From: Ken Montgomery <ken.montgomery@techamerica.org>
To: PublicComments@bis.doc.gov
Date: Mon, Feb 7, 2011 5:48 PM
Subject: ATTN: RIN 0694-AF03 - Strategic Trade Authorization LicenseException

To: Regulatory Policy Division, Bureau of Industry and Security

Re: ATTN: RIN 0694-AF03 - Strategic Trade Authorization License Exception

Please accept the attached comment letter on behalf of the 1200 members of TechAmerica.

Best regards,

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February 7, 2011

Sent via email to: publiccomments@bis.doc.gov

Regulatory Policy Division
Bureau of Industry and Security
Room 2705
U.S. Department of Commerce
Washington, DC 20230

RE: Federal Register: December 9, 2010 (Volume 75, Number 236)
RIN 0694-AF03

Export Control Modernization: Strategic Trade Authorization License Exception

Dear Sir or Madam:

TechAmerica would like to thank the Department of Commerce and the interagency task force for the tremendous amount of work that has been done so far in support of the Administration's Export Control Reform Initiative.

TechAmerica appreciates the opportunity to comment on this and forthcoming proposed regulations. The involvement of industry in the reform effort will ensure the resulting export control system is streamlined in a way that more effectively addresses national security concerns in an era of globalization, while making the system more transparent and efficient for the government and regulated community.

Please accept our comments below which include policy principles, criteria for controlling end items, parts and components and technology and software, as well as the proposed rule which would add a new license exception to the Export Administration Regulations (EAR). This Strategic Trade Authorization (STA) exception would allow exports, reexports and transfers (in-country) of specified items to destinations that pose little risk of unauthorized use of those items.

Policy Principles

* Consistent with the Administration's goal of avoiding an overly broad and complex export control system, the Administration should adopt positive lists that consist only of sensitive items that are susceptible to effective control. The positive list should apply only to end items, allowing controls on associated sensitive parts/components, software and technology to be applied as specified below.

* To this end, products, equipment, systems, parts, components, software and technology that are or will become widely available or accessible, or are otherwise not susceptible to effective control, should be classified under EAR99 except under very narrow and justifiable circumstances. Similarly, items should not be subject to Tiers 1-3 controls where broad foreign availability or capability exists.

* Restructure the CCL to align with the format of the revised USML. In particular, a CCL category should focus primarily on identification of end items that produce a significant, substantial or critical military or intelligence advantage. Parts, components, technology or software would only be subject to control as a subcategory of a listing for an end item, but only if they are peculiarly responsible for the specific features of the end item that produce a military or intelligence advantage (see specific criteria below).

* Considerations that should inform the Administration's proposed criteria for placing items within the 3-tier control structure should include:

- An application of foreign availability that includes whether equivalent foreign items and capabilities exist, as well as other relevant factors, including but not limited to the degree to which an item is available or accessible through commercial channels outside the U.S.
- Tier 1 and 2 controls should apply to items that have an inherent military or intelligence capability. In particular, the controls should apply to items with functions/capabilities that are peculiarly responsible for critical or substantial military/intelligence applications.
- All other items subject to control under the 3-tiered structure should fall under Tier 3.
- Items where companies hold CCATs or other rulings indicating products are EAR99 should continue to stand since items don't fall under any of the Tiers on the new control list.
- Ensure that positive control list parameters for sensitive end items are predicated upon precise, clear, objective and positive criteria. If control metrics for an item cannot be articulated in objective, unambiguous and positive standards, the items should not be subject to Tier 1-3 controls.

* Technical export control parameters should be continuously reviewed with a view toward swiftly updating those parameters that are overtaken by technological advances, wide availability and foreign availability.

* The new 3-tier list structure should contain descriptions and criteria that avoid subjecting items to export controls that are more stringent than they are today. In addition, the removal of terms like "specifically designed" should not result in the broadening of controls.

* The new export control system should comport with multilateral agreements and disciplines.

Criteria for Controlling End Items

* An end item should only be controlled within with the 3-tiered CCL structure if it possesses characteristics that are directly related or essential to the creation of a critical, substantial or significant military- or intelligence-related advantage. Such items are contemplated in the Wassenaar Sensitive and Very Sensitive lists.

* An end item should fall under EAR99 if it is not directly related or essential to the creation of a military/intelligence advantage.

* An end item should also fall under EAR99 if it meets the wide availability, controllability and broad foreign availability guidelines stated in the second policy principle above. For example, scalar computers should fall under EAR99, given the broad foreign availability of such computers and advanced capabilities that exist outside the U.S., including China (see www.top500.org).

