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United Technologies

September 13, 2011

Regulatory Policy Division
Bureau of Industry and Security
Room 2099B
U.S. Department of Commerce
14th St and Pennsylvania Ave., NW
Washington, D.C. 20230

Attn: RIN 0694-AF17

Re: Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control under the United States Munitions List (76 Fed. Reg. 41958, July 15, 2011)

Dear Mr. Mooney:

United Technologies Corporation ("UTC")[1] appreciates the opportunity to submit these comments on the Bureau of Industry and Security's ("BIS") proposed rule seeking comment on revisions to the Export Administration Regulations ("EAR") regarding the control of items the President determines no longer warrant control under the U.S. Munitions List ("USML"). The notice seeks input on the changes to the EAR to address the movement of items from the USML to the Commerce Control List ("CCL").

UTC strongly endorses the Administration's Export Control Reform Initiative, and its stated goal of strengthening national security and the competitiveness of key U.S. manufacturing and technology sectors by focusing on current threats and the changing technological landscape. Of paramount importance in achieving this goal is reforming both the U.S. Munitions List ("USML") and the Commerce Control List ("CCL"), and aligning associated export licensing policies, to achieve a more positive, transparent and predictable structure that concentrates munitions and dual-use export controls on the most sensitive items. The alignment and tiering of the USML and CCL, and the transfer of militarily less significant items to CCL control, would facilitate UTC's ability to compete more effectively in the international marketplace while maintaining and enhancing U.S. national security and foreign policy objectives.

[1] UTC is a global, diversified corporation based in Hartford, Connecticut, supplying a broad range of high technology products and services to the aerospace, power generation, security, transportation, and building systems industries. UTC's companies are industry leaders, among them Hamilton Sundstrand aerospace and industrial systems; Pratt & Whitney aircraft engines, space propulsion systems and industrial turbines; Sikorsky helicopters; Carrier heating, air conditioning and refrigeration systems; Otis elevators and escalators; UTC Fire & Security electronic security and fire safety systems; and UTC Power fuel cell and power systems. With 2010 revenues of $54.3 billion, UTC is the 44th largest U.S. corporation.

As the proposed rule recognizes, the current USML structure and "catch-all" jurisdictional standards reach far too broadly, imposing controls on countless parts, components, assemblies, attachments and accessories of military products and their associated technologies that have little or no military significance and are indistinguishable from commercial counterparts that are widely available globally. The over-control of vast numbers of parts and components under the USML puts enormous pressure on the defense trade licensing and compliance systems, requiring exporters and their global suppliers, partners and customers to manage life-cycle controls under the rigorous requirements of the International Traffic in Arms Regulations ("ITAR"). Managing these requirements demands significant licensing and compliance resources, and hinders the speed, efficiency and effectiveness of international programs with allies and regime partners. As such, the present system imposes excessive costs on U.S. exporters and recipients of controlled goods and services, constrains international competiveness, and impedes collaboration with U.S. friends and allies with no commensurate benefit from the standpoint of protecting U.S. national security interests.

Consistent with the President's export reform objectives and the ongoing Defense Department-led interagency review of the USML, the proposed rule is a critical step towards implementing meaningful reforms of the export control lists. UTC supports the broad movement of militarily less significant end-items, parts and components, including but not limited to so-called "generic" parts and components (e.g., nuts, bolts, fasteners, etc.), to the jurisdiction of the Export Administration Regulations ("EAR"). However, items moved to EAR jurisdiction should be subject to controls on the CCL only to the extent that national security and foreign policy considerations clearly warrant control by the U.S. Government, which include maintaining our commitments in the Wassenaar Arrangement or other multilateral export control regimes. Where CCL controls are warranted, under existing ECCNs or the proposed "600 series," they should be carefully calibrated to the significance of the items and applied so as to maximize eligibility for license exceptions to U.S. friends, allies and regime partners. Certain modifications to the proposed rule are needed to fully realize these objectives.

## A. General Comments on the Proposed Rule

The proposed rule for the movement of items from the USML to the CCL would make extensive changes to the EAR and the CCL. The proposal touches on 15 parts of the EAR, and establishes a framework with complex interactions among new and existing ECCNs, license exceptions, *de minimis* principles, and definitions in Part 772. As a general matter, the Commerce Department should allow for supplemental comments on this framework as future proposed changes to USML categories and their corresponding CCL changes are published. Our comments below follow the general sequence (but not the numbering) set forth in the Supplemental Information description of the proposed rule.

