping is documenting the Electronic Export Information (EEI) Internal Transaction Number (ITN). However, technical data and defense service exports under an exemption are excluded from filing an EEI under §§123.22(b)(3)(iii). ATK recommends a note be added to §§123.26 to clarify that EEI ITN is not required for technical data and defense service exports under an exemption.

- §§126.16(f)(2) & §§126.17(f)(2)

  State: "*Operations, programs, and projects that cannot be publicly identified will be confirmed in written correspondence from the Directorate of Defense Trade Controls.*" The subsections do not identify what is the process (and required information) for an exporter to request confirmation from the Directorate. ATK requests the Directorate detail that process, either through expanding the subsection or through separate guidance posted to the Directorate's web site.

- §§126.16(f)(3) & §§126.17(f)(3)

  State: "*U.S. Government end-use will be identified specifically in a U.S. Government contract or solicitation as being eligible under the Treaty.*" If the Directorate is maintaining a web site of approved programs for exporters and the regulators (i.e. Census, CBP) to reference to confirm eligibility; is having the 'U.S. Government contract or solicitation' state eligibility sufficient? Or must it be identified on the Directorate's web site? As part of the final rule, ATK recommends the Directorate clarify this point.

- §§126.16(g)(5) & §§126.17(g)(5)

  ATK encourages the Directorate to consider alternatives to the proposed requirements of §§126.16(g)(5) & §§126.17(g)(5). ATK proposes the Directorate adopt a written notification requirement on the exporter. If the exporter is exporting a Treaty eligible defense article that incorporates a Treaty excluded defense article; the exporter should be permitted to site the exemption covering all articles – IF: (a) The exporter provides written notification to the Directorate of their intension, at least 10 days prior, to export an excluded article embedded in an eligible article; (b) The written notification must include information detailing how all the requirements of the exemption are satisfied, excluding the defense article being excluded under Part 126, Supplement No 1; and (c) The embedded defense article is required for the larger system to perform its intended function.

- §§126.16(h)(8) & §§126.17(h)(8)

  Requires immediate notification to the Directorate if defense articles exported under the Treaties have been or are being proposed for sale, retransfer, or reexport to "any of the countries listed in §126.1 of this subchapter, any citizen of such countries, or any person acting on behalf of such countries." This proposed subsection seems counter to the recently released exemption under §126.18, which would allow a dual or third country national from a §126.1 country access if the end-user or consignee satisfies the requirements in §§126.18(b).

- §§126.16(j)(3)(i) & §§126.17(j)(3)(i)

  Marking individual defense articles being exported under the Treaties will add a large administrative and engineering burden upon the exporters. ATK recommends the Directorate consider revising the subsection to read as follows:

  "Defense articles (other than technical data) shall be accompanied by documentation (such as contracts or invoices) clearly associating the defense articles with the appropriate markings as detailed in paragraphs (j)(1) and (j)(2) of this section;"

  This allows for a standard, consistent method of labeling all defense articles, regardless of size or type, and communicating the information to community members.

- §§126.16(j)(4) & §§126.17(j)(4)

  State: *"Contracts and agreements for the provision of defense services shall be identified with the appropriate identification detailed in paragraphs (j)(1) and (j)(2) of this section."* Contracts and business agreements typically do not contain technical data but requiring their marking in accordance with (j)(1) and (j)(2) implies these documents are technical data. ATK recommends the Directorate removes the requirements under these subsections.

- §§126.16(k)(1) & §§126.17(k)(1)

  Subparagraphs (i)(C) allows for registered Part 129 Brokers located in the U.S. to engage in the Treaty related activities but the same allowance is not part of (ii)(C) for entities located in Australia or the United Kingdom and registered with the Directorate under Part 129. ATK requests the Directorate consider allowing registered Part 129 Brokers located in the United Kingdom or Australia to participate in Treaty permitted activities.

- §§126.16(l)(1) & §§126.17(l)(1)

  State, in-part: *"Exporters shall also maintain detailed records of any reexports and retransfers approved or otherwise authorized by the Directorate of Defense Trade Controls of defense articles or defense services subject to the Defense Trade Cooperation Treaty..."* However, proposed §§123.9(c)(4)(ii) allows "a member of the Australian Community or the United Kingdom Community" to submit a reexport, retransfer request directly to the Directorate. In those situations, the U.S. exporter may not be aware of the request and approval; and therefore, will not have the necessary records per the proposed subsection. Therefore, ATK requests the Directorate to consider revising the proposed subsections as follows:

  §§126.16(l)(1)
  "...U.S. Exporters requesting reexport or retransfer, pursuant to §§123.9(c)(4)(i), *and members of the Australian community requesting reexport or retransfer, pursuant to* §§123.9(c)(4)(ii), *shall also maintain detailed records of any reexports and retransfers requested, approved or otherwise authorized by the Directorate of Defense Trade Controls of defense articles or defense services subject to the Defense Trade Cooperation Treaty between the United States and Australia and the requirements of this section.*

  §§126.17(l)(1)
  "...U.S. Exporters requesting reexport or retransfer, pursuant to §§123.9(c)(4)(i), *and members of the United Kingdom community requesting reexport or retransfer, pursuant to* §§123.9(c)(4)(ii), *shall also maintain detailed records of any reexports and retransfers requested, approved or otherwise authorized by the Directorate of Defense Trade Controls of defense articles or defense services subject to the Defense Trade Cooperation Treaty between the United States and the United Kingdom and the requirements of this section.*

- §§126.16(l)(2) & §§126.17(l)(2)

  Technical data and defense service exports under an exemption are excluded from filing an EEI under §§123.22(b)(3)(iii). ATK recommends "*and defense service*" be removed from the first sentences of the subsections.

