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3 August 2015

United States Department of State  
Directorate of Defense Controls  
Office of Defense Trade Controls Policy  
2401 E. Street, NW  
Washington, DC 20037

RE: Revisions to Definitions in the ITAR (RIN 1400-AD70)

To Whom It May Concern:

We applaud the U.S. Department of State (DOS) in its efforts through the Export Control Reform Initiative to enhance clarity of International Traffic in Administration Regulations (ITAR) definitions and establish consistency between ITAR and terms found in the Export Administration Regulations (EAR). We appreciate the opportunity to provide a formal response to the proposed revisions to the ITAR definitions that was released through Federal Register Public Notice 9149 on 3 June 2015.

With approximately 195,000 members residing in the United States, The Institute of Electronics and Electrical Engineers – USA (IEEE-USA) is an organizational unit of the Institute of Electrical and Electronics Engineers, Inc. (IEEE), the world's largest organization for technical professionals, and a leading educational and scientific association for the advancement of technology. A large contingent of our membership in academe, industry, and commercial services conduct fundamental research and export technologies under the current ITAR definitions.

In our analysis, the proposed definitions would unintentionally expand ITAR's authority to include research and technologies that are currently exempt. We strongly believe such an expansion in the increasingly competitive global technology market would unnecessarily impede progress in the research environment, restrict exports of technologies that do not possess dual-use characteristics, and ultimately jeopardize US technological leadership.

With the understanding that this is not the intention of the DOC, IEEE-USA offers its analysis and provides several suggestions for improvement in the following pages. We would be happy to answer any questions you might have regarding our analysis or suggestions. We further offer to provide subject matter experts to assist in further development of these definitions, including leaders in fundamental research and technology development.

## *Fundamental Research and NSDD 189*

For over 30 years, the fundamental research that has been conducted by scientists, mathematicians and engineers has been protected under the 1985 National Security Decision Directive (NSDD) 189, which specifies:

“where the national security requires control, the mechanism for control of information generated during federally-funded fundamental research in science, technology and engineering at colleges, universities and laboratories is classification. ... No restrictions may be placed upon the conduct or reporting of federally-funded fundamental research that has not received national security classification ...”

The proposed ITAR revisions to 120.49 expands existing restrictions associated with pre-publication review of federally-funded fundamental research other than classification. This greatly impacts the conduct of fundamental research in all forms and – in principal – invokes the deemed export provisions over all federally-funded research regardless of its dual-use nature. IEEE-USA believes this would violate the First Amendment of the US Constitution and would both inherently and unnecessarily impede the progress of US technology research and development.

## *Public Domain*

The proposed revision to the definition of “Public Domain” to obtain authorization from a cognizant Government Official to release technical information or data into the “public domain” in 120.11(b) appears to reverse prior DOS actions to comply with the Constitution’s first amendment. ITAR would explicitly challenge the Constitution, and in the attempts to align the definitions between ITAR and EAR, the proposal appears to remove the comparable Free-Speech compliant language in EAR section 734(b)(3)(I). We propose to delete 120.11(b), not revise 734.3(b)(3)(I); and do not delete 734 Supplement 1.

The proposed definition appears to place publishers at risk to ensure that technical data release has been obtained by a publication submitter. Publishers like IEEE and IEEE-USA need clear guidance on what information we need to obtain and retain in order to confirm that we are not distributing unauthorized content. In addition, we need guidance on what actions will be required for published content that is subsequently deemed to have been unauthorized for release or is inadvertently distributed without authorization.

## *Required*

The proposed revision to the definition of “required” in ITAR 120.46, “only that portion of technical data that is peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions” would be met if technical data are for development, production, or use of a defense article. The only exception would be those data that are subject to three releases now in the definition of “specially designed.” In IEEE-USA’s

evaluation, the June 3 proposals overturn ITAR's "required" definition in ITAR and increase the scope of what is regulated under ITAR.

It is important to regulate only those items that possess distinguishing features from those that are readily available from commercial sources. There are cases where commodities or technologies are available in unrestricted markets that also possess comparable features, data, or qualifications to those regulated under ITAR today.

We strongly suggest that ITAR should apply only to those items that possess inherently unique qualities or features that contribute substantially to the overall system performance of an ITAR product. The "peculiarly responsible" definition should reflect this suggestion through the explanation of "technology," wherein "peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions." The exemptions to this definition should be enabled through revisions to Notes 2 and 3, including possibly changing "enumerated" to "controlled" in Note 2 and retaining the decontrol parameters that evolved from the EAR in Note 3.

*Discrepancies between Country Lists in ITAR and EAR*

The ITAR 126.1 list of prohibited countries should mirror those in EAR. The DOS should work with DOC to maintain consistency across countries and regions, including the Crimea.

Thank you for giving us the opportunity to provide this information. Feel free to contact IEEE-USA's Director of Government Relations, Mr. Russell Harrison, at [r.t.harrison@ieee.org](mailto:r.t.harrison@ieee.org) for further assistance.

Respectfully submitted,

A handwritten signature in blue ink that reads "James A. Jefferies". The signature is written in a cursive, flowing style.

James A. Jefferies  
President, IEEE-USA