February 7, 2011

Timothy Mooney
Office of Exporter Services
Regulatory Policy Division
Bureau of Industry and Security
Department of Commerce
1401 Constitution Ave., NW
Room 2705
Washington, DC 20230

ATTN: Notice of Inquiry – CCL and RIN 0694-AF03

Dear Mr. Mooney:

Cummins Inc. ("Cummins") hereby submits our comments regarding two advance notices of proposed rulemaking the Bureau of Industry and Security ("BIS") issued for public comment on December 9, 2010, concerning how descriptions of items controlled on the Commerce Control List ("CCL") could be more clear, positive, and "tiered,"[1] and concerning the creation of License Exception STA.[2] We appreciate the opportunity to provide comments on these important issues. Cummins is dedicated to supporting the efforts of the U.S. Government to protect its national security interests. A targeted and transparent export control regime can be an effective tool in protecting those national interests. We support President Obama's export control reform initiative to re-evaluate and modernize export control regulations.

Cummins Inc. is a global leader in the diesel power industry. The company operates four business segments: Engine, Power Generation, Components, and Distribution. We have complementary business units that design, manufacture, distribute and service engines and related technologies, including fuel systems, controls, air handling, filtration, emission solutions and electrical power generation systems. Headquartered in Columbus, Indiana, U.S.A., Cummins serves customers in approximately 190 countries and territories through a network of more than 500 company-owned and independent distributor locations and approximately 5,200 dealer locations. Cummins reported net income of $428 million on sales of $10.8 billion in 2009.

[1] 75 Fed. Reg. 76664.
[2] 75 Fed. Reg. 76653.

Cummins Inc.
500 Jackson Street, MC60711
Columbus, IN 47202 USA
cummins.com

I. Summary

With regard to the request for comments on how to make the CCL more clear and positive, Cummins respectfully submits that some of our products provide excellent examples of the need to revise particular Export Control Classification Numbers ("ECCNs") and define critical terms used in the Export Administration Regulations ("EAR"). We suggest that (1) the reasons for controlling our products should be reexamined and changed to a less restrictive level that would be appropriate for these items; (2) the applicable ECCNs should be revised to be transparent, use positive lists; (3) ECCN-specific "catch-all" provisions should be eliminated; and (4) relevant terms, such as "part," "component," "therefor designed," and "specially designed" should be defined.

Cummins makes a wide variety of diesel engines. Most of these engines are for commercial applications. But we have modified certain parts and components of some engine models for use in combat and non-combat military vehicles. Consequently, the "specially designed or modified" parts and components for non-combat military vehicles fall under ECCNs 9A018, 9D018, and 9E018 of the Commerce Control List ("CCL"), while the "specifically designed or modified" parts and components for combat military vehicles fall under Category VII(g) of the U.S. Munitions List ("USML"). Cummins does not make any engine consisting entirely of parts and components that are controlled under the CCL or USML. Rather, the engines we make for military trucks mostly consist of commercial parts and components, most of them classified as EAR99.

This letter will discuss the Cummins products that BIS has advised are currently controlled under the EAR for National Security ("NS") reasons: ECCNs 9A018, 9D018, and 9E018.[3]

Perhaps our concerns about the NS controls on these particular items can be illustrated by two examples. First, as BIS currently interprets and applies the EAR to our products, a license would be required to export an exhaust muffler for use in a non-combat military transport truck in Costa Rica. Second, a deemed export license would be required to include an Indian employee assigned to a team of engineers working on

[3] Cummins also manufactures and exports items classified under 2A994, 8A992.f and g, and 9A990.a, as well as their software and technology counterparts. All of these items are controlled for Anti-Terrorism ("AT") reasons. Most of Cummins' products are classified as EAR99.

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500 Jackson Street, MC60711
Columbus, IN 47202 USA
cummins.com

power steering reservoirs, including a reservoir that is modified to fit an unarmed all-wheel drive vehicle that happens to have a passenger cab fitted with ballistic protection.