  If ATK's recommendation in the preceding paragraph is adopted, ATK also recommends the final paragraph of both subsections be revised to state: *"Such exports must meet the required export documentation and filing guidelines of §123.22(a), (b)(1), and (b)(2) of this subchapter."*

  If ATK's recommendation in the preceding paragraph is not adopted, ATK recommends the final paragraph of both subsections be revised to state: *"Such exports must meet the required export documentation and filing guidelines, including for defense services, of §123.22(a) and (b) of this subchapter."*

- §§126.16(m) & §§126.17(m)

  ATK requests the Directorate clarify if the exporter is required to submit a 'negative' report pursuant to §130.10 if the value of the contracts or other instruments are valued at $500,000 or more but the aggregate amount of the political contributions, and fees or commissions are less than $5,000 and $100,000, respectively.

- Note 5 to Supplement No. 1

  As written, the proposed Note would require a MLA for the manufacture by a Community Member, for end-use by Australia or the United Kingdom. But a MLA is not required for end use by the U.S. Government. ATK requests the Directorate to reconsider their position.

ATK again wants to thank the Directorate for the opportunity to comment on the ANPR and applauds the Directorate's continued efforts to clarify and update the Regulations.

Sincerely,

Robert Schuettler
Director, Corporate Export Licensing
Alliant Techsystems Inc.

AUSTRALIAN INDUSTRY GROUP

DEFENCE COUNCIL OF THE AUSTRALIAN INDUSTRY GROUP

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21 December 2011

Ms Sarah Heidema
Office of Defense Trade Controls Policy
US Department of State
Washington DC
Attention: Regulatory Change – Treaties
By email: DDTCResponseTeam@state.gov

Comment on the proposed rule under the International Traffic in Arms Regulations (ITAR) which will give effect to the Treaty for the US.

Dear Ms Heidema

The Australian Industry Group (Ai Group) welcomes the opportunity to provide comment to the United States Department of State on the proposed rule under the International Traffic in Arms Regulations (ITAR) which will give effect to the Defense Trade Cooperation Treaty between the United States and Australia.

We support comments provided by Saab Systems Pty Ltd through the Export Control Director, Australian Country Unit, Saab Group. In addition, Ai Group makes the following further comment focussed on the supplement:

> The Supplement table 1 at the rear of the proposed amendments to ITAR regulations (new S126.16 - Exemptions pursuant to the Defence Trade Cooperation Treaty between the US and Australia") has the effect of exempting (restricting) US defence articles on the USML which can be exported without a US Department of State ITAR export licence under the proposed AUST/US Defence Trade Control Treaty legislation. This means, in effect, that the existing ITAR approvals processed through the US Department of State would still be required to obtain a US export licence for these items.
>
> In the USML categories of equipment/technology, which some companies rely upon to support their technology and product lines, the exemptions are so restrictive that these companies would still have to have their US suppliers obtain an ITAR export licence from the US Department of State for the majority of their acquisitions from the US. This would apply, for example, to Category XI - Military Electronics. It is noted that AESA radars and technology are not listed in the Supplement Table 1 as not being exportable under the Defence Trade Cooperation treaty regulations. However, such items/technology are specifically identified in the body of the ITAR Amendment on page 72254 as not being exportable from the US under the new

regulations. In fact, it specifically says that such items will continue to require separate export authorisation from the US Department of State under the existing approval processes.

Key comment: The Supplement Table 1 needs to be made consistent with S126.16 g.(5) ie, items under USML Category XI(a)(3) are not included in the treaty export provisions and should also be shown in Supplement No 1. Also, the listing in Supplement Table 1 Category XV(e) Antennas is incomplete, as it does not have dots or crosses against sub paras a and b.

Thank you for consideration of our views.

Yours sincerely

Innes Willox
Executive Director

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United Technologies

December 22, 2011

Sarah Heidema
Office of Defense Trade Controls Policy
Directorate of Defense Trade Controls
PM/DDTC, SA-1, 12th Floor
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U.S. Department of State
Washington, D.C. 20522-0112

Attn: Regulatory Change—Treaties

Re: Implementation of Defense Trade Cooperation Treaties (76 Fed. Reg. 72246, November 22, 2011)

Dear Ms. Heidema:

United Technologies Corporation ("UTC")[1] appreciates the opportunity to submit these comments on the Directorate of Defense Trade Controls' ("DDTC") proposed rule seeking comment on amendments to the International Traffic in Arms Regulations ("ITAR") to implement the Defense Trade Cooperation Treaty between the United States and Australia and the Defense Trade Cooperation Treaty between the United States and the United Kingdom ("the Treaties"). The notice seeks input primarily on two new proposed exemptions, revised wording of the Canadian exemption, and various miscellaneous amendments.

UTC is a company with a significant global military product footprint and a history of working with counterparts in Australia and the United Kingdom under numerous agreements and licenses. In calendar year 2011, approximately ten percent of the nearly 1,000 export authorizations we received through mid-December were for the export of defense articles or defense services to end-users in Australia and the United Kingdom, many of which supported end-uses that are authorized under the Treaties. The Treaties will provide industry leaders like UTC with the flexibility to export, without the requirement to obtain individual ITAR authorizations, a range of U.S. Munitions List ("USML") hardware, technology and services to approved community members in Australia and the United Kingdom where those exports are in furtherance of one of four specified end-uses.

