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August 6, 2012

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

ATTN: Mr. Timothy Mooney

SUBJECT: RIN 0694–AF65: Proposed Revisions Concerning Export Control Reform and License Exceptions

Dear Mr. Mooney:

United Technologies Corporation ("UTC") is submitting the attached comments in response to the Commerce Department's proposed rule concerning Export Control Reform and License Exceptions as published in the June 21, 2012 Federal Register.

We appreciate the opportunity to comment on this important proposed rule. Please feel free to contact me if you have any questions about these comments.

Sincerely,

Jim Lemon

Jim Lemon
202-336-7462

Attachment: UTC comments on June 21, 2012 proposed Revisions Concerning Export Control Reform and License Exceptions

United Technologies Corporation ("UTC") Combined Comments and Recommendations on June 21, 2012 Department of State Proposed ECR Transition Plan and Department of Commerce Proposed Rule on Export Control Reform and License Exceptions (i.e., "transition rules")

Industry recognizes that the goals of Export Reform cannot be achieved without significant effort on the part of all parties. However, as described below, the effort is significant, and there are aspects of the proposed transition rules that will effectively shorten the transition period, resulting in an undue burden on exporters.

The Commerce Department's proposed transition rule states that it should be read "in conjunction" with the State Department's proposed transition rule. For the purpose of these comments, we are also reading those two rules in conjunction with each agency's proposed Category VIII transition rules, because it is our understanding Category VIII will be one of the first categories to transition. As such, these comments are applicable to various provisions of both agencies' proposed overall transition plans and proposed Category VIII transitions.

Comments Applicable to Both Transition Rules

Impact on internal control and compliance systems and procedures, jurisdictional and classification marking systems, and defense trade

The Commerce Department's proposed transition rule states that, "[i]n addition to protecting and enhancing U.S. national security, Export Control Reform is expected to generate significant long-term benefits for U.S. exporters in the form of more efficient and flexible export controls that are more tailored to the significance of the item." However, a primary concern of industry is that the agencies' draft plans, when taken together, will seriously degrade the real-time efficiencies and flexibilities that exporters must have in order to comply with export control laws and provide uninterrupted support to defense trade as they begin to adjust to the transition.

On November 7, 2011 State and Commerce proposed to transition most parts, components, accessories, and attachments ''specially designed'' for military aircraft, engines and related articles, and technology related to all of those items from Category VIII of the Unites States Munitions List ("USML") to the Commerce Munitions List ("CML"). In its proposed rule, the State Department indicated that, based in part on responses to its December 2010 notices, the Administration had determined that fundamentally altering the structure of the USML "would significantly disrupt the export control compliance systems and procedures of exporters and reexporters." As a result, in lieu of those fundamental changes, the November 7 Category VIII proposal and others like it were put forth in part to "minimiz[e] the impact on exporters' internal control and jurisdictional and classification marking systems."

However, because the Category VIII rules alone will affect the jurisdiction of millions of pieces of hardware and an even greater number of technical specifications and other data items related to those hardware items, the impact on exporters will unavoidably be enormous. Unfortunately, State's proposed transition plan will greatly increase that impact and could significantly disrupt the export control compliance systems and procedures of exporters and reexporters.

At a minimum, exporters must perform the following tasks to ensure compliance with the transition rules:

1. assess the proper jurisdiction of all USML products and technologies pursuant to the transition rule;
2. identify known transitioning items;
3. Identify previously rendered commodity jurisdiction (CJ) determinations for transitioning items that are now invalid in accordance with the transition plan.
4. identify items for which jurisdiction is uncertain.
5. obtain CJ's for items with uncertain jurisdiction
6. determine the classification of all transitioning items on the Commerce Control List;
7. obtain CCATS determinations from Commerce for items with uncertain classifications
8. reclassify all transitioned items in internal databases;
9. maintain records reflecting all assessments of the proper regulatory jurisdiction and classification over their items.
10. examine all ITAR licenses/agreements/retransfer authorizations to determine which ones include transitioning items or technologies.
11. determine Commerce Department license requirements for transitioning items;
12. obtain any necessary Commerce Department licenses
13. train employees on their new obligations under the EAR
14. educate foreign parties on their new obligations under the EAR
15. make changes to internal compliance programs necessitated by the USML to CCL transition.
16. terminate or remove all CML items from existing ITAR licenses and begin exporting under EAR licenses/authorizations.

