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Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control under the United States Munitions List (USML)

Dear BIS:

The American Bar Association ("ABA") Section of International Law ("Section") appreciates this opportunity to comment on the proposed rule published in the Federal Register by the U.S. Department of Commerce, Bureau of Industry and Security ("BIS") on July 15, 2011 (76 Fed. Reg. 136, 41958-41985) regarding intended revisions to the Export Administration Regulations ("EAR") (the "Proposed Rule").

We present these views exclusively on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, accordingly, should not be construed as representing the policy of the ABA itself.

The ABA is the largest voluntary professional association in the world. The Section, with over 20,000 members, is the ABA leader in the development of policy in the international arena, the promotion of the rule of law, and the education of international law practitioners. Many of its members are experienced in the export control laws of the United States and other countries.

We applaud the U.S. Government's efforts to amend the EAR and related authorities, as part of the President's ongoing Export Control Reform effort, to enhance support of our allies, improve efficiency in licensing, and reduce unintended consequences. We recognize the considerable thought and effort that dedicated public officials have put into the Proposed Rule and related export reform initiatives, and we agree with the view expressed in the preamble to the Proposed Rule that, when finalized to take into account the comments of interested parties, the changes should serve "to reflect contemporary national security and foreign policy objectives, reduce confusion about which items are controlled and how, and improve the ability of the U.S. Government to monitor and enforce controls on technology transfers with national security implications while helping to speed the provision of equipment to allies and partners who fight alongside United States armed forces in coalition operations." 76 Fed. Reg. 136, 41958.

While the foregoing national security and foreign policy objectives are of foremost concern, we also believe that the Proposed Rule, once refined and adopted, will facilitate beneficial economic effects for U.S. manufacturers. For example, many members of the Section represent, both as outside and in-house legal counsel, U.S. manufacturers whose items and technology have been designed out of foreign items because of the uncertain effect of U.S. defense trade controls, even when it is recognized that such items and technology are widely available or do not warrant the more stringent retransfer controls of the International Traffic in Arms Regulations ("ITAR"). By better rationalizing, tailoring, and tiering controls, the agencies involved in the Proposed Rule and other aspects of the President's Export Control Reform initiative will do much to allay the concerns giving rise to such barriers to U.S. exports in the global marketplace.

Our specific comments on key aspects of the Proposed Rule follow below.

## SPECIFIC COMMENTS

### *(1) 600 Series.*

*(A) Addition of the 600 series on the CCL.*

Overall we believe the 600 series is well-conceived and sensible, both conceptually and structurally. We anticipate that the Proposed Rule, once finalized, should be an effective transitional step toward a unified positive control list.

Retaining the existing Commerce Control List ("CCL") structure should minimize the disruptions to companies adapting to the ongoing changes since most are already familiar with working with Export Control Classification Numbers ("ECCNs"). Consolidation of items in the 600 series into what BIS characterizes as a "Commerce Munitions List" should reduce the time needed to find those items as they will be located within the same area in each CCL category.

Alignment of the 600 series numbering with the Wassenaar Arrangement Munitions List ("WAML") should facilitate understanding and interpretation of the proposed Commerce Munitions items by our international partners in government and industry.

We take particular note of proposed subparagraph "y" of the 600 series. As implied in the sample 600 series entry (discussed in further detail below), this subparagraph appears to be intended

as a recurring place in future 600 series entries for parts, components, accessories and attachments that, while "specially designed" for 600 series or U.S. Munitions List ("USML") items, warrant control for only Anti-Terrorism ("AT") reasons because they have little or no military significance. Such an approach, if implemented consistently and thoughtfully, would mitigate substantially the unduly burdensome licensing requirements over such militarily insignificant items that U.S. Government officials have frequently acknowledged in public comments about export reform.

(i) Sample 600 series entries.

The Proposed Rule provides sample 600 series entries that we believe represent a rational fusion both of EAR and ITAR listing methodologies. Proposed ECCN 0A606, for instance, retains the CCL's tendency toward positive, specific descriptions, while placing parts, components, *etc.* into their own discrete subparagraphs ("x" and "y"), much as the USML currently does. A unified positive list reflecting a consistent, recurring structure will aid exporters navigating the complex contours of U.S. export controls.