### 1. Addition of the "600 Series" ECCNs to the CCL

The proposed rule provides a reasonable process for the control of items as they transition from the USML to either existing AT-only ECCNs or to the proposed "Commerce Munitions List" 600 series ECCNs. A significant portion of the items produced by UTC

companies subject to current ITAR licensing requirements falls under USML Category VIII – Aircraft and Associated Equipment. Of the volume of licenses in calendar year 2010, nearly 82 percent of license submissions involved defense articles – parts, components, accessories, attachments and associated equipment – currently falling under subcategory VIII(h) and other parts and components "catch-all" subcategories on the USML. We believe many of these items would migrate to the 600 series, falling within the "x" category for parts and components "specially designed" for commodities enumerated in series 600 ECCNs or in the USML, or the "y" category for parts and components also "specially designed" but that have little or no military significance. Still other parts and components, including but not limited to standard, generic, off-the-shelf parts,[2] should appropriately fall outside of the 600 series consistent with the intent of list reform. As discussed below, the definition of "specially designed" is absolutely critical to the new control structure for parts and components and, we believe, in its proposed form does not meet the Administration's objectives for list reform.

As an example, a UTC business unit manufactures smoke, overheat, explosion and fire detection and suppression products for civil and military air and land platforms. Generally speaking, these systems utilize the same technologies and perform identical functions regardless of the specific platform application. However, these products typically are modified in form or fit (*e.g.*, size, shape, sensor length and setting) for the particular platform application, including for military vehicles controlled in USML Category VII.

Under the proposed new ECCN 0A606 – Ground vehicles, "parts" and "components", fire detection and suppression systems are not specifically enumerated in subparagraphs 0A606.a through d. Further, fire detection and extinguishing products, although contributing no specific military capability or functionality to the platform, are not listed in subparagraph 0A606.y. Therefore, such fire safety products and their constituent parts likely fall within subparagraph A0606.x as a "component" or "part" that is "specially designed" for defense articles in USML Category VII. These items appear to be caught by the "specially designed" definition under prong (b), which seemingly captures all "parts" or "components" of any item enumerated on the USML or CCL, and would not qualify for any of the four exclusions contained in prong (d). Under a category "x" classification, the products would be subject to NS1 and RS1 controls and eligible for certain license exceptions (including STA). Nonetheless, we believe such an outcome continues to over-control fire safety products that have little or no military significance and have commercial equivalents in widespread use. In addition to narrowing the breadth of the "specially designed" definition, we strongly recommend the agencies carefully and exhaustively populate the list of parts and components enumerated in the "y" category of the 600 series as items are moved to the CCL. We believe smoke, overheat, explosion and fire detection system parts and components should be so enumerated in A0606.y.

We also note an apparent omission in proposed ECCNs 0D606 (Software) and 0E606 (Technology), neither of which exclude from NS1 and RS1 license requirements software

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[2] In industry practice, standard parts and components are single unassembled items manufactured to standard industry sizes, increments, tolerances and dimensioning, as opposed to unique customer requirements that are specific to a particular application. Standard parts may consist of the following families: bolt, bracket, adaptor, cap, clamp, coupling, collar, cable, clip, cover, cushion, ferrule, flange, gasket, grommet, insets, nuts, packing, pin, plug, retaining ring, reducer, rivet, screw, seal, sleeve, spacer, stud, thrust wire, tube nut, washer, etc.

"specially designed" or technology "required" for parts and components enumerated under 0A606.y. Software and technology related to "y" commodities and meeting the definitions of their respective ECCN headings would require authorization to many destinations, while the commodities themselves would be subject only to AT controls. In particular, maintaining license requirements on technology for such benign and militarily insignificant items perpetuates unnecessary burdens on U.S. exporters and frustrates the objectives of list reform with no reasonable national security justification. We recommend that covered software and technology for parts and components in the "y" basket be controlled at the same level as the commodity.

**2. License Exceptions for the "600 series" ECCNs**

This section addresses the application of License Exceptions to the proposed "600 series" ECCNs. We believe a substantial portion of the items UTC presently licenses under the ITAR could be eligible for exceptions if moved to the CCL. The RPL and STA exceptions would be of particular use in supplying spare parts, components and assemblies to foreign military customers. In many cases, foreign militaries do not do their own heavy maintenance on platforms or major subsystems or components (*e.g.*, gas turbine engines), and instead will contract with a non-governmental facility to perform the work. STA eligibility for exports to private parties (such as third-party maintenance shops) when the item is ultimately destined for use by a governmental end-user in the STA-36 countries is critically important, and will improve response times and reduce paperwork while maintaining national security goals. The proposed rule acknowledges this imperative:

> [T]he U.S. Government recognizes that there will be a significant volume of trade between and among private companies in the STA-36 countries regarding 600 series [items] that would ultimately be for use by...agencies in governments of one of the STA-36 countries. Provided these [items] would be exported, reexported or transferred (in country) in accordance with the terms of License Exception STA, U.S. export control interests would be protected while at the same time transactions with the governments of STA-36 countries would be facilitated.

