December 21, 2011

Department of State
Bureau of Political-Military Affairs
Department of Defense Trade Controls
2401 E Street, N.W.
12th Floor, SA-1
Washington, D.C. 20522

ATTN: Sarah Heidema

RE: RIN 1400-AC95 Implementation of Defense Trade Cooperation Treaties
   76 FR, no.225, 22 CFR Parts 120, 123, 124, 126, 127 and 129

Dear Ms. Heidema:

The Aerospace Industries Association (AIA) appreciates the opportunity to provide comments on the proposed rule. The United States, Australia, and the United Kingdom are allies with longstanding relationships based on mutual national security, foreign policy, and economic interests and values. AIA has been a strong supporter of the U.S. Defense Trade Cooperation Treaties with Australia and the UK and reforming how the United States licenses the export of defense articles to these close allies.

The UK and Australia Defense Cooperation Treaties are an important first step toward modernizing the management of the U.S. export licensing system. Viewed in the context of the Administration’s ongoing comprehensive Export Control Reform initiative, the provisions of the Treaties reflect an important evolution in how the United States of America implements a licensing framework focused on moving beyond a transaction-by-transaction approach to a more efficient model that promotes effective collaboration – without sacrificing fundamental security interests.

AIA applauds the ongoing effort to transform the current export control system and encourages continued focus on reform initiatives that support critical U.S. Government defense and security programs, strengthen important international partnerships, facilitate defense trade with our close allies and partners, and eliminate export control licensing burdens that make U.S. companies less competitive and cost-efficient. Such an approach not only will be in the national security interests of the United States, but will create jobs at home, encourage state-of-the-art defense
research and development, and ensure that the U.S. defense industrial base remains strong and capable of protecting us from future threats and challenges.

It would have been beneficial if the UK Government had published the proposed Open General Export License (OGEL) to implement the US-UK Defense Trade Treaty so that we could clearly identify any conflicts or gaps in the two sets of implementing regulations. We understand the UK Government intends to publish their proposed OGEL in January, 2012, at which time we may submit additional comments to this proposed rule.

We encourage the Department of State to work closely with the Defense Trade Advisory Group (DTAG) as the Treaties are implemented. AIA encourages the Department of State to request DTAG input 30 days prior to all Treaty Implementation Committee meetings. We encourage the Implementation Committee to provide the DTAG with a read-out of their discussion within 30 days after their meeting.

Our comments focus on the following topics:

1. Marking requirements for both the articles and documentation
2. Treatment of dual/third country nationals working for Australia and UK eligible parties
3. Review and update process for the excluded technologies list
4. Complexity of the determination process to assure eligibility prior to using the exemption
5. Reexport/Retransfer Restrictions
7. Administrative comments (terminology, errors in citation reference, etc.)

Below are AIA comments:

Marking of Defense Articles and Documentation

The marking requirement for defense articles and documentation in Sec. 126.16(j) and Sec. 126.17(j) is more comprehensive than marking requirements for defense articles exported under an export license or license exemption, and also includes a unique Destination Control Statement to be inserted on accompanying documentation that differs from the standard in Sec.123.9. Including instructions for the marking of classified defense articles and services in Sec. 126.16 and Sec. 126.17(j) could cause confusion given that the export of classified defense articles and services under the treaties is excluded in Supplement No. 1, and Note 1 of the supplement refers to the use of Sec. 125.4(b)(1) for classified exports. Sections 125.16(j) and 126.17(j) should require marking every article “unless impracticable,” in which case the exporter need only mark the accompanying documentation. A reasonable interpretation of “impracticable” is key to a useable exemption. This approach would still effectively alert end-users of the sensitive nature of Treaty articles and align the Treaty exemptions with current industry best practices for marking ITAR-controlled defense articles.
The marking requirements for the hardware itself imposes additional requirements that many will find cost prohibitive and administratively challenging, particularly the process of applying and removing marking during the product life cycle. We are concerned the cost of implementing this type of comprehensive marking alone will deter any widespread use of the exemption, unless there is no alternate export authorization available. AIA member companies strongly believe keeping the marking requirement in place as is will virtually eliminate use of the treaties for hardware exports. We recommend that you consider reviewing the marking requirements to determine if a less onerous marking requirement is appropriate.

**Treatment of Dual/Third Country Nationals at Australian and UK companies**

The Department recently updated the ITAR with respect to treatment of dual/third country nationals. The ITAR requirements for identification and treatment for dual/third country nationals receiving defense services, technical data and/or defense articles is clear. However, it is not identified within the proposed rule how dual/third country nationals employed by UK eligible parties would be identified and treated within the context of Treaty-eligible transactions. The Department should clarify this with publication of the final rule.

