

Franklin Vargo

Vice President

International Economic Affairs

February 8, 2011

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

Re: ATTN: USML-Positive List

Via email: [DDTCResponseTeam@state.gov](mailto:DDTCResponseTeam@state.gov)

Dear Under Secretary Tauscher:

The National Association of Manufacturers (NAM) welcomes the opportunity to comment on revisions to the United States Munitions List (USML) and the new control criteria for defense articles (RIN 1400-AC78).

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 and the Administration for undertaking this tremendous exercise to create a positive list out of the USML. We agree that such changes are necessary to better focus limited resources on protecting those items that need to be protected, to end jurisdictional confusion, and to provide clarity to make it easier for exporters to comply with the regulations and for the government to administer and enforce them.

We provide the following comments based on the proposed criteria, outcome of the Category VII review, and comments made by government officials.

**1. The control list should reflect an overarching review of the USML and not a stove piped approach.**

While we agree that the USML and Commerce Control List (CCL) are too big and complex to be reviewed in their entirety all at once and support the Administration's category-by-category approach, we are concerned that the focus on individual categories could have unintended consequences and could lose sight of the end goal to create higher fences around fewer, but more critical, items.

Our concern is not so much about what is controlled but rather on the level of control. In applying the criteria and determining the tier of control, we believe an absolute scale, which weighs items and technologies against other items and technologies from other categories, needs to be applied as opposed to a relative scale that only analyzes items and technologies in that category. Not all categories are equal and within each category more or less of the controlled items may or may not be deserving of a tier 1 control level. If a relative scale is used, we risk the possibility of returning to the status quo and undermining the intent of the reform initiative. We believe cross-checking each category against other categories will result in a greater identification of the truly critical technologies and higher fences around fewer items.

## **2. Parts and Components Should Not be Considered Defense Articles**

Under current policy, parts and components that are specifically designed for an USML end-item are generally controlled on the USML. The NAM suggests that such parts and components generally are not within the scope of the new tier criteria because they do not “provide a capability that could reasonably be expected to cause damage to national security if not controlled.”

We believe the vast majority of parts or components currently subject to the USML are not deserving of placement on the USML solely because the components were specifically designed for a USML end-item. Further, even if certain parts and components are within the scope of tier 3 or even tier 2, most of these parts can be more appropriately controlled under Commerce Department jurisdiction.

We recommend that the State Department and the interagency team consider a near-term initiative to transfer the great majority of such parts and components off the USML. Since review of the USML and the CCL is too big and complex to be done at once, we believe the Administration should take an interim step regarding jurisdiction over parts and components across all USML categories even as the broader review continues. Such an initiative would be straightforward to implement and should be done in conjunction with the Commerce Department’s CCL to ensure that such parts and components do not immediately become EAR99 items. Such action would demonstrate a significant and near-term success for the Administration’s export reform initiative and would be fully consistent with the principles and procedures that have been established.

## **3. Consistent Application of New Criteria**

One of the underlying goals of this reform is to move away from “catch-all” or “reason for design” controls that sweep in many items and technologies that offer little to no military advantage. The NAM fully supports this objective and believes it is aligned with the overall goal of building high fences around fewer items.

After review of the proposed new category seven, we are concerned that “specifically designed for” is being used unintentionally to determine if and when a technology or item is controlled. Using such a ubiquitous term will not result in higher fences around fewer items. The proposed rule specifically notes that non-specific catch-all controls capture parts and components modified for military applications that offer no military advantage. It is our position that such non-specific standards also catch subassemblies or larger items, such as tanks, as well.

We recognize that it is difficult to change the precedent of using “specifically designed for.” We encourage the interagency working group and the State Department to step back and review the rationales behind certain controlled items. A tank, simply because it is used in a combat zone and was specifically design for that purpose, is not in and of itself critical to national security. The most basic and unsophisticated items can be specifically designed for a military item. The question is what characteristics of the tank make it critical to national security or our military. Those characteristics are what need to be controlled. In some instances, the intrinsic nature of the tank will warrant control, in others it will not. Unfortunately, we are concerned that in the proposed new category seven, ‘specifically designed for” was used as a criteria for deciding to control an item or not. Below we provide more specifics that we believe will alleviate the working group’s reliance on specifically designed for.

Furthermore, the proposed definition for “specially designed for” tracks very closely to the definition in the EAR. However the proposed definition does not specify that the standards for “specially designed for” need to relate to the core military functions. For example, the engine start switch of a VII(a)(1)(iii)(A) tank is directly related to the functioning of that defense article. It starts the motor which makes the tank move. The engine start switch is not however, directly related to the unique military aspects of the tank, the positive criteria established for control of it. The proposed definition could make this catch all phrase in the ITAR even vaguer. We encourage the interagency team provide greater clarity on the term in the final rule.

#### **4. Need to Focus on Core Items that Directly Contribute to an Item/Technology’s Military value**

As discussed in the previous section, we are concerned that “specifically designed for” is indirectly being used to determine when an item will be controlled and at what level. We offer the following new approach to help alleviate use of “specifically designed for.” We believe to determine the level of control (tier 1, 2, or 3), it is important for the criteria to include the concept of “directly contribute.” This analysis should focus on whether the item(s) directly contribute to the end item performing its unique military function or mission. “Directly contribute” is important, as this keeps the list focused on those items that really are the core items of defense articles.

