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September 13, 2011

*Via electronic mail (publiccomments@bis.doc.gov)*

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

*Re:* RIN 0694-AF17—Comments Concerning Proposed Revisions to the Export Administration Regulations: Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List

Dear Sir or Madam:

Oshkosh Corporation ("Oshkosh") respectfully submits these comments in support of the Bureau of Industry and Security's ("BIS") proposed revisions to the Export Administration Regulations ("EAR") regarding the control of military items that will no longer be subject to the International Traffic in Arms Regulations ("ITAR").[1] We believe the Proposed Rule, in conjunction with other elements of the President's Export Control Reform Initiative, will reduce many of the unnecessary challenges that U.S. defense companies currently face when cooperating with suppliers in friendly countries and supporting U.S. and allied forces around the world.

Oshkosh and its family of subsidiaries manufacture specialty heavy-duty vehicles and access equipment for both commercial and military customers, the largest of which is the U.S. military (Army and Marine Corps). We export a wide range of products and technologies that are classified as EAR99; Export Control Classification Numbers ("ECCNs") 9A018, 0A018, 9E018, or 0E018; or U.S. Munitions List ("USML") Category VII. Accordingly, Oshkosh is keenly interested in the Proposed Rule, which represents a substantial step towards a more rational, common-sense export control system having "higher walls around fewer, more critical items," in the words of former Secretary of Defense Robert Gates.

Our comments concerning specific elements of the Proposed Rule follow.

[1] 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), 76 Fed. Reg. 41958 (Jul. 15, 2011) (hereinafter, the "Proposed Rule").

**(a) 600 Series.**

Oshkosh agrees with the reasoning behind the creation of a series of 600-tagged ECCN entries to accommodate the migration of defense items that are determined no longer to be ITAR-controlled. Solely from an exporter's perspective, we might prefer to see an entirely new Commerce Control List ("CCL") Category 10 to serve as a consolidated repository of ECCNs for all Wassenaar Arrangement Munitions List ("WAML") items not on the USML. We recognize, however, that such an approach might be impractical, in part because it could require a dramatic change in the structure of the CCL and the established use (within both government and industry systems) of five-digit ECCNs.

In light of such obstacles, Oshkosh supports the Proposed Rule's 600 series methodology as a general matter. More specifically, we applaud the plan to correlate the final two digits of the 600 series ECCNs to corresponding WAML categories, as well as the use of .x and .y subparagraphs for consistently listing parts, components, *etc*. An ECCN naming convention having a regular, repeating structure will aid exporters in determining which ECCNs and controls apply to their particular items.

On a related point, we request that BIS consider taking this opportunity to revise confusing Category titles to more accurately reflect Category contents. Category 0, for instance, is "Nuclear Materials, Facilities, and Materials [and Miscellaneous Items]," although it currently also includes ECCNs for items ranging from thumbscrews to hunting scopes to military construction equipment. Similarly, Category 9, "Aerospace and Propulsion," contains ECCNs for non-combat military vehicles, mobile forensics laboratories, and certain commercial diesel engines and tractors. Proficient exporters can navigate the CCL well enough with the aid of its index and the benefit of experience, but novices may be led astray by outdated Category titles.

**(b) Sample 600 Series Entries—Ground Vehicles.**

Oshkosh supports the movement of ECCN xY018 items to the 600 series generally, and offers three specific suggestions concerning proposed ECCN 0A606.

First, we recommend that the modifier "non-combat" be removed from the description of military support vehicles in ECCN 0A606.b.5. The distinction between the undefined terms "combat" and "non-combat" as applied to military vehicles may not always be clear. For instance, an unarmored military tow truck is strictly speaking a "military recovery vehicle" described by current USML Category VII(d) and therefore ostensibly a combat vehicle. Yet such a truck is more appropriately controlled as a non-combat ground vehicle in ECCN 9A018/0A606 (as the Proposed Rule and pending amendments to USML Category VII reflect). Other examples of vehicles not clearly being either combat or non-combat might include armored ambulances, or certain SWAT-type vehicles for military or civilian police forces.

The planned revisions to USML Category VII and ECCN 9A018/0A606 may not resolve such ambiguities regarding combat and non-combat military vehicles. To minimize potential confusion, we would modify proposed 0A606.b.5 to read simply as follows:

> b.5. Ground transport vehicles (including trailers) "specially designed" for military use not controlled under USML Category VII or elsewhere in this ECCN;[2]

This change would focus a jurisdictional analysis more on objective vehicle mission capabilities than on interpretations of "combat" and "non-combat" in the military vehicle context. In addition, this language would act as a safety net, ensuring that any military vehicles—whether combat or non-combat—somehow not clearly fitting a characterization in USML Category VII or elsewhere in 0A606 are controlled in 0A606.b.5, consistent with the WAML, and not inadvertently classifiable as EAR99.

Second, we recommend that ECCN 0A606.x and .y be modified to make clear that certain critical parts, components, *etc.* of military vehicles will not be EAR-controlled. 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. To reduce the risk of misinterpretation, 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 would have to be made to 0B606.x and y.