One of UTC's four aerospace units estimates that 80,000 parts and components will move from the USML to the CML and require new ECCN classifications. Another 10,000 parts and components are expected to remain on the USML, but will need to be reclassified into new USML categories. It estimates that at least 150 USML licenses/agreements will be impacted by these changes, and that 45 core customers will be impacted.

Another UTC aerospace unit estimates it will need to assess the jurisdiction of 75,000 hardware items and approximately 900,000 related data items. It estimates 400,000 of those items will ultimately transition to the CML, but that as many as 3000 may have uncertain jurisdiction. The unit has just over 300 active USML agreements/licenses, and estimates that 270 of those approvals contain items that will transition to the CML. It

estimates its 60 full time export managers and business area export representatives ("BAERs) and its 800 part time BAERs could spend up to 350,000 hours on transition-related work over the next two years.

Both of these business units also expect a significant increase in the number of CJs and CCATS they submit to the regulatory agencies as a result of the transitions.

Under the proposed plans, after a final rule is published, exporters must begin the huge job of internally identifying CML items, and seeking CJs and CCATS when doubt exists. But as explained below, State's implementation plan would also require exporters to immediately begin focusing on whether, with each CML determination they make, they will be able to continue to export *any* items (i.e., USML or CML) under any State Department licenses, agreements or other authorizations that may include those CML items.

After publication of a final rule, and certainly for the Category VIII rules, State's proposed plan will unnecessarily create a rapidly growing "licensing emergency" with each internal CML classification and could disrupt the licensing of USML items for military programs through the plan's abbreviated validity periods for existing USML authorizations, and its proposed RWAs of all new license requests, amendments, extensions, etc. that may contain any newly identified CML items. Efficiency and flexibility would therefore erode with each internal CML classification as the validity of more and more licensed defense trade will be jeopardized. Thus, the stated goal of State's phased implementation plan, "to mitigate the impact on U.S. license holders, while assuring that all defense trade that should be licensed remains so," cannot be met under the plan as drafted.

Commodity Jurisdiction and Classification:

The State **(S)** and Commerce **(C)** draft transition plans, and Commerce's proposed Category VIII transition rules **(C2)** provide that:

1. **(S)** Exporters are encouraged to review each revised USML category along with its companion CCL category to determine whether their items have transitioned to the jurisdiction of the Department of Commerce.

2. **(S)** Licensees who are unable to ascertain the proper jurisdiction of their items may request a CJ determination from DDTC through the current, established procedure.

3. **(S)** Licensees who are certain their items have transitioned to the CCL are encouraged to review the appropriate Export Control Classification Number (ECCN) to determine the classification of their item.

4. **(S)** Licensees who are unsure of the proper ECCN designation may request a Commodity Classification Automated Tracking System (CCATS) determination from the Department of Commerce through the current, established procedure

5. **(C)** The Administration recognizes that some items that would fall within the scope of the proposed new ECCNs will have been subject to commodity jurisdiction (CJ) determinations issued by the United States Department of State. The State Department will have either determined that the item was subject to the jurisdiction of the ITAR or that it was not.

6. **(S)** Previously rendered commodity jurisdiction (CJ) determinations for items deemed to be USML, but that are subsequently transitioning to the CCL pursuant to a published final rule, will no longer be valid after the transition date.

7. **(C2)** Items the State Department determined to be not subject to the ITAR and that are now not described on the CCL would be subject to the AT-only controls of the ''.y99'' paragraph of the applicable ECCN if they would otherwise be within the scope of the ECCN. Thus, for example, ECCN 9A610.x would control any part, component, accessory, or attachment not specifically identified in the USML or elsewhere in the ECCN if it was ''specially designed'' for a military aircraft.

8. **(C2)** If a particular part, component, accessory, or attachment was, as defined, ''specially designed'' for a military aircraft and was at the time of a CJ determination not identified on the CCL, it would be controlled under 9A610.y.99.