Criteria for Controlling Parts and Components

* Parts and components, such as semiconductors, should not be subject to a separate control category, but rather should be controlled in association with the end products, systems or equipment in which they are to be incorporated. In that case, the parts and components should only be controlled when peculiarly responsible for the specific features of an end item that produce a military or intelligence advantage[1].

* Parts/components that are not general purpose, or are not generally commercially applied, should fall within Tier 3 if they are: (1) specially designed for (i.e., used exclusively in) a defense article; and (2) peculiarly responsible for enabling military/intelligence applications. In the area of integrated circuits, only those devices considered by the industry as either application specific ICs (JEDEC definition of an "ASIC") or "custom" ICs (an integrated circuit developed or produced to conform to a single customer's unique requirements) and are peculiarly responsible for enabling military/intelligence applications should be controlled on the CCL and fall within Tier 3 when peculiarly responsible for the specific features of an item that produce a military or intelligence advantage. Parts/components should not fall within Tiers 1 or 2, given their

[1] Inconsequential characteristics such as radiation tolerance, quality screening, packaging, and temperature resistance should not be considered "peculiarly responsible" for the features of a military or intelligence end item and should not trigger control for semiconductors or integrated circuits.

inability to make a military/intelligence contribution without first being incorporated into downstream products, systems or equipment.

* Parts/components that are general purpose or generally commercially applied, including ICs that are not ASICs or "custom" ICs, should be classified as EAR99. General purpose parts/components by themselves have no inherent military or intelligence capability; in addition, parts/components that are generally commercially applied are civilian in character and, hence, cannot by definition be peculiar to military or intelligence applications.

* Parts and components that meet the wide availability, controllability and broad foreign availability guidelines stated in the second policy principle above should fall under EAR99.

Criteria for Controlling Technology and Software

* Software and technology should only be controlled within Tiers 1-3 to the extent they are peculiarly responsible for enabling a feature of an end item that provides a critical, substantial or significant military- or intelligence advantage.

* Software and technology that are general purpose or generally commercially applied should be classified as EAR99. General purpose software and technology by themselves have no inherent military or intelligence capability; in addition, software and technology that are generally commercially applied are civilian in character and, hence, cannot by definition be peculiar to military or intelligence applications.

* Software and technology subject to the EAR that meet the wide availability, controllability and broad foreign availability guidelines stated in the second policy principle above should fall under EAR99.

* Tier 1-3 controls should not apply to “use” technology, including technology that is the minimum necessary for the installation, operation, maintenance (checking) and repair of those items which are not controlled or whose export has been authorized.

Definitions

For purposes of the above architecture, TechAmerica believes that the terms parts, components and end items should be defined as follows:

Part/Component – An input, part, piece, subassembly or ingredient of an end item.

End Item – A final combination of components/parts, and/or materials in the form of a product, system or piece of equipment that is ready for its intended use (e.g., ship, aircraft, magnetometer, launch vehicle, marine acoustic system, milling machine).

License Exception STA

TechAmerica would like to thank the Department of Commerce for evaluating and proposing new approaches to exporting low risk items to low risk countries by utilizing license exceptions versus individual licenses. We would also like to encourage the Department of Commerce to consider additional non-licensing mechanisms such as the validated end-user program, intracompany licensing and "open licenses" that are used in the United Kingdom.

At this time while there continue to be separate Dual-Use and Military control lists, the benefits of license exception STA are not readily distinguished from existing EAR license exceptions such as GBS and CIV. Unless it is clear to the exporter that using STA has benefits over using existing, familiar license exceptions that do not require incremental statements or procedures, then it is doubtful that the new exception will be used.

Moreover, creating a unique Destination Control Statement for this license exception will likely create costly export system change requirements, and create confusion for the overseas customer. The overseas customer who is re-exporting may realize he/she can use alternate US re-export license exceptions and thus be confused by the additional language and decide that using US-sourced product is not worth the uncertainty and potential liabilities.

TechAmerica is also concerned over language in the STA proposal that creates potential for including ECCN 3A001 items in Tier 1 of a restructured Commerce Control List. The inclusion of 3A001 items in Tier 1 would run counter to the principles articulated above for the treatment of parts and components, and would result in excessive controls that run counter to the Administration's objective of making export controls more selective and effective. Because the integrated circuits covered by 3A001 items are only part of subassemblies integrated into end items, they should be subject to a lesser degree of control than end items.

TechAmerica would like to thank the Department of Commerce for the opportunity to provide comments on Export Control Modernization and proposed license exception STA.

Sincerely,

Ken Montgomery
Vice President, International Trade Regulation