

Toolkit for Writing Public Comments on Export Control Reform

Christopher B. Stagg
Partner, Stagg Noonan LLP

May 4, 2015

Client Alert No. 15-05-01

=====

Overview

This toolkit provides general drafting guidance and tips to assist organizations with preparing public comments in response to proposed rules for Export Control Reform under the International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR).

Responding to proposed rules with public comments is the primary method for influencing how the government will implement export control regulations. It is also a key method for seeking clarity over the intended meaning of the proposed regulations.

This toolkit concisely summarizes some of the best practices for writing public comments. It is based on my experiences at the U.S. Department of State in writing regulations under the ITAR and EAR for Export Control Reform, and in reviewing industry comments of proposed rulemaking.

Drafting

In drafting the public comment, it is essential that the comment moves immediately to the issues that are of concern. Also, the public comment response needs to be clear about what the organization wants the government to do. In particular, is the public comment seeking to delete, revise, or clarify a proposed rule? This request needs to be clear.

In moving immediately to the issues, the public comment should not spend too much space with background information about the organization. The government reviewers want to quickly identify the specific issues and recommendations.

As such, provide a short paragraph about your organization and its specific relation to how it is affected by the proposed rule. Greater details of the organization and how it is impacted by the proposed rule should be included in the discussion section.

Next, the public comment needs to identify the specific area in the proposed rule that the comment will address. After identifying the specific area of concern, provide a short sentence that summarizes the concerns and whether the government should delete, revise or clarify the regulation. For example:

Category VIII(h)(8) – The meaning of “threat-adaptive” is unclear and it could control items in normal commercial use, and it should be revised or clarified.

At this point, the public comment should summarize its concerns and requests in less than 150 words, and in block-quote format so it stands out. For example:

To summarize, we are concerned about [state concern]. We note that [briefly state the key concerns]. We request that the government [clarify/delete/revise] the proposed regulation.

This summary conforms to how the government responds to public comments in the *Federal Register*. It is intended only to provide a basic overview of the issue, the concern, and the proposed solution. It also makes it easier for the initial government reviewers to appropriately place the comment in the review matrix document. This matrix document forms the basis of discussion during the interagency meetings

Once these sections are completed, then the public comment should go into a detailed discussion by advocating its position and informing the government of its concerns with clear examples. The discussion should include a blend of policy and technical arguments in support of its position. A short conclusion should also be included.

It is a best practice to keep the discussion points to as few pages as possible. The inclusion of white papers can be used to supplement lengthy public comments. Although there is no rule on length, each concern that is expressed in the comment should be addressed within one to three pages.

Practical Tips

Alternatives. When advocating any change to a proposed rule, it is a best practice to also suggest reasonable alternatives. These alternatives include the use of different control criteria or clarifying notes. By providing alternatives, it allows the government to consider not only the impact of using the alternative criteria, but also that there might exist a middle ground.

Audience. There are several audiences within the government that will review public comments. Initially, they are reviewed by the publishing agency for placement into a matrix document for later interagency review. Once in interagency review, the comments undergo a policy and technical analysis. This is performed by different sets of reviewers and in different agencies. Thus, public comment responses must be written in consideration of these various policy and technical audiences.

Consequences. Describing the consequences on industry of the proposed rule is similar to using examples. However, a description of the consequences will enable the government reviewers to better ascertain the impact on industry. It will also help the government to uncover any potential unintended consequences, or to better understand how industry is interpreting the proposed rules. Describing consequences can strengthen the argument, and particularly in the case where the consequences are significant or the proposal would bring about unintended consequences. As a best practice, identifying the consequences to a proposed rule is most effective when articulated with specific examples.

Examples. Remember to evidence and substantiate any claims with specific examples. The number one reason for why the government rejects recommendations from public comments is because of the failure to clearly provide examples in support of the comment's argument. For instance, if the comment states that the regulation would control items in normal commercial use, then the comment must provide actual examples of what specific items the regulation would control.

Policy arguments. Framing policy reasons to support a public comment response does not have to take place in a vacuum. The government has already specified its policy criteria for whether an item should be subject to the ITAR. Specifically, it is the government's intention not to describe in the revised USML those items that are in

normal commercial use unless such items provides the U.S. with a critical military or intelligence advantage. Ideally, the comment would show how its recommendations are consistent with this policy.

Specificity. The government values responses that provide specific information over general claims. Accordingly, try to be as specific as possible. The comment also needs to clearly identify the regulatory section, the concerns, and the proposed fix.

Technical arguments. If appropriate, then include pertinent technical information to advocate your position. Remember though that not every government reviewer will have a technical background. As such, it is a best practice to start a technical argument from a level that any layperson could understand, and then proceed into more technical details.

Christopher Stagg is a Partner at Stagg Noonan LLP where he advises clients on U.S. export control laws, as well as the ongoing regulatory revisions under Export Control Reform. Mr. Stagg was previously with the U.S. Department of State where he was deeply involved in Export Control Reform. For more information, please go to www.staggnoonan.com.