

## **Comment Submittal to Notice of Proposed Rule Making by the Department of State, Docket Number 9149, Federal Register Document Number 2015-12844**

Reference Link:

<https://www.federalregister.gov/articles/2015/06/03/2015-12844/international-traffic-in-arms-revisions-to-definitions-of-defense-services-technical-data-and-public>

<https://federalregister.gov/a/2015-12844>

### **Summary**

This comment requests clarification by the Department of State with regards to the regulatory regime regarding dissemination of public domain information via the Internet where a presumption of worldwide distribution is operative. Specifically, with regards to three conditions that may occur in the public domain,

- a. Information concerning bona fide “defense articles” that has been previously released into the public domain.
- b. Information related to “defense articles” but does not meet the criteria of being “peculiar” to a bona fide ITARS regulated article or service.
- c. Information concerning information that is not a “defense article” and is by definition not subject to ITARS.

We request response to our comment as to whether the presumed dissemination authority interpretation contained herein for each of these conditions is accurate.

If not, we request the Department clarify and provide specific language so as to provide an actionable regimen for information dissemination under these two circumstances.

Finally, we request that the Department of State incorporate the resulting actionable guidance into a revision to this NPRM and recommend republishing the changes for an additional comment period prior to finalization of rulemaking.

### **Context**

We commend the Department of State as it continues to update the regulatory regime of 22 CFR to adapt to technological changes of information dissemination. We applaud the many elements of this Notice of Proposed Rule Making that recognize the nebulous nature of the Internet and seeks to maintain and streamline pathways and procedures for the controlled dissemination of ITARS regulated articles, services and information. We believe it is congruent with the national interest for the United States to ensure state of the art

mechanisms for doing so.

We also acknowledge that within the text of this NPRM, the Department of State is struggling within the rule making process to come to terms with old rule language that is overly broad and burdensome particularly with defining where the boundary of where ITARS purview ends. We see and understand the intent of introducing concepts of “peculiarity” and “specific enumeration” into the regulatory regime to clarify the responsibilities and limits of the Department with regards to the missions of ITARS compliance management.

We realize it is a difficult process to develop rules that cover so broad a topic that can have a detrimental impact on the safety and security of the nation if executed incorrectly. We further realize that over regulation also affects the technological and economic competitiveness of the nation and observe sensitivity within the language of the NPRM care to not negatively impact that competitiveness on the world stage. Our desire in these comments is to constructively assist in furthering the process of executing the regulatory mission correctly.

### **Nature of Clarification Requested**

We are particularly interested in clarifying the definition of where the boundary of where Department of State’s authority to regulate “defense articles and services” under ITARS ends and responsibility for the control of non-ITARS articles, services and information passes back into the private economy. We note that within the private economy, what is and what is not discussed openly is affected by a combination of the U.S. 1<sup>st</sup> Amendment rules governing free speech and the competitive forces of trade secrecy in a free market.

Based on our analysis of the NPRM, we posit the following clarifying questionnaire for the consideration of the Department,

Question	Yes	No
1. Is the item a bona fide ITARS defense article per 22 C.F.R. 121.1 or a defense service per 22 C.F.R. 120.9?	Proceed to question 2	Item is not subject to ITARS.
2. Is the item or information specifically excluded from ITARS purview per 22 C.F.R. 120.11?	Item is not subject to ITARS.	Proceed to question 3.
3. Is the technical data “peculiar” to the development, manufacture, operation	Proceed to question 4	Item is not subject to ITARS.

or maintenance of the defense article or service as defined by 22 C.F.R. 120.10 that does not fail to meet the inclusion criteria of 120.10(a) and is not included in the enumerated exclusion criteria of 120.10(b)?		
4. Is the technical data peculiarly “required” to achieve or exceed the controlled performance levels, characteristics or functions shared with another defense article or service that meets the criteria of question 1?	Initiate an additional diligence test specific to each defense item identified.	Proceed to question 5.
5. Has the “peculiar” information been previously authorized for release into the public domain?	Item is not subject to ITARS.	Proceed to question 6.
6. Has a new certificate of authorization for release the peculiar information into the public domain been obtained from the Department of State?	Item is not subject to ITARS.	<b>ITEM IS SUBJECT TO ITARS.</b>  22 C.F.R. REGULATIONS REGARDING CUSTODY, HANDLING, EXPORT, REEXPORT, RELEASE, TRANSFER and RETRANSFER MUST BE FOLLOWED.

## Questions

1. Does the Department of State agree with logic interpretation of the rules for inclusion or exclusion from ITARS per the criteria enumerated above as extracted from the published language of NPRM 2015-12844?
2. We interpret the terms “peculiar” and “required” as published in the NPRM to indicate a high bar of criteria that must be positively satisfied in order for

- an item to be included as being subject to ITARS. Furthermore, we imply that failure to meet these high threshold tests indicates information shall be presumed by the Department to not be subject to ITARS unless positively determined to be so. Is this a proper interpretation?
3. For material determined to not be subject to ITARS, we believe the Department should clearly state that once determined so, whether by nature of categorization or authorized release by the Department into the public domain, the burden of control and liability passes out of the Department and into the hands of the private sector. Is this correct and will the NPRM be amended to include specific language indicating this will be the regulatory policy?
  4. Once information passes into the public domain, it is our interpretation that the modality of dissemination is immaterial to the Department; meaning, there is no difference whether the material is presented to the public via a human presentation as in a conference or training session, via a tangible publication as in a book or magazine in a library, store or mail order path, or electronic means as in the Internet or in the case of non-ITARS trade secrets, secured private networks. Is this interpretation of equality of distribution channel correct? Can the NPRM be amended to make this equivalence more clear?
  5. Finally, with respect to proposed section 22 C.F.R. 120.11, instead of waiting for a future date, should the Department of State enumerate more than a TBD list of items specifically excluded from ITARS so as to facilitate clarity for the large base of Internet consumers of public information? This would seem most appropriate given that a stated intent of this NPRM is to ease the flow of information in the first place. It seems to follow that the Department would not want to create new impediments that would trigger new and possibly more litigation laden caseload stresses on the regulatory process.

We look forward to the Department's responses to our comments.

Respectfully submitted,

/s/Dennis Santiago

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