



The National Council on International Trade Development

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VIA E-MAIL: RPD2@BIS.DOC.GOV

Ms. Hillary Hess, Director
Regulatory Policy Division, Office of Exporter Services
Room 2705
U.S. Department of Commerce
Washington, DC 20230

RE: Regulation Identification Number 0694-AC94; Proposed Rule Regarding Revised "Knowledge" Definition, Revision of "Red Flags" Guidance and Safe Harbor

Dear Ms. Hess:

The National Council on International Trade Development (NCITD) is pleased to respond to the Bureau of Industry and Security's (BIS) request for comments on a proposed rule that would revise the knowledge definition in the Export Administration Regulations (EAR), update the "red flags" guidance and provide a "safe harbor" from liability arising from knowledge under that definition.¹

Background

Founded in 1967, NCITD is a nonprofit trade association of large and small U.S. exporters and importers who are advocates of EAR policies that are consistent with national security, foreign policy and a flexible export transaction process that promotes export trade. Our membership includes large, mid-size, and small firms, exporters and importers, freight forwarders and brokers, banks, attorneys, trade groups, and consulting firms. Our members understand the importance of their role in preventing exports and reexports that might be contrary to the national security and foreign policy interests of the United States.

¹ 69 Fed. Reg. 60829 (Oct. 13, 2004).

NCITD members fully support the continuing efforts of the U.S. Government to secure our nation from threats posed by weapons of mass destruction and specifically to those that may be related to illegal or diverted exports. We, however, have serious concerns that the proposed rule will impose undue burdens on manufacturers and exporters, without any evidence that the proposed regulatory changes will have a positive impact on national security or will prevent diversions to proscribed or inappropriate end-users.

Our specific comments and concerns on the proposed rule are outlined below:

Revised Definition of "Knowledge"

BIS proposes to amend the definition of "knowledge" in section 772.1 of the EAR in four ways:

1. Incorporating a "reasonable person" standard;
2. Replacing the phrase "high probability" with "more likely than not";
3. Adding the phrase "*inter alia*" to the description of facts that could make a person aware of the existence or future occurrence of a fact; and
4. Eliminating the phrase "known to the person" from the sentence in the knowledge definition that knowledge may be inferred from the "conscious disregard of facts known to the person."

The proposed rule notes that these changes are a clarification of the current standard and are consistent with existing BIS and industry practice. We disagree. The combination of these changes to the knowledge standard will result in a decreased and vague standard of evidence to establish "knowledge" on the part of exporters.

While a "reasonable person" standard is not uncommon or in itself objectionable, adding such a standard and removing the "known to the person" language will result in the overall standard becoming unreasonably vague. Under the new standard, a person has knowledge of facts and circumstances if a "reasonable person" would, upon consideration of the facts and circumstances (not necessarily known to them), conclude that the facts and circumstances are more likely than not. This circuitous reasoning can only serve one purpose - to facilitate the enforcement of alleged violations based on after-the-fact determinations of what an exporter could have or should have "known."

The suggestion that "more likely than not" is not a change from "high probability" is not entirely accurate. The "more likely than not" standard is not only patently lower than "high probability," it requires a mathematical balancing of the facts to come up with the 51 percent likelihood that the standard, by definition, requires.

The phrase "*inter alia*" is on its face vague and gives no additional guidance or clarification to the definition of knowledge. This phrase simply provides unspecified grounds on which to find a violation.

Contrary to the impact statements set forth on page 60,829 of the proposed rule, we believe that this change will impose greater burdens on small and large entities who will struggle to understand and to comply with the new knowledge standard. This change will not reduce uncertainty among exporters and may actually increase the need for exporters to consult with legal counsel prior to making decisions on whether to proceed with a transaction. Therefore, contrary to BIS's assessment of the impact of this rule on exporters, NCITD believes that this proposal, if enacted, will increase the training and compliance burden of our members and other U.S. exporters.

Additional Red Flags

NCITD's members appreciate BIS's efforts to provide guidance to exporters to prevent the diversion of items subject to the EAR to proliferation related purposes and other potential EAR violations. However, by nearly doubling the number of red flags BIS has placed a substantial new burden on exporters. The following proposed red flags are of particular concern to NCITD's members:

Red Flag # 15: The customer uses an address that is inconsistent with standard business practices in the area (e.g., a P.O. Box address where street addresses are commonly used).

