Please disregard the Congressional Notification Section of this version and see new attachment.

National Defense Industrial Association

2111 Wilson Boulevard, Suite 400
Arlington, Virginia 22201-3061
Tel: (703) 522-1820 • Fax: (703) 522-1885
Web page: http://www.ndia.org

The Voice of the Industrial Base

August 6, 2012

Mr. Timothy Mooney
Regulatory Policy Division
Bureau of Industry and Security
Room 2705
U.S. Department of Commerce
Washington, D.C. 20230

Subject: Response to Proposed Revisions to the Export Administration Regulations: Implementation of Export control Reform; Revisions to License Exceptions After Retrospective Regulatory Review, 77 FR 37524, RIN 0694-AF65

Dear Mr. Mooney,

The National Defense Industrial Association (NDIA), which includes over 1,753 corporate members and approximately 85,360 individual members of whom 24,423 are military members/government employees, appreciates the opportunity to comment on proposed rule outlining the plan to transition items from the US Munitions List to the Commerce Control List. NDIA appreciates the effort by the Administration to address this issue and its recognition that there are very practical issues that must be addressed in order for the export control reform effort to work in a 21st century international economy. Industry recognizes that additional effort will be required on the part of the U.S. Government, the responsible agencies, the Congress, and industry to accomplish this transition. But, we welcome that additional effort. We strongly believe that the transition is needed, and that correctly done it will both strengthen U.S. export controls and enforcement while enabling U.S. firms to be more competitive in the critical international market. We commend the Administration's efforts on export control reform and agree with the overall proposed structure for a smooth and seamless transition. However, we do have concerns with some aspects of the proposed rule. NDIA believes certain requirements should be reconsidered and that some additional clarification is required in other areas to ensure these concepts are practical once reform is finalized.

Congressional Notification Requirements: There is no statutory basis for applying the Congressional Notification requirements of the Arms Export Control Act to items controlled under the jurisdiction of the Export Administration Act (as currently authorized by the International Emergency Economic Powers Act). These items will have been transferred from the USML to the CCL precisely because the Administration has determined, and the Congress will be consulted and notified of this determination under Section 38(f) of the AECA, that these items no longer require control under the AECA, as clearly stated in Section 38(f) of the act. NDIA recognizes and acknowledges the legal discretion though of the Department of Commerce to craft regulatory language to implement such a requirement in the interests of national security. We strongly urge the Department to delete this proposed requirement.

Although we do urge the Department to delete this requirement, should the Department of Commerce move forward with the implementation of this notification requirement, we recommend consideration of the following amendment to the proposed language. Because the proposed rule's language on this subject matches the parallel provision in the ITAR, the dollar value thresholds for triggering Congressional Notification should not be based on the overall contract value. Instead, the dollar value thresholds should be based on the license application value under which the EAR-controlled exports would occur.

Entry Into Force: We strongly urge the Department to ensure the effective date for a final version of this rule is at least 120 days from its publication. There will be a level of effort in preparing for implementation of this rule that will include product jurisdiction and classification review and training prior to implementation. Most other actions associated with it should be able to be accomplished during the proposed 2-year transition period. But, the training

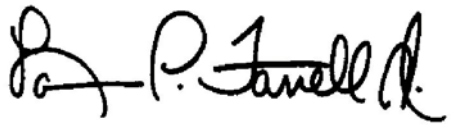
and initial jurisdiction and classification will have to be done prior to implementation. A four-month lead time to accomplish such actions will still require a not insignificant level of effort. But, completing these actions within this window should be achievable. So, we recommend 120 days as an absolute minimum.

License Exception TMP: We believe the proposed changes to the Temporary Export exception will create an undue burden to employers by introducing additional logging requirements for data previously authorized to the traveling user, if the user is a non-US person. In order for a non-US person to have access to the data at issue, BIS would have granted a deemed export license or authorized its use under another license exception in the first place. It would be onerous to impose additional requirements for data that has already been licensed just because its non-US user is traveling. If the concern driving this paragraph is due to potential unauthorized transfers, BIS should rest assured that companies currently invest on encryption software and other data loss prevention tools to ensure their proprietary information stored on employees' devices is protected. Therefore, a requirement to demonstrate the need to travel with each piece of technology stored on the device is not only impractical, but creates non-compliance risk, even if such requirement is only for non-US persons. We recommend this paragraph be deleted.

600-Series Unique Destination Control Statement: We are concerned that the proposed new destination control statement specific for 600-items will add confusion to company export control efforts while not achieving the apparent goal of the proposal, to raise awareness of the restrictions on reexport of 600-series items. We believe that it is appropriate to impose a requirement that the exporter notify the recipient in writing of the items that are subject to the 600 series and the associated limitations on reexport of those items as a condition for using a license exception for any item under the 600-series. A written notification requirement will achieve the awareness goal desired without forcing exporters to reprogram shipping systems for a custom destination control statement applicable to only certain items. This approach would also ensure the use of a single destination control statement. Something that would greatly reduce confusion as well as manpower needed to process multiple and varied control statements.

With the exception of the above comments, the proposed rule is fairly positive. We enthusiastically support the export control reform initiative and are excited to see it draw to a successful conclusion.

