



August 6, 2012

U.S. Department of State
Office of Defense Trade Controls Policy
PM/DDTC, SA-1, 12th Floor
2401 E Street, NW, (SA-1)
Washington, D.C. 20037

Subject: ECR Transition

Reference: DOS-2012-0020

Dear Ms. Goforth:

The Aerospace Industries Association (AIA) submits the following comments for the aforementioned proposed rule. AIA appreciates the effort by the Administration to address this issue. AIA commends the Administration's efforts on export control reform and agrees with the overall proposed structure for a smooth and seamless transition. However, AIA believes that additional clarification is required to ensure these concepts are practical once proposed control list reforms are finalized.

Congressional Notification Requirements:

AIA does not support the proposed Congressional Notification requirement for USML items approved for transfer to the "600 series." As a threshold matter, the Export Administration Act ("EAA"), as currently authorized by the International Emergency Economic Powers Act ("IEEPA"), does not specifically authorize the Congressional Notification requirements, as proposed.

That stated, we acknowledge the discretion of the U.S. Government to craft regulatory language to implement such a requirement in the interests of national security, should it choose to do so. Given the fact that the Administration's review and proposed transfer of certain items from the USML to the CCL, with the concurrence of Congress under the AECA's 38(f) provision, is predicated on the premise that these items are not of critical importance to U.S. national security, we strongly urge removing the proposed Congressional notification requirement.

From a practical standpoint, duplicate notifications will result in significant transaction delay and cost to both industry and government, without increasing transparency regarding defense trade for Congressional stakeholders.

Rationale:

A single contract could include the sale of one or more complete items, as well as additional items for shipping, storage, testing, or other purposes. In such situations, the relevant ITAR application will normally require Congressional Notification, due to the high dollar value of the contract. Companion EAR license applications for parts and components would be related to the same contract. Therefore, EAR applications could inadvertently be subject to identical Congressional Notification requirements. This double-notification requirement would be an unnecessary regulatory burden for both government and industry.

We ask that both the Departments of State and Commerce reconsider the Congressional Notification language in the BIS proposed rule and that the provision be amended so as to base the notification requirement 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. The Departments should also specifically indicate that there is no expectation for EAR applications to be subject to notification requirements in the circumstances in which the same platform has been notified pursuant to an ITAR application (or is being notified concurrently.)

Dual Licensing/Compliance Requirements for Defense Sales:

AIA members have previously raised significant concerns about the new procedures, as proposed in this rule and the separate proposed rule establishing a jurisdictional methodology based on a concept of “Specially Designed” (see AIA comments submitted on August 3, 2012), which will create dual-licensing and compliance requirements for a single defense sale. While the proposed rule seeks to ensure that existing ITAR license exemptions are not eliminated when moving an item to the CML, it does not address the fundamental problem with requiring multiple licenses and item jurisdiction determinations for a single defense transaction.

The proposed State and Commerce rules should authorize the use of comprehensive ITAR licenses (e.g., DSP-5, DSP-73, etc.) for the exports of CML or CCL items that are parts and components of ITAR defense articles (i.e., end-items and systems), in lieu of obtaining additional authorization(s) from the Department of Commerce, if these parts and components are included as part of a sale of a USML-controlled defense article. This would be in keeping with current industry export licensing practice and would eliminate the burden on the U.S. Government and industry associated with redundant licensing and compliance requirements - without adversely affecting national security interests. This approach would also be in keeping with the original intent of Export Control Reform – to create one list, licensed by one agency. Where it is possible, the U.S. Government should seek to implement that objective, not create multiple new license requirements and compliance burdens for U.S. defense trade with our allies and partners abroad.

Rationale:

If implemented in its current form, a U.S. company that is seeking to sell USML Category VIII military aircraft to a foreign government, including some assembly abroad, would need authorization from the Department of State. That sale and assembly, however, could include thousands of parts and components that would be controlled separately under the CML. Although

control on the CML might expedite future sales of parts and components to this approved program, the initial transaction that currently requires only a single authorization from the Department of State would now require multiple licenses from two agencies. This will not make U.S. defense licensing more efficient.

