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: Charles B. Shotwell
   Director, Office of Defense Trade Controls Policy

RE: Notice of Proposed Rulemaking, RIN 1400-AC96, 76 FR no. 215
   (November 7, 2011) Revision of USML Category VIII

Dear Mr. Shotwell:

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 VIII (aircraft and related articles) of the U.S. Munitions List (USML) to describe more precisely which military aircraft and related defense articles warrant control on the USML, will create a “positive” list which will result in a more predictable, efficient, and transparent export control system. Additionally, creating new classifications on the Commerce Control List (CCL) will ensure proper oversight is established for items moving from the USML to the CCL. AIA has long been a champion of sensible export control reform and we are encouraged the Administration shares this priority.

It should be noted that Category VIII is closely related to Categories XI (military and space electronics), 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, AIA and its members may amend our attached comments once we have an opportunity to see the draft revisions to these other categories.

AIA and our member companies would like to particularly highlight the importance of section 121.1(h)(1). Capturing parts and components of aircraft with reduced signature that are common in other aircraft because they are specially designed for the latter could result in increased compliance risk. To minimize this potential risk, AIA offers an amendment to the
proposed 121/1(h)(1) language (see below). It is critical that industry and the U.S. Government can come to an agreement on this section.

In addition to the ambitious control list review process, AIA continues to encourage adoption of other licensing reform priorities, including “Program Licensing” and exemptions for spare parts replacement and support for U.S. Government activities, as the Administration pursues comprehensive export control reform. These licensing management initiatives will complement the control list changes contained in the proposed rule and will help facilitate strategic trade with our close allies and partners, strengthen important international partnerships, and create jobs and economic opportunities at home. AIA and our member companies thank the Administration for their tireless efforts to implement export control reform.

Below please find AIA’s comments and suggested revisions of the proposed ITAR amendments:

**Definitions:**

- Clarify the Definition of “End Items” and “Major Components”

The definition of terms in the International Traffic in Arms Regulations (“ITAR”) §121.8, should be revised to distinguish whether items designed to be integrated into a platform requiring “only a power source to place it in an operating state” are considered “end items” or “major components”. The regulation also should include additional definitions as currently used in industry – such as “platform”, “system” and “sub-system” - to illustrate clearly the treatment of items in the ITAR.

- Harmonize Key Definitions Between ITAR and EAR

State and Commerce departments should coordinate to assure that these terms and other key terms necessary for proper regulatory interpretation should be the same in both sets of regulations. Currently the Commerce Department proposed rule (RIN 0694-AF36,(76 FR 68675, November 7, 2011) includes a definition of “build-to-print technology” that is different in some respects to the existing definition of “build-to-print” in the ITAR §124.13. Inconsistent definitions between the two export control regulations pose a compliance risk.

**Proposed Regulations:**

The current proposed regulations cite components, parts, accessories, attachments, and equipment for specific aircraft (example B-1B, B-2...). Specifying the type of aircraft creates a “catch-all” for parts/components etc when only the highly sensitive part/components of such aircraft should be controlled on the USML. Aircraft with reduced observability and conventional aircraft potentially contain parts and components that are common to both aircraft. As written, it appears the rule would capture these common parts and components under the ITAR for the aircraft with reduced observability (e.g. F-35), despite not having intrinsic reduced observable properties. Hence the jurisdiction would need to be determined by the end aircraft as opposed to the part or component itself. As proposed, fighter aircraft produced by two manufacturers (
again sharing common parts and components) could now also face different regulatory regimes favoring one fighter over another in the international market. The unintended consequence of the proposed set-aside is increased compliance risk. Below is a proposed revision.

121.1(h) Components, parts, accessories, attachments, and associated equipment directly related to commodities controlled by §121.1(a), as follows:

(1) Components, parts, accessories, and attachments “specially designed” to reduce observability of aircraft enumerated in (a)(1) thru (a)(12) of this section (including developmental aircraft and/or United States Government technology demonstrators) using features or methods not in the public domain (§120.11). Items that reduce observability of the aircraft only through plan form alignment, unless listed below, are subject to the jurisdiction of the Export Administration Regulations. Observability reduction (aka signature reduction) includes any part of the spectrum (e.g., radio frequency, infrared, electro-optical, visual, ultraviolet, acoustic and magnetic);

Designating that parts, components, accessories, attachments, equipment, or systems that are manufactured using either classified production data or are developed using classified information on the USML, is problematic in that the exporter may not have any means by which to know the origin of the design if the items themselves are unclassified. Below is a proposed revision.

121.1 (19) Any component, part, accessory, attachment, equipment, or system that:
(i) is classified;
(ii) contains classified software;
(iii) is manufactured using classified production data; or
(iv) is being developed using classified information.

We note that the proposed definition of Aircraft in 121.3(a)(1) does not include military aircraft with the "C" (Cargo) designation and concur that cargo aircraft should not be subject to control under the USML. However, cargo aircraft with specific "strategic airlift" capabilities set forth in (a)(4) of this section will continue to be controlled. We believe that these aircraft are more appropriately controlled on the CCL, when they do not include systems controlled on the USML, such as the capability for air-to-air refueling. Control on the CCL would continue the requirement to obtain licenses for the export of such aircraft.