9. **(C2)** If it was identified or, as a matter of law or the result of a subsequent commodity classification (''CCATS'') determination by Commerce, controlled by another legacy ECCN, such as 9A991.d, 7A994, or 9A003, that ECCN would continue to apply to the item.

10. **(C2)** If, however, the State Department had made a CJ determination that a particular item was subject to the jurisdiction of ITAR but that item is not described on the final, implemented version of a revised USML category, a new CJ determination would not be required unless there was doubt about the application of the new USML category to the item.

11. **(C2)** Thus, unless there were doubts about the jurisdictional status of a particular item, exporters and reexporters would be entitled to rely on the revised USML categories when making jurisdictional determinations, notwithstanding past CJ determinations that, under the previous version of the USML, the item was ITAR controlled.

12. **(C2)** Finally, if the State Department had made a CJ determination that a particular item was subject to the jurisdiction of the ITAR and that item remains

in the revised USML, the item would remain subject to the jurisdiction of the ITAR.

13. **(S)** Consistent with the recordkeeping requirements of the ITAR and the EAR, licensees and foreign persons subject to licenses must maintain records reflecting their assessments of the proper regulatory jurisdiction over their items.

Clearly, the guidance above shows that simply determining the correct jurisdiction and classification of transitioning items can be a formidable task, especially in large companies where transitioning parts and their related specification sheets and other data items can easily number in the hundreds of thousands, as in the case of UTC's aerospace units. For example, for those commodities that will transition to the CML, UTC will also need to review all associated technical data (drawings, specifications, blueprints, manufacturing data, inspection processes, repair instructions, etc.). It is not unusual for a commodity to have up to twenty associated technical documents.

For the reasons provided below, while this extensive jurisdiction and classification work is underway, existing defense trade authorizations should not be jeopardized with unrealistic transition deadlines.

Licensing and Exporting of Transitioning Items After Final Rule Publication:

Commerce's transition rule provides that holders of State licenses for items that transition to Commerce jurisdiction who wish to begin using BIS authorizations may do so as early as the effective date of the rule by returning their DDTC licenses and complying with the EAR. That option will undoubtedly be used by many exporters for products that can be quickly reclassified and transitioned to Commerce control.

The Commerce rule also states that Commerce anticipates that State "will set forth approximately a two-year period during which, under certain circumstances, holders of DDTC authorizations that include items transitioning to the EAR may continue to use those authorizations." Unfortunately, State's transition rule contains provisions that would severely restrict the ability of exporters to either continue the uninterrupted use those authorizations -- even for non-transitioning items -- or obtain any new authorizations for potential transitioning items, even while those companies are heavily involved in the commodity jurisdiction determination and classification process described above.

State's proposed transition rule provides that, should a license or agreement contain an item or items moving from the USML to the CML, then the term of that license or agreement will automatically be limited to two years and cannot be renewed or amended until the transitioning items have been removed. Essentially, the inclusion of a transitioning item 'triggers' a status change to a license or agreement in terms of expiration date or 'amend-ability.' Therefore, all licenses and agreements must be reviewed to determine if they contain any of these 'trigger' items, as the term of the license may be less than what is indicated on the face of the license. Furthermore, this

review may need to be repeated with the publication of additional applicable USML categories.

The ITAR and EAR categories will be completely new and will require careful analysis, as 'items' that transition includes both commodities and technical data. Exporters will want to be certain that items are eligible to move from the USML to the CML, and that also may require requesting commodity jurisdictions (CJ) when doubt exists. As there will be no experience with the new regulations, out of an abundance of caution it is likely that the volume of CJs will increase. In the case of complex systems such as aircraft or aircraft engines, a license or agreement to support such systems typically covers literally thousands of parts[1], many of which may move to the CML, and as importantly, many will remain on the USML. Therefore, these reviews will take a significant amount of time.

Whereas an expiration date can be planned, amendments are not always so accommodating. As an example, there may be an urgent business need to add a party, and the amendment will be delayed due to the need to review all the items covered by the license/agreement and also the possibility of needing to apply for a Commerce license.