We offer two additional discrete points concerning the sample 600 series entries. First, we recommend that the modifier "non-combat" be removed from the description of military support vehicles in ECCN 0A606.b.5, which would then read as follows:

> b.5. Ground transport vehicles (including trailers) "specially designed" for military use not controlled under USML Category VII;

This change would ensure that any combat military vehicles somehow not clearly fitting a characterization in USML Category VII are controlled at least in this ECCN (consistent with the WAML), and not inadvertently construed as EAR99.

Second, as currently written, 0A606.x and .y together could be construed by unwary readers to include *all* parts, components, *etc.* "specially designed" for USML Category VII defense articles, even though many such items will remain ITAR-controlled. We recommend that the qualifier "not on the USML" be added to 0A606.x and .y as follows:

> x. "Parts," "components," "accessories and attachments," not on the USML, that are "specially designed" . . . .
>
> y. Specific "parts," "components," "accessories and attachments," not on the USML, that are "specially designed" . . . .

Corresponding changes should similarly be made to 0B606.x and y.

(ii) Current xY018 ECCNs that will be moved to the 600 series ECCNs.

We agree that a new 600 series Commerce Munitions List should include the defense items currently falling in the xY018 ECCNs.[1] Consolidation of all EAR-controlled defense items into a common, structured series of ECCNs should aid both regulators in managing export policy and licensing requirements and industry in interpreting and complying with the applicable classifications and controls.

*(B) Addition of license review policy for 600 series items for National Security ("NS") and Regional Stability ("RS") reasons.*

(i) Section 742.4: National Security license review policy.

We share the concerns of BIS about the potential contribution of 600 series items, directly or indirectly, to the enhancement of any country's military capabilities contrary to U.S. national security interests, or in a manner that that would alter or destabilize a region's military balance contrary to U.S. foreign policy interests.

Nevertheless, we believe that these concerns would be addressed by making the proposed revisions to this section apply only to those items that are controlled multilaterally by the four major nonproliferation regimes (the Nuclear Suppliers Group, the Missile Technology Control Regime, the Australia Group, and the Wassenaar Arrangement). We recommend that USML items that subsequently transition to the 600 series should not be controlled for NS reasons unless multilateral agreement is obtained from participating member states in the relevant regimes.

(ii) Section 742.6: Regional Stability license review policy.

A new paragraph is added to capture items in ECCN 0Y521 (the proposed new entry that would capture emerging technologies previously controlled by USML Category XXI) under the Regional Stability Column 1 ("RS1"), the more stringent of the two columns under this control. RS controls are the result of a U.S. unilateral determination, not one established by multilateral agreement. Under RS1, a license is required for all destinations on the Commerce Country Chart, except Canada, for specified ECCNs.

The general licensing policy under the Regional Stability control would remain unchanged; *i.e.*, license applications would be reviewed on a case-by-case basis to determine whether the export or re-export could contribute directly or indirectly to any country's military capabilities in a manner that would alter or destabilize a region's military balance contrary to the foreign policy interests of the United States.

We believe this is appropriate provided that RS1 controls apply only to 600 series items not yet controlled by multilateral agreement. But any subsequent relocation on the CCL for such items, if and when multilateral agreement is reached on how these items should be controlled, should be made effective in a timely fashion to reduce unwarranted licensing burdens.

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[1] We note that the proposed "Related Controls" paragraph for ECCN 0A018 concludes with a reference to "0A108.a," which appears to be a typographical error.

(iii) Section 744.21: China Military "Catch-All" licensing policy.

Although it appears that 600 series items captured under proposed subparagraph "y" of a particular entry (*i.e.*, certain "specially designed" parts, components, accessories and attachments) are intended to be subject as a general principle to AT-only controls because of their military insignificance, the Proposed Rule would nevertheless subject such items to the "catch-all" policy in EAR § 744.21 that triggers a restrictive licensing requirement for certain items intended for Chinese military end use, with a policy of denial when such items would make a material contribution to Chinese military capabilities and result in advancing Chinese military interests in a manner contrary to U.S. national security.

We recognize that all current USML items are presumptively prohibited for transfer to China under ITAR § 126.1, and that the EAR "catch-all" rule arguably would provide greater discretion for the U.S. Government to determine on a case-by-case basis whether such items, once migrated to the 600 series, make the requisite material contribution to Chinese military capabilities. We support the prospect of greater licensing flexibility, as we could envision that certain previously ITAR-classified items could be deemed sufficiently insignificant such that, even if otherwise subject to the "catch-all" licensing policy, they might be deemed not to meet the "material contribution" standard. Accordingly, we encourage the U.S. Government to clarify in due course whether it will apply a "per se" rule (*i.e.*, all subparagraph "y" items intended for a Chinese military end use as defined by EAR § 744.21(f) are subject to a policy of denial) or if there is room for discretion. This would help reduce uncertainty and, correspondingly, license applications that would stand no chance of approval.