[1] UTC is a global, diversified corporation based in Hartford, Connecticut, supplying a broad range of high technology products and services to the aerospace, power generation, security, transportation, and building systems industries. UTC's companies are industry leaders, among them Hamilton Sundstrand aerospace and industrial systems; Pratt & Whitney aircraft engines, space propulsion systems and industrial turbines; Sikorsky helicopters; Carrier heating, air conditioning and refrigeration systems; Otis elevators and escalators; UTC Fire & Security electronic security and fire safety systems; and UTC Power fuel cell and power systems.

A. General Comments on Proposed Exemptions §126.16 and §126.17

UTC welcomes the addition of these two ITAR exemptions. Although they will not replace a significant number of existing agreements and licenses or significantly reduce UTC's licensing burden in the future, these exemptions will provide options that will enable the business to operate in a more flexible and agile way.

Due to the complexity required to implement the Defense Trade Cooperation Treaties, we suggest that a Frequently Asked Questions (FAQ) section be provided, perhaps on the DDTC website. This FAQ document could be used to clarify provisions of the exemptions without the need to add explanatory text to the regulation itself.

1. Paragraphs i.2.i and i.3 of §126.16 and §126.17 – Written requests to DDTC for transition of existing authorizations

The Transitions section requires the submission of a written request to DDTC if a U.S. exporter, Australian Community member, or United Kingdom Community member desires to transition from an existing license or other approval to the use of the provisions of §126.16 or §126.17. To provide guidance to applicants, the FAQ could include an explanation that the "written request" specified in these paragraphs should be in the form of a General Correspondence request. To allow the request to be properly and expeditiously directed internally within DDTC, a recommended subject line could identify the request as "Request to Transition defense articles (or services) pursuant to §126.16 (or §126.17)". Additionally, a template for this request could be included to ensure that applicants provide all the information required by paragraphs i(2)(i) and i(3) of §126.16 and §126.17, and to facilitate DDTC's review of such requests.

Additional guidance in the form of a FAQ would also assist members of the Australian Community and the United Kingdom Community in navigating the process of submitting requests to DDTC as they may not be familiar with the protocol and requirements.

2. Section j of §126.16 and §126.17 – Marking of Exports

The Marking section requires item markings to change as the item moves between the U.S. and either Australia or the United Kingdom. Paragraph j(2) is specific that certain markings must be removed from defense articles if they are returned to a member of the United States Community. The requirement to change markings will increase the cost of implementation, and will preclude the use of several common collaboration tools.

The addition and deletion of markings on defense commodities may be problematic. Such markings must be secure so as not be accidently separable from the item, but also must be easily changed. In cases where there will be a one-way export of hardware, this may not be difficult. In cases where hardware may be transferred between an Australian or United Kingdom Community member and a U.S. entity (say for repair or calibration), the logistics become more complex and may reduce the use of the exemption.

With regard to technical data exports, such data is often transferred between the U.S. and foreign entities using secure web portals, secured common file sharing locations, etc. If a file is resident on a U.S. server, it requires one set of markings, but once it is accessed by the authorized Australian or United Kingdom entity it must have a different set of markings. Although technically possible, implementing this very specific set of requirements would be costly and would discourage use of the exemption. Similarly, there are software tools that allow multiple parties to collaborate on a given document; it would be technically unfeasible to have each party view it with a different set of markings.

We strongly encourage a regulation that allows concurrent marking. Instead of having to change or remove markings as an item (especially technical data) crosses an ownership boundary, allow both sets of markings to remain on the item. This will greatly simplify the implementation, reduce cost, and avoid inadvertent marking violations. Eliminating the requirements as stated in §126.16(j)(2) and §126.17(j)(2) would allow exporters to utilize concurrent markings.

3. Section l (1)(i) through (xvii) of §126.16 and §126.17 – Recordkeeping

The referenced section(s) provide a comprehensive and inclusive list of record data. Section §123.26, Recordkeeping for exemptions, contains a similar but not identical list. We favor a clear, comprehensive, and inclusive list of recordkeeping requirements, but differing requirements in separate sections creates opportunity for confusion.

We recommend that Section §123.26 serve as the single location in the regulations for an inclusive list of data required to meet recordkeeping obligations. Section l (1)(i) through (xvii) of §126.16 and §126.17 could then be modified to reference Section §123.26. Should the terms of the Treaties require data be retained in excess of Section §123.26, those items would be included in Sections §126.16 and §126.17, and a reference to this fact added to §123.26.

In addition, Paragraph l (1)(x) requires the "Classification of the export." This should be clarified as the "Category of the export," assuming it refers to the Part 121.1 USML Category.

4. Minor typographical errors

- §126.16(h)(6): The second usage of the USML Category XI(a)(3) example in this paragraph should read "electronically scanned array radar systems".

- §126.17(a)(4)(i): The reference to paragraph (i) ***Transfers*** should be (i) ***Transitions***.

B. Comments on Part §126.17 – Implementation of the Defense Trade Cooperation Treaty with the United Kingdom

Paragraph g(8) of Section §126.17 states that defense articles and defense services "specific to" items that appear on the European Union ("EU") Dual Use list are ineligible for export under the exception. The term "specific to" creates uncertainty as to what is being limited. We would request clarification of what is prohibited, either in the text of the regulation or in the FAQ.