For example, the Apache helicopter is a four-blade, twin-engine attack helicopter that is capable of deploying missiles on a target. The helicopter itself is not necessarily military; rather the military characteristics are associated with other functionalities or equipment on the helicopter. It is the weapon systems and weapons integrated onto the Apache that directly contribute to the military function and missiles being fired on target. Those weapons systems and weapons could be integrated onto any helicopter which could then fire weapons on a target. In this example, the weapons and weapons systems, not the helicopter, are critical to the core functions that provide the military value. If the helicopter has certain special navigational, speed, tracking, climb, targeting or other characteristics that separate it from basic helicopters, then those core functions and the systems that deliver them are what make it militarily valuable and are what should be controlled, not the entire helicopter.

Looking back at category VII and specifically designed for, we offer another example using the M-1 tank. A M-1 tank (category VII (b)) is definitely a defense article. There are certain characteristics that make the tank unique to the military and warrant control. For example, the tank has the capacity for a large gun to be affixed on the front and is made with special armor, beyond just thick steel, such that if it is shot, the tank will only suffer minor dents. But other parts or components on the tank do not enable the tank to perform its uniquely military mission.

If you remove the gun system, the special armor, and the special defense attachments that help it to defeat missiles, what is leftover is a large, mobile steel unit. Although the other parts such as the hybrid electric drive engine might appear to be candidates for the control list, they may not directly contribute to the unique military aspects of the M-1 tank. Very thick steel is not unique to the military or to tanks. Rather, it is the type of steel that provides the military advantage not the thickness of the steel.

As for the drive system on the tank it is not uniquely military. Tanks were originally manufactured with gasoline engines, then diesel engines, and now many are using hybrid electric drives. The important point is that the tank has a drive system, any drive system. The exact type of drive system is immaterial as it is not unique to the tank. It is the special armor and the gun system in this example that directly contribute to the military function. The drive system does not directly contribute to the military function and should not be controlled.

We recognize that is just one example of many but the concepts laid out above are applicable to every category and many of the military items controlled on the USML.

#### **5. Need to Focus on Characteristics that Make the Technology or Item Unique in a Military Context**

The NAM also has concerns with regard to technical function limits that may be set to determine if an item or technology provides a military advantage. In many cases, the technical function will be the same for a both a commercial or military item, technology, or application. For example, a military radar can have the same bandwidth capacities as a commercial radar. Setting a standard based on bandwidth will capture many commercial items as well as military items. Instead, the review should focus on the characteristics that distinguish a military radar from a commercial radar. A military radar has the ability to jam signals, allow targeting, and frequency hop whereas a radar on a commercial aircraft does not have those abilities. Therefore it is not the technical function limits, per se, that should be used to distinguish between a military and commercial item but rather the characteristics that make an item or technology unique in a military environment and provide specialty functions.

Another example is computer software. The extensive coverage of “software” used for military systems is too broad. It would be preferable and easier to manage for software manufacturers and customers if the regulations would distinguish software that is used in military systems from software that provides enhanced military functions. As an example, if a software offering were designed to help an aircraft operator or a logistics company optimize and maximize loading of all its aircraft, and then an air force asked to modify that software to include loading parameters, weight and balance, and explosion disbursement and damage calculation capabilities for military cargo aircraft and incendiary cargo, it should be made clear that only the microprograms, data on the military aircraft, and the incendiary cargo are governed by ITAR. The rest of the software should be covered by the EAR.

## 6. Definitions

The NAM urges the State Department to define terms and instructions in the proposed rule clearly adopting the Wassenaar definitions of the identical term when possible (e.g. “specially designed”) and clearly identify to the public that the U.S. definition is the same as the Wassenaar definition, or in instances where it differs, clearly identify what is different, so that globally industry and governments are using the lists within the same context. We understand from various updates that the interagency taskforce is working on a definitions paper that will be published as a proposed rule in the near future and want to stress that clear definitions are a critical component to completion of the list review exercise.

## 7. Ongoing Review Process

NAM members urge the Administration to issue a further proposed rule identifying the infrastructure needed to keep the lists updated “over the product life cycle” to assure that items and technology are controlled at the appropriate technology threshold levels and that the items are tiered with licensing policy based on multilateral regimes and global availability. Industry further recommends that the process provide for scheduled updates and that technical and trade advisory committees be requested to provide specific input as various sections of the list are routinely reviewed. Without the infrastructure with defined processes and assignees, we have a concern that the ultimate goal of list review, “higher walls around fewer items” will not come to fruition.

In conclusion, we believe it is important for the interagency teams to rely more heavily on the characteristics that make an item or technology militarily unique and the attributes that directly contribute to the military functions. This level of analysis will allow the State Department and Administration to move away from “specifically designed for” and create a control list that builds higher walls around fewer items. We appreciate the dedication of the Administration and the interagency teams to reform the U.S. export control system and look forward to continuing to work with the agencies on this initiative.

Thank you,

A handwritten signature in black ink, appearing to read 'Frank Vargo', with a long, sweeping horizontal stroke extending to the right.

Frank Vargo