*(C) License exceptions for 600 series items.*

The Proposed Rule imposes restrictions on the availability of certain license exceptions for items in the 600 series, depending on the type of item. The six license exception provisions discussed at length under the Proposed Rule are:

- EAR § 740.2: Restriction on All License Exceptions
- EAR § 740.3: Shipments of Limited Value (LVS)
- EAR § 740.9: Temporary Imports, Exports, and Re-exports (TMP)
- EAR § 740.10: Servicing and Replacement of Parts, Components, Accessories, and Attachments (RPL)
- EAR § 740.11: Governments, International Organizations, *etc.* (GOV)
- EAR § 740.20: Strategic Trade Authorization (STA)

For 600 series end items, four license exceptions would be available immediately; *i.e.*, LVS, TMP, RPL, and GOV (but only to a country in the "STA-36" list of countries in EAR § 740.20(c)(1), which includes countries in the European Union, and close allies such as Australia, New Zealand, South Korea, and Turkey when for an ultimate official end use in specific governmental activities). In addition, applicants would be able to seek a determination of eligibility to use license exception STA for 600 series end items.

License exceptions LVS, TMP, RPL, and GOV are also available for 600 series parts, components, accessories and attachments, and apply to Group B or C ECCNs. For software and

technology in the 600 series, three license exceptions are available; *i.e.*, Technology and Software (TSU), STA, and GOV (STA-36).

Following are our comments on specific license exceptions.

(i) Section 740.2: Restrictions on All License Exceptions, and Section 740.11: Governments, International Organizations, *etc.* (GOV).

The Proposed Rule revises this section to prohibit the availability of license exceptions for 600 series items to countries subject to a U.S. arms embargo (including U.N. arms embargoes), unless authorized by license exception GOV if the item is destined for official use by personnel and agencies of the U.S. Government or for official use within the national territory of the country by agencies of cooperating governments. The list of countries subject to U.S. arms embargoes will be listed elsewhere in the EAR and will be drawn from ITAR § 126.1. But license exception GOV for 600 series items would be available only for STA-36 countries.

License exception GOV would be available for export, re-export, or transfer in-country of 600 series end items to STA-36 countries provided these items are destined ultimately for end use by armed forces, police, paramilitary, law enforcement, customs and border protection, correctional, fire, and search and rescue agencies of a government of those countries.

We believe certain categories of eligible government entities require clarification to reduce ambiguity and the consequent risk of unwitting violations. For example, the terms "correctional" and "paramilitary" leave potential room for interpretation, inasmuch as governments frequently outsource such functions to private contractors. We recommend that BIS provide further guidance to clarify whether and, if so, to what extent private contractors performing essentially government functions, state-owned enterprises, *etc.* are envisioned to fall within the scope of GOV.

(ii) Section 740.20: License Exception Strategic Trade Authorization (STA).

We make the following comments regarding the STA eligibility review process set forth in EAR § 740.20(g). First, as a general matter, the Proposed Rule welcomes public comment on the appropriate processing times for license applications involving 600 series items. Executive Order 12981 requires interagency consensus on a BIS license application by day thirty-nine of a ninety-day timeframe. If no consensus is reached by that day, the license application enters the dispute resolution process that begins at the interagency Operating Committee on Export Policy ("OC") and ends at the desk of the President by day ninety.

Regarding the STA eligibility process specifically, we believe it is difficult to suggest an appropriate timeframe without knowing more about the process and whether, for example, an eligibility request would be undertaken in tandem with the Advisory Committee on Export Policy ("ACEP") review process (the second tier of the interagency dispute resolution process in dual-use licensing comprised of politically-appointed individuals at the assistant secretary level) or on a parallel track by a new independent interagency committee comprised of representatives from the Departments of Commerce, Defense, and State. And if it is the intent to review STA eligibility requests in tandem with the ACEP licensing review process, we are concerned whether such a review, as defined in the proposed rule, would provide adequate administrative due process.

Accordingly, we believe it would be useful for BIS to provide further clarity on the proposed STA eligibility review process, and its precise relationship to the ACEP licensing process.