As to the specific performance criteria listed in the proposed rule for strategic airlift aircraft, the capability to land into unimproved or short airfields in aircraft capable of airlifting payloads over 35,000 lbs to ranges over 2,000 nm is not unique to military aircraft and should not be considered for purposes of defining strategic airlift aircraft. Including control parameters in Part 121.3 instead of within the text of Category VIII under section 121.1 would require exporters to consult two separate areas within the regulations, unnecessarily increasing complexity and the possibility for compliance issues for exporters.

To assist in the differentiation of "strategic" aircraft from commercial aircraft, we recommend that the performance criteria be changed from "unimproved or short airfields" to "unimproved and short airfields". To conclusively differentiate between "strategic" aircraft and commercial aircraft, we recommend that this definition include the following text at the end of
the control paragraph: "(...)short or unimproved airfields), and are specially designed or modified for military application."

When defining “mission system” under 121.3(a)(6) it is important to incorporate qualifying language. Further qualification/clarification of the “mission system” terminology in the proposed rule is necessary to ensure the proposed regulation will have the intended result. Without the limiting language, a commercial aircraft with the remnants of an ITAR-controlled mission system (e.g., FLIR wiring) could remain ITAR controlled until each nonspecific support element was removed from the aircraft. Suggested revision is below:

121.3(a)(6) - Incorporate the essential elements of any “mission systems” controlled under this subchapter. “Mission systems” are defined as “systems” (see § 121.8(g) of this subchapter) that are defense articles that perform specific military functions beyond airworthiness, such as by providing military communication, radar, active missile counter measures, target designation, surveillance, or sensor capabilities.

Additionally, the broad definition of “system” provided for under 121.8(g) combined with the “mission systems” definition under 121.3(a)(6) does not clearly define at what point the combination of end items and/or component become classifiable as a “mission system”. Guidance or further clarification on the weighting or criteria applied to the designation of the determination of a “mission system” would aid in the proper classification, for example, of a commercial aircraft modified with an ITAR controlled mission system whereby the same mission system is subsequently removed to a degree allowing the unmodified aircraft to return to EAR controls.

Further, if the remnants of ITAR controlled “mission systems” preclude the commercial aircraft’s return to EAR controls, members of the aerospace community will be forced to consider services on civil aspects of the otherwise commercial aircraft as a defense service. This would cause a licensing burden on both manufactures and service providers, but also on the Department of State.

The proposed regulations capture lithium-ion batteries that provide 28 VDC or 270 VDC on the USML. Lithium-ion batteries are not uniquely military and should be placed on the CCL. We suggest section 121.1(h)(13) be deleted.

With regard to the lack of objective parameters for military unmanned aerial vehicles (UAVs), AIA offers below revised versions of the proposed rules, Category VIII, sub-paragraphs (a)(5) and (a)(6), including military UAVs that would not be considered Significant Military Equipment (“SME”). We further recommend that UAV Ground Control Stations specially designed for a military UAV that have the capability to process data collected by military electronics on the UAV, be specifically identified within Category VIII, and have proposed additional entries to cover the ground control stations.

We believe that any unmanned aerial vehicle (“UAV”) specially designed for a military application which is not in MTCR Category 1, and does not include any specially designed capability covered by the USML, should be transferred to the proposed Commerce Munitions List (“CML”) ECCN 9A610.a, or existing ECCN 9A012. The proposed rule did not specifically
address whether ECCN 9A012 would be eliminated in the same manner as 9A018. We recommend including specific language in the final rule including those unmanned aerial vehicles covered on the CCL in Category 9A012 or added to the proposed 9A610.

Optionally Piloted Vehicles (OPV) without the avionics and software installed that allow the aircraft to be flown unmanned should be considered manned aircraft for evaluation under the ITAR in Category VIII. OPV’s including the unmanned avionics and software, and operated as a UAV or optionally piloted aircraft should be evaluated as a UAV using the criteria proposed for UAV’s in Category VIII.

With rapid and continuous advancement in UAV technology we would support the formation of a working group between the Departments of State/Commerce and industry so that UAVs/UAV technology can be continuously evaluated for appropriate export control.

Additionally there are current exemptions on the USML that are critical to efficient defense trade. There is an exemption under Section 123.16(b)(9) for the export of unclassified parts and components to a U.S. company’s foreign subsidiary if the item will be used for manufacture, assembly, testing production, or modification. Unfortunately there is no parallel license exception in the EAR for intra-company transfers. If a USML item does not need a license to be sent to Country X, then that same item should not need a license to travel to Country X under the CCL. AIA encourages the Department of Commerce to enact similar licensing exemptions on the CCL for former ITAR items that currently enjoy such exemptions on the USML.

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. Additional member company comments can be found on the next page.

Best regards,

Remy Nathan
Vice President, International Affairs
Aerospace Industries Association
Additional AIA member company comments:

Comments:

1. An AIA member company recommended identifying tilt rotor aircraft on the enumerated listing of aircraft found under Category VIII(a). The aerospace industry considers tilt rotor aircraft a unique combination of both a utility helicopter and fixed wing aircraft.

While a tilt rotor aircraft may be provided for under a descriptive provision (e.g., 121.1(a)(11): Aircraft equipped with any mission systems controlled under this subchapter), a specific enumeration of tilt rotor aircraft would alleviate a perceived gap in controls governing this class of aircraft.

For example, the EAR includes “tilt rotor or tilt-wing airborne aircraft” under the definition of “aircraft” at 15 CFR § 772.1. A similar identification of military tilt rotor or tilt wing aircraft in the ITAR would create a unified terminology between the regulations and ensure a potential gap is filled.