C. Comments on Supplement No. 1 to Part 126

This proposed rule adds Supplement No. 1 to Part 126 to identify the defense articles and defense services that are ineligible for the new exemptions and the existing Canadian Exemption. The 13th entry under I-XXI indicates that "Libraries (parametric technical databases) specially designed for military use with equipment controlled on the USML" are ineligible for export under §126.17. This exclusion requires additional clarification, as it could be considered so broadly as to prohibit the export of most all technical data and defense articles under the exemption. Most software programs include "libraries" of data to be used by the program, and this could even be construed to mean any tabular listing of technical data associated with a defense article. At a minimum, any defense article that contains software would be assumed to have software libraries specific to that article, and therefore excluded from the exemption.

D. Comments on Part §126.5 – Canadian Exemptions

The proposed rule makes several changes to the Canadian Exemption, the two main changes being (1) the transfer of items exempt from the exemption previously listed in §126.5(b) to the new Supplement No. 1 to Part 126; and (2) the deletion of §126.5(c) and inclusion of "defense services" in §126.5(b).

The transfer of items previously listed in §126.5(b) to Supplement No. 1 provides a common approach with the Australia and United Kingdom Treaty exemptions. This approach is reasonable, although the previous listing, while expansive, was also workable.

The deletion of Section §126.5(c) removes the requirements for written certifications (paragraphs (c)(3) and (c)(4)) in connection with the export of defense services under the exemption. As implied in Supplement No. 1 to Part 126, line 15 of the I-XXI items, a written arrangement between the U.S. exporter and the Canadian recipient still must be obtained in order for defense services to be eligible for export under the exemption, but the required content has been streamlined in the proposed rule. This is a welcome rationalization of the requirements without endangering the integrity of the transaction; however, it is confusing to have an active requirement (i.e., obtain a written arrangement for defense services in order to use the exemption) couched in such a passive way (i.e., defense services are not eligible unless you obtain a written arrangement). The way this requirement is included in the proposed rule likely will result in violations as it is hidden in Supplement No. 1 and easy to overlook.

The current Section (c)(6) explicitly lists seven types of defense services and technical data, four of which ((c)(i) through (c)(iv)) are eligible for export under the exemption, and three of which ((c)(v) through (c)(vii)) are ineligible. The three specifically excluded types of defense services and technical data are captured in Supplement No. 1 to Part 126 (the 14th entry under I-XXI). By deleting references to specific eligible types of defense services and technical data, and only specifying the ineligible items, the proposed rule could have unintended consequences leading to confusion as the current descriptions of eligible and ineligible items work together. As an example, the existing paragraph (c)(6)(vii), Manufacturing Know-How, specifically provides a carve-out for build-to-print data as specified in the proposed to be deleted (c)(6)(i). Another example involves defense services and technical data related to inspection, which is identified as eligible under current paragraph (c)(6)(iv), Maintenance, but could be interpreted as a manufacturing process to produce a qualified, finished defense article and, therefore, excluded under Manufacturing Know-How.

We recommend retaining a clear, positive list of defense services and technical data eligible for the §126.5 exemption. If it is not feasible or desirable to include such a list in the text of the exemption in the revised §126.5(b), perhaps DDTC would consider adding a note to the end of §126.5 or adding a note to Supplement No. 1 similar to the following:

> Note X: Defense services or technical data specific to applied research (§125.4(c)(3)), design methodology (§125.4(c)(4)), engineering analysis (§125.4(c)(5)), or manufacturing know-how (§125.4(c)(6)) are not eligible under the Canadian exemptions. This exclusion does not include defense services or technical data specific to build-to-print as defined in §125.4(c)(1), build/design-to-specification as defined in §125.4(c)(2), or basic research as defined in §125.4(c)(3) which may be exported in accordance with the terms of the Canadian exemptions. These defense services and technical data are eligible for export under the exemption, in addition to maintenance (i.e., inspection, testing, calibration or repair, including overhaul, reconditioning and one-to-one replacement of any defective items, parts, or components, but excluding any modification, enhancement, upgrade or other form of alteration or improvement that changes the basic performance of the item).

E. Comments on §123.9 – Country of ultimate destination and approval of reexports or retransfers

The proposed rule adds "destination" as an item that must be determined prior to the submission of an application, the claiming of an exemption, or a request for approval pursuant to §123.9(c). As both §123.9(a) and §123.9(c)(3) specify that an applicant must determine the end-user and end-use, it is unclear what is meant by "destination." Does "destination" differ from the information required for end-user and end-use?

UTC has generally understood the requirement to identify the end-user to include the end-user's address and country in addition to its name, as required by DDTC's DSP forms (e.g., Block 14 on the DSP-5 and DSP-5 vehicle; Block 24 on the DSP-61; and Block 22 on the DSP-73). If this is not considered the "destination", the regulations should clarify what "destination" means in the context of this section.

* * *

For additional information, please contact the undersigned at (202) 336-7467 or, with regard to technical proposals, Ari Novis at Pratt & Whitney at (860) 557-2353.

Sincerely,

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

EGAD

Export Group for Aerospace & Defence

Operating under the joint auspices of:

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22nd December 2011

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

Dear Sarah,

Regulatory Changes— Proposed Amendment to ITAR Parts 120, 123, 124, 126, 127, and 129 to Implement US-Australia and UK Defense Trade Cooperation Treaties

On 22nd November 2011 the US Federal Register requested that any interested parties feed any comments into the US State Department on the proposed regulatory changes pertaining to the implementation of the US-Australia and UK Defense Trade Cooperation Treaties, for your consideration, by Thursday 22nd December 2011.