**Review and Update Process for the Excluded Technologies List**

We are concerned that utilization of the Treaty will initially be constrained due to the scope and breadth of the proposed Exclusion List. The proposed rule excludes many items (Supplement No. 1 to Part 126.) This extensive exclusionary list – which will apply to items incorporated into larger systems as well (See Sec. 126.17(g)(5)) – limits the utility of the Treaty to facilitate defense trade. Comments have been made by U.S. Government personnel regarding commitment to periodic review and update of excluded technologies. AIA wishes to express concern that the proposed exemption will have limited utility unless an annual review and discussion on this topic is incorporated into annual Treaty Management Board meetings, with updates to the Exclusion Lists also published annually.

Sec. 126.17(g) (8) excludes defense articles and services specific to items that appear on the European Union Dual Use List. That document needs to be incorporated into the ITAR as an annex to Sec. 121 of the ITAR to assure that the requirement to consult the EU Dual Use List will be met by U.S. Exporters.

**Complexity of the Determination Process to Assure Compliant Exemption Use**

The complexity to determine appropriate use of the treaties is a deterrent to using the exemption, due to the risk of non-compliance for incorrect determinations. Further, given the nature of the UK-based supply chain (which includes other European sub-
contractors and participants), use of the Treaty will be constrained for supply chain participants external to the UK even if the activity and UK parties would otherwise be eligible. If a company requires a TAA for portions of the activity and could use the exemption for the UK portion of the activity, administration complexity of such a scenario would result in most companies opting for the typical multi-party Technical Assistance Agreement covering all the parties, including those in the UK otherwise eligible for the exemption.

**Reexport/Retransfer Restrictions**

Sec. 123.9(a) required written approval from DDTC before “reselling, retransferring, reexporting, retransferring, transshipping or disposing of a defense article to any end user, end use or destination other than stated in the export license, . . . except in accordance with the provisions of an exemption under this subchapter that authorizes [the activity] without such approval.” Exclusions are provided for reexports or retransfers to NATO, NATO agencies, a government of a NATO country, or specified countries (Australia, Israel, Japan, New Zealand, or the Republic of Korea.) At issue is whether a defense article exported to Australia or the UK under the terms of the proposed regulation would require written authorization for operational deployment or training purposes in other countries. DDTC should clarify as to whether a written authorization would be required, for example, for U.S.-origin articles transshipping a third country for use by U.S., UK, and or Australian forces in a training exercise or prepositioned in a third country for deployment in an ongoing military conflict.

**U.S. Government Procedures and Notifications**

AIA requests additional clarification on the following issues regarding U.S. Government processes identified in the proposed rule.

1. **Permissible Classified End Uses**

   Sec. 126.16(f)(2) states that “operations, programs, and projects that cannot be publicly identified will be confirmed in written correspondence from [DDTC].” It is uncertain if this written correspondence will be provided in response to request for a specific export or generally issued to all affected parties with an interest in a particular operation, program, and/or project. DDTC may want to consider establishing a classified notification process for other parties interested in a determination.

2. **Approved Communities**

   The proposed rule references the UK and Australia Communities, defined as entities and facilities identified as members by DDTC “at the time of a transaction.” Annotating the list to include dates for when an entity or facility was added and/or removed would
greatly assist corporate compliance efforts. We encourage DDTC to include these dates in posting this information on the website.

**Administrative Comments**

1. The term “defense articles” is used throughout the proposed rule. We recommend that the (a)(1) Definitions in both proposed §126.16 and §126.17 be updated to include reference to the term “defense articles” and reiterate the meaning to include articles and technical data as defined in §120.6 Defense Articles.

2. In the proposed Sec. 126.17(a)(4)(iii) and Sec.126.16 (a)(4)(iii), the term “required” is used to identify a transfer that is “required” for a specific end use under the respective Defense Trade Cooperation Treaty. The term required implies a standard that is used in other sections of the ITAR that is not an appropriate standard in eligibility determination to utilize the exemption. We recommend the term be changed to “pursuant to” an end use specified in the Defense Trade Cooperation Treaty in all areas within the proposed exemptions.

3. Citations in Sec.126.17 regarding filing of export information are identified as Sec.126.16 (e)(1) –(4) and should be identified as Sec.126.17 (e)(1) – (4).

4. There are numerous instances of avoidable redundancy in the proposed exemptions, such as recordkeeping requirements identical to recordkeeping requirements in Sec. 122.5, and U.S. person registration requirements identical to Sec. 120.1.

We look forward to implementing guidance and publication of the final rule on the Defense Trade Cooperation Treaties to facilitate defense trade with our closest allies. Please know that you have a willing and committed partner in AIA going forward.

Best Regards,

Remy Nathan
Vice President, International Affairs
Aerospace Industries Association