We respectfully submit that the analytical framework used in the State Department's proposed revision of U.S. Munitions List ("USML") Cat. VII of the International Traffic in Arms Regulations ("ITAR"),[4] which identified three tiers of export controls and employed a reasonably well-defined positive list of controlled items, should be applied by BIS to these three ECCNs. It is our understanding that under the proposed revision of USML Cat. VII, our specially designed or modified engine parts for combat military vehicles, as well as their software and technical data, would no longer be controlled under that category.[5]

For the same reasons that led the State Department to conclude that our products do not have military significance warranting their export control under USML Cat. VII in Tier 1, 2, or 3, we believe strongly these items should not be transferred automatically to ECCNs 9A018, 9D018, and 9E018 of the CCL, where they would be controlled at the NS Col. 1 level under Tiers 1, 2, or 3. When this framework is applied in the CCL context, we believe the Government will agree that the products previously controlled for NS Col. 1 reasons do not meet the criteria for any of these tiers.

We recommend that the reason for control for diesel engines and their parts and components should be changed from NS Col. 1 to a "holding" ECCN controlled for Anti-Terrorism ("AT") reasons only, or that these items ultimately should be reclassified as EAR99.

This more closely follows the export control reform initiative's stated goal of "higher fences around smaller yards." If the items previously controlled under USML Cat. VII were moved to the current ECCN 9A018, the fences would merely be moving to a different yard. Resources in the government and individual companies would still be required to control items such as a dipstick modified to fit a military vehicle, at no apparent gain to national security.

Our engines are of the highest quality. But today's diesel engine market is mature, global, and highly competitive. A wide range of sizes and applications of diesel

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[4] 75 Fed. Reg. 76930, December 10, 2010.

[5] In the terminology of the proposed ITAR rule, these items do not "provide a significant military or intelligence advantage, or make a significant contribution to the indigenous development, production, use, or enhancement of a Tier 1, 2, or 3 item."

Cummins Inc.
500 Jackson Street, MC60711
Columbus, IN 47202 USA
cummins.com

engines, and their parts and components, are made by our competitors in Russia, China, India, Brazil, Mexico, South Korea, Europe, and many other countries. The leading edge technology for diesel engines deals with complying with ever stricter emissions regulations. The military requires less advanced and more widely available technology in their engines because they are typically exempt from emissions requirements. Strict unilateral controls on the export and reexport of these widely available items in the context of today's global market does not appear to advance U.S. national security and foreign policy interests.

Regarding proposed License Exception Strategic Trade Authorization ("STA"), we understand that STA might not be available for 9A018 items. We don't understand how excluding from this license exception items such as diesel engines and their parts and components would protect the national security and foreign policy interests of the U.S. For example, the exhaust muffler mentioned above could be manufactured readily in numerous countries. If Cummins Brazil made it, the item might be subject to the EAR under the direct product rule, but License Exception APR would authorize its export from Brazil to Costa Rica, without the burdensome paperwork required by STA.

II. Discussion

A. Making the CCL a more clear, positive, and tiered list

1. 9A018, 9D018, and 9E018 are Unilateral Controls

ECCNs 9A018, and its software and technology counterparts, 9D018, and 9E018, respectively, appear to be unilateral dual use national security controls. Most of the other items subject to the EAR and controlled for NS Col. 1 reasons are multilateral in nature. Under the Wassenaar Arrangement ("WA"), as well as its predecessor, COCOM,[6] ground vehicles and components are and were controlled on the Munitions List under category ML6. These items are not controlled on the WA Dual-Use List. When the U.S. Government implemented the WA/COCOM control lists, ML6 was split into different groups of items controlled under the USML and the CCL. Apparently no other WA member has implemented ML 6 in this way.

Today USML Cat. VII controls "Military type armed or armored" vehicles. CCL ECCN 9A018.b controls "ground transport vehicles (including trailers) and parts and

[6] COCOM stands for the Coordinating Committee for Multilateral Export Controls.

Cummins Inc.
500 Jackson Street, MC60711
Columbus, IN 47202 USA
cummins.com

components therefor designed or modified for non-combat military use and unarmed all-wheel drive vehicles capable of off-road use which have been manufactured or fitted with materials to provide ballistic protection to level III … or better."

Because of this split jurisdiction, it seems unlikely that a meaningful comparison of the licensing standards administered by the U.S. and other WA member countries concerning military vehicles could be made.

2. BIS has interpreted and applied 9A018.b to recontrol engines

We defer to BIS' superior knowledge of the history of 9A018.b and its predecessors. We merely offer the following general points in the hope they might assist BIS in researching how the current ECCN might, or might not, be interpreted to control diesel engines and their parts and components.