Comment: This proposed red flag requires an exporter to know the usual manner of addressing shipments in every country. Exporters may not be familiar with standard business practices in their customers' countries. Furthermore, P.O. Boxes are the predominant mail delivery method in numerous Middle Eastern countries, due to less developed street numbering systems, placing additional burdens on companies doing business in such countries.

Red Flag #18: The customer is known to have or is suspected of having dealings with embargoed countries.

Comment: Many foreign customers, including affiliates of U.S. exporters, have lawful dealings with countries embargoed by the United States. The fact that a legitimate foreign customer also trades legally with an embargoed country, such as Cuba, should not be considered to be a red flag unless the exporter believes there is a cognizable risk of illegal diversion to an embargoed destination.

Red Flag # 20: The product into which the exported item is to be incorporated bears unique designs or marks that indicate an embargoed destination or one other than the customer has claimed.

Comment: This proposed red flag requires that the exporter have knowledge of what kind of "designs or marks" could indicate an embargoed country is the intended destination. BIS does not specify what those designs or marks might be and is unreasonably vague.

NCITD urges BIS to modify the list of red flags as noted above. In addition, we submit that BIS should reconsider whether these additional red flags will actually provide any greater benefits than the red flags that currently exist and have been successfully used by exporters for many years.

Safe Harbor

The proposed "Safe Harbor" provision is so unwieldy that it is unlikely to be of much use to exporters. As a result, we respectfully request BIS to exclude this proposal from the final rule.

Under the proposed safe harbor, exporters that take the three steps identified in new section 764.7(b) of the EAR will not have knowledge imputed to them by application of the definition of knowledge in section 772.1 of the EAR if, prior to shipment, they submit a report to BIS identifying all red flags associated with a transaction and what steps were taken to resolve them. Under the proposal, exporters cannot conclude that the red flags have been successfully resolved until they receive an affirmative reply from BIS, which is supposed to be provided within 45 days (although not defined, we believe that this refers to calendar, not business days).

NCITD believes that the costs of implementing and utilizing such a safe harbor program will outweigh the benefits of such a program. Contrary to the regulatory impact statement, this proposed safe harbor will have a negative economic impact on small and large U.S. exporters. Current business conditions require that "go" or "no go" decisions be made within a matter of hours or days. U.S. exporters cannot tolerate delays and uncertainties of up to 45 days to receive a response from BIS before proceeding with a shipment. As a result, this proposal will likely result in lost sales to U.S. companies, even if the end-users or end-users may be legitimate. Moreover, the transaction costs of complying with all of the steps outlined in the safe harbor proposal and preparing and submitting a report to BIS may result in many companies deciding to proceed with the shipment anyway, rather than risking a negative outcome from BIS. We believe that the vast majority of U.S. exporters are equipped to evaluate whether to proceed with a shipment or not, without having to obtain the advance approval of the U.S. Government. The small percentage of companies that ignore or flout U.S. export controls will continue to do so regardless of whether a safe harbor exists or not.

If BIS intends to proceed with the safe harbor process, NCITD suggests a number of changes to the current proposal. NCITD proposes that the safe harbor review process be modeled as a notification process, similar to License Exception AGR, whereby exporters submit an advance notification to BIS and the agency is required to inform the exporters within 12 business days whether any objections have been raised by reviewing agencies. Alternatively, BIS could provide exporters with an initial first response to a safe harbor request within 5 business days or less that informs the applicant whether the scenario is acceptable, unacceptable or is complicated enough to warrant further review. In the latter case, BIS should be prepared to notify the exporter whether it is permissible to proceed or not within 30 calendar days. NCITD also suggests that BIS accept safe harbor requests via email in addition to regular mail. Finally, if BIS chooses to proceed with a safe harbor program, we request that BIS ensure that adequate staff members are employed to ensure a timely turnaround of safe harbor requests and that the reviewing agencies are required to notify BIS of their decisions in a timely manner. Thank you very much for your consideration of our comments.

Respectfully submitted,



Mary O. Fromyer
Executive Director
NCITD