



April 14, 2011

The Honorable Ellen Tauscher
Under Secretary, Arms Control and International Security
Department of State
Washington, DC 20230

Re: Amendment to ITAR: Replacement Parts/Components and Incorporated Articles

Via email: DDTCResponseTeam@state.gov

Dear Under Secretary Tauscher:

The National Association of Manufacturers (NAM) welcomes the opportunity to comment on amendments to the International Traffic in Arms Regulations (ITAR) designed to update policies regarding replacement parts/components and incorporated articles.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Our members play a critical role in protecting the security of the United States. Some are directly engaged in providing the technology and equipment that keep the U.S. military the best in the world. Others play a key support role, developing the advanced industrial technology, machinery and information systems necessary for our manufacturing, high tech, and services industries.

We commend the State Department for seeking to amend the ITAR to streamline the flow of parts and components and to eliminate redundancy in licensing. This initiative is a significant step and an important part of the President's Export Control Reform effort. The proposed changes can enhance the military capabilities of U.S. allies and partners, reduce the uncertainty and time lags U.S. defense suppliers currently face in providing replacement parts and components and incorporated articles, and better focus limited U.S. export control resources where they are more needed.

We concur with the Department's conclusion that the current rule regarding parts and components imposes burdensome requirements for additional licenses for systems and components that have already been examined in the process of obtaining earlier licenses. The proposed exemption has the potential of making exports of spare parts and components much faster, allowing swifter repairs to U.S. supplied end-items used by U.S. allies and partners.

We applaud the Department's initiatives in proposing new Sections 123.28(a) and 126.19 to improve the efficiency and effectiveness of the Department as well as the license applicants. We appreciate that, in addition, the Department is publishing the proposed rule and soliciting further public comment. We are pleased to be able to present our views.

In reviewing the proposed rule, the NAM and the members of the NAM's Export Control Task Force believe the Department's intent to streamline the process is an important step forward and will have a positive effect. We also believe the proposed amendments could be improved significantly by incorporating a number of further changes. We are concerned that in the absence of these further changes, the impact of the changes will be more limited than the Department intended. We also believe our recommendations do not in any way limit the necessary security over sensitive items. Our recommendations follow.

Proposed Rule 123.28

Additional Exporters

As structured, the rule requires the party using the exemption to be the applicant of the previously approved authorization to export the U.S. origin end item. §123.28(a)(2) of the proposed exemption points to §121.8 for the definition of end item. That definition, per §121.8(a), reads "An end-item is an assembled article ready for its intended use. Only ammunition, fuel, or another energy source is required to place it in an operating state." Thus, any company that manufactures parts or components (defined in §121.8(d) and (b)), who delivers those parts and components to a company that integrates them into an end item for export, would not be able to use this exemption. This is a serious limitation that significantly impedes the utility of this exemption.

For example consider the case of a defense article platform fighter jet: an "end item" from an original manufacturer. The installed systems, equipment, and accessories applicable to that end-item would not qualify for the exemption as proposed as they are not from the "applicant of the previously approved authorization to export the U.S-origin end-item,"

The Department added, however, that it would be willing to consider the possibility of expansion of the exemption to include major subcontractor component suppliers. The NAM urges the Department to make such an expansion. Limiting the exemption only to the exporter listed in a previously approved authorization will limit industry's ability to take advantage of this exemption and thereby limit any improvement on the current delays in providing replacement parts to our allies.

Accordingly, the NAM recommends that, as a minimum, the Department expand the exemption to include not only exporters specifically identified in a previously approved authorization, but also to any major subcontractor. It would be even better if the exemption were expanded to include parts and components of U.S. original manufacturers of military platforms, systems, and equipment except for specifically-identified critical, sensitive, or classified parts and components in their respective categories. However, It would seem the exemption could be granted to all suppliers previously qualified on the A/C who have had previous license approval.

If all the companies who contribute to the production of an aircraft were a pyramid, the current proposal would help one company (i.e., the tip of the pyramid). The revision to include major subcontractors would help a few dozen companies, at most. There are probably another 5,000 companies who will have to continue going through the licensing process for orders that in some cases will barely pay the licensing fee. While the NAM recognizes there are some complications for the Department here, finding a way to manage this situation would benefit not only exporters but also the Department in terms of reduced licensing processing.

Non-Government Consignees

Section 123.28(a)(6) requires that the consignee of the shipment of parts or components be the foreign government approved under the original export authorization. This means the foreign government must be the party that takes direct possession of the shipment from foreign customs and maintains possession. This is problematic because foreign governments generally do not operate in that manner, nor does the U.S. government. The foreign government typically has commercial companies who do this for them. In many cases those same companies perform the actual repairs, which is why the U.S. company ships the replacement parts to them. For example, we understand that the UK and Japanese governments use commercial contractors to manage some of their maintenance and repair programs. U.S. defense companies ship spare parts to those established and reliable contractors as the foreign consignee, with the respective Ministry of Defense identified as the ultimate end user on the license application. The present wording of the exemption would render it unusable in this instance and in a very large number of cases, which we do not believe was the Department's intent.

Accordingly, the NAM recommends the exemption be expanded to apply to parts and components exported to foreign governments through their designated commercial companies who are responsible for installing the spare parts and components into a military platform or system delivery to or use by the foreign government. The rule could be modified to cover instances in which the consignee of the shipment is the foreign government, their designated logistics contractors, or other consignees approved under the original export authorization.

Possession of a Purchase Order

Section 123.28(b)(1) requires the exporter to be in possession of a purchase order from the foreign government end user. We assume this means a purchase order for the spare parts and/or components rather than for the original end item. While the rule will be applicable to some purchases, the rule – inadvertently, we believe – would appear to not cover replacement parts or spares exported under warranty. The reason for that is there is generally no purchase order for parts or replacements covered under the original warranty. A significant portion of replacement parts are provided to our allies for repairs pursuant to warranties, so the requirement to have a purchase order in hand is a significant hindrance to using the exemption.