The relevant ECCN has undergone several noteworthy revisions over the past 29 years or so. It appears that, at least as far back as 1982, ECCN 2406A controlled engines. Specifically, paragraph "a" controlled "Specially designed military vehicles, excluding vehicles listed in Supplement No. 2 to Part 370." Paragraph "c" controlled "Engines for the propulsion of the vehicles enumerated above, specially designed or essentially modified for military use." Paragraph "d" controlled "Specially designed components and parts therefor."

But on August 29, 1991, the CCL was reorganized to implement changes to the dual-use list agreed to by the members of COCOM.[7] ECCN 2406A was replaced by 9A18A. But 9A18A no longer listed engines. New paragraph "b" controlled "Vehicles specially designed or modified for military purposes." Around 1998, when 9A018 was created, that language in paragraph 'b" was retained. ECCN 9A018 has undergone other changes since 1998, but since 1991 it appears that engines have not been described in positive terms.

Obviously one reasonable inference that may be drawn from this history is that in 1991 the U.S. Government decided to decontrol engines made for non-combat military trucks under 9A018.b.

[7] 56 Fed. Reg. 42824, see p. 42897. "COCOM" stands for the Coordinating Committee for Multilateral Export Controls. These changes included the publication of an entirely new CCL.

Cummins Inc.
500 Jackson Street, MC60711
Columbus, IN 47202 USA
cummins.com

Unfortunately, 9A018.b now contains "catch-all" language, which is discussed in more detail below. On August 18, 2009, BIS invoked that "catch-all" language in an Advisory Opinion issued to Cummins. BIS stated that the classification for a commercial engine that was modified for a military vehicle "would probably be ...9A018(b) because it appears this engine is a uniquely configured component of ground transport vehicles specially designed or modified for non-combat military use." (emphasis in the original)

Cummins respectfully submits there is no compelling policy reason why BIS should interpret and apply the "catch-all" language of 9A018.b today to control engines that it removed from a positive list 20 years ago.

3. 9A018.b does not use a positive list of controlled items

Unlike the other paragraphs of ECCN 9A018, paragraph "b" does not use a positive list of controlled items. Instead, it uses an undefined "catch-all" term to control ground transport vehicles "and parts and components therefor designed or modified for non-combat military use."

This paragraph is not transparent. It provides no guidance to exporters and reexporters about what parts and components might be controlled. The terms "therefor designed or modified," "parts," and "components" are not defined in the EAR. Consequently, exporters and reexporters receive no guidance concerning whether or not engines are controlled, and no guidance about how far down in a hierarchical list of an engine's parts and components the control might reach. Does the ECCN control an entire engine, a fuel assembly, a turbo charger, and/or an engine bolt, any of which might be "therefor designed or modified"? There is no guidance.

ECCN 9A018.b refers to EAR section 770.2(h), which provides Interpretation 8.[8] Section 770.2(h)(1) puts a bit of a gloss on the ECCN, substituting the more frequently used term "specially designed or modified" for "therefor designed or modified." But since the former is not defined either this provides no additional guidance.

[8] Interpretation 8 was added on August 31, 2004. 69 Fed. Reg. 52992. It replaced Interpretation 19, which described the split between USML and CCL controls for "Military Automotive Vehicles." Interpretation 19 referred to "functional parts" of military automotive vehicles, including, among others, "the power train," which presumably included the engine.

Cummins Inc.
500 Jackson Street, MC60711
Columbus, IN 47202 USA
cummins.com

Cummins recommends that ECCN 9A018.b (and as appropriate, 9D018 and 9E018) be revised to provide a well-defined positive list of items controlled.

4. 9A018.b and Interpretation 8 may use a variation of the "see through" rule

Section 770.2(h)(2) states that "Modification of a ground vehicle for military use entails a structural, electrical or mechanical change involving one or more specially designed military components." It then states that such components include, but are not limited to, the following four things: (1) pneumatic tire casings designed to be bullet-proof or to run when deflated; (2) tire inflation pressure control systems operated from inside a moving vehicle; (3) armored protection of vital parts (e.g., fuel tanks or vehicle cabs); and (4) special reinforcements for mountings for weapons.

Please note that engines and their parts and components are not mentioned in Interpretation 8. This suggests they are not good examples of what BIS considers as "military components." However, since the list of specially designed military components in 770.2(h)(2) is illustrative and not exhaustive, one cannot rule out that engines and their parts and components are indeed considered by BIS to be "military components." Integrating an engine into a vehicle does entail making certain structural, electrical, or mechanical changes.

