



July 6, 2015

U.S. Department of State
Bureau of Political-Military Affairs
Directorate of Defense Trade Controls
2401 E. St, NW
12th Floor, SA-1
Washington, DC 25022

ATTN: Ed Peartree, Director, Office of Defense Trade Controls Policy, U.S. Department of State

SUBJECT: RIN 1400-AC88

Dear Mr. Peartree

AIA applauds the efforts of the Department of State, Directorate of Defense Trade Controls (DDTC) in making strides towards harmonizing the ITAR with the EAR under Export Control Reform (ECR). The following comments are provided in response to DDTC's Federal Register Notice Vol. 80, No. 99, May 22, 2015 (29565-29569).

I. Exemption Usage for EAR-Controlled Items

Industry appreciates the clarification on ITAR exemption usage for EAR-controlled items provided in the revised language of § 120.5(b). This explanation confirms industry's interpretation of how to handle the transition of items from the USML to the CCL while still able to maintain one export authorization. In our review of the proposed revised language, it would appear that DDTC has included language that would overly restrict industry's exemption options. As interpreted, DDTC is restricting the coverage of all ITAR exemptions for EAR-controlled items to situations only when related USG authorization exists for the end item as illustrated in the language below.

...provided the items subject to the EAR are for use in or with defense articles authorized under a license or other approval.

There are several exemptions in the ITAR that do not tie its eligibility and usage to related license approvals. Including an all-encompassing restriction to only use license exemptions for EAR-controlled items when it is tied directly to a related approval will limit industries' ability to operate as it had prior to ECR. AIA believes the controlling language found in individual exemptions clearly addresses when

related approval is tied to the eligibility of that exemption. For illustrative purposes, below are two examples of ITAR technical data exemptions; one with the tying language and one without.

125.4 (b)(3) Technical data, including classified information, in furtherance of a contract between the exporter and an agency of the U.S. Government, if the contract provides for the export of the data and such data does not disclose the details of design, development, production, or manufacture of any defense article;

125.4(b)(5) Technical data, including classified information, in the form of basic operations, maintenance, and training information relating to a defense article lawfully exported or authorized for export to the same recipient. Intermediate or depot-level repair and maintenance information may be exported only under a license or agreement approved specifically for that purpose;

Having language in § 120.5(b) that restricts eligibility for EAR-controlled items would make some exemptions unnecessarily ineligible. AIA requests the removal of this language from § 120.5(b) as AIA member companies firmly believe that the criterion of each individual exemption already adequately addresses when related authorizations are required.

~~....provided the items subject to the EAR are for use in or with defense articles authorized under a license or other approval.~~

Additionally, AIA would like DDTC to provide clarification and guidance in their final ruling on the proper classification to be entered into the AES system for EAR-controlled items shipped under an ITAR exemption (e.g. VIII(x), ECCN). The proposed edits to § 123.9(b)(2) do not address AES filings.

II. Destination Control Statement

The AIA membership is very supportive of DDTC's efforts to harmonize the Destination Control Statement (DCS) with the Department of Commerce. However, the proposed revisions to the DCS are seen as quite lengthy and will cause a problem when applying all required elements to an airway bill or bill of lading. Additionally, even though the language may be harmonized with the EAR, the implementation of the DCS between the two agencies remains inconsistent. This is discussed further below.

As to the length of the DCS, there simply is not enough room available for industry to apply all of these requirements to an airway bill or bill of lading. Industry is struggling with placement of the current DCS version at § 123.9 on many carriers' forms. The field length available is too restrictive and results in extreme secondary measures by industry to secure required markings on the airway bill or bill of lading. The government may only see that industry is using different methods to apply the DCS; however, the reality is that industry is struggling to find easy solutions to comply. These alternative methods are not by choice and are viewed by industry as cumbersome, time consuming and costly. AIA is concerned that DDTC is over simplifying efforts industry takes in order to apply these markings. In many instances, exporters are delaying, and in some instances halting, shipments or are expending moneys modifying order processing systems in order to apply ITAR required markings to an airway bills or bills of lading. The recent changes under ECR have generated industry's awareness to this problem.