We also recommend that BIS delete the proposal to remove the authority of the Under Secretary to render the final determination in the STA eligibility process. This proposal would add a fourth paragraph to Section 756 of the EAR ("Appeal From an Administrative Action"). The existing paragraphs of that section do not limit the authority of the Under Secretary. The proposal, as stated, simply denies to a person, directly and adversely affected by a final administrative action, the opportunity to appeal to the Under Secretary by transferring that authority on an STA eligibility request to the lower-level political interagency ACEP that, under current regulations, is authorized to review controversial dual-use licensing decisions made by the OC Chair. This part of the proposal is unprecedented.

Also, as reflected in Supplement 2 to EAR Part 748, information required to support the STA eligibility request includes an assessment by an applicant, if known, concerning the applicability to the item in question of the export control laws and regulations of close allies and participating members in the four multilateral nonproliferation regimes. Although the requirement is limited by the qualifier, "if known," we are concerned nonetheless that such an undertaking may impose on an applicant a perceived duty to opine on foreign legal requirements. We believe, with all due respect, that this could create unanticipated and unreasonable burdens on potential applicants, including the potentially significant legal costs to conduct such a likely complex assessment, and to undertake a competent translation into English of foreign law. Moreover, applicants could face the prospect of liability for misstatements should they unwittingly misconstrue or misinterpret such foreign requirements, or advance a position inconsistent with the views of the U.S. Government reviewers.

We recognize that to obtain STA eligibility for 600 series end items, an applicant should be prepared to provide all available material information in support of such a request. But we believe that even with the qualifier, "if known," the expectation that applicants opine on foreign export controls is misplaced. We believe that adding a requirement to analyze foreign export controls as a condition of obtaining STA eligibility is not consistent with one of the key goals of the Export Control Reform initiative—reducing the administrative burdens on applicants in light of the admitted complexity of existing U.S. export controls.

Finally, we recommend that BIS provide applicants with an opportunity to participate in unclassified interagency discussions on their STA eligibility requests similar to the opportunity to participate in open sessions of interagency discussions associated with the interagency dual-use licensing review process.

*(D) Revisions to Interpretation 8: Ground Vehicles.*

We believe that the proposed revisions to Interpretation 8 at EAR § 770.2(h) appropriately reflect changes to corresponding parts of the EAR and CCL. We nevertheless offer four specific suggestions.

First, in conjunction with our earlier suggestion regarding the "non-combat" modifier in ECCN 0A606.b.5, we recommend that EAR § 770.2(h)(3)(i) be revised to read as follows:

(i) Ground transport vehicles (including trailers) "specially designed" for military use and not controlled under USML Category VII are classified under ECCN 0A606.b.5.[2]

Second, we recommend that the final rule contain consistent terminology describing the civil, non-military vehicles covered by Interpretation 8 (and ECCN 0A606.b.4). EAR § 770.2(h)(1) describes these vehicles, in pertinent part, as "unarmed civil vehicles that are all-wheel drive sport utility vehicles capable of off-road use," whereas EAR § 770.2(h)(3)(ii) identifies "unarmed civil all-wheel drive vehicles capable of off-road use." The first description limits the scope to sport utility vehicles, whereas the second does not. A single, consistent description would help reduce potential confusion.

Third, as currently written, Note 1 to paragraph (h)(3)(ii) of Interpretation 8 could be construed to mean that "civil automobiles" and trucks that are designed for transporting money or valuables with armored or ballistic protection are subject to the ITAR. We recommend that this note be clarified, consistent with WAML Category 6, to read as follows:

**Note 1 to paragraph (h)(3)(ii):** "Civil automobiles," and trucks designed or modified for transporting money or valuables, having armored or ballistic protection are EAR99, provided they are not all-wheel drive vehicles capable of off-road use.

Finally, we recommend that the phrase "marketed through civilian channels in the United States" in the description of "civil automobiles" in Note 2 to paragraph (h)(3)(ii) be revised or eliminated (and we would caution against its use in future rulemakings). Many military and civil vehicles currently controlled in ECCN 9A018.b are available for purchase either directly from their manufacturers or from resellers in the commercial market. Thus, the implicit assumption that controlled vehicles are not marketed or available in "civilian channels" may not bear up in the light of practical experience. Moreover, making the manner of sale a dispositive factor in the classification of an item runs counter to the positive, capabilities-based approach being taken in the overall effort to modify the CCL and USML.

