AIRBUS

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Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce
Room 2099B
14th Street and Pennsylvania Avenue NW
Washington DC 20230

Re: RIN 0694–AF64 / Docket No. 120330233–2160–01

Revisions to the Export Administration Regulations (EAR): Control of Military Electronic Equipment and Related Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML): Category XI

This letter is submitted by Airbus Americas Inc. on behalf of itself and its ultimate parent company Airbus SAS (hereafter collectively referenced as "Airbus") in response to the request for comments published in the Federal Register on November 28, 2012 in the above-referenced public notice (the "Proposed Rule"). Airbus has consulted with its ultimate parent company EADS in the preparation of these comments.

Airbus is the prime contractor for the development and production of the A400M, a four-engine turboprop military transport aircraft that incorporates a large number of U.S.-origin components. Among those components are military electronics within USML Category XI, and therefore the proposed rule potentially will have an important impact on production, service, and training activities involving the A400M. The prior proposed rules relating to control of aircraft and related items (published in the November 7, 2011 Federal Register) and gas turbine engines and related items (published in the December 6, 2011 Federal Register) will also affect the A400M program. Currently, U.S. exports of components and technical data for use in the A400M program are managed under the authority of hundreds of licenses, technical assistance agreements and warehouse distribution agreements issued by the State Department's Directorate of Defense Trade Controls (DDTC).

The comments in this letter focus on two aspects of implementation of the shift of jurisdiction of the designated items from the International Traffic in Arms Regulations (ITAR) to the Export Administration Regulations (EAR):

- The application of License Exception STA under circumstances in which most of the items being exported are destined for use in eligible countries, but some portion may not, and the items that will be used in non-eligible countries cannot be determined in advance.

- The application of ITAR licensing controls on the provision of "defense services" when assistance is needed from a U.S. supplier to integrate 600 series item into a military aircraft, or to repair a 600 series item that is installed in a military aircraft.

Airbus is using the A400M program as an example in these comments, but believes that other production programs and many other companies will be affected in a similar manner.

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Use of License Exception STA

Pursuant to the Proposed Rule and prior proposed rules relating to the 600 series, License Exception STA will be available for exports of 600 series items under certain conditions. For U.S. suppliers to use STA to export 600 series items, Airbus would need to make the following certification that it:

> (i) Is aware that [INSERT DESCRIPTION AND APPLICABLE ECCNS OF ITEMS TO BE SHIPPED] will be shipped pursuant to License Exception Strategic Trade Authorization (STA) in § 740.20 of the United States Export Administration Regulations (15 CFR 740.20);
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> (ii) Has been informed of the ECCNs noted above by [INSERT NAME OF EXPORTER, REEXPORTER OR TRANSFEROR];
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> (iii) Understands that items shipped pursuant to License Exception STA may not subsequently be reexported pursuant to paragraphs (a) or (b) of License Exception APR (15 CFR 740.16(a) or (b));
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> (iv) Agrees not to export, reexport or transfer these items to any destination, use or user prohibited by the United States Export Administration Regulations; and
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> (v) Agrees to provide copies of this document and all other export, reexport or transfer records (*i.e.*, the documents described in 15 CFR part 762) relevant to the items referenced in this statement to the U.S. Government as set forth in 15 CFR 762.7.
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> (vi) For "600 series items," confirms that the items are for ultimate end use by a government of a country listed in § 740.20(c)(1), the United States Government, or a person in the United States, and agrees to permit an end-use check.

There are 36 countries listed in § 740.20(c)(1), which are known as the "STA-36 countries." In the case of the A400M program, sales have been made to STA-36 countries, but there currently is one customer that is not.[1] The use of items currently subject to the ITAR for aircraft destined to that country are permitted by ITAR authorizations, such as warehouse distribution agreements, and therefore there has been no reason for U.S. suppliers to distinguish between exports of items destined for STA-36 countries and those destined for the non-STA-36 country.

Under the current form of the STA regulations and the above certification, the question therefore arises whether U.S. exporters will be able to use STA for exports of items under circumstances in which Airbus and the U.S. exporters know that some portion of the items ultimately will be used for a non-STA-36 country. Airbus of course acknowledges that it would need to obtain EAR licensing authority for a retransfer of any 600-series item to a non-STA-36 country.[2]

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[1] Airbus of course is seeking to make other sales of the aircraft, and expects orders from more non-STA-36 countries in the future.

[2] Airbus understands that under regulations currently under consideration by the U.S. Government, it is possible that if an end product contains an item subject to the ITAR as well as 600 series items, an ITAR retransfer authorization could be issued that would cover both the ITAR and 600 series components of the end product.