Sincerely,



LtGen Lawrence P. Farrell, Jr., USAF (Ret)
President and CEO
National Defense Industrial Association

National Defense Industrial Association

2111 Wilson Boulevard, Suite 400
Arlington, Virginia 22201-3061
Tel: (703) 522-1820 • Fax: (703) 522-1885
Web page: http://www.ndia.org

The Voice of the Industrial Base

August 6, 2012

Mr. Timothy Mooney
Regulatory Policy Division
Bureau of Industry and Security
Room 2705
U.S. Department of Commerce
Washington, D.C. 20230

Subject: Response to Proposed Revisions to the Export Administration Regulations: Implementation of Export control Reform; Revisions to License Exceptions After Retrospective Regulatory Review, 77 FR 37524, RIN 0694-AF65

Dear Mr. Mooney,

The National Defense Industrial Association (NDIA), which includes over 1,753 corporate members and approximately 85,360 individual members of whom 24,423 are military members/government employees, appreciates the opportunity to comment on proposed rule outlining the plan to transition items from the US Munitions List to the Commerce Control List. NDIA appreciates the effort by the Administration to address this issue and its recognition that there are very practical issues that must be addressed in order for the export control reform effort to work in a 21st century international economy. Industry recognizes that additional effort will be required on the part of the U.S. Government, the responsible agencies, the Congress, and industry to accomplish this transition. But, we welcome that additional effort. We strongly believe that the transition is needed, and that correctly done it will both strengthen U.S. export controls and enforcement while enabling U.S. firms to be more competitive in the critical international market. We commend the Administration's efforts on export control reform and agree with the overall proposed structure for a smooth and seamless transition. However, we do have concerns with some aspects of the proposed rule. NDIA believes certain requirements should be reconsidered and that some additional clarification is required in other areas to ensure these concepts are practical once reform is finalized.

Congressional Notification Requirements: There is no statutory basis for applying the Congressional Notification requirements of the Arms Export Control Act to items controlled under the jurisdiction of the Export Administration Act (as currently authorized by the International Emergency Economic Powers Act). These items will have been transferred from the USML to the CCL precisely because the Administration has determined, and the Congress will be consulted and notified of this determination under Section 38(f) of the AECA, that these items no longer require control under the AECA, as clearly stated in Section 38(f) of the act. NDIA recognizes and acknowledges the legal discretion though of the Department of Commerce to craft regulatory language to implement such a requirement in the interests of national security. We strongly urge the Department to delete this proposed requirement.

Although we do urge the Department to delete this requirement, should the Department of Commerce move forward with the implementation of this notification requirement, we recommend consideration of the following amendment to the proposed language. Because the proposed rule's language on this subject matches the parallel provision in the ITAR, the dollar value thresholds for triggering Congressional Notification should not be based on the dollar value of the EAR license application. Instead, the dollar value thresholds should be based on the ***contract value*** under which the EAR-controlled exports would occur.

Entry Into Force: We strongly urge the Department to ensure the effective date for a final version of this rule is at least 120 days from its publication. There will be a level of effort in preparing for implementation of this rule that will include product jurisdiction and classification review and training prior to implementation. Most other actions associated with it should be able to be accomplished during the proposed 2-year transition period. But, the training

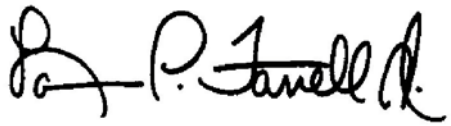
and initial jurisdiction and classification will have to be done prior to implementation. A four-month lead time to accomplish such actions will still require a not insignificant level of effort. But, completing these actions within this window should be achievable. So, we recommend 120 days as an absolute minimum.

License Exception TMP: We believe the proposed changes to the Temporary Export exception will create an undue burden to employers by introducing additional logging requirements for data previously authorized to the traveling user, if the user is a non-US person. In order for a non-US person to have access to the data at issue, BIS would have granted a deemed export license or authorized its use under another license exception in the first place. It would be onerous to impose additional requirements for data that has already been licensed just because its non-US user is traveling. If the concern driving this paragraph is due to potential unauthorized transfers, BIS should rest assured that companies currently invest on encryption software and other data loss prevention tools to ensure their proprietary information stored on employees' devices is protected. Therefore, a requirement to demonstrate the need to travel with each piece of technology stored on the device is not only impractical, but creates non-compliance risk, even if such requirement is only for non-US persons. We recommend this paragraph be deleted.

600-Series Unique Destination Control Statement: We are concerned that the proposed new destination control statement specific for 600-items will add confusion to company export control efforts while not achieving the apparent goal of the proposal, to raise awareness of the restrictions on reexport of 600-series items. We believe that it is appropriate to impose a requirement that the exporter notify the recipient in writing of the items that are subject to the 600 series and the associated limitations on reexport of those items as a condition for using a license exception for any item under the 600-series. A written notification requirement will achieve the awareness goal desired without forcing exporters to reprogram shipping systems for a custom destination control statement applicable to only certain items. This approach would also ensure the use of a single destination control statement. Something that would greatly reduce confusion as well as manpower needed to process multiple and varied control statements.

With the exception of the above comments, the proposed rule is fairly positive. We enthusiastically support the export control reform initiative and are excited to see it draw to a successful conclusion.

Sincerely,



LtGen Lawrence P. Farrell, Jr., USAF (Ret)
President and CEO
National Defense Industrial Association