This problem could be solved if Section 123.28(b)(1) were modified to include a provision that in lieu of a purchase order, the exporter could be in possession of documentation evidencing that the shipment was being made in response to a request under a valid warranty.

Foreign Military Sales

Section 123.28, as written, appears to exclude parts and components that are destined for end-items that were originally exported under the Foreign Military Sales (FMS) program. Many U.S. allies participate in the FMS program, and we recommend expanding the exemption to include parts supplied through that program. We believe the subsection could be revised to reflect that in the case of the FMS program, the exporter of the U.S.-origin end-item may not always be the applicant of a previously approved authorization.

The NAM recommends that the rule be modified to permit the export without license of parts or components of U.S.-origin end-items sold under the U.S. Foreign Military Sales (FMS) program, and held in the inventory of a foreign government when the conditions already stipulated in the rule are met and when:

- The exporter has been issued a contract by the Department of Defense (DoD) for sale of parts or components, and the contract cites the funding FMS case(s);
- The FMS case and implementing DoD contract is in effect; and
- The consignee of the shipment is the purchaser as identified in the FMS case, or their designated consignee.

Expanding the exemption to include parts supplied under the FMS program would also require amending the current subsection (b), which currently requires purchase orders for the replacement parts and original license numbers. When replacement parts are exported pursuant to the FMS program, however, neither of these requirements would be available. Accordingly, we recommend the subsection be amended to allow the exporter to claim the exemption if it is in possession of a purchase order from the foreign government end-user, the U.S. government (USG) contract, or the FMS letter of offer and acceptance (LOA). The exporter should be required to cite in its Automated Export System (AES) filing the license or FMS case number authorizing the previously approved export, and provide on request a copy of the license, FMS case number and a copy of the purchase order, USG contract, of LOA.

Other Recommendations

Section 123.28(a)(9) requires that the replacement parts or components being exported be consistent with U.S. Government authorized maintenance activities. There is no definition of, or clarification on, what exactly a “U.S. Government authorized maintenance activity” is. As such, the phrase will raise significant questions as to something qualifying for the exemption or not. That will result in simply getting a license rather than using the exemption as it will be the less risky course of action. Additional clarification or guidance is needed in order to provide exporters confidence in complying.

Additionally, condition (4) in the rule requires that the type, amount, and frequency of the exports are consistent with repair and replacement in accordance with normal logistical support requirements for the number of end-items in the end-user inventory. The condition does not specify what are “normal logistical support requirements” or the standard for determining what is “normal.” Similar to the above requirement, clarification or guidance would be very helpful.

We also recommend that the Department consider amending the value limitation in the current ITAR exemption for parts and components. The current exemption for spare parts and components limits the eligible transaction value to \$500, which is not a figure that realistically reflects today's prices for parts and components. The NAM believes the eligible transaction value should be raised to a figure that would be appropriate for today's prices. We recommend that the eligible part or component value could be raised to \$15,000.

Further, we recommend allowing suppliers to use the exemption on a one-time basis if specifically authorized by the Directorate of Defense Trade Controls. For example, suppliers could request a one-time authorization for a specific end-user, or they could receive a certification based on prior performance as trusted exporters.

Proposed Rule 126.19

De minimus Value

The Department's proposal to modify ITAR treatment of incorporated articles is also an important step in achieving the Administration's reform efforts. The proposed rule has the potential to help focus ITAR coverage of embedded USML items more tightly on situations where diversion is a plausible concern.

We are, however, concerned that the proposed value requirement will hinder the proposed rule's effectiveness. One of the conditions to qualify for the proposed exemption is that the value of the defense articles incorporated into commodities be less than one percent of the value of the end item." This condition would make the exemption impracticable for industry members in many contexts.

First, determining whether the defense article is less than one percent of the value would be difficult in many situations, and exporters therefore would be likely to continue seeking DDTC licenses rather than rely on this exemption. When an end-item is a total system sold to a foreign government, the individual value of the parts, including defense articles, that make up that system are not priced separately. Thus, to determine whether a particular defense article qualified for the exemption, it would be necessary to establish a sales price value as if the exporter were selling a spare part. This process would not only present difficulties in determining the appropriate sales price but also in documenting the price.

Second, by setting any dollar value requirement, the situation will exist where the same defense article can be incorporated into one commercial item and exported under the EAR, but it cannot be exported under the EAR if incorporated into another commercial item simply because its value exceeds one percent of the commercial item value in the second case, though in both cases the two technology security limitations and one end-use limitation are met.

Additionally, a de-minimus value will add significant confusion as to what does and does not qualify as it creates the situation where one day a commercial item with a defense article component incorporated does not meet the limitation and the next day it does simply because the price of other commercial components contained in the commercial item have gone up, increasing the overall commercial product price to the point that it now meets the one percent requirement.

The rule already has three significant requirements contained in 126.19: that the article must be rendered inoperative if it is removed from the commercial item, that there is no technical data released regarding the production, development, or use of the defense article, and that the incorporation of the defense article does provide nor is related to a military application or military end-use that raises national security concerns. These would appear adequate for security requirements.

Concluding Comment

The NAM wishes to reiterate its appreciation for the initiatives the Department is proposing in these rules. They are very significant changes and will make a strong contribution toward achieving the President's goal of simplifying export controls while maintaining – indeed, we believe improving – national security. We look forward to the Department's careful consideration of our recommendations above, and stand ready for further discussion of our suggestions.

Thank you for this opportunity.

Frank Vargo
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