Additionally, it is common that a transitioning item be called out on multiple agreements. As an example, transitioning parts in support of F100 Fleet Management Programs for our foreign partners may appear on two dozen different agreements. The first agreement to expire would then trigger the need to re-baseline all the other agreements, possibly well before the two year limit. In the case where there are thousands of parts to review, the effect is to render the two-year term moot. Also, the shortened term or 'amend-ability' of a license or agreement may be triggered by just a single item transitioning from the USML to the CML

A State Department license has always been deemed by industry to be a type of "safe harbor" to license -- or perhaps "over-license" -- CCL items for which jurisdiction was not "certain," or which were parts and components of a larger sale of USML defense articles and related USML parts and components.

The proposed transition plans, as they related to Category VIII items, are heavily reliant on exporters' ability to internally determine the correct jurisdiction, classification and licensing requirements for virtually all of their parts and components and related technical data that are used on military aircraft or engines. As such, exporters will not be "certain" of jurisdiction and classification and licensing requirements over many transitioning items until they have either completed the commodity jurisdiction and classification process required by the rules (as itemized above), or obtain a CJ and/or CCATS. In addition, jurisdiction mistakes will likely be commonplace with respect to internal reclassifications and for some time identical items will undoubtedly be exported alternatively as USML and CCL items by different exporters/reexporters.

Furthermore, as stated in the Commerce's draft transition plan, a major reason for the proposed transitions is avoidance of the situation where "[t]he least significant part or

[1] It is not unreasonable for a gas turbine engine to have on the order of 8,000 different part numbers.

component is generally controlled [under the ITAR] the same way as the most significant part or component and the end item itself." Thus, U.S. National Security would clearly not be threatened by the export of a CML item on a USML license.

Recommendations

We offer the following suggestions that would still result in plan implementation, while allowing industry to plan the workload, instead of having to react to it:

1. Given the facts above and the magnitude of the proposed Category VIII transition alone, we recommend the transition plans of both agencies be revised to make clear that the identification of a transitioned item as a USML item on an export or temporary import control document, or the export or retransfer of such an item under a State Department license or other authorization will not be deemed to be a "Violation" of either the ITAR or the EAR.

2. We recommend modifying the transition rules such that industry has four years to transition CML exports from ITAR licenses to Commerce licenses/authorizations independent of required amendments or expiration dates of existing or new State Department authorizations that may include CML items. Effectively, State Department licenses and agreements containing transitioning items could be obtained, amended and renewed under the ITAR during the four year transition term. This would eliminate the need to immediately re-baseline twenty-three agreements because the twenty-fourth agreement with a common CML item expires shortly after the rule takes effect, or one of the licenses requires a minor amendment. Companies will need to review every agreement they have (which may easily be in the hundreds), some with several thousand items. In addition to the Jurisdiction and Classification effort, there will be a considerable increase in the number of licenses to be written, as in many cases, an ITAR agreement won't be eliminated, but simply supplemented by a new Commerce license. Given the load on licensing organizations, we recommend that State Department licenses and other approvals continue to be issued, amended and valid for transitioning items until for at least four years after the rule is published in order to mitigate the rapid onset of work.

3. To address the situation where a large military sale includes a relatively small number of CML or CCL items, or when a new license or agreement would otherwise required in order to accommodate a small number of associated CML or CCL items, consider the creation of an optional 'de minimis' threshold that would permit State to authorize such CML and CCL exports under a State Department license..

Specific Comments on the Commerce 6/21/2012 Rule

Previous License Approval for STA Recipients

This provision requires clarification. The intent of the rule is to ensure the purchaser, intermediate consignee, ultimate consignee, or end-user ('foreign recipient') has undergone some level of USG screening. However, the U.S. entity planning on using the STA will only be aware of its own authorizations, which is much more limiting than the intent of general screening. To provide the broadest possible use of the exception that still meets the intent, BIS and DDTC could provide a public database of 'foreign recipients' that have been screened. Also, there is no time limit specified, implying that any authorization, no matter how long ago issued, would be sufficient. Lastly, if the 'foreign recipient' has undergone a change of ownership, organization, or name, there will be a need for guidelines for the user of the STA to determine if STA can still be used.

Congressional Notification

We do not support the Commerce Department's plan to impose congressional notification requirements on CML items. Removal of less sensitive items such as parts and components from the lengthy congressional notification process was deemed to be an important benefit of the export reform effort.