Apparently, if a ground vehicle undergoes a structural, electrical, or mechanical change involving a specially designed military component, such as one of the four listed, then the entire vehicle is controlled under 9A018.b. As discussed above, BIS has interpreted 9A018.b to mean that this ECCN does control an engine, or engine part or component, which has been specially designed or modified for a non-combat ground vehicle that is controlled under that ECCN.

Thus, it appears that BIS applies to diesel engines a two-step version of the State Department's controversial jurisdictional interpretation known as the "see through rule." Actually, it appears that the BIS version is more sticky than the State version. First, the EAR "see through" the vehicle to its specially designed military component, such as armoring for the cab, and if such component is present the entire vehicle is controlled under 9A018.b. Second, with the entire vehicle controlled under 9A018.b, a diesel engine or its parts and components that have been specially designed or modified for use in that vehicle are likewise controlled under 9A018.b. Because of this two-step analysis, 9A018.b controls the engine and its parts and components even in situations where they have nothing, functionally or operationally, to do with the specially

Cummins Inc.
500 Jackson Street, MC60711
Columbus, IN 47202 USA
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designed or modified military components of the vehicle, such as its armored cab. For example, the engine would power the vehicle in essentially the same way with or without armoring for the cab, the presence of run-flat tires, etc.

We confess we do not understand the rationale for such an expansive and non-transparent use of the term "specially designed or modified" to control items such as diesel engines and their parts and components. We respectfully recommend that 9A018.b and Interpretation 8 be revised to control only a positive list of items that are true military components that have been specially designed or modified for non-combat vehicles. We do not believe diesel engines and their parts and components are "military components."

We note that there may be a basis for applying the three tier concept to the specially designed military components of a non-combat vehicle. For example, it might make sense to review the four military components listed in 770.2(h)(2) and place them in Tiers 1, 2, or 3, as appropriate. However, we would urge BIS to resist the temptation to use Tier 3 as a "catch-all" for controlling non-military components of non-combat vehicles, such as diesel engines and their parts and components. Tier 3 should have a well-defined bottom floor.

5. Engine parts and components

By way of background, one of Cummins' main business units, the Engine Division, designs and manufactures approximately 15 models of diesel engines, ranging from 1.4 to 78 Liters, for use in vehicles, vessels, and electrical power generators. Many engine series have parts, such as engine blocks, pistons, and valves, which are used interchangeably across different types of applications, such as vehicles, marine vessels, land electrical power generators, and marine electrical power generators. The vehicle engine applications range from pick-up trucks to buses to very large mining trucks.

The great majority of Cummins' products are for civilian use. Most of our business with the military is marketed as commercial off-the-shelf ("COTS") products. However, Cummins does manufacture and export certain items that currently are subject to U.S. export controls under both the ITAR and the EAR.[9] The reason our products are controlled is because the ITAR and EAR use variations of the same

[9] For example, we believe the following parts and components are classified under 9A018.b: exhaust assembly (including a gasket, pipe, stack, and tube), formed tube, intake air tube, exhaust muffler, pipe crossover, stack, tube, power steering filter element, power steering reservoir, and end cap.

Cummins Inc.
500 Jackson Street, MC60711
Columbus, IN 47202 USA
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undefined concept, namely, that an item is controlled if it was intentionally designed or modified for a military truck.

Modification of a commercial diesel engine for a military vehicle, whether combat or non-combat, is typically done either (1) to enable the engine to fit into and connect with the vehicle or (2) to enable the engine to operate within desired performance parameters, such as RPM, horsepower, torque, durability, and fuel economy. These engine modifications do not affect the functionality of the vehicle's weapons systems, armor, night vision equipment, or communications systems. The modifications simply enable the engine to be installed in the military truck and run as required.

Cummins does not make any engine that consists entirely of parts and components that are specially/specifically designed or modified for military use. For all of our engines supplied to the military, the majority of their parts and components come from the commercial sector. They were designed, developed, tested, and proven in civilian uses. Only a small percentage of parts and components need to be redesigned or modified for installation in a particular military truck, or to achieve a performance specification of a military end-user. Even then, the necessary changes typically are relatively minor.

Cummins recommends that the terms "specially designed or modified," "designed or modified therefor," "parts," and "components" be defined precisely. Furthermore, we recommend that BIS consider expressly excluding from the coverage of "specially designed" any item that is modified solely to make it fit with another item, and that is not modified to alter the basic operation or function of an item. For example, if a customer wants us to modify the shape of a commercial plastic air cleaner for use in a particular non-combat military truck, this type of modification should not fall within the scope of "specially designed," because it has no affect on the operation of the engine or the military vehicle.

