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August 6, 2012

Timothy Mooney
Regulatory Policy Division
Bureau of Industry and Security
Department of Commerce
Washington, DC 20230

Re: Proposed Revisions to the Export Administration Regulations: Implementation of Export Control Reform; Revision to License Exceptions after Retrospective Regulatory Review (RIN 0694-AF65)

Via email: publiccomments@bis.doc.gov

Dear Mr. Mooney:

The National Association of Manufacturers (NAM) welcomes the opportunity to comment on revisions to Export Administration Regulations (EAR) that would implement the Export Control Reform initiative and revise license exceptions.

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. The NAM has long been a staunch advocate of rational export control policies that address evolving national security concerns and modern business practices. Manufacturers' ability to remain ahead of global competition is significantly undermined by the outdated and ineffective U.S. export control system. In a recent study, the Milken Institute estimated that U.S. high tech exports could increase by $60 billion, resulting in 350,000 new jobs, if the export control system is comprehensively modernized.

We applaud the Administration's efforts on export control reform. Further, we believe that the structure outlined in this proposed rule will proved a smooth transition into a modernized export control system. However, we believe that clarifications are required to ensure these concepts are feasible to implement, to comply with and to enforce.

We are concerned that the proposed transition plan would establish a Congressional notification requirement for U.S. Munitions List (USML) items approved for transfer to the Commerce Control List (CCL) "600 series", often referred to as the Commerce Munitions List (CML). Unlike the Arms Export Control Act (AECA), the Export Administration Act (EAA) – as currently authorized by the International Emergency Economic Powers Act (IEEPA) – does not require a Congressional notification requirement for changes to the Export Administration Regulations (EAR). The Administration's export control reform initiative has focused primarily, so far, on the effort to evaluate the USML and transfer certain items to the CCL after notifying Congress, per the AECA's 38(f) provision. The export control reform initiative is grounded on the principle that those transferred items are not critically important to U.S. national security. Therefore, the NAM does not support establishing a Congressional notification requirement for

items on the CML. The technical specifications for transferred items have been vetted for transfer from the USML, and Congress was appropriately notified before the transfer. We recommend removing the CML Congressional notification language from the proposed rule. Alternatively, we recommend amending the provision to activate the notification requirement based on the dollar threshold of the license application, rather than the contract value. In this manner, parts and components subject to the EAR would not be inadvertently captured. Follow-on shipments of CML parts and components not identified in the initial transaction should not be subject to follow-on notifications in the future. We strongly recommend, prior to establishing a final rule, the Department remove the current notification requirement.

Manufacturers have also raised concerns that new licensing procedures, as proposed in this rule, will create dual-licensing requirements for a single defense sale. While the proposed rule appropriately ensures that existing ITAR license exemptions are not eliminated when an item transfers to the CML, the proposed rule does not address a situation where multiple licenses might be required for a single defense transaction. The NAM recommends the Departments of State and Commerce authorize the use of ITAR licenses (e.g., DSP-5 and DSP-73) for the export of CML and CCL items that are parts and components of ITAR-controlled defense articles, rather than requiring additional licensing from the Commerce Department, if part of an initial sale. This would reduce redundant licensing requirements without adversely affecting national security interests, while maintaining the original intent of the President's export control reform initiative. We urge the Department to mitigate, to the extent possible, compliance burdens associated with shipping U.S. defense platforms to our allies and partners abroad.

A U.S. company that exports a military aircraft to an allied nation needs authorization from the State Department. That sale might include thousands of parts and components that could be controlled separately under the new CML. Flexibility provided by the CML might expedite future sales of parts and components to this approved program, but the initial transaction that previously required a single authorization would now require multiple licenses from two agencies. Moreover, a dual-licensing framework would require a manufacturer to analyze potentially thousands of small component parts for individual listing on a Commerce license. Each one of these items would need to be individually evaluated to determine whether it is controlled on the CCL, CML or USML. Under current licensing requirements, these parts and components are authorized for export as general categories of items. A predictable, efficient and transparent licensing system should minimize situations like this.

The proposed rule does provide a Note that states: "The export of items subject to the EAR that are sold, leased, or loaned by the Department of Defense to a foreign country or international organization must be made in accordance with the FMS Program carried out under the Arms Export Control Act." If this Note is intended to ensure the authorization for Foreign Military Sale (FMS) will include authorization for both USML and CML/CCL items, we encourage the Department to clarify that intent.

Licenses for temporary import/export and export/import (e.g., DSP-61 and DSP-73) should extend until they either expire or are returned by the applicant holder. The proposed two-year expiration would have an adverse impact on many previously approved programs and sustainability efforts. The administrative burden, coupled with potential production delays and cost increases, of reviewing hundreds of temporary licenses to assess the jurisdictional status of individual parts and components or production and test equipment would likely far outweigh any perceived benefits of obtaining new licenses.