AIA asks DDTC to reconsider placement of the DCS on the airway bill or bill of lading for four reasons.

- (1) The airway bill or bill of lading documents do not have enough room available for industry to comply as outlined above.
- (2) The airway bill or bill of lading documents act as receipts for goods being transported and constitute agreements between shipper and carrier on the terms of their transport¹. AIA offers that the utility of having a DCS on the airway bill or bill of lading serves little purpose of notifying the recipient of the U.S. export controls. Most airway bills or bills of lading do not make it into the hands of the person who has oversight of the disposition of the goods being received.
- (3) The proposed changes to the EAR do not require it. The revised DCS language evens the playing field for notifying the foreign recipient of the controls over products by simply stating they all have some level of controls by U.S. government regulators. How that language makes its way to the foreign recipient should also be the same. Requiring two separate methods of implementing the same language between EAR and ITAR shipments will cause problems for companies, particularly those with electronically generated shipment documents. Industry may be subjected to additional costs to update their electronic systems to allow for flexibility in applying the DCS. Additionally, instituting two separate methods will inevitably cause administrative violations of the ITAR if the DCS is left off an airway bill or bill of lading.
- (4) Lastly, it was opined by a DDTC representative during the BIS weekly Wednesday teleconference on June 3 that by having the DCS language on the airway bill or bill of lading this will notify all those handling the package that the goods inside are defense articles and are to be handled accordingly. AIA would like to posit a different point of view in that by singling out defense articles with this marking, it highlights which packages contain defense related equipment and will make them more susceptible to diversion or theft. AIA suggests DDTC consider the position that if all the packages look the same, then it would be harder for nefarious individuals to target defense articles for diversion while en route to their final destination.

In addition to removing the DCS from the airway bill or bill of lading, AIA suggests removal of the requirement to have on “purchase documentation or invoice”. AIA would like clarification on the usage of the terms “purchase documentation or invoice” included in the proposed § 123.9(b)(1); particularly, how do these terms relate to the “contractual documentation” term used in the proposed EAR rule. AIA believes that these terms are unnecessarily vague and adds unnecessary burden to industry to comply. Often a company will not know the export license number or exemption number at time of purchase to be able to apply to a purchase order. Furthermore, many items are purchased years in advance of actual shipment. By the time the goods ship, the product could be reclassified and the shipping documentation would be inconsistent with the purchasing documentation. Lastly, a sizable portion of the defense articles exported from the United States are destined to U.S. government entities overseas or to foreign recipients under Foreign Military Sales efforts where the purchasing documentation is between a U.S. company and the U.S. government. AIA cannot find any utility in requiring industry to include this language in such purchasing documentation under this type of relationship.

If DDTC is using these terms to refer to the commercial invoice, AIA suggests DDTC utilize this more commonly known term in place of purchase documentation or invoice. Additionally, it is suggested that

¹ 15 CFR Part 30 defines bill of lading as “A document that establishes the terms of a contract between a shipper and a transportation company under which freight is to be moved between specified points for a specified charge. Usually prepared by the authorized agent on forms issued by the carrier, it serves as a document of title, a contract of carriage, and a receipt for goods.”

DDTC refrain from using the term *shipping documents*², as this captures more than the necessary documents the DCS should be applied.

AIA believes that the DCS which acts as notification of U.S. export controls to the foreign recipient is best applied on the commercial invoice which is also in line with the proposed changes to the EAR § 758.6³. Therefore, AIA recommends the following edits to § 123.9(b)(1):

- (1) The exporter shall incorporate the following information as an integral part of the commercial invoice whenever defense articles are to be exported, retransferred, or reexported pursuant to a license or other approval under this subchapter:

If DDTC agrees with only requiring the commercial invoice to contain the DCS, the length issue outlined above is more tenable as industry has more control over the formatting of the commercial invoice. No changes will be required to the length of the DCS.