Specific comments on the parameters of RPL and STA are provided below.

a. <u>Part 740.10 Servicing and Replacement of Parts and Equipment (RPL) - Major subassemblies</u>. Proposed paragraph §740.10(a)(2)(i) defines replacement parts, components, accessories, or attachments. Although this paragraph includes 'subassemblies', the definition of 'subassembly' specifically excludes 'major subsystems' such as those composed of a number of subassemblies. The exclusion of 'major subsystems' is both problematic and unnecessarily restrictive. It is problematic because there is no obvious threshold to differentiate a 'subassembly' or 'component' from a 'major subsystem.' The example given of a subassembly is a printed circuit board with components mounted thereon. Three circuit cards in an enclosure may be a controller, but it is a 'component' or 'assembly' because it is useful only when used in conjunction with an 'end item.' It is not clear when a component is also a 'major subsystem.'

The exclusion of 'major subsystems' also unnecessarily restricts the usefulness and purpose of the RPL exception by limiting servicing options. It is often easier and quicker to swap out a major subassembly to effect repairs than to perform a major disassembly to reach the one failed part. An example is an aero gas turbine engine, which is comprised of a number of major 'modules' (*e.g.*, fan, compressor, combustor, turbine, etc.). Although there is no threshold for 'major subassembly', a turbine module, which is composed of a number of subassemblies (disks, blades, bearings, shafts, etc.), would meet the intent of the definition. Replacing a failed turbine blade requires a well-equipped shop with specialized tools, significant disassembly, and complex testing on re-assembly. Replacement at the module level is significantly quicker and easier. The removal of the phrase "This definition does not include major subsystems such as those composed of a number of subassemblies" from 740.10(a)(2)(i) would still meet the intent of the exception and eliminate confusion due to an unclear and unnecessary threshold.

Additionally, with regard to Part 740.10(b) concerning the servicing and replacement of defective or unacceptable U.S.-origin commodities or software, the term "U.S.-origin" should include any items manufactured abroad pursuant to U.S. Government authorization.

b. Part 740.20 Strategic Trade Authorization (STA) - Proposed timeline for eligibility consideration. The ability of the Departments of Commerce, Defense, and State to determine whether an end item is eligible for the STA exception will depend greatly on the detail supplied in the application and with the complexity of the end item under consideration. Although it is incumbent on the applicant to provide a thorough and detailed application, it is not uncommon for USG reviewers to have a different set of concerns than those anticipated by the applicant. Sufficient time should be allowed for the agencies to request additional information from the applicant in respect to the review criteria. The alternative is time constraints may result in a denial of an otherwise eligible item.

We recommend an additional review period for consideration of end-item eligibility be identified. This could be implemented in §750.4(f) (Procedures for processing license applications) by allowing for an additional review period of 10 calendar days, with an extension if agreed to by the applicant.

c. Part 720.9 Temporary imports, exports and reexports (TMP). ITAR exemptions 123.16(b)(9) and 125.4(b)(9) allow certain hardware and technical data exports without a license and do not impose a time limit for the hardware and data to remain outside the United States. This flexibility would be reduced for 600 series items transferred from the USML to the CCL and eligible for TMP, which generally requires return of items within one year of the date of export or reexport. We recommend increasing the authorized period of temporary use abroad to permit more flexibility for temporary exports of 600 series items.

### 3. *De Minimis* Rules for 600 Series Items

The rule proposes to establish a 10 percent *de minimis* threshold for 600 series items – commodities, equipment, software and technology – incorporated into foreign-made items. We support permitting *de minimis* treatment for 600 series items, as it is likely to help alleviate some of the resistance among foreign manufacturers (often fueled and exploited by

foreign competitors) to using U.S.-origin products in their platforms and systems. But we also note that it will introduce additional burdens for foreign manufacturers that must navigate the complex rules and perform the calculations for 600 series content at the lower 10 percent threshold and 600 series plus all other U.S.-origin content at the 25 percent threshold. Indeed, it is hard to discern a national security interest, for example, in counting category "x" parts and components towards controlled U.S. content under a 10 percent rule. Setting a 25 percent level for 600 series items, consistent with most other CCL controlled items, will simplify the de minimis analysis for foreign manufacturers, promote greater accuracy in calculations, and more effectively advance legitimate industrial base interests without compromising national security objectives.

