NATIONAL ASSOCIATION OF Manufacturers

**Franklin Vargo**

*Vice President*
*International Economic Affairs*

September 13, 2011

The Honorable Eric Hirschhorn
Under Secretary of Department of Commerce
Bureau of Industry and Security
Washington, DC 20230

Re: Proposed Revisions to the EAR: Control of Items the President Determines No Longer Warrant Control Under the USML (RIN 0694-AF17)

Dear Mr. Hirschhorn:

The National Association of Manufacturers (NAM) welcomes the opportunity to comment on the proposed rule (RIN 0694-AF173) published by the Commerce Department's Bureau of Industry and Security (BIS) regarding the control of items that the President determines no longer warrant control on the United States Munitions List (USML).

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 in developing the advanced industrial technology, machinery, and information systems necessary for our manufacturing, high tech, and services industries.

The NAM commends the Commerce Department, along with the Administration's interagency team, for creating a workable regulatory construct to facilitate the transfer of low- and no-risk items from the USML to the Commerce Control List (CCL) and for attempting to provide reasonable definitions for key phrases. The NAM fully supports the Commerce Department's stated objectives to create control lists that accurately reflect contemporary national security and foreign policy objectives, reduce confusion for manufacturers and customers, and improve the ability of the U.S. government to monitor and enforce controls on technology transfers with national security implications. The structure of the new "600 series" Export Control Classification Number (ECCN) is a reasonable way to handle items that have been transferred from the USML and are not classified elsewhere under an existing ECCN, and we look forward to the transfer of appropriate items and technologies to the CCL after the proper Congressional notification period.

In reviewing the proposed rule, however, the NAM has several concerns specifically related to the proposed definitions. The definition for "specially designed" is drafted to significantly alter the treatment of some parts and components and, unfortunately, falls short of ideal. The Commerce Department acknowledged, within the proposal, that the new definition must neither result in an increase in from a lower control level to "600 series" controls, particularly for items currently deemed EAR99, nor in causing items historically controlled by the Export Administration Regulations (EAR) to become controlled by the International Traffic in

Arms Regulations (ITAR). As proposed, the new definition would likely have that unintended effect in some cases. Many products previously approved, via commodity jurisdiction classifications, as EAR99 do not meet the criteria to be excluded from the proposed "specially designed" definition.

The proposal would be improved by further clarifying that "specially designed" only encompasses parts and components that are peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions of the specified end item identified in the CCL. Integrated circuits, for example, meet the definition of a component since they have no utility apart from the end items into which they are incorporated. Their export control status should be determined by the control status of the end items into which they are incorporated. Without adjustments to the proposed definition, the new "specially designed" will catch some components that are either currently classified as EAR99 or fall within another ECCN subject only to anti-terrorism controls (e.g., 3A991) and subject those items to more stringent controls.

Another challenge to the proposed definition of "specially designed" are distinctive items like printed circuit boards, which contain vital information about the electronics for which they are designed. Each board is uniquely designed for a specific piece of electronics, and a printed board can only be designed and manufactured as a custom product. Nearly all USML categories contain items that have electronics and, therefore, contain printed boards. Although printed boards are not specifically identified among the list of equipment controlled by ITAR, printed boards for ITAR-controlled items are regulated by requirements for specifically designed or modified parts and components and printed board designs are regulated by requirements for technical data. Because printed boards are not listed explicitly in ITAR, the control of printed boards under ITAR may be inadvertently overlooked. Cases like this must be carefully considered before finalizing any new definitions or when considering which items to keep on a positive USML.

Additionally, significant changes from current practice would result from the new definitions of "component" and "end item." The proposed definition of "end item" includes the qualifier phrase "stand-alone." The EAR does not currently have a definition for "end item," leaving some manufacturers and exporters to rely on the ITAR definition. The ITAR, in §121.8, currently defines an "end item" as "an assembled article ready for its intended use." The ITAR – like the proposal – goes on to define a component as "an item which is useful only when used in conjunction with an end item." The proposal cites an automobile and its battery as examples of an end-item and a component, respectively. Under the current ITAR definition, however, an automobile battery would itself be an end item. The finished battery is ready to provide electrical power for the automobile, which is its intended use. Under the proposed definition, that automobile battery would be a component. This is a major shift, and would likely result in far more "components" than under current interpretation.

The NAM commends the Administration for moving forward with an ambitious export control reform initiative. Successful modernization of the U.S. export control system should focus both on "what" is controlled as well as "how." As the interagency task force continues its work on identifying appropriate levels of control for goods, services, and technologies, we also encourage the Administration to move forward simultaneously on reforming and streamlining the mechanisms and techniques used to manage licensing.

The NAM appreciates this opportunity to provide comments on the proposed framework and is eager to see it implemented, with due consideration for the various sectors, industries and items that will be significantly impacted.

Thank you.

Sincerely,

Frank Vargo

FV/la
By E-mail: publiccomments@bis.doc.gov