This response is provided by the Export Group for Aerospace and Defence (EGAD), on behalf of UK Industry, to these proposals. EGAD is a non-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 (A|D|S), the British Naval Equipment Association (BNEA), INTELLECT and the Society of Maritime Industries (SMI).

We have been working very closely with the UK Ministry of Defence (UK MoD) on the organisation of a series of Industry briefings on the implementation of the UK/US Treaty; the latest of these have taken place on 10th October and the 8th and the 18th November 2011, and have assisted us in providing written comments back to the UK MoD on UK Industry's views on the Treaty.

We have been watching with great interest the development of the Treaty since 2007, and would like to submit the following comments on the proposals, as published on 22nd November 2011.

- New 123.9(c)(4).The need for a separate retransfer approval process under the Treaties is not clear. It is not required by the Implementing Arrangements. The procedure for retransfer authorisation under an exemption is covered in the main body of 123.9(c).

- New 126.17(a)(1)(iv) Definition of 'intermediate consignee'' as a person 'who receives defence articles...for the sole purpose of effecting onward movement...' is ambiguous. It would appear to exclude storage facilities, which are normally regarded as 'intermediate consignees' for ITAR purposes. Clarification on this would be welcome.

- New 126.17(a)(3)(vi). All required documentation maintained by the recipient to be available upon request of the USG. An oversimplification of the IA (Section 11 (4)(b)(vii), which says that any records etc will be provided ***to HMG*** on the request of either participant. See also (a)(4)(v) and (n)(3).

- New 126.17(d). Members of UK Approved Community to be listed on DDTC website. We have been informed by the UK MoD that they do not intend to publish a list; the UK MoD's stance does not seem to us to be practical or wise, but we also believe that the DDTC website is not the right place for it, either. Perhaps the AOF website, which is now password protected, would be a better solution? See also (f) on procedures for identifying authorised end uses and (k)(ii)(B) on UK intermediate consignees.

- New 126.17(h)(3). Any retransfer or re-export outside the Approved Community is prohibited without specific DDTC authority. In our view this is far too restrictive, and fails to make adequate provision for temporary exports for trials, etc where the item remains under the control of the consignee.

- New 126.17(j)(5). The statement required in shipping documentation unhelpfully fails to identify the goods either as USML or as Treaty items. We would suggest that the first sentence begins: 'These US Munitions List commodities are authorized by the US Government for export under the US-UK Defense Trade Cooperation Treaty for export only to the United Kingdom.....'

Finally, it is noteworthy that the number of exclusions by country in the proposed Supplement No 1 is:

Canada	Australia	UK
43	55	81

We realise that this is something of an oversimplification, but it illustrates the limitations of the Treaty, especially since most of the additional exclusions must be down to the British Government.

We hope that the above suggestions may assist the US State Department in its endeavours on this.

Regards

Brinley Salzmann - Secretary, EGAD

AEROSPACE INDUSTRIES ASSOCIATION

December 21, 2011

Department of State
Bureau of Political-Military Affairs
Department of Defense Trade Controls
2401 E Street, N.W.
12th Floor, SA-1
Washington, D.C. 20522

ATTN: Sarah Heidema

RE: RIN 1400-AC95 Implementation of Defense Trade Cooperation Treaties
76 FR, no.225, 22 CFR Parts 120, 123, 124, 126, 127 and 129

Dear Ms. Heidema:

The Aerospace Industries Association (AIA) appreciates the opportunity to provide comments on the proposed rule. The United States, Australia, and the United Kingdom are allies with longstanding relationships based on mutual national security, foreign policy, and economic interests and values. AIA has been a strong supporter of the U.S. Defense Trade Cooperation Treaties with Australia and the UK and reforming how the United States licenses the export of defense articles to these close allies.

The UK and Australia Defense Cooperation Treaties are an important first step toward modernizing the management of the U.S. export licensing system. Viewed in the context of the Administration's ongoing comprehensive Export Control Reform initiative, the provisions of the Treaties reflect an important evolution in how the United States of America implements a licensing framework focused on moving beyond a transaction-by-transaction approach to a more efficient model that promotes effective collaboration – without sacrificing fundamental security interests.

AIA applauds the ongoing effort to transform the current export control system and encourages continued focus on reform initiatives that support critical U.S. Government defense and security programs, strengthen important international partnerships, facilitate defense trade with our close allies and partners, and eliminate export control licensing burdens that make U.S. companies less competitive and cost-efficient. Such an approach not only will be in the national security interests of the United States, but will create jobs at home, encourage state-of-the-art defense

research and development, and ensure that the U.S. defense industrial base remains strong and capable of protecting us from future threats and challenges.

It would have been beneficial if the UK Government had published the proposed Open General Export License (OGEL) to implement the US-UK Defense Trade Treaty so that we could clearly identify any conflicts or gaps in the two sets of implementing regulations. We understand the UK Government intends to publish their proposed OGEL in January, 2012, at which time we may submit additional comments to this proposed rule.

We encourage the Department of State to work closely with the Defense Trade Advisory Group (DTAG) as the Treaties are implemented. AIA encourages the Department of State to request DTAG input 30 days prior to all Treaty Implementation Committee meetings. We encourage the Implementation Committee to provide the DTAG with a read-out of their discussion within 30 days after their meeting.

