



An OSI Systems Company

February 1, 2012

Daniel Mullaney
Assistant U.S. Trade Representative for
Europe and the Middle East
600 17th St., N.W.
Washington, DC 20508

Re: *Docket No. USTR-2012-0001:*
U.S.-EU High-Level Working Group on Jobs and Growth

Dear Mr. Mullaney:

On behalf of Rapiscan Systems, Inc. (“Rapiscan”), we submit these comments in response to the Office of the United States Trade Representative’s (“USTR”) January 11, 2012 *Federal Register* notice inviting interested parties to submit comments on topics that should be taken up by the newly formed U.S.-EU High-Level Working Group on Jobs and Growth (“Working Group”).

As summarized in USTR’s request for comments, the mandate of the Working Group includes the “[r]eduction, elimination, or prevention of unnecessary ‘behind the border’ non-tariff barriers to trade in all categories.” We wish to bring to your attention two such barriers which have impeded our company’s ability to sell passenger screening equipment in EU markets. The barriers are (1) a technical regulation adopted by the European Commission in November 2011 that discriminates, without any scientific basis, against passenger scanners that use ionizing radiation (*i.e.*, X-ray), and (2) the unfair and unjustified use of sole sourcing in airport procurements. The combined impact of these barriers so far has been to exclude exports worth \$50,000,000 from the EU, affecting approximately 75 jobs in the United States. We expect the impact to be even greater as long as these barriers remain unaddressed.

Our Company

Rapiscan is a California corporation with its headquarters in Hawthorne, California. It is a wholly-owned subsidiary of OSI Systems, Inc. (“OSI”), which also is a California corporation headquartered in Hawthorne, California. Rapiscan is the leading supplier of cargo and passenger screening equipment to airports and other customers around the world. Since it began doing business in 1993, Rapiscan has installed over 60,000 screening products in more than 50 countries. Its customers include both private and government entities, including the U.S.

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Departments of Defense and Homeland Security. Rapiscan employs more than 300 people in the United States and exports goods and services worth approximately \$250,000,000 per year.

EU Non-Science-Based Technical Regulation

The first EU non-tariff barrier we would recommend for inclusion on the Working Group's agenda is a regulation the European Commission ("Commission") adopted on November 10, 2011, concerning the use of passenger security scanners in EU airports ("the Security Scanner Regulation").¹ The European Commission had established EU-wide standards for civil aviation security in April 2009.² The regulation it adopted then set forth a list of permitted methods for the screening of passengers at EU airports including (a) hand search; (b) walk-through metal detection equipment; (c) hand-held metal detection equipment; (d) explosive detection dogs; and (e) explosive trace detection equipment.

In December 2009, the "underwear bomber" incident (involving an individual who carried plastic explosives on a plane bound from Amsterdam to Detroit) prompted EU airport authorities to begin testing passenger security scanners to detect metallic and non-metallic objects. Testing was done at airports in Finland, France, Germany, Italy, the Netherlands, and the United Kingdom and included scanners using two different types of technology: (1) ionizing radiation (also known as "backscatter" or X-ray), and (2) millimeter wave. The tests showed ionizing radiation to be the more effective technology, resulting in fewer "false negatives" (*i.e.*, failing to detect objects on a passenger's body) and fewer "false positives" (*i.e.*, erroneously indicating a potential threat where none exists).

Notwithstanding these tests, the European Commission adopted the Security Scanner Regulation, which added security scanners to the list of approved passenger screening methods, but only "security scanners which do not use ionising radiation." The rationale for excluding scanners that use ionizing radiation is unstated but appears to be health-based, although no scientific studies have established the existence of any health risk. In fact, studies conducted in the United States, United Kingdom, France and Germany, including by the U.S. Food and Drug Administration and Johns Hopkins University, have determined that there is no health risk. The European Commission has asked its Scientific Committee on Emerging and Newly Identified Health Risks to do its own study. That Committee's report is due in March 2012.

The EU exclusion of X-ray technology for passenger screening is a non-science-based technical barrier to trade. Many countries have successfully and safely deployed backscatter systems at airports; the Transportation Security Administration ("TSA") has deployed over 300

¹ Commission Regulation (EU) No 1141/2011, amending Regulation (EC) No 272/2009, 2011 O.J. (L293) 22. *See also* Commission Implementing Regulation (EU) No 1147/2011, 2011 O.J. (L294) 7.

