



May 3, 2023

23/

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Dear [REDACTED]:

I am responding to your January 31, 2023, letter requesting an advisory opinion from the Bureau of Industry and Security (BIS) pursuant to § 748.3(c) of the Export Administration Regulations (EAR, 15 C.F.R. Parts 730-774).

Your letter requests confirmation of [REDACTED] interpretation of § 734.3(b)(3)(v) of the EAR with regard to information shared with the International Civil Aviation Organization (ICAO) during aircraft standards development. Specifically, [REDACTED] is requesting that BIS confirm that certain data generated by [REDACTED] and provided to ICAO is information that constitutes non-proprietary system descriptions, and therefore is not subject to the EAR.

According to your letter, there are two levels at which ICAO members generate and share information and data with ICAO: 1) the Working Group level; and 2) the Subcommittee level. Working Group level information may contain “technology” that may be subject to the EAR and classified under Export Control Classification Numbers (ECCNs) 7E994 and 9E991; Subcommittee level information is less detailed and is not intended for publication but serves as the basis for global standards that will be published.

According to your letter, the information and data that [REDACTED] generates and shares with ICAO at the Subcommittee level, (e.g., with the Committee on Aviation Environmental Protection (CAEP)), is generally “an aggregate of inputs intended to serve as the basis for standards that future civil aircraft will be required to meet, in this case for noise and carbon dioxide emissions. Such information must be shared amongst participants for ICAO to achieve its aviation safety and environmental objectives.”

Your letter states that the information [REDACTED] shares with ICAO at the Subcommittee level does not convey any information required for the development, production, or use of a particular item, but is:

- Shared with competitors in the course of standards setting activities;
- Intended to inform a standard that will ultimately be published; and
- Anonymized such that it is not specific to any particular product.

Therefore, [REDACTED] believes that the information it shares with ICAO members constitutes non-proprietary system descriptions as that term is used in § 734.3(b)(3)(v) of the EAR, and therefore is not subject to the EAR.



BIS notes that if the information and data that [REDACTED] shares with ICAO and its Committees does not meet the definition of “technology” as defined in § 772.1 of the EAR,<sup>1</sup> then pursuant to the Note to paragraph (b)(3) in § 734.3(b)(3), it would not be subject to the EAR. That Note states: “Except as set forth in part 760 of this title, information that is not within the scope of the definition of “technology” (see § 772.1 of the EAR) is not subject to the EAR.” The data included with your letter in Attachment A does not meet the definition of “technology,” therefore, it is not subject to the EAR.

However, in your letter, [REDACTED] requests that BIS confirm that the information and data generated by [REDACTED] and provided to ICAO is information that constitutes non-proprietary system descriptions as described in § 734.3(b)(3)(v). Although non-proprietary system descriptions are not further defined in the EAR, guidance on what BIS considers to be non-proprietary can be found in the preamble to a final rule published June 3, 2016, titled “Revisions to Definitions in the Export Administration Regulations” (81 FR 35586). The preamble of that rule stated that: “Whether a particular technology is one that the possessor would readily share with competitors provides a fairly reliable test of whether that technology is subject to the EAR.” BIS would consider the same general principle to apply to a non-proprietary systems description, since the purpose of the exclusion in § 734.3(b)(3)(v) of the EAR is to avoid subjecting to the EAR’s controls general information that is insufficiently detailed or precise to be of use in the “development,” “production,” or “use” of the product to which it relates.

Therefore, provided that the information and data that [REDACTED] shares with ICAO and its Committees are not necessary for the “development,” “production,” or “use” of any item classified in an ECCN on the Commerce Control List (CCL), or in the alternative, that they describe the performance of one or more platforms, and are intended to be shared with competitors, then they would not constitute “technology”, or alternatively, would be a non-proprietary system description as that term is used in § 734.3(b)(3)(v) of the EAR. If either scenario applies, then the information and data that [REDACTED] shares with ICAO and its Committees would not be subject to the EAR.

In rendering this opinion, BIS has relied upon the information provided in your letter of January 31, 2023. Any change in the facts and circumstances, as presented in your letter and restated in this advisory opinion, may implicate different regulatory obligations, including potential licensing requirements, under the EAR. If you have questions regarding any aspects of this advisory opinion, please contact Susan Kramer at Susan.Kramer@bis.doc.gov.

Sincerely,

*Hillary Hess*

Hillary Hess, Director  
Regulatory Policy Division

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<sup>1</sup>Technology means: Information necessary for the “development,” “production,” “use,” operation, installation, maintenance, repair, overhaul, or refurbishing (or other terms specified in ECCNs on the CCL that control “technology”) of an item.