Our comments focus on the following topics:

1. Marking requirements for both the articles and documentation
2. Treatment of dual/third country nationals working for Australia and UK eligible parties
3. Review and update process for the excluded technologies list
4. Complexity of the determination process to assure eligibility prior to using the exemption
5. Reexport/Retransfer Restrictions
6. U.S. Government Procedures and Notifications
7. Administrative comments (terminology, errors in citation reference, etc.)

Below are AIA comments:

Marking of Defense Articles and Documentation

The marking requirement for defense articles and documentation in Sec. 126.16(j) and Sec. 126.17(j) is more comprehensive than marking requirements for defense articles exported under an export license or license exemption, and also includes a unique Destination Control Statement to be inserted on accompanying documentation that differs from the standard in Sec.123.9. Including instructions for the marking of classified defense articles and services in Sec. 126.16 and Sec. 126.17 **(j)i** could cause confusion given that the export of classified defense articles and services under the treaties is excluded in Supplement No. 1, and Note 1 of the supplement refers to the use of Sec. 125.4(b)(1) for classified exports. Sections 125.16(j) and 126.17(j) should require marking every article "unless impracticable," in which case the exporter need only mark the accompanying documentation. A reasonable interpretation of "impracticable" is key to a useable exemption. This approach would still effectively alert end-users of the sensitive nature of Treaty articles and align the Treaty exemptions with current industry best practices for marking ITAR-controlled defense articles.

The marking requirements for the hardware itself imposes additional requirements that many will find cost prohibitive and administratively challenging, particularly the process of applying and removing marking during the product life cycle. We are concerned the cost of implementing this type of comprehensive marking alone will deter any widespread use of the exemption, unless there is no alternate export authorization available. AIA member companies strongly believe keeping the marking requirement in place as is will virtually eliminate use of the treaties for hardware exports. We recommend that you consider reviewing the marking requirements to determine if a less onerous marking requirement is appropriate.

Treatment of Dual/Third Country Nationals at Australian and UK companies

The Department recently updated the ITAR with respect to treatment of dual/third country nationals. The ITAR requirements for identification and treatment for dual/third country nationals receiving defense services, technical data and/or defense articles is clear. However, it is not identified within the proposed rule how dual/third country nationals employed by UK eligible parties would be identified and treated within the context of Treaty-eligible transactions. The Department should clarify this with publication of the final rule.

Review and Update Process for the Excluded Technologies List

We are concerned that utilization of the Treaty will initially be constrained due to the scope and breadth of the proposed Exclusion List. The proposed rule excludes many items (Supplement No. 1 to Part 126.) This extensive exclusionary list – which will apply to items incorporated into larger systems as well (See Sec. 126.17(g)(5)) – limits the utility of the Treaty to facilitate defense trade. Comments have been made by U.S. Government personnel regarding commitment to periodic review and update of excluded technologies. AIA wishes to express concern that the proposed exemption will have limited utility unless an annual review and discussion on this topic is incorporated into annual Treaty Management Board meetings, with updates to the Exclusion Lists also published annually.

Sec. 126.17(g) (8) excludes defense articles and services specific to items that appear on the European Union Dual Use List. That document needs to be incorporated into the ITAR as an annex to Sec. 121 of the ITAR to assure that the requirement to consult the EU Dual Use List will be met by U.S. Exporters.

Complexity of the Determination Process to Assure Compliant Exemption Use

The complexity to determine appropriate use of the treaties is a deterrent to using the exemption, due to the risk of non-compliance for incorrect determinations. Further, given the nature of the UK-based supply chain (which includes other European sub-

contractors and participants), use of the Treaty will be constrained for supply chain participants external to the UK even if the activity and UK parties would otherwise be eligible. . If a company requires a TAA for portions of the activity and could use the exemption for the UK portion of the activity, administration complexity of such a scenario would result in most companies opting for the typical multi-party Technical Assistance Agreement covering all the parties, including those in the UK otherwise eligible for the exemption.

Reexport/Retransfer Restrictions

Sec. 123.9(a) required written approval from DDTC before "reselling, retransferring, reexporting, retransferring, transshipping or disposing of a defense article to any end user, end use or destination other than stated in the export license. . .except in accordance with the provisions of an exemption under this subchapter that authorizes [the activity] without such approval." Exclusions are provided for reexports or retransfers to NATO, NATO agencies, a government of a NATO country, or specified countries (Australia, Israel, Japan, New Zealand, or the Republic of Korea.) At issue is whether a defense article exported to Australia or the UK under the terms of the proposed regulation would require written authorization for operational deployment or training purposes in other countries. DDTC should clarify as to whether a written authorization would be required, for example, for U.S.-origin articles transshipping a third country for use by U.S., UK, and or Australian forces in a training exercise or prepositioned in a third country for deployment in an ongoing military conflict.

U.S. Government Procedures and Notifications

AIA requests additional clarification on the following issues regarding U.S. Government processes identified in the proposed rule.

1. Permissible Classified End Uses

Sec. 126.16(f)(2) states that "operations, programs, and projects that cannot be publicly identified will be confirmed in written correspondence from [DDTC]." It is uncertain if this written correspondence will be provided in response to request for a specific export or generally issued to all affected parties with an interest in a particular operation, program, and/or project. DDTC may want to consider establishing a classified notification process for other parties interested in a determination.

2. Approved Communities

The proposed rule references the UK and Australia Communities, defined as entities and facilities identified as members by DDTC "at the time of a transaction." Annotating the list to include dates for when an entity or facility was added and/or removed would

greatly assist corporate compliance efforts. We encourage DDTC to include these dates in posting this information on the website.