² Commission Regulation (EC) No 272/2009, 2009 O.J. (L91) 7.

systems in the United States, and the systems have been deployed at large airports in the United Kingdom.³ The EU exclusion has no basis in science, health, or security and is inconsistent with the EU's obligations under the World Trade Organization ("WTO") *Agreement on Technical Barriers to Trade* ("TBT Agreement"). In particular, Article 2.2 of the TBT Agreement requires the EU to "ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade." The Security Scanner Regulation is a "technical regulation" within the meaning of the TBT Agreement: it is a "[d]ocument which lays down product characteristics . . . with which compliance is mandatory."⁴ By discriminating among passenger scanners based on the technology the scanners incorporate, the regulation creates an unnecessary obstacle to international trade.

This obstacle is not justified by any of the TBT Agreement's exceptions. While protection of human health – the purported basis for the EU's discriminatory measure – is indeed a legitimate objective under Article 2.2 of the TBT Agreement, the EU has failed to establish that discriminating against scanners that use ionizing radiation is "not . . . more trade-restrictive than necessary to fulfill" that objective. It has not given consideration to "available scientific and technical information," as Article 2.2 requires it to do. Neither the regulation nor the Commission's press release that accompanied its issuance cites any such information.⁵ Further, the Commission not only apparently ignores the scientific and technical information available in the aforementioned U.S. studies, it openly acknowledges that the EU's own scientific study has yet to be completed. Thus, by its own admission, the Commission has rushed to adopt a regulation without first considering the relevant scientific and technical information.

Rapiscan estimates that there will be demand for approximately 3,200 passenger security scanners at airports in the EU. Taking account of both the equipment and the services associated with installation and maintenance of the equipment, the EU market is worth approximately \$640,000,000. But for the Security Scanner Regulation, Rapiscan would be eligible to serve that market, including through the supply of goods and services produced in the United States. The Regulation is expected to result in \$200,000,000 in lost exports from the United States, affecting 150 – 200 U.S. jobs.

The Security Scanner Regulation is ideally suited for consideration by the Working Group. Among other goals, the Working Group has been tasked with examining options for the "[r]eduction, elimination, or prevention of unnecessary 'behind the border' non-tariff barriers to

³ The UK deployment was part of a pilot program, prior to issuance of the Security Scanner Regulation. UK airports are permitted to continue using the scanners as an exception to the general rule against scanners using backscatter technology.

⁴ TBT Agreement, Annex 1, para. 1.

⁵ See European Commission, Press release, *Aviation security: Commission adopts new rules on the use of security scanners at European Airports*, IP/11/1343 (Nov. 14, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1343>.

trade in all categories” as well as the identification of “opportunities for enhancing the compatibility of regulations and standards.” The EU’s discriminatory regulation on security scanners is a quintessential behind-the-border, non-tariff barrier to trade, unsupported by scientific evidence and inconsistent with U.S. and international standards. We urge that it be addressed by the Working Group.

Discriminatory Airport Procurements

The second EU non-tariff barrier we would urge be included on the Working Group’s agenda concerns the exclusion of U.S. suppliers, such as Rapiscan, from bidding on procurements by EU airport authorities. Recently, Rapiscan was prevented from bidding on two major airport procurements in Germany. First, in the spring of 2010, the Procurement Office of the Federal Ministry of the Interior (*Beschaffungsamt*) adopted technical specifications for the procurement of passenger screening equipment at the Berlin Brandenburg International Airport that effectively prevented Rapiscan from bidding and ensured that the contract would be awarded to the German division of UK-based Smiths Detection. Then in August 2011, the same office issued a sole source contract to the same supplier (Smiths Heimann GmbH) for the supply of passenger screening equipment at the Frankfurt International Airport.

These two exclusions of Rapiscan from major airport procurements in the EU occurred despite the fact that the U.S. Transportation Security Administration routinely opens its procurements to European suppliers, even though it was not required to do so under the WTO *Agreement on Government Procurement* (prior to the recently concluded revision of that agreement). Such exclusions also are inconsistent with Directive 2009/81/EC of the European Parliament and Council, which generally requires procuring authorities in EU Member States to open procurements for defense and security equipment to competitive bidding on the basis of reciprocity.⁶

Rapiscan estimates that its exclusion from the two German procurements mentioned above prevented about \$32 million in exports from the United States.

Rapiscan is not suggesting that the Working Group serve as an appellate body to review the two German procurements or any other particular procurements. However, the Group should examine ways to prevent selectivity in government procurement from operating as a barrier to trade, as it did in the case of these recent procurements. At a minimum, the Working Group should consider measures to ensure that U.S. suppliers have the same opportunities in the EU that European suppliers have in the United States.

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⁶ 2009 O.J. (L216) 76.

Thank you for your consideration of these important issues. I am available to discuss them with you and your staff at your convenience.

Sincerely,

A handwritten signature in black ink that reads "Peter Kant". The signature is written in a cursive style with a large initial "P" and a long, sweeping underline.

Peter Kant
Executive Vice President
Rapiscan, Systems, Inc.