It is important to highlight in this regard that the U.S. origin items used in the A400M program are fungible in sense that the items are not specific to an individual aircraft, but rather can be used in any of the A400Ms. Airbus does not know at the time of ordering which particular units of an item may be used in an aircraft destined for the non-STA country. The items become part of inventory, which may later be used in the production of any A400M aircraft, as a spare or replacement part, or for testing purposes. Airbus would be able to apply for reexport authorizations for using a specific quantity of such items in aircraft destined for a non-STA-36 country, but it would be highly impractical and uneconomic to attempt to segregate such items in an independent inventory system. Airbus is not required to segregate items in that manner under its current ITAR authorizations.

Airbus proposes that the conditions for use of License Exception STA be slightly modified, so that U.S. exporters could still use STA for exports of 600 series items to Airbus, while shifting the responsibility to Airbus to apply for reexport authorization for such items if they will be used in aircraft destined for a non-STA-36 country. To achieve this goal, Airbus suggests that the STA certification for 600 series items be amended as follows:

> (vi) For "600 series items," confirms that ***unless otherwise authorized by the U.S. Government***, the items are for ultimate end use by a government of a country listed in § 740.20(c)(1), the United States Government, or a person in the United States, and agrees to permit an end-use check.

The new language is presented in bold italics. The proposed amendment refers to "U.S. Government" in a broad manner because it is possible that EAR-controlled components within the foreign-made product will be licensed for reexport under an ITAR authorization that encompasses both USML and 600 series items.

This same approach to the use of license exceptions is reflected in License Exception GBS, which authorizes the export of eligible commodities to destinations in Country Group B. Although a certification from the consignee is not required, it is clear that a reexport of a commodity exported under GBS to a destination not in Country Group B requires a reexport authorization. Similarly, License Exception ENC incorporates limitations on reexports through 15 CFR § 740.17(c), which provides:

> U.S. or foreign distributors, resellers or other entities who are not original manufacturers of encryption commodities and software are permitted to use License Exception ENC only in instances where the export or reexport meets the applicable terms and conditions of this section. Transfers of encryption items listed in paragraph (b)(2) of this section to "government end-users," or for government end-uses, within the same country are prohibited, unless otherwise authorized by license or license exception.

Absent implementation of the proposed amendment to the certification, License Exception STA likely would not be available for use in the A400M program at all. U.S. suppliers would assume that EAR licenses are required for all exports of 600 series items, even for such items that ultimately will be used in aircraft for the governments of STA-36 countries. That would undermine the benefits of the shift in jurisdiction, and could in fact lead to greater licensing burdens for U.S. exporters. In particular, the A400M program has been granted "program status" by DDTC, which facilitates the coordination of the large number of licenses involved; there is no equivalent program available under the EAR.

Airbus believes that this type of problem would arise not only for suppliers for the A400M program, but rather would be a widespread impediment to the use of License STA for 600 series items. Airbus therefore urges that the amendment to the certification proposed herein be adopted.

Defense Services

The proposed transfer of certain items from the jurisdiction of the ITAR to the EAR contained in the Proposed Rule and in prior related proposed rules have not addressed in detail the relationship between the EAR and the ITAR's regulation of "defense services." Airbus is concerned that there will remain an overlap in jurisdiction that will have the effect of requiring U.S. exporters to obtain licensing authority from DDTC to provide support services relating to 600 series items.

The background is as follows. The ITAR's definition of "defense service" includes in pertinent part:

> (1) The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles. …[3]

Since all technical activities related to defense articles are already covered by the Technical Assistance Agreements (TAAs) approved by DDTC to which Airbus and its U.S. suppliers are parties, this broad definition has not imposed additional special burdens on the A400M program. Upon the shifting of jurisdiction over the 600 series items to the EAR, however, this definition of "defense service" would require Airbus' U.S. suppliers to maintain all of their existing TAAs, even if they obtain EAR licenses for exports of the items and related technology. That is because, in Airbus' experience, this definition is applied to cover technical activities related to any end product that is a defense article. In other words, a U.S. supplier assisting in the maintenance, repair, installation or integration of an item into a military aircraft (or other military end products, such as a tank) currently are deemed to be providing a defense service.

DDTC previously proposed to change the scope of "defense service" in a proposed rule published on April 13, 2011.[4] In that proposed rule, DDTC proposed to revise the definition of "defense service" in pertinent part as follows:

> (1) The furnishing of assistance (including training) using other than public domain data to foreign persons (see § 120.16 of this subchapter), whether in the United States or abroad, in the design, development, engineering, manufacture, production, assembly, testing, intermediate or depot level repair or maintenance (see § 120.38 of this subchapter), modification, demilitarization, destruction, or processing of defense articles (see § 120.6 of this subchapter); or
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> (2) The furnishing of assistance to foreign persons, whether in the United States or abroad, for the integration of any item controlled on the U.S. Munitions List (USML) (see § 121.1 of this subchapter) or the Commerce Control List (see 15 CFR part 774) into

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[3] 22 CFR § 120.9(a).