The re-export and re-transfer of USML hardware is also a concern for manufacturers. Foreign recipients of U.S.-origin hardware will not be in a position to correctly classify post-transition re-exports or re-transfers of hardware originally received as USML items. For example, a foreign party that purchases a defense article under a DSP-5 license "in furtherance of" an agreement, which permitted re-export authority to a third party, may not understand that the re-transfer authorization is no longer valid if the hardware moves to the CML. Accordingly, the re-transfer after the effective date of the hardware moving to the CML would potentially be a violation for which the original U.S. exporter is accountable, in accordance with 127.1(c). We urge the Department to consider solutions to this scenario.

In Supplement 1 to Part 736, we encourage the Department to include guidance in General Order 5 regarding shipping documentation. Furthermore, we recommend that for items exported under a grandfathered license, the exporter be allowed to reference either the old USML code or the new Export Commodity Classification Number (ECCN). Given the varying needs of U.S. exporters through the transition period, there will likely be circumstances when a single company will need to ship the same part under an old USML code or license while also shipping under the new ECCN. Giving exporters maximum flexibility will greatly ease cost and compliance burdens during the transition.

Part 740 introduces the term Major Defense Equipment (15 CFR 740.2), but does not define it in Part 772. We suggest adding quotation marks to the term and including the definition in Part 772.

We support the proposed structure for license exception TMP, but we urge the Department to provide additional clarifications. In paragraph (a), the proposed rule uses the phrase "order to acquire the item", but does not provide a definition or an example to what this means. We recommend the Department provide either a definition or an example (e.g., a purchase order).

In subparagraph (a)(1), the proposed rule creates an exclusion for destinations in E:2, Sudan, or Syria. We believe this should be replaced with country group E1, since that is how exclusions of this type are typically referenced in the EAR. In subparagraph (a)(3), we encourage the Department to clarify whether the term "their employees" includes all employees located at U.S. facilities of a company organized under the laws of the United States (U.S. company) as well as all employees located at foreign branches of a U.S. company. Furthermore, paragraph (a)(3)(B) creates an unnecessary burden for employers by introducing additional recordkeeping requirements for data previously authorized to the traveling user, if the user is a non-U.S. person. In order for a non-U.S. person to have access to this kind of data, BIS would have first granted a deemed export license or authorized its use under another license exception. It is onerous to impose additional requirements for data that has already been licensed simply because its non-U.S. user is traveling. Manufacturers invest heavily in data loss prevention tools to protect proprietary information stored on employees' devices. We recommend this paragraph be removed.

For paragraph (a)(14)(iii), if an exporter is required to apply for a license to retain an item abroad beyond one year, we suggest that the extension should match the standard validity period of a license: four years. We also recommend that the Department provide clarification that paragraph (a)(3)(ii) can be used in conjunction with license exception LVS. We support the proposed structure for license exception GOV, but we urge the Department to provide additional clarifications.

We encourage the Department to replace the references to “A:1” with “Wassenaar member countries.” We also recommend the Department provide confirmation that proposed paragraph (c)(2) will apply to agencies of cooperating countries, even if these agencies are no longer at the national level. For example, as part of the European Union integration, member countries delegated the airworthiness authority to the European Aviation Safety Agency (EASA). EASA’s authority is identical to the U.S. Federal Aviation Administration (FAA). It is not an international agency, because it mandates airworthiness rules and standards across the EU. The exclusions listed in paragraphs (3)(i) and (3)(ii), should not be titled “Items on the Sensitive List” or “Items on the Very sensitive list.” We recommend removing these titles and simply referencing the supplement numbers. Regarding license exception STA, we urge the Department to further explain how the proposed Note 2 will be implemented. We recommend that the exporter should only be required to provide the information on the initial export to the party.

In addition to our previous comments about the Congressional notification requirements included in Part 743, we also recommend moving the definition of major defense equipment from paragraph 743.5(a) to Part 772.

For Part 758, we recommend an amendment to proposed paragraph 743.4 to include all “600-series” items, excluding “.y items.” Based on previous proposals, “.y items” are to be controlled for AT-reasons only. We are concerned that the proposed new destination control statement specific to 600-series items will add cost to exports without raising awareness of the restrictions on re-export of 600-series items, which appears to be the goal. It is appropriate to impose a requirement that the exporter notify the recipient in writing about items that are subject to the 600-series controls and the associated limitations on re-export 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 without imposing a requirement for exporters to re-program shipping systems for a destination control statement applicable to only certain items.

Finally, we recommend the effective date for a final rule should be at least 180 days from its publication. Exporters will need to undergo extensive systematic changes (e.g. classification changes, software updates and training) that will require time and resources. A reasonable effective date will facilitate compliance and would be fully consistent with the approach that has been taken by other Commerce Department agencies, like the Census Bureau.

The NAM appreciates this opportunity to provide comments on the proposed rule regarding the transition of items from the USML to the CCL. Please feel free to contact us if you have any questions about these comments.

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Thank you,

Lauren Airey