6. Electronic Control Module and Its Software

Most commercial diesel engines produced today have an electronic control module ("ECM") that acts as the "brains" of the engine. BIS has previously advised that if Cummins specifically modifies the software of the ECM for use in a non-combat military vehicle, that modified software is controlled under 9D018. Given the absence of definitions of the relevant terms, as discussed above, there is no analytical classification framework within which this guidance can be understood and applied.

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500 Jackson Street, MC60711
Columbus, IN 47202 USA
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The ECM contains software that enables the engine to operate efficiently, safely, and in compliance with local emissions control regulations. All Cummins vehicle engines that are electronically controlled use essentially the same ECM software. That software is loaded with pre-established calibration settings that provide a series of instructions to the engine. In order for a particular model of an electronic engine to perform within the desired parameters, its calibration settings are selected to control items such as, the amount of fuel intake, the amount of air used, the RPM ranges, and the interaction with the emissions package required for the vehicle.

It may be useful to think of the various calibration settings as books on the shelves of a library. There are hundreds of possible books (settings) available for use in different applications (e.g., pick-up trucks, buses, tractor-trailers). A Cummins engineer goes to the library and selects the books (settings) needed to allow the engine to perform as required for a particular customer in a certain application. Many of these calibration settings already exist. For example, the settings for a bus engine that will be used in Paris, France must meet the emissions standards applicable in the European Union, as well as the bus operator's specifications for fuel economy, RPM, and engine longevity. Different settings might be required for a bus engine used in Cuzco, Peru, which has a much higher altitude and different emissions standards than Paris. To change a bus engine's calibration settings from Paris to Cuzco, a Cummins technician would use different parameters when compiling the calibration to be loaded into the engine's ECM software.

The majority of the calibration settings within the ECM software will remain the same regardless of whether the application is commercial or military. However, there are a few customized calibration settings required for a military application that are different from a typical commercial application. The most common difference concerns the settings for emissions controls. Typically, military vehicles are exempt from local emissions control regulations. Emissions controls are achieved at the expense of power, so if eliminated the engine can have a greater power rating.[10]

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[10] There is a comparable concern for certain non-military engine applications. The emissions controls for emergency vehicles require separate settings that are being reviewed with the Environmental Protection Agency to ensure the emergency vehicles can operate effectively during emergency situations. The settings in the ECM calibration for these engines would be different than other commercial applications so the engines would not automatically "de-rate" (i.e., slow down to protect the engine emissions) while in route to a fire or other emergency.

If a military truck customer wishes to use what is essentially a commercial electronic diesel engine but specifies that it must have no emissions controls[11] in order to optimize power, the ECM calibration software typically used for that engine series will have to be adjusted to reduce the emissions control settings to zero but allow the engine to continue operating.

Because of the ambiguity of the term "specially designed or modified" there is no transparent analytical framework an exporter or reexporter can use to self-classify adjustments made to ECM software calibration settings. Cummins pointed out to BIS that adjusting calibration settings does not entail reprogramming the ECM's software source code. Without addressing whether or not changing calibration settings constitutes reprogramming, BIS indicated that, while it was likely that the ECM software would be classified as EAR99, any modification to the software that is specifically made for a non-combat military truck would be controlled under 9D018.

It appears that BIS has interpreted the concept of "specially designed or modified" uniquely and broadly in the context of electronic engine software. However, the fact remains that calibration settings in an ECM originally intended for a military vehicle could be changed to a number of previously established settings or "books" used for commercial engines, and the military vehicle's engine could still function with varying degrees of effectiveness.

We respectfully recommend that 9D018 be revised to clearly exclude ECM calibration settings from control.

7. Technology controls on minor parts

As an engine manufacturer, Cummins maintains a database of technical engineering drawings for all of its engines, major assemblies, components, and parts, down to the level of the smallest bolt, washer, and bushing. We have hundreds of thousands of these drawings. A few dozen of them are subject to 9E018, which controls technology for the "development," "production," or "use" of 9A018.b items. The reasons for control are NS Col. 1, RS, AT, and UN.

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[11] One European military customer required, in their request for bids to supply electronic engines for military trucks, that the engines must include the option for the driver to switch the EU emissions controls on or off, depending on the circumstances in which the trucks are being used. For example, the military unit could operate its transport trucks with their emissions controls on during convoys and with their emissions controls off during battlefield missions.