[4] DDTC, Proposed Rule, 76 Fed. Reg. 20590 (April 13, 2011).

> an end item (see § 121.8(a) of this subchapter) or component (see § 121.8(b) of this subchapter) that is controlled as a defense article on the USML, regardless of the origin ….

The April 13, 2011 proposed rule also stated that the following would not be considered a defense service:

> (1) Training in the basic operation (functional level) or basic maintenance (see § 120.38) of a defense article;
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> * * *
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> (3) Testing, repair, or maintenance of an item "subject to the Export Administration Regulations" (see 15 CFR 734.2) administered by the Department of Commerce, Bureau of Industry and Security, that has been incorporated or installed into a defense article ….

Under this proposed rule as applied to 600 series items, there would be a distinction between services that related to "incorporation" or "installation" – which apparently would not be a defense service – and those that relate to "integration" – which would be a defense service. Although these terms are not defined in the proposed rule itself, DDTC provided the following explanation in the preface to the proposed rule:

> … "installation" means the act of putting something in its pre-determined place and does not require changes or modifications to the item in which it is being installed (*e.g.*, installing a dashboard radio into a military vehicle where no changes or modifications to the vehicle are required; connecting wires and fastening the radio inside of the preexisting opening is the only assistance that is necessary). "Integration" means the systems engineering design process of uniting two or more things in order to form, coordinate, or blend into a functioning or unified whole, including introduction of software to enable proper operation of the device. This includes determining where to install something (*e.g.*, integration of a civil engine into a destroyer which requires changes or modifications to the destroyer in order for the civil engine to operate properly; not simply plug and play).[5]

In the case of the A400M, many of the U.S. suppliers previously have been engaged in activities meeting this definition of "integration." But Airbus foresees many circumstances in which the distinction between "integration" and "installation" may not be clear, especially when the end item is still under development.

A further problem is that it is not always possible to predict with certainty when an integration issue will arise. For example, a service technician engaged in an installation might offer a suggestion for improving cabling or another type of modification to how the item is physically installed. In that circumstance, an activity that was expected to be only "installation" (and therefore not a defense service) potentially would become "integration" (and therefore a defense service).

Similarly, the proposed rule would distinguish between "basic-level maintenance", on the one hand, and "intermediate-level" and "depot-level" maintenance on the other. Although those terms are

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[5] 76 Fed. Reg. at 20591.

defined in the proposed rule, each of the definitions uses the words "repair," "calibration," and "testing", and each refers to replacement of parts.[6] Companies and engineers may not be able to determine with certainty when an activity is sufficiently significant to pass from being "basic-level" to "depot-level." Similarly, a repair might start out as being for "on-equipment," but during the repair the technician might decide that the equipment should be removed (becoming "off-equipment") in order to finish the work properly.

It is Airbus' expectation that, in practice, companies will choose to maintain existing TAAs, or obtain new ones, in order to ensure that their servicing activities are "safely" covered by an ITAR authorization. Companies will not wish to risk adopting an interpretation with which the U.S. Government may later disagree.

Accordingly, under both the current regulations and the proposed amendment to the definition of "defense service," U.S. suppliers of 600 series items for the A400M would need to maintain both ITAR and EAR authorizations for exporting the same products and technical data, and Airbus would need to maintain compliance with both sets of regulations in relation to those items. The result would be a licensing system that will be potentially more cumbersome than the one currently in place, with an increased risk of confusion.

For these reasons, Airbus proposes that, as part of the export control reform process and implementation of the shifts in jurisdiction, consideration be given to modifying the scope of "defense service," at least with respect to 600 series items, so that all technical activities relating to such items would be subject exclusively to the EAR.

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Airbus appreciates this opportunity to comment on the proposed regulations. As noted above, these comments are submitted in relation to the proposed shift in jurisdiction for military electronics, but apply equally to other 600 series categories.

Respectfully submitted.

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cc: GRX

[6] Under the proposed rule, "Basic-level maintenance" (also referenced as "organizational-level maintenance") applies to "on-equipment" and would include: "repair, inspecting, servicing, or calibration, testing, lubricating and adjusting equipment, as well as replacing minor parts, components, assemblies and line-replaceable spares or units." "Intermediate-level maintenance" applies to "off-equipment" and would include "[c]alibration, repair, or testing and unserviceable parts, components, or assemblies". "Depot-level maintenance" would include "[i]nspection, testing, calibration or repair, including overhaul, reconditioning and one-to-one replacement of any defective items, parts or components."