***(2) Creation of ECCN 0Y521 as an Equivalent to USML Category XXI.***

An important feature of a positive list system is that BIS will be able to subject to control emerging technologies without resorting to broad, ill-defined, catch-all categories. Proposed ECCN 0Y521 is a significant step in the right direction because it requires BIS to affirmatively place items into the category and make a commodity classification determination on the item within a specified period of time. But some aspects of the Proposed Rule raise a concern that this category may be overused. First, the ability to extend for as many as three years the classification of an item in this holding category, which would be subject to very stringent controls, appears overlong given the speed at which technology is developed and brought to market. Consideration should be given to a shorter period.

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[2] As currently written in the Proposed Rule, EAR § 770.2(h)(3)(i) refers to ECCN 0A606.b.4. We believe the intended cross-reference here is to ECCN 0A606.b.5.

Second, there is a risk that this category will be overused as a holding category for difficult commodity classification requests, allowing BIS to defer commodity classification decisions for a significant period of time. Should this occur or be perceived to be occurring, it could have a chilling effect on the willingness of companies to submit commodity classification requests. This would increase self-classification efforts in close cases, which may increase classification errors. One way to alleviate this concern may be to clarify the extent to which BIS anticipates using this new category. It appears that the intent of BIS is to use this category sparingly and in exceptional cases only, but it would be beneficial to express this in the final rule.

The rule would also benefit from additional clarification of the process BIS expects to use in placing items in this new category. We believe additional explanation is warranted as to how BIS will identify articles for inclusion in this category (*e.g.*, on its own initiative, in the course of a commodity jurisdiction request, or in some other way) and how manufacturers will be notified that their articles have been identified for control under this category. It would also promote transparency if there were a way for manufacturers of articles designated as within this category to participate in the process of reclassifying the article. Such participation would also assist BIS in this process because manufacturers are generally the most knowledgeable about the articles under review.

***(3) Changes to EAR Definitions to Address the Movement of Items from the USML to the EAR.***

Regarding the term "specially designed" in particular, BIS has provided a thoughtful and coherent explanation of the challenges it faces in trying to reconcile the goal of creating a comprehensive system of classification based on positive, parametric criteria against our multilateral commitments that remain based, in part, on subjective criteria such as design intent. We appreciate the difficulty BIS faces in trying to devise a single definition that balances these competing interests, and it is obvious from the level of detail provided in the supplementary information to the Proposed Rule that BIS officials have given the proposed definition careful attention.

It seems clear to us that BIS seeks in good faith to distinguish and exclude from unwarranted control a wide universe of existing items, including parts and components, that are intuitively understood to be sufficiently "generic" (for lack of a better term) despite a military design intent, which intent historically has been a predominant rationale for maintaining presumptive control over items on the USML.

Notwithstanding the commendable rationale behind the effort to define the term in a comprehensible manner, a fundamental element of the proposed definition remains largely inscrutable. In particular, as applied to items other than parts and components, "specially designed" means, *inter alia*, that an item has properties "peculiarly responsible" for achieving or exceeding the designated control parameters as a result of "development." Despite expressed best efforts to avoid a tautology, the definition still seems to circle and engulf itself, with "development" to be "peculiarly responsible" appearing to be synonymous with the current design intent-based understanding of "specially designed." Both notions involve an inquiry into the original design pedigree of an item's attributes which, as a practical matter, will be a function of design intent. These remain subjective criteria in tension with a proposed system predicated on objective parameters.

Thus, it remains unclear (at least to us) that design intent has been eliminated from the proposed definition regarding items other than parts and components (though the criteria for designating parts and components themselves are commendably objective and accessible). We are optimistic that however challenging the effort proves to be to refine the term "specially designed," BIS seems committed to advancing a rule of reason that overall will serve to remove controls over the prosaic nuts, bolts, springs, washers, cables, brackets, *etc.* that have been modified for use in defense end items.

And though we remain concerned that the proposed definition only goes so far in terms of providing much-needed clarity, we will look for further opportunities to help BIS clarify the term, which we believe may present themselves after BIS has had an opportunity to take into account the preliminary concerns of other commentators.

* * *

We believe the recommendations and comments set forth above are consistent with the rationale and objectives set forth in the preamble to the Proposed Rule, and we hope they prove useful in shaping a final rule that will best accomplish those objectives.

We look forward to continued communications regarding these important issues, and we appreciate your consideration of these comments.

Sincerely,

Michael E. Burke
Chair, ABA Section of International Law