**4. Creation of ECCN 0Y521 as an Equivalent to USML Category XXI**

a. Review Process. Part 742.6 (Regional stability) establishes 0Y521 "miscellaneous" ECCNs to list those items not listed elsewhere in the CCL, but which BIS, with concurrence of the Departments of Defense and State, deem to require control based on the sensitivity of the item. This change includes a required timeline to move items from 0Y521 to other ECCNs. Items would be identified through publication in the Federal Register and listed in Supplement No. 5 of Part 774.

The U.S. Government maintains authority to create additional RS controls on items at its discretion. This usually has been accomplished by adding onto an existing ECCN or creating a new ECCN. We support establishing a formal process to add new items and emerging technologies and, more importantly, a defined process and timeline to move these items into an established ECCN. We note that although the addition of the 0Y521 ECCNs is part of the proposed USML to CCL alignment, this is a stand-alone provision in that the new ECCNs can be supplied from sources other than the USML.

However, the proposed approach to identifying items under 0Y521 is commodity-centric and would list the item by model number or broader descriptor. Implementation for "software" (D) and "technology" (E) may be an issue, where descriptions will need to become performance-based. Unless the description is well-bounded, there is a risk of over-control and/or overlap with existing ECCNs. And as with any unilateral control, there is a risk of putting U.S. industry at a competitive disadvantage.

We recommend the Commerce Department consult with the appropriate TACs on the process to determine descriptions for Supplement No. 5 of Part 774. This consultation, based on the input from industries that will need to implement the classification, would reduce the probability of either an unintended over-control, or inadvertent overlap with existing ECCNs.

b. Sunset provision. Items placed in ECCN 0Y521 and not re-classified within one calendar year (with up to two one-year extensions) will be designated EAR99. UTC supports this approach so that 0Y521 does not become a "catch-all" classification that no item can escape; however, we believe a three-year period when a potentially EAR99 item would be controlled at NS1 due to lack of review is excessive. We suggest allowing no more than one 12-month extension.

## 5. Proposed Definition of "Specially Designed"

The proposed rule's definition of "specially designed" plays a fundamental role in determining the structure and scope of the revised CCL. The clear aim is to eliminate, to the greatest extent possible, the need to divine the designer's intent or apply other subjective concepts to determine jurisdiction and classification. Further, the definition must reduce over-control and unnecessary licensing or other authorization requirements for the broad universe of parts and components transferred to the CCL that have little or no military significance. As proposed, however, the definition appears to be confusing, difficult to administer, and may result in overly broad control of benign parts and components contrary to the objectives of the list reform effort.

The proposed definition breaks items down into two groups: (1) *parts or components*, and (2) *items other than parts or components*, i.e., end-items, materials, accessories and attachments, software and technology. Each group has its own set of tests.

a. Items other than parts and components (subparagraph (a)). To qualify as a "specially designed" item, the item must be enumerated on the CCL and, as a result of "development", have properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions of the controlled item. This construction is a welcome move away from subjective intent criteria, but it does not completely eliminate ambiguity and interpretational questions surrounding the phrase "peculiarly responsible", *i.e.*, the significance of an item's properties to the stated performance characteristics or functions. This phrase can be viewed to mean the properties are both necessary and sufficient to achieve or exceed the stated performance parameters. As it did for the definition of "required" technology and software in Part 772.1, Commerce should include adequate examples of the application of this concept to specific items.

In addition, the limiting clause of a "specially designed" item achieving CCL status through "development" is unnecessary. It is reasonable to assume that achieving the CCL performance thresholds, characteristics or functions would not be intrinsic to the item, but could only be reached through one or more of the activities described in "development".

b. Parts and components (subparagraph (b)). The limiting language of subparagraph (a) is not used in the proposed definition of specially designed "parts" and "components" in subparagraph (b). As proposed, the definition appears to capture every "part" and "component" of every end-item or other equipment on the CCL or USML, no matter how inconsequential, unless the part or component is itself enumerated on the CCL or USML per subparagraph (c) or falls within one of the four limited exclusions under subparagraph (d). This approach does not seem consistent with the objectives of control list reform to focus on the nature of the item rather the design intent or how an item is used.

