From: Catherine Robinson <CRobinson@nam.org>
To: WARVIN@bis.doc.gov; PublicComments@bis.doc.gov
Date: Tue, Feb 8, 2011 7:53 AM
Subject: Comments on the proposed STA license exception--RIN 0694-AF03

To Whom It May Concern:

Please find attached the NAM's comments on the proposed STA license exception-RIN 0694-AF03<http://www.federalregister.gov/r/0694-AF03>.

Thank you

Catherine Robinson, Esq.
Director High Tech Trade Policy, International Economic Affairs
Direct: (202) 637-3403
Cell: (202) 277-7502 (PLEASE NOTE NEW CELL PHONE NUMBER)
Email: crobinson@nam.org

Click here to see what is new at nam.org<http://www.nam.org/>

[cid:image001.png@01CBC6ED.31500E30]<http://www.nam.org/>

NATIONAL ASSOCIATION OF Manufacturers

Franklin Vargo

Vice President
International Economic Affairs

February 7, 2011

The Honorable Eric Hirschhorn
Under Secretary
Department of Commerce
Washington, DC 20230

Re: Export Control Modernization: Strategic Trade Authorization License Exception, RIN 0694-AF03

Via email: publiccomments@bis.doc.gov

Dear Under Secretary Hirschhorn:

The National Association of Manufacturers (NAM) welcomes the opportunity to comment on the proposed rule published by the U.S. Department of Commerce, Bureau of Industry and Security (BIS) (RIN 0694-AF03) regarding the strategic trade authorization (STA) license exception (hereinafter "the proposed rule").

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Our members play a critical role in protecting the security of the United States. Some are directly engaged in providing the technology and equipment that keep the U.S. military the best in the world. Others play a key support role, developing the advanced industrial technology, machinery, and information systems necessary for our manufacturing, high tech, and services industries.

The NAM is particularly interested in the proposed rule. Successful modernization of the U.S. export control system should focus not only on "what" is controlled, but also on "how." As the interagency task force continues its work on identifying appropriate levels of control for goods, services, and technologies, we encourage the Administration to move forward simultaneously on reforming and streamlining the mechanisms and techniques used to manage licensing. This proposed rule represents the first of what we hope will be several new licensing policies.

The current over-reliance on transaction-by-transaction licensing is particularly anachronistic in light of increasing collaboration with allies and partners, synchronization of control regimes around the world, ever-expanding intra-company trade, and significant increases in the number of license applications. In fact, the NAM identified reform of the "how" as its first reform recommendation for dual-use controls. This is particularly important in light of the expected increase in the volume of license applications BIS will receive once the review of the United States Munitions List (USML) is complete and items and technologies are moved to the Commerce Control List (CCL).

It is important to address the expected significant growth rate proactively so that BIS is not faced with a similar situation experienced by the State Department in 2007 with a 10,000 case backlog. Therefore it is critical for BIS to minimize the use of a transaction-by-transaction approach towards licensing dual-use exports. As the volume continues to increase, as well as the complexity of the applications, this approach will no longer serve the needs of the government or industry. For these reasons, we are supportive of the STA and hope it is the first of many new licensing mechanisms to be unveiled as part of the new three tier licensing system.

For numerous companies, the proposed rule is a sensible approach towards aligning export risk with regulatory burdens and national security concerns. It permits eligible low risk items to be shipped to allies and friendly countries under a process that provides regulator insight to the transaction and explicitly notifies end-users of their obligations regarding re-export and in-country transfers, while at the same time removing tedious individual licenses. In addition to STA, BIS should develop licensing policies for items in the proposed tiers 2 and 3 that provide additional flexible authorization mechanisms such as validated end user, intra-company and program licensing, and use of an "open license" similar to that used in the United Kingdom.

While we support the concept of STA and appreciate the work of BIS and the interagency team, the STA does have limitations which we discuss below. We provide one general comment followed by several specific to the STA.

1. Need for Ambitious Licensing Policies.

As we have stated, the NAM fully endorses new licensing mechanisms that move away from a license-by-license approach. In doing so, we believe the Commerce Department and the President's reform initiative need to "think big." While we recognize that changing the status quo is no simple task, we also firmly believe that reforms or changes to the current system must be ambitious and represent substantial change from the government's current policies.