III. § 126.4

The proposed changes to § 126.4 provide for both positive changes and areas that may require additional updates. Specifically, there exists inconsistencies with the EAR license exception GOV (15 CFR Part 740.11) that reconciling may benefit industry and allow for easier implementation of § 126.4. AIA offers the following comments:

§ 126.4 (a)(1) proposed language positively establishes a broader opportunity for industry to utilize the exemption than is currently available and these edits are viewed as a positive step. AIA however notes that Note 1 to Paragraph (a) limits contractor support to U.S. persons. AIA submits that government installations exist that utilize non-U.S. persons and local contractors to handle their mail room or are identified as recipients of hardware shipments. Those persons are typically under the direct supervision of U.S. military personnel. AIA feels that this restriction may hamper its members' ability to meet heightened demands from U.S. agencies located at such installations. AIA proposes that this restriction is unnecessary and requests removing references to U.S. persons from Note 1.

§ 126.4(c) requires a separate written statement be provided to the Port Director at time of export acknowledging that the exporter meets the requirements of the exemption. AIA requests that this requirement be removed as duplicative to the requirements of the Foreign Trade Regulations (FTR) filing of an EEI. An exporter is already certifying under the FTR that their filing is accurate and complete (see 15 CFR 30.71). Producing a separate written statement identifying the same is duplicative and an unnecessary burden.

§ 126.4(c) also requires a certification be added to the airway bill or bill of lading when shipments support § 126.4(a)(1) criterion. AIA requests this requirement be altered and provides the below discussion to support this request.

AIA respectfully points out that DDTC's certification language is not harmonized with the certification language required as part of utilizing the GOV exception under the EAR (see § 740.11(b)(2)(iii)(E)(3)). In addition to the dissimilar certification language, AIA believes that circumstances surrounding when the

² 15 CFR Part 30 defines shipping documents as "Documents that include but are not limited to commercial invoices, export shipping instructions, packing lists, bill of lading and air waybills."

³ Federal Register Proposed Rule, Vol. 80, No. 99 on May 22, 2015.

certification is required is also inconsistent. Under the EAR, the GOV certification is only required when dealing with Government Furnished Equipment (GFE). AIA offers that not all goods exported to support § 126.4(a)(1) activity will be GFE as defined by the Federal Acquisition Regulations (FAR). AIA requests that the certification language at § 126.4(c) be rewritten to be consistent with Part 740.11 and furthermore be limited to GFE shipments in order to harmonize with the GOV exception. It is our assertion that the more consistent shipment markings can be between the two agencies, the more industry will be able to control the markings and ensure they are accurate. Differing markings for the same type of end user can be confusing and may result in many administrative violations.

Lastly, this section requires placement of said certification on the airway bill or bill of lading. AIA requests the removal of the requirement for the certification to be placed on the airway bill or bill of lading due to reasons fully explained above. If DDTC disagrees with industries' request, it should be known that there isn't enough room for both the DCS and this certification to be placed on the airway bill or bill of lading. In line with what was mentioned above, administrative non-compliance violations may result. AIA suggests DDTC require the certification be supplied either on the commercial invoice or separately and supplied with the rest of the shipping documentation.

IV. Conclusion

In conclusion, AIA again emphasizes its support for DDTC's efforts under ECR to harmonize with the EAR. As DDTC progresses with its efforts, AIA asks that the regulators be aware that divergences between the two regulations in administrative implementation requirements may lead to confusion and ultimate non-compliance. When exporters are faced with dealing with the same foreign customers for the same program and the only difference is the USML Category or ECCN of the product, having to implement two different administrative procedures for a shipment becomes problematic and potentially costly for industry. The more closely implementation of the regulations can be structured; the more likely industry will be able to comply more fully.

Best Regards,

A handwritten signature in black ink, appearing to read 'Remy Nathan', with a long horizontal line extending to the right.

Remy Nathan
Vice President – International Affairs
Aerospace Industries Association