A shortfall in the part or component group definition is the case where a nominally AT-only controlled item could become controlled at a higher level simply due to first use. The export classification of an item is determined by actions outside the control, and possibly the knowledge, of the item's originator. For example, a given integrated circuit (chip) in common use is controlled for AT-only under ECCN 3A991. The manufacturer then develops

and offers for sale a new chip which is slightly faster but still meets ECCN 3A991. The first user to market with this new chip is a machine tool company that uses the part in an armor plate drilling machine controlled under ECCN 0B606.a. The new chip is now "specially designed" for a commodity subject to ECCN 0B606.a and, therefore, controlled under ECCN 0B606.x. The new chip does not escape control due to the exclusion in subparagraph (c) as an ECCN 3A991 item is controlled for AT-only and does not meet the definition of 'enumerated.' Likewise, the new chip is not excluded under subparagraphs (d)(1)-(4), as it is not a part, is not specifically excluded from control on the CCL, is not yet used in other end-items in serial production, and is not interchangeable (one-for-one basis) with any other chip.

We are concerned that the overall result of this expansive definition, and the narrow applicability of the exclusions, will lead to over control of legions of militarily less significant parts and components, or even worse, greater levels of control than currently apply. The exclusions and notes also inject significant complexity and ambiguity into the definition of "specially designed" and make it challenging to apply. This may well cause exporters to place greater emphasis on pursuing mechanisms to specifically exclude parts and components from CCL controls. We urge the Commerce Department to revise the definition to address the shortcomings, and as noted above to carefully and exhaustively populate the list of parts and components enumerated in the "y" category of the 600 series as items are moved to the CCL.

## B. Additional Comments on Implementation of the Proposed Rule

In Supplement No. 1 to Part 732, the addition of Red Flag #13 in paragraph (b) is a partial overlap with both Red Flags #2 and #3. This is true of items other than "600 series." We suggest generalizing Red Flag #13 to: 'The quantity ordered is much greater than the expected need by the buyer or destination.' In addition, new Red Flag #14 in paragraph (b) could be generalized to cover other barred entities. We suggest generalizing Red Flag #14 to: "The customer indicates the items may be reexported to a denied party or embargoed country (including arms embargoed countries for "600 series" items)."

In the Reasons for Control table for proposed ECCN 0A606, the exception from NS, RS, and UN controls for A0606.y items appears in the right hand side of the table in the Country Chart column. We believe it would be clearer to specify the exception for "y" items in the left hand side of the table in the Controls column, for example: "NS applies to the entire entry, except 0A606.y").

## C. Phase-In of Changes

UTC believes that the transfer of items of lesser military significance from the USML to the CCL will result in reduced cost and improved business flexibility. However, the transition of potentially tens of thousands of parts and components, each with a multiplicity of associated technical documents,[3] will require time. Items will have to be reviewed for changes in jurisdiction and classification, and based on the results, documentation marking

[3] The lifecycle of a part or component encompasses numerous documents that would constitute technical data under ITAR 120.10 and "technology" under EAR §772, including blueprints, schematics, process sheets, test, inspection, and repair documents, and operating manuals.

changes as necessary. Numerous internal support processes such as training material, forms, software, databases, and licenses/agreements will need to be updated.

The philosophy of the phase-in should be to avoid unnecessary costs and schedule delays. To ease concern and possible confusion over this transition, the rule should explicitly address the phase-in of changes, as follows:

- Permit 'grandfathering' of existing item jurisdiction and classification. This essentially makes the transition of items from the USML to CCL optional. Items would be re-categorized when there is a business case to transition eligible items.

- Permit 'grandfathering' of existing and in-process licenses and agreements. There may be cases where amending a Department of State authorization may be faster than applying for a new BIS license. In this case, the item(s) would necessarily retain the jurisdiction stated in the authorization. Continuing to license an item under the original jurisdiction should not preclude transitioning the item to the CCL without agency agreement.

The benefits of the proposed rule will ensure that most items eligible for transition will be moved, but this covers cases (infrequency of export, low margin) where the costs of re-classification outweigh any gain.

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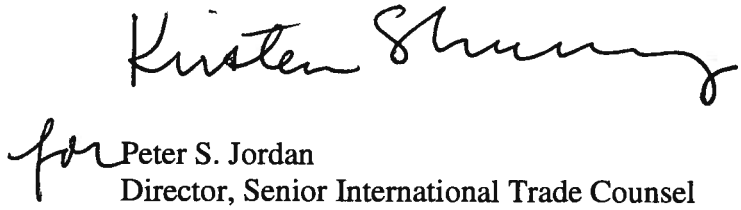
For additional information, please contact the undersigned at (202) 336-7467 or, with regard to technical proposals, Ari Novis at Pratt & Whitney at (860) 557-2353.

Sincerely,



for Peter S. Jordan
Director, Senior International Trade Counsel
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