Moreover, this dual licensing framework would require a company to parse out potentially thousands of small parts and components for individual listing on a Commerce license. Each one of these items would need to be individually evaluated to determine whether it is a CCL, CML or USML item, increasing the complexity of the existing licensing requirements. Under current USML processes, these parts and components are authorized for export as general categories of items (e.g., "Category VIII(h) parts and components of the hydraulic/mechanical/electrical system.")

A new dual-licensing regime would impose very significant additional compliance burdens and costs on international defense and aerospace trade under both the Foreign Military Sales (FMS) and direct commercial sales (DCS). As such, this change would be difficult to characterize as "reform." The proposed Department of Commerce rule accompanying FRN RIN 06494-AF65 "Transition 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." (See p. 37538 Note to (b)(2).) If the intent of this note is to declare that the authorization for FMS cases under 22 CFR 126.6(c) will apply to both USML and CML items, then that should be articulated clearly and explicitly in both the Department of Commerce and Department of State proposed rules. However, even if that is the intent, this exception would not apply to, or lessen the compliance burdens and costs associated with, Department of State authorizations for DCS.

During the list review process, the Departments of Commerce and State considered the creation of a license exception that would authorize CML items accompanying an ITAR-licensed export. AIA would also support this approach as a solution, if it was effectively crafted to address the duplicate license requirements and additional compliance burdens discussed above.

Temporary Exports/Imports

AIA recommends the following language be added to the proposed rule:

"Licenses issued by the Department of State prior to the effective date of the final rule for each revised USML category for the temporary export or import of items transitioning to the CML or CCL will remain valid until expired or returned by the license holder, whichever occurs first. Any limitation, proviso or other requirement of the license will remain in effect.

Following the effective date of the expiration or conclusion of the ITAR license, any items that were exported under the ITAR, but subsequently transitioned to the EAR, should be treated as such and any requests for post-transition reexports or retransfers should be submitted to the Department of Commerce, as required by the EAR."

Rationale:

The expiration of ITAR temporary licenses, based on the need for an amendment or within a two year period, would cause a substantial additional burden on defense programs for sustainment (e.g.,

temporary transfer of items requiring repairs) and production (e.g., transfer of temporary test and/or production tooling). This would necessitate industry assessing thousands of active temporary licenses to determine jurisdictional status of individual items. Conducting these assessments as licenses expire (e.g., four years) or as they are returned by the license holder would be a more manageable process, and accomplishing the same objective. There is no risk to national security with this proposal, as temporary licenses require all hardware to be returned to its origin.

Reexport/Retransfer:

Reexport and retransfer of USML hardware is also a concern for our members. Licenses, agreements and other authorizations issued by the Department of State prior to the effective date of the transition regulation that authorize the reexport or retransfer of items (and related technical data) transitioning to the CML should be “grandfathered” without expiration.

Rationale: Foreign recipients of US origin hardware may not be in a position to correctly classify post-transition reexports or retransfers of hardware and technical data originally received as USML-controlled. For example, a foreign party that purchases a defense article, authorized for export under a DSP-5 license “in furtherance of” an agreement, which permitted reexport authority to a third party, may not understand that the retransfer authorization is no longer valid, if the hardware moves to the CML. Under Technical Assistance and Manufacturing License Agreements, the Department of State has authorized the sublicensing and reexport/retransfer of literally millions of items and related technical data to many thousands of foreign persons. Accordingly, the retransfer after the effective date of the items moving to the CML would potentially be a violation for which the original US exporter is accountable, in accordance with 127.1(c). Finally, if the USG has already conducted a comprehensive review and issued an authorization for such reexport or retransfer, it should not be required to repeat the process.

Existing Authorizations

AIA recommends adding the following language:

“Authorizations (DSP5, Part 124 Agreements) for items transitioning to the CML that are issued in the period prior to the date of final rule publication for each revised USML category will remain valid until expired, or returned by the license holder, whichever occurs first. Any limitation, proviso or other requirement imposed on the DDTC authorization will remain in effect. During the transition period, exporters may continue to identify the original USML category delineated in the DDTC authorization on all required shipping documentation and AES filings.

