January 28, 2013

U.S. 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: Ms. Candace M. J. Goforth, Director, Office of Defense Trade Controls Policy, Department of State

RE: Notice of Proposed Rulemaking, ITAR Amendment – Category XI and ‘Equipment’

Dear Ms. Goforth:

The Aerospace Industries Association (AIA) and our member companies appreciate the opportunity to comment on the Department of State’s proposed amendments to the International Traffic in Arms Regulations (ITAR). Revising Category XI (Military Electronics) of the U.S. Munitions List (USML) to describe more precisely which military electronics and related defense articles warrant control on the USML will create a “positive” list that will result in a more predictable, efficient, and transparent export control system. AIA has long been a champion of export control reform, and we are encouraged the Administration shares this priority. To further progress on sensible export controls, AIA would like to highlight the below issues for further consideration.

Overlap of USML Categories:
Category XI is closely related to Categories VIII (aircraft and associated equipment), XII (fire control, range finder, optical and guidance and control equipment), and XIX (gas turbine engines). A successful export control reform effort will address the symbiotic relationship of USML categories. In this regard, the U.S. Government should recognize the importance of finalizing related categories in timely manner. As these other categories are completed and published in final form, the licensing jurisdiction for affiliated electronics may be vague. To avoid unnecessary confusion, the Departments as of State and Commerce should seek to minimize the delay between the publication of Category XI and these related categories in final form.

Specially Designed Language:
Category XI, like many other categories, contains extensive use of the phrase “specially designed.” Final industry recommendations and comments are dependent on the full understanding of “specially designed,” which was published in draft form on June 19, 2012 (See AIA public comments submitted on August 3, 2012). While the proposed revision to USML Category XI represents significant progress towards creating a positive list, there are several instances in which
the inclusion of “specially designed” in the control parameters will create vague “catch all” commodity descriptions that run counter to the objective of creating an enumerated list of the most-sensitive commodities that warrant the stringent controls of the International Traffic in Arms Regulations (ITAR). Including specific parameters may not be possible for all items in Category XI. However, where possible, parameters should be included, for example in XI(a)(1)(v) “low frequency/very low frequency”; XI(a)(1)(vi) “cooperative sensing”; or AESA radars in XI(a)(3)(xii).

In those instances where inclusion of specific parameters is not possible, AIA recommends integrating the concept of “specifically designed for articles controlled in this subchapter” to avoid the inadvertent capture of commercial systems – this will reduce confusion and questions relating to systems currently in use in the civil sector. For example, C3, C4, and C4ISR systems (XI(a)(5)(i)) “specially designed” to integrate, incorporate, network, or employ defense articles may unintentionally capture command and control systems built using predominantly commercial components; autonomous processing/control systems and equipment that enable cooperative sensing (XI(a)(1)(vi)) is likely to capture commercial Autonomous Underwater Vehicles (AUVs) that use non-military cooperative sensing; and XI(a)(3)(xii) will likely capture commercial AESA radars using electronic steering.

Foreign Availability:
Additionally, we believe the Administration should recognize the foreign availability of electronics when creating the bright line between USML and CCL. Many proposed control parameters are already achieved by products available from various international providers. Items available internationally offer no critical military or intelligence advantage to the United States. Further, as such items are not exclusively available from the United States they do not meet the new criteria the Administration has articulated for maintaining control under the ITAR. If U.S. partner and ally countries make equivalent systems, parts, or components commercially available, and not subject to ‘munitions list’ level control., the U.S. should apply a comparable level of control. To do so otherwise would encourage the designing-out (ITAR-free) of U.S. electronic parts and components.

Developmental Program language:
Establishing jurisdiction based on the funding source is likely to result in control inconsistencies. The Administration should consider amending the language regarding developmental programs (XI(a)(7)) to ensure that a Department of Defense contracting officer is not making final decisions as to whether something is ITAR controlled.

Additionally, while the notes to proposed USML Category XI(a)(7) for developmental electronics are helpful, AIA recommends additional language to proposed Category XI(a)(7) “Developmental electronic devices, systems, or equipment for a military application, funded by the Department of Defense and inventions/innovations not disclosed to the U.S. Government.”

Commodity Jurisdictions:
Industry would like assurance from the Department of State that prior Commodity Jurisdictions (CJs), which identified an item as commercial, and subject to CCL jurisdiction, would not have to be re-submitted to ensure that they are still under the CCL.
Civil/Commercial Products:

Particular attention should be given to avoid capturing civil technologies related to traffic collision avoidance systems, phased arrayed satellite communications antennas, automatic direction finder antennas, air surveillance radars and the commercial wireless security sector.

Printed Circuit Boards:

AIA members recommend the following regarding Printed Circuit Boards and patterned multichip modules found in the revised Category XI:

1. Separate designation of PCB’s and patterned multichip modules to account for differences between the two, and provide definitions of the two.
2. Ensure the language reflects the concept that in most cases, the treatment of the PCB/patterned multichip module should follow the commodity jurisdiction of the article that it is designed for (as opposed to the commodity jurisdiction of the overall system into which it is incorporated).
3. Further, language in Category XI should reflect the concept that there are cases where the PCB (or design of the PCB) does not itself reveal ITAR-controlled technical data even though it is designed for an ITAR controlled defense article. To account for such cases, companies must be allowed to self-classify jurisdiction of the PCB/PCB design based on the presence/absence of ITAR controlled technical data, or submit a CJ to get such a determination.

Parts/Components:

The revisions are not clear as to whether a part/component will be controlled under USML Category XI(c) simply because it is described in XI(c), or if the control of such a part/component under Category XI(c) is conditional upon it being used in or specially designed for items described in and controlled in XI(a). Given the doubt in jurisdiction this creates, the connection between XI(c) and XI(a) should be clarified in the final rule, including any other assumption(s) that the exporter or end-user must consider in order to properly determine whether or not the electronic part/component is controlled under XI(c).

AIA has long been a champion for sensible export control reform and we commend the Administration for their tireless efforts to achieve meaningful reform. Please know that AIA is a willing and committed partner to reform efforts going forward.

Best regards,

Remy Nathan
Vice President, International Affairs
Aerospace Industries Association