Administrative Comments

1. The term "defense articles" is used throughout the proposed rule. We recommend that the (a)(1) Definitions in both proposed §126.16 and §126.17 be updated to include reference to the term "defense articles" and reiterate the meaning to include articles and technical data as defined in §120.6 Defense Articles.

2. In the proposed Sec. 126.17(a)(4)(iii) and Sec.126.16 (a)(4)(iii), the term "required" is used to identify a transfer that is "required" for a specific end use under the respective Defense Trade Cooperation Treaty. The term required implies a standard that is used in other sections of the ITAR that is not an appropriate standard in eligibility determination to utilize the exemption. We recommend the term be changed to "pursuant to" an end use specified in the Defense Trade Cooperation Treaty in all areas within the proposed exemptions.

3. Citations in Sec.126.17 regarding filing of export information are identified as Sec.126.16 (e)(1) –(4) and should be identified as Sec.126.17 (e)(1) – (4).

4. There are numerous instances of avoidable redundancy in the proposed exemptions, such as recordkeeping requirements identical to recordkeeping requirements in Sec. 122.5, and U.S. person registration requirements identical to Sec. 120.1.

We look forward to implementing guidance and publication of the final rule on the Defense Trade Cooperation Treaties to facilitate defense trade with our closest allies. Please know that you have a willing and committed partner in AIA going forward.

Best Regards,

Remy Nathan

Remy Nathan
Vice President, International Affairs
Aerospace Industries Association

MIBTF Comments for Federal Register Notice on the Implementation of Defense Trade Cooperation Treaties

The International Sales Committee of the Munitions Industrial Base Task Force has reviewed the Proposed Rule for implementation of the Defense Trade Treaties. The Committee finds the Proposed Rule to be a disappointment since most of the products of the U.S. munitions industry are not eligible for the treaty with the United Kingdom. Items included in Supplement---No. 1. (that includes items ineligible for the United Kingdom but not Australia) that are most disappointing are:

- Defense articles and services specific to ammunition and fuse (sic fuze) settings for guns and armament controlled in Category II (Reference ITAR Category III)
- Energetic materials, pyrotechnics (Reference ITAR Categories V and XII)

There are many unanswered questions concerning implementation of the treaties. Examples include:

- The products, technologies and services included in Supplement No. 1 that are of most interest to the Task Force (Category III, IV, V, XII) appear overly broad. Our membership has not reported issues with obtaining licenses for these items going to entities in Canada, Australia or the United Kingdom. The Task Force requests the Department reevaluate Supplement No 1 and provide additional granularity to exclude only those items of true concern to the Department. The Task Force is available and willing to work with the Department to foster those discussions with the munitions industry.
- Will these lists be refined and shortened as the USML Category rewrites are issued in final form?
- What industries have endorsed the treaties?
- Given the perceived limited scope and utility of the treaties, they appear to be more trade agreements than a tool to support U.S. national security and foreign policy. The Task Force recommends the Department consider ways to foster the intent of the treaties – increase security cooperation.

We respectfully recommend that the issues and questions cited above be addressed before implementation of the treaties is finalized and approved.

Prepared by: John Hager, MIBTF International Consultant

Approved by: Richard Palaschak, MIBTF Director of Operations

DRS Technologies, Inc.
Trade & Security Compliance Office
2345 Crystal City Drive
Arlington, VA 22202

December 22, 2011

Mr. Robert S. Kovac
Managing Director
PM/DDTC, SA-1, Room 1200
Directorate of Defense Trade Controls
Bureau of Political Military Affairs
U.S. Department of State
Washington, DC 20522-0112

Subject: Response to the Proposed Rule, Implementation of Defense Trade Cooperation Treaties RIN 1400-AC95

Dear Mr. Kovac:

DRS Technologies, Inc. is fully supportive of the U.S. Government efforts to reform the regulations and systems for controlling exports. As a 10,000+ employee company with products and customers in both the international commercial and defense markets, we are very familiar with the current export control systems. The reforms are much needed to help the U.S. export control apparatus stay in step with the ever evolving and changing global markets and national security climates.

We have reviewed the proposed rule regarding the implementation of the UK and Australian Defense Trade Cooperation Treaties. The treaties themselves represent significant advances in the mutual national security relations between these two long-standing U.S. allies. Regarding the proposed rule to implement the treaties, we have serious concerns with the list of excluded items, the complexity of the proposed rule, and the significant document and article marking requirements. As written, we believe the complexity of trying to correctly determine if items, parties, and purposes are authorized under the treaties coupled with the additional administrative requirements directed by this rule will severely limit their use by industry.

The Excluded Technologies List

We are very concerned that utilization of the Treaty will be significantly constrained due to the scope and breadth of the proposed Exclusion List. Several exclusions that span all twenty one categories are so vague that they could easily be interpreted to encompass every part, component, and drawing associate with any defense article. Additionally, while comments have been made by U.S. Government personnel regarding commitment to periodic review and update of excluded technologies, we are concerned that the proposed exemption will have very limited utility unless a robust review and update process are specifically incorporated. An annual review and discussion on this topic should be incorporated into annual Treaty Management Board meetings,

with updates to the Exclusion Lists also published annually. Specific comments regarding the excluded technologies are:

1. §126.17(g) (8) excludes defense articles and services specific to items that appear on the European Union Dual Use List. Recommend that either the European Union Dual Use List be incorporated into the ITAR as an annex to §121 to assure that the requirement to consult the EU Dual Use List can be accomplished by U.S. Exporters or that the Department compare the EU Dual Use List against the USML, eliminate the portions that are already covered by the USML, specifically incorporate items that are not, and delete the above reference to the EU Dual Use List.

