NATIONAL ASSOCIATION OF Manufacturers

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Vice President
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The Honorable Kevin Wolf
Assistant Secretary of U.S. Department of Commerce
Bureau of Industry and Security
Washington, DC 20230

Re: Proposed Revisions to the Control of Aircraft & Related Items the President Determines No Longer Warrant Control Under the USML

Via email: publiccomments@bis.doc.gov

Dear Mr. Wolf:

The National Association of Manufacturers (NAM) welcomes the opportunity to comment on revisions to Export Administration Regulations (EAR) that would create new Export Control Classification Numbers (ECCNs) for aircraft and related items that 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, developing the advanced industrial technology, machinery and information systems necessary for our manufacturing, high tech, and services industries.

We commend the Commerce Department and its partners for undertaking this significant list review exercise and moving articles that no longer warrant stringent controls under the International Traffic in Arms Regulations (ITAR) to the Commerce Control List (CCL). We hope these changes will better focus limited resources on protecting those items that truly need it, end jurisdictional confusion, bolster interoperability with our allies, and provide greater clarity for both the exporters who need to comply with the regulations and for the government officials who administer and enforce them.

We appreciate the Administration's stated objective to excise from the U.S. Munitions List (USML) generic parts, components, accessories and attachments that do not provide a significant military advantage to the United States on their own, even if they are specifically designed or modified for a defense article. The new 600-series ECCNs, including those in CCL Category 9 that will take on items that were previously controlled under USML Category VIII (Aircraft & Related Parts), will continue to provide appropriate and robust controls on those items that warrant review.

The NAM is concerned, however, about the potential for a significant increase in regulatory complexity for defense exporters after items are shifted from the USML to the CCL. If not managed properly, the net result could leave U.S. defense exporters grappling with two military lists, two sets of regulations and a possible third category eligible for the Strategic Trade Authorization (STA) exemption. This scenario seems to run counter to the principle goals of the President's export control reform initiative: predictability, efficiency and transparency. We encourage the Administration, as it moves toward finalizing these proposals, to consider these goals and the new system's impact on manufacturers who will be working to implement and comply with the controls.

As one example of the inconsistencies between the two systems that may cause confusion and frustration for manufacturers, several exemptions currently available in the ITAR do not yet seem to be available in the proposed 600 series ECCNs of the CCL. For example, Section 123.16(b)(9) of the ITAR includes an exemption for the temporary export of unclassified parts, components, and test equipment to a U.S. company's foreign subsidiary if the item will be used for manufacture, assembly, testing production or modification. There is no parallel in the EAR for such intra-company transfers. We urge the Administration to review the inconsistencies and address them in a final version of the CCL 600 series.

The NAM also encourages the Department to clarify whether previously issued commodity jurisdiction ("CJ") determination that determined an item was EAR99 will remain valid. We are concerned that items currently classified as EAR99, as a result of CJ determination, could become controlled by the proposed ECCN 9A610.y.99 because the item is not specified elsewhere on the CCL. Exporters would be required to obtain EAR export licenses that are not currently required for EAR99 items.

The NAM continues to encourage the Administration to harmonize and clarify key definitions across the relevant regulations, including definitions for "build-to-print" and "specially designed." The definition of "build-to-print" should be revised to include engineering requirements, process specifications, quality assurance and assistance to a proficient supplier to refine its existing production process to address the peculiarities of a specific part to meet quality standards. The definition of "specially designed" is of particular concern to manufacturers, and it is difficult to accurately characterize the impact of these revisions without that key definition in place.

The definition for "specially designed" is of particular concern to manufacturers. The term is used more than a dozen times in the proposed revision to Category VIII (Aircraft & Related Parts), and it is difficult to accurately characterize the impact of these revisions without that key definition in place. The proposed definition published in the December 2010 Advance Notice of Proposed Rulemaking (ANPRM) stated that a "specially designed" USML item must have properties that distinguish it for certain predetermined purposes and must relate directly to the function of the defense article. The Administration should include this bright line in its next proposed definition. The Administration should also consider including separate criteria for parts, components, accessories and attachments in any definition of "specially designed" instead of grouping these four distinct categories together. A part's unique qualities are its form and fit, given its design is based on specific limitations related to the higher-level item into which it is designed to fit. The design of a component, on the other hand – its form and fit – is not necessarily dependent on the item with which it will be associated. Rather, it is dependent on function. When a part is considered "specially designed," its form and fit should be the relevant

criteria. For a component, it should be the component's unique function to the item with which it will be associated.

We encourage the Commerce Department to withhold publication of any revised final rules for new ECCNs until industry has had the opportunity to comment on the new definition of "specially designed." We are eager to see a new proposal for that definition in early 2012.

Additionally, the NAM would like to note that the new Supplement No. 4 to Part 740 would hamper the utility of the Strategic Trade Authorization (STA) license exception. The supplement adds complexity to the treatment of parts and components that are not inherently military. We recommend that Supplement 4 be deleted or, at least, significantly scaled back. It contains many items that are common to commercial aircraft, and STA is already limited to allies and trusted international regime members. Many of the 36 countries included in the first tier of STA control already participate in development and production of U.S.-origin military aircraft parts and components, and they have comparable software and technology. If the Administration finds it necessary to include a list of items requiring a license for software and technology beyond "build-to-print," it should include only items with unique military functionality and no commercial equivalent. Items on this list should be justified by foreign availability studies. Otherwise, the "build-to-print" definition will need revisions.

The NAM also recommends that the Department reconsider its proposed *de minimis* level of ten percent for the 600-series parts and components incorporated into foreign end items. This *de minimis* level, which is inconsistent with other EAR obligations, would increases the complexity of compliance. We recommended the Administration adopt a standard *de minimis* calculation of 25 percent for all destinations except proscribed countries identified in the International Traffic in Arms Regulations, §126.1.

In conclusion, 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 and technologies, we also encourage the Administration to move forward simultaneously on reforming and streamlining the mechanisms used to manage licensing. Specifically, we recommend that the Administration continue to recalibrate the controls on encryption-related items and revisit the Intra-Company Transfer (ICT) license exception. The NAM continues to support the creation of a framework to facilitate low-risk trade between corporate entities that maintain strong internal compliance programs and technology control plans. Such a licensing mechanism need not be contingent upon tier placement, except for a small group of sensitive items, and instead should be based on a risk-management system that will allow the government to focus on truly sensitive items and technologies.

We look forward to more clarity on key definitions. The proposed revisions – particularly a new definition of "specially designed" – on parts like nuts, bolts, screws, rivets and other fasteners will have a major impact on so-called "third tier" manufacturers. It is our understanding that many fasteners and forgings, even those that were specially designed for military aircraft, will likely shift over to the CCL and the jurisdiction of the Export Administration Regulations (EAR). The CCL's flexible controls will facilitate an increase in foreign sales of those parts to our friends and allies.

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. We look forward to continuing to work with the State Department and its partners on this initiative.

Thank you,

Frank Vargo

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