Applications and amendment requests for items transitioning to the CML that are received by DDTC prior to final rule publication for each revised USML category will be adjudicated up until the effective date of the rule, unless the applicant requests that the application be Returned Without Action. New application requests for items moving to the CCL which are received after the effective date will be Returned Without Action with instructions to contact the Department of Commerce.”

Rationale:

This approach will allow exporters to evaluate the impact of the USML to CML change and assess on a case-by-case basis whether to continue operating under valid authorizations or transition to the EAR.

Some AIA members have thousands of active agreements at any one time. The new requirement to identify the jurisdiction for every item in an agreement would preclude amendment and the swift consideration of a new authorization, likely resulting in contractual issues, including potential work stoppage. This in turn would undermine the reliability of the United States to deliver defense platforms and systems to our allies and partners in a timely and efficient manner. Given the time and effort to secure the initial ITAR authorization, it may in fact be more efficient for the exporter to continue operating under the authorization rather than submit a duplicate request under the EAR.

In most cases, AIA estimates that transitioning to the EAR will significantly streamline the export process, particularly when eligible for EAR license exceptions (e.g., STA, RPL, TMP, etc.). But in some cases (e.g., if ineligible for an EAR exception), AIA member companies should be permitted to continue to export under existing DoS approvals throughout the life of the authorizations. This would provide a natural phasing in of the new system without costly and time-consuming base-lining/realignment efforts that will disrupt international trade and the defense supply chain.

If DDTC needs a firm date at which transition would be completed, we suggest four (4) years as the appropriate transition period, as this reflects the current standard authorization from the Department of State.

Commodity Jurisdiction Sanctity Recommendation:

AIA recommends adding the following sentence to address validity of existing Commodity Jurisdiction (CJ) determinations:

“Previously rendered CJ determinations for items deemed to be CCL, shall remain valid and their parts, components, accessories and attachments covered in the CJ determination shall remain subject to Commerce jurisdiction. Classifications of such items under the CCL shall also remain valid after the transition date.”

Rationale:

The suggested addition will preserve the validity of previous CJ determinations. This is particularly important for situations where a precedent CJ included a CCL classification in addition to a jurisdiction assessment. Without this clarification, exporters may suddenly discover items previously assessed as “EAR99”, or other CCL entry, would transition to the CML with corresponding increased levels of control. Further, this note will clarify that exporters do not need to start again with assessments of products that were subject to prior CJs and would eliminate the potential for parts and components of an end item that was previously determined to be Commerce pursuant to a CJ from potentially being subject to the ITAR.

Entry Into Force:

The effective date for a final version of this rule should be of at least 180 days from its publication.

Rationale:

The proposed rule would require companies to undergo multiple implementation changes (e.g., classification changes, marking requirements, tool updates, training, and licensing) that require time, thought and substantial resources. A delayed effective date for this rule is fully consistent with the approach that has been taken, for example, by the Bureau of the Census in rules that have a wide impact across the exporting community with the processing of hardware shipments through U.S. Government interfaces, such as AES. Without sufficient time to implement the complicated and resource-intensive requirements of the proposed rules, U.S. companies will be unable to comply and the chances for inadvertent compliance issues increases.

AIA continues to support the Administration's efforts on export control reform, but our members have concerns about the proposed transition process as indicated above. Without modifications to the proposed Department of State and Department of Commerce transition rules, the overarching control list reform effort will not have the intended effect of making the U.S. export control system more efficient and effective and may, in fact, have adverse effects on U.S. defense and aerospace trade. Accordingly, we encourage the Departments of State and Commerce to consider these potential ramifications, and the recommended changes proposed in this letter, before publishing the export control reform transition plan in final form.

AIA appreciates the opportunity to provide comments on this proposed rule. If you have any questions or require additional information concerning this submission, please contact the undersigned at 703-358-1070 or by e-mail at: remy.nathan@aia-aerospac.org.

Best regards,



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