2. Supplement No. 1, USML Category I-XXI, "Defense articles and services specific to the existence or method of compliance with anti-tamper measures made at the U.S. Government direction" is not sufficiently defined. There are currently many commodities that would appear to not meet this criteria except that the DoD has placed provisos on export license approvals that incorrectly place anti-tamper requirements on them. The DoD policy document cited is DoD Instruction 5200.39, Critical Program Information (CPI) Protection Within the Department of Defense, signed by the Under Secretary of Defense for Intelligence. The applicability of that document outside of the Department of Defense (5200.39 paragraph 2(b)) is limited to "DoD contractors performing work on or supporting DoD contracts with contractual terms that require the contractor to protect CPI." We recommend that a note be added to the above language to clarify that its scope is limited to only such items as identified in a contract with the DoD where the terms of the contract identify such items as CPI and the contract requires the contractor to protect such CPI.

3. Supplement No. 1, USML Category I-XXI, "Defense articles and services specific to reduced observables or counter-low observables in any part of the spectrum. See Note 2." Note 2(a) states that the above applies to "...defense platforms, including systems, subsystems, components, and materials (including dual-purpose materials used for electromagnetic interference (EM) reduction technologies....)." As written this entry is so broad that it would prohibit the use of the treaty for a commercial power supply used on a military platform that has thicker sheet metal to reduce its electromagnetic interference with other electronic components. MIL-STD-461 is a military standard addressing electromagnetic interference limitations for electronic articles purchased by, or designed for the DoD. It applies to almost everything the DoD purchases. We have several approved commodity jurisdictions for electronic articles that meet this standard simply by using thicker sheet metal to reduce the EM footprint. Per note 2(a) of this proposed exemption, such simple and routine items as power supplies, power inverters, and electrical transformer-rectifiers will be ineligible for this treaty exemption. Additionally, given the statement "including dual-purpose materials used" it could be interpreted that the Department is exerting jurisdiction over commercial items that meet such a signature reduction definition. We recommend the above entry be deleted and specific signature reduction issues be addressed in the USML categories that are applicable rather than all 21 categories, many of which have absolutely no signature reduction equities. Additionally, when addressed as such, the definition should be

sufficiently narrow as to only apply to systems, subsystems, and components directly related to the signature reduction of the overall platform.

4. Supplement No. 1, USML Category I-XXI, "Libraries (parametric technical databases) specially designed for military use with equipment controlled on the USML." At first glance, this entry appeared to be focused on such parametric technical database libraries as those associated with electronic combat equipment specified in USML Category XI(a)(4). But, given the entry applies to all 21 USML categories and there is no definition supplied for "parametric technical databases" we are left with the dictionary definition of the words. As such, this entry appears to prohibit the export of any technical database of parameters relating to any defense article controlled on the USML. That could quite possibly encompass all technical data. We recommend the above entry be deleted and specific parametric technical database library issues be addressed in the USML categories that are applicable rather than all 21 categories. Additionally, when addressed as such, a note should be added clearly defining what it is the Department is trying to exclude from these exemptions.

Complexity of the Determination Process to Assure Compliant Exemption Use

We are very concerned with the complexity of the process to determine if an article, a party, and a purpose all line up to be able to correctly use these exemptions. We have cited above our concerns with the complexity of correctly determining if an article is eligible. Additionally, unlike the existing Canadian exemption, which is complicated, these exemptions are even more so in that the approved parties and the approved purposes are not published in the statute. They are to be published on an internet website, subject to change without notice. As such, it will be impossible to provide assurances to any of our businesses that they can rely on actually being able to export articles under these exemptions at the time their program is ready to export. The only way to assure such an export is approved at the time of export will remain getting an approved export license in advance.

Marking of Defense Articles and Documentation

The marking requirement for defense articles and documentation in §126.16(j) and §126.17(j) is significantly more comprehensive than the marking requirements for defense articles exported under an export license or license exemption. The proposed rule also includes a unique Destination Control Statement to be inserted on accompanying documentation that differs from the standard in §123.9. The marking requirements for the hardware itself imposes additional requirements that many will find cost prohibitive and administratively challenging, particularly the process of applying and removing marking during the product life cycle. We are very concerned not only with the cost of implementing this type of comprehensive marking, but also with having to implement, provide training for, and audit for compliance essentially two separate and distinct processes. This alone will definitely deter the use of these exemptions. We strongly urge the Department to review these requirements and more closely align them with the current ITAR requirements, if at all possible.

Further, given the nature of the UK supply chain with other European sub-contractors and participants, use of the Treaty does not apply, even if the activity and UK parties would otherwise be eligible, for supply chain participants external to the UK. If a company requires a TAA for portions of the activity and could use the exemption for the UK portion of the activity, administration complexity of such a scenario would result in most companies opting for the typical multi-party Technical Assistance Agreement covering all the parties, including those in the UK otherwise eligible for the exemption.

We look forward to publication of the final rule implementing these treaties with two of our closest allies. We sincerely believe incorporating changes in relation to our above concerns will make the implementation of these treaties significantly more effective for both the U.S. government and for industry.

Should you have any questions in this matter or require additional information, please contact Mr. Greg Hill at (703) 412-0288, ghill@drs.com.

Sincerely,

Heather C. Sears
Vice President, Trade & Security Compliance
& Associate Corporate Counsel
DRS Technologies, Inc.