We are concerned that the STA, while useful, is too conservative. We offer this concern in light of comments provided by government officials stating that the STA is a "conservative tier 2 licensing policy" and that the STA will replace the current "GBS" license exception, which will no longer exist once the Commerce and State Departments merge their respective control lists. As proposed, BIS expects the STA exception to reduce its licensing burden by 3,000 licenses. While this is not insignificant, it is not a large portion of the low-risk licensing volumes currently facing BIS.

Modifications to the STA and additional licensing policies are needed to fundamentally change how the current system operates. We encourage the Commerce Department and the Administration's working group to create new licensing mechanisms that move beyond conservative proposals and/or the repackaging of existing policies to fit within the new construct. This reform initiative is uniquely different from past reform efforts, and we believe it is critical for the government to use the current momentum to usher in new licensing policies that are both ambitious and place higher walls around fewer products while improving transparency, efficiency, and effectiveness.

One such licensing policy is the highly desired intra-company transfer (ICT) license exception. The NAM remains supportive of implementation of an intra-company transfer license exception — not the 2008 proposed rule, per se, but of the concept more generally. We recognize that as proposed in 2008, the ICT would not have been utilized by the majority of companies eligible, but this does not undermine the concept or the potential such an exception could have on lowering licensing volumes for low-risk trade. Restarting interagency work on a new ICT is exactly the level of ambition we believe this reform initiative should undertake.

While we recognize the Commerce Department is seeking comments on dual-use licensing mechanisms, as the two lists are merged, it is important to discuss licensing mechanisms that will exist for dual-use and defense items. At the State Department, we encourage the government to streamline the management of licensing for those government-mandated defense and security programs in which success depends on effective collaboration and technology exchanges with allies and partners. In the context of a given program, the government should consider – ideally at program inception -- what technologies it wants to share, with whom, and under what conditions. A successful "streamlined" approach to licensing in this context must not be limited to components and spares for completed systems. Rather a "programmatic" framework, or plan, would cover all transactions within a given scope (technologies, parties), other than those involving the most sensitive technologies. Once such an authorization is approved and notified to Congress, no further approvals should be required for transactions covered within the scope of the authorization.

Lastly, ambitious licensing policies should not be created based only on the expected decrease in licensing volumes, but rather in tandem with a decrease in individual licenses and improving the perceptions abroad that U.S. manufacturers are dependable business partners. This combination will result in higher fences around fewer, more critical, items and technologies while increasing export opportunities for U.S. manufacturers. The current licensing policies have created a negative perception of U.S. manufacturers abroad, with many partners including contract provisions that design-out U.S.-made parts and components due to the lack of transparency and efficiency in the current system.

In short, while we appreciate the effort and work on the STA, we do not believe it reaches the level of ambition we believe this review initiative is capable of achieving.

2. Utility may be Outweighed by Clunky, Overly Burdensome Requirements

The NAM applauds the Commerce Department for taking the initiative to begin moving away from a transaction-by-transaction approach. However, the STA may not be as attractive to manufacturers as the agency desires. The response from the NAM's broad and varied membership is diverse but one theme is consistent—there are some good ideas contained within the proposal but our company will only be able to use the STA for a small portion of our license volume, if at all. Additionally, depending on the company, some view STA 1 (available for transactions subject to multiple control reasons) as desirable, while others see little to no value. On the flip side, numerous companies that view STA 1 of little to no value believe that STA 2 (available for transactions subject to National Security (NS) controls) has potential to alleviate some licensing volumes. Still others believe the STA is clunky in operation, places too many limitations on the export control classification number (ECCN) and destinations, and puts into place burdensome notification, destination control statements and consignee statement requirements that will likely lead many manufacturers to avoid using the STA. The bottom line: more work is needed to make the STA more attractive and useful to companies.

3. Simplify Consignee and Destination Control Statement Requirements

As currently structured, the STA is really two individual license exceptions applicable to two different sets of countries and items or technologies, based on the reason for control. As noted above, the NAM refers to STA 1 as the exception applicable to exports subject to multiple reasons for control such as NS and chemical-biological (CB), and STA 2 as the exception applicable to exports subject only the NS controls. The STA rulemaking compensates for these distinctions by applying STA 1 to a significantly smaller group of countries than is permitted under STA 2.