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500 Jackson Street, MC60711
Columbus, IN 47202 USA
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As a global company operating in approximately 190 countries, Cummins has many teams of engineers who must review technical drawings. These teams are composed of employees recruited from a highly skilled, highly diverse workforce. The engineers need to review technical drawings for a variety of design, development, manufacturing, repair, and quality-control reasons. Cummins engineers also need to communicate with non-U.S. customers, joint venture partners, and distributors about the technology for particular engine applications, as well as specific parts and components.

To comply with 9E018,[12] Cummins must maintain strict access controls on the technical drawings relating to those particular items that are controlled under 9A018.b. For example, we must sequester all engineering drawings showing an air intake tube that was specially designed or modified for a military truck.

However, since in many instances most of the parts and components of a particular engine series are not subject to NS Col. 1 or ITAR controls, this means that technical engineering drawings for many parts can be shared widely within Cummins, while a few must be restricted. Yet the technical drawings subject to strict access controls typically reveal little, if anything, about how to "develop," "produce," or "use" the entire engine. The 9A018.b parts are controlled only because they were "specially designed or modified" for a non-combat military truck application. Technology relating to the rest of the engine might be EAR99.

Cummins recommends that if BIS continues to control diesel items on the CCL, it consider the option of eliminating controls on the "development" and "production" technology for diesel engines and their parts and components, and apply only an AT level technology control on the "use" of those items. For example, Cummins makes certain diesel powered portable electric generators and their specially designed parts, which are controlled at the AT level under 2A994. The technology counterparts to 2A994 expressly exclude from control technology for the "development" or "production" of 2A994 items. ECCN 2E994 controls only "use" technology for 2A994 items.[13]

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[12] Cummins also has to comply with USML Cat. VII(h), which controls technical data for the parts and components controlled under Cat. VII(g).

[13] 2E001 controls technology for the "development" of various Cat. 2 items but excludes 2A994. 2E002 controls technology for the "production" of various Cat. 2 items but likewise excludes 2A994.

Cummins Inc.
500 Jackson Street, MC60711
Columbus, IN 47202 USA
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B. Proposed License Exception STA

If BIS decides to continue controlling diesel engines and their parts and components under 9A018, Cummins recommends that they be made eligible for License Exception STA. Cummins further recommends that the proposed documentary requirements for using STA, such as a special destination control statement and a statement from the consignee, not be required for items such as diesel engines and their parts and components.

The reality is that these items present a low level risk to the national security and foreign policy interests of the U.S. Diesel engines and their parts and components are purpose-built, meaning they are designed and manufactured to do one thing, namely, work in diesel power applications. They can't be used for the purposes for which other types of items subject to NS controls are used, such as spaceflight or night vision. Consequently, the only diversion risk diesel engines and their parts and components present is the risk that they might be shipped to prohibited destinations, end-users, or end-uses. The EAR already has sufficient controls in place to deal with that risk.

We submit there is another way to look at the diversion risks for diesel products. We see no justification, in terms of sound export control policy, for requiring, on the one hand, a special destination control statement plus a consignee statement to use License Exception STA to export an exhaust muffler that was modified from the original EAR99 version in order to fit on a non-combat military truck, and, on the other hand, the regular destination control statement and no consignee statement to export the original version of that exhaust muffler. They are bent in different ways to fit different trucks, but both items are just exhaust mufflers.

III. Conclusion

For the reasons stated above, Cummins respectfully recommends that BIS revise ECCNs 9A018, 9D018, and 9E018, Interpretation 8, and the related key terms of the EAR, to make it clear that diesel engines and diesel engine parts and components that are designed or modified for military vehicles are not controlled for NS reasons under Tiers 1, 2, or 3.

However, if BIS ultimately decides to maintain NS controls on these items, Cummins recommends that proposed License Exception STA be revised to include these diesel products, and that the unique documentary requirements of STA be eliminated entirely for diesel products.

Cummins Inc.
500 Jackson Street, MC60711
Columbus, IN 47202 USA
cummins.com

Thank you for the opportunity to comment on these important regulatory proposals. If we may be of assistance in providing for your review further technical or foreign availability information about our products, please let us know and we would be happy to assist.

Respectfully Submitted,

Brian Jaskot
Manager, Export Compliance
Law Department
Cummins Inc.
500 Jackson Street
Columbus, IN 47202 USA