Finally, we recommend that Regional Stability (RS) controls not be applied to ECCN 0A606.a (military construction equipment and related items). RS does not apply to the current equivalent ECCN, 0A018.a, and we are not aware of any compelling reason for a change in licensing policy for these items.

**(c) Exceptions.**

*(1) Governments (GOV).*

Oshkosh is a manufacturer of ECCN 9A018.b and 0A018.a military systems and already uses the GOV license exception regularly to export to the U.S. Army and Marine Corps in Afghanistan, Iraq, and elsewhere. As a result of our experience, we strongly support the

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[2] A corresponding change would need to be made to Interpretation 8, including subsection 770.2(h)(3)(i), which might read:

> (i) ECCN 0A606.b.5 encompasses ground transport vehicles (including trailers) "specially designed" for military use and not controlled under USML Category VII or elsewhere in ECCN 0A606.

proposed availability of GOV for exports of 600 series items. More than any other exception in the EAR, GOV would allow U.S. companies to efficiently export a variety of 600 series defense items to U.S. armed forces in theater.

We further agree with the Proposed Rule's exclusion of GOV subsection 740.11(b)(2)(ii) from the country restrictions set forth in subsection 740.2(a)(12). As a practical matter, the most urgent, high-volume demands for controlled parts coming from U.S. armed forces overseas involve their operations in countries subject to U.S. arms embargoes (Afghanistan and Iraq, for instance). Prohibiting the use of GOV in such situations would build unnecessary license-driven delays into the contractor logistics support system on which the U.S. military relies.

In a similar vein, Oshkosh requests that BIS consider modifying subsection 740.2(a)(12) and GOV subsection 740.11(b)(2)(iii) to allow unlicensed exports of 600 series items—or at least 600 series "parts" and "components"—to subsection 740.20(c)(1) government entities cooperating with U.S. forces during operations in third countries, including embargoed countries. It is difficult to imagine any situation in which BIS would deny an application for authorization to export items to a subsection 740.20(c)(1) ally fighting alongside the U.S. The extension of GOV to such cases would allow U.S. exporters to better support coalition efforts without the undue burden and delay of obtaining export licenses that would generally be foregone conclusions.

*(2) Strategic Trade Authorization (STA).*

Oshkosh supports the plan to make STA available to 600 series items. We also agree it is appropriate to allow less-sensitive non-end items (*i.e.*, parts, components, technology, *etc.*) to be exported under STA without the same interagency review process envisioned for end-items. This will allow U.S. exporters to continue making immediate and efficient use of STA in most of the situations for which it was intended—working with suppliers and supporting end-users in allied countries.

In order to maximize the utility of STA, we recommend that the ultimate end-user conditions in proposed subsection 740.2(a)(13) include the governments not only of the foreign countries listed in subsection 740.20(c)(1), but also of the United States. This will ensure that a U.S. company may export 600 series parts or technology to a subcontractor in an STA-covered country for use in the production of items that will be sold to the U.S. government.

**(d) Definition of "Specially Designed."**

Oshkosh applauds the effort to craft a definition of "specially designed," a critical, dispositive phrase that has long been the subject of discussion, debate, and even litigation. The proposed definition does not, in our opinion, completely remove questions about subjective design intent from export jurisdiction/classification analyses, but it offers important clarifications that should allow exporters to make more reasoned determinations consistent with U.S. national security and foreign policy concerns.

With regard to paragraph (a) of the definition, we only note that the subjective design intent approach currently familiar to U.S. export control practitioners would likely endure in the context of end-items and technology. The Proposed Rule states, in pertinent part, that an end-item or software is "specially designed" if, "as a result of 'development,' it has properties 'peculiarly responsible'" for achieving certain characteristics or capabilities. Any inquiry into an item's "development" will effectively constitute an inquiry into design history and intent. In other words, as a practical matter, we think asking what about at item's "development" caused it to meet certain specifications will generate essentially the same discussion as asking why it was designed to meet them.

With regard to paragraph (b), we recommend that the language be simplified and that attention be drawn to the exclusions that come later in (c) and (d). The revised paragraph might read as follows:

> (b) Except as provided in paragraphs (c) and (d) of this definition, a "part" or "component" of an item is "specially designed" if that item is "enumerated" in a category of the CCL.

Finally, Oshkosh supports the treatment of "parts" and "components" in paragraph (d), which we think will minimize the need to assess subjective design intent by focusing on the suitability and production use of these items in various end-item applications. Such an approach will help both government and industry stakeholders avoid dedicating resources unnecessarily to controlling parts that either are or become commonly used and available.

* * *

We are grateful for the opportunity to contribute input concerning the Proposed Rule, and appreciate your consideration of this submission.

Please don't hesitate to contact the undersigned at (920)235-9151 or pbriscoe@oshkoshcorp.com with any questions about these comments.

Respectfully submitted,
/s/
J. Patrick Briscoe
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