In order for companies to use either STA 1 or STA 2, they must provide: 1) the ECCN to the consignee; 2) a prior consignee statement containing the ECCN, an understanding that the items/technologies are not eligible for the APR license exception, and a statement that the goods can not be exported contrary to U.S. export control restrictions, among others; and 3) a destination control statement. This is going to require significant change to current internal control plans and numerous documents and training protocols. To do so, manufacturers will have to use limited financial resources to meet the requirements. Unfortunately, as currently structured, the costs outweigh the benefits of using the STA for many companies.

The NAM recommends that the STA be amended to reflect that the information requested is already provided to the consignee instead of creating new additional, duplicative processes. Manufacturers already provide destination control statements, have processes in place that include informing the consignee not to export, reexport, or transfer items to any destination, use, or user prohibited by the Export Administration Regulations (EAR), and stating that the APR license exception is not applicable. Moreover, both the destination statement and ECCN number are provided to the consignee on the invoice and airway bill. Basically, the new requirements are repackaging information that manufacturers already make available to both the government and consignees. We ask for changes to the STA to remove duplicative requirements on consignees and exports by not requiring a prior consignee statement. This request is consistent with Secretary Gates' theme of creating higher fences around fewer items to support national security and U.S. exports.

4. Consistent Applications with Existing Controls and Policies

The lack of clarity or consistency with other provisions of the EAR also makes the STA less attractive. First, as part of the prior consignee statement, consignees are required to state that they will only use the items/technologies for "civil end use" purposes. The proposed rule defines "civil end use" as an end-use other than a military end-use as defined in section 744.21(f) or a proliferation activity described and prohibited by part 744 of the EAR. This definition essentially takes the definition from the 2007 China End-Use Rule and applies the foreign policy behind that rule to a significantly larger group of countries that are not subject to the same foreign policy controls as China. This application is not consistent with treating countries differently based on our foreign policy. Clearly our foreign policy objectives for STA countries are vastly different than with China.

Second, the proposed rule requires manufacturers to list the destination control statement on all export documents whereas section 758.6 of the EAR only requires the destination control statement to "be entered on the invoice and on the bill of lading, air waybill, ***or*** other export control document that accompanies the shipment from its point of origin in the United States to the ultimate consignee or end-user abroad." We believe the proposed rule should be consistent with section 758.6 and, therefore, the "and" in the proposed rule should be changed to an "or."

5. Level of Control

The NAM understands the need to build higher fences around more critical items and technologies and believes that is an important foundation for this reform initiative. We do, however, offer the following comments on how several ECCNs are being categorized.

The NAM is concerned over text in the STA proposal that establishes potential for including ECCN 3A001 items in tier 1 of a revised Commerce Control List. 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. The inclusion of 3A001 items in tier 1 would produce overreaching controls that conflict with the Administration's objective of making export controls more selective and effective.

Also the STA exception appears overly conservative in its exclusion of ECCNs 6A002, 6A003, and 9A018. While there are very sensitive portions of 6A002 and 6A003, there are other parts of these ECCNs that have significant foreign availability in both regime partner and non-regime partner nations. Equivalent non-space qualified focal plane arrays in 6A002a2 and 6A002a3, for example, are available from several European manufacturers. The cameras containing those focal plane arrays (6A003b) are currently available world-wide from vendors in Europe, the Middle East, the Pacific, and most notably China. Regarding 9A018, it covers everything from military trainer aircraft to military trucks and trailers. The items in 9A018b are non-combat ground transport vehicles and trailers, and like the items in 6A002a2, 6A002a3, and 6A003b, have world-wide availability. We recommend the ECCNs 6A002a2, 6A002a3, 6A003b, and 9A018b be included in this new exception.

In conclusion, the NAM appreciates the opportunity to provide comments on the STA and is supportive of new licensing policies; but encourages BIS and the Administration to be more ambitious and make changes to the STA that will increase its utility.

Thank you,

Frank Vargo