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Recommendations for Improving Dual-Use Export Controls

In support of President Obama's export controls review, the National Association of Manufacturers (NAM) is providing eight recommendations which we believe will strengthen national security, focus limited resources on truly sensitive technologies, promote U.S. technological and scientific leadership, and improve economic competitiveness. The eight recommendations are provided for the Administration's consideration as it moves forward to implement near and medium-term improvements to the system while evaluating the need for fundamental reform. The NAM looks forward to providing further input at the appropriate time to the Administration and Congress on our vision for fundamental reform and creation of a new export control system for the 21st century.

We believe our recommendations will align the current system with our current security needs and the realities of the global technological environment and – as a practical matter – allow the system to operate in a more predictable, transparent, and efficient manner.

Recommendation #1: Improve the Licensing System and Increase Transparency

The existing licensing protocols and policies fail to adequately address the threats the United States faces in the 21st century. Since the Cold War exports have substantially increased and globalization has fundamentally changed the interconnectedness of business operations around the globe. Changes must be made to the licensing protocols and the underlining policies if the United States is to protect national security, to remain a leader in technological development, to promote interoperability with U.S. partners and allies, and to strengthen global competitiveness. Increased transparency in the licensing system is also needed. Improving the availability of information to U.S. exporters would promote greater efficiency in both the pre-licensing stage and licensing process. Export control reform must create new efficiencies for caseload management, increase transparency, and afford special treatment to our closest allies and trusted end-users in a manner that is consistent with our foreign policy and national security objectives.

Specifically, BIS should:

- Approve and implement the intra-company transfer (ICT) proposal in a way that ensures the administrative requirements are calibrated to minimize the burden on industry without compromising national security.

- Expand existing Commerce license exceptions to include more items and additional reasons for control beyond national security (NS), especially for multilateral regime members. Examples include but are not limited to:
 - Expanding license exception GBS (shipments to country group B) to include more Export Control Classification Numbers (ECCN) for both NS and unilateral reasons for control (such as crime control and regional stability).
 - Expanding license exception APR (additional permissive reexports) to include additional NS ECCNs as well as for non-NS controls where those APR- eligible destinations are also related regime members (e.g., the Australia Group and commodities controlled for chemical/biological (CB) reasons).
- Implement the Commerce Department proposal for a fast-track licensing process for trusted countries with proven compliance by:
 - Reducing the wait time when applying to send samples to a customer.
 - Expediting repeat licensing allowing the exporter to reference the prior license approvals.
 - Extending license validity periods from 2 to 5 years.
- Implement the Commerce Department proposal of a license free zone for exports and re-exports to or from key allies and other foreign countries that maintain high export control standards consistent with U.S. foreign policy and national security objectives.
- Create an interface to the Simplified Network Application Process Redesign (SNAP-R) to allow industry to submit license applications electronically from their own licensing development and implementation systems.
- Create a narrow list of controlled items and technologies for deemed exports and a new general authorization for those items and technologies subject to deemed exports.
- Update the exception for informational materials, receipt and/or transmission of telecommunications services to scale of current technologies. Products including software downloads and technology made freely available without restriction, regardless of whether they contain encryption, should be exempt from controls.
- Create an exception for safety of flight civil aircraft equipment for embargoed countries.
- Increase the value of the LVS (limited value shipments) exception.
- Expand the countries and items and technologies eligible for export under the Validated End User (VEU) program.
- Use clear and specific language for license conditions and narrowly tailor them to limit the impact on the scope of the license, in a manner consistent with U.S. foreign policy and national security objectives.

- Require agencies to demonstrate reasons for imposing specific license conditions and to draw a reasonable nexus between said conditions and the agency’s mission, and allow an applicant review and appeal these assertions prior to issuance of the license.
- Improve Technical Advisory Committees (TAC) by:
 - increasing membership where current limitations are constricting.
 - opening more sessions to the public when prospective changes and new issues are discussed.
 - publishing more details on working groups and how interested parties can participate without being members of the TACs.
- Impose a condition for submission of a Commodity Classification Automated Tracking System (CCATS) for product or technology requiring approval from the Original Equipment Manufacturer (OEM) if the submission is not from the OEM. This condition should be waived if the CCATS submission positively identifies why such a requirement cannot be met (e.g. OEM is out of business). BIS should issue CCATS determinations to the applicant, as well as the OEM, if the OEM is not the applicant.
- Review and revise EAR part 772 Definitions of Terms to provide further clarity (e.g., the definition of "specially designed").

Recommendation #2: Greater Assessment of Foreign Availability

Technological capabilities are no longer limited to a relatively small number of companies and/or countries. Implementing more robust foreign availability assessments does not automatically equate with lessening controls and jeopardizing national security. Foreign availability assessments should be part of a dynamic export control regime that is constantly reevaluating threats to the United States and those technologies that are most critical to protecting our national interest. Foreign availability assessments can provide the government with a greater understanding of foreign capabilities and result in more efficient uses of limited government resources.

The current process for determining “foreign availability” puts U.S.-made products at a competitive disadvantage vis-à-vis foreign-made products. In making determinations, the government does not consider availability from countries that participate in the multilateral regimes. This approach to “foreign availability” assumes that all dual-use items controlled by the United States are also controlled by our regime partners in the same way. This is not the case. Even though the Commerce Control List (CCL) and international lists are now very similar, many items restricted by the United States are available in Wassenaar member countries because of differences, for example, in licensing administration, compliance and enforcement procedures, technical interpretation of the lists and application of re-export rules.

The NAM seeks for foreign availability to be a major pillar of any reform effort. Specifically, the new system should:

- Reestablish the Office of Foreign Availability; standardize a definition and methodology for determining how foreign availability impacts U.S. national security and foreign policy.
- Recognize foreign availability of unilaterally controlled items absent strong countervailing justifications for the control.
- Recognize, in practice, foreign availability of items from member countries of the international export control regimes.
- Work with industry to develop the criteria, process, and data needed for the interagency team to find foreign availability.
- Articulate the evidentiary threshold for finding foreign availability. The petitioning company/industry should bear the burden of proof to establish foreign availability of an item or technology. After a presumption of foreign availability has been established, the government would have the burden to prove with clear and convincing evidence any lack of foreign availability.
- Create a system for registering items found to be available in the foreign market place and eliminate the need for each company to submit foreign availability requests for the same products.
- Establish timeframes for processing foreign availability requests to improve efficiency and transparency.

Recommendation #3: Encryption

As is true for many of the industries affected by export controls, rapid technological advancement in and the ubiquitous nature of cryptography have rendered many of the controls obsolete and can only serve to decrease the competitiveness of many U.S. manufacturers. The encryption controls are overly complicated and difficult for U.S. exporters to understand and comply with them. Many hardware and software products are increasingly being reclassified for export control purposes as “encryption items” due to their rapidly growing incorporation of encryption capability as a commodity feature, albeit usually a minor one. This designation is intensifying export controls on many products by imposing highly disruptive licensing or license-like requirements such as mandatory product reviews, end user restrictions, and post-export reporting. The reclassification trend is already producing a serious rise and backlog in encryption licensing cases at BIS.

A thoroughgoing review of encryption rules should be conducted to ensure that they do not impose unnecessary restrictions and burdens that hamper US competitiveness, a key component of US national security. Specifically, the Administration should fundamentally restructure its policy in this area to take account of current encryption technology trends, the incorporation of cryptographic capability into widely available commercial software and hardware products, and the globalization of encryption capability. Such reforms should also focus on simplifying the regulations to help industry comply with them and reduce administrative costs. To these ends, we recommend the following:

- Remove review requirements from mass-market and other commodity products and components consistent with the practice of U.S. allies.
- Ensure mass-market treatment for components that are designed for use in mass-market products or that are otherwise widely available.
- Eliminate post-export reporting requirements.
- Lift unilateral controls in general, such as those on encryption used in connection with Open Cryptographic Interfaces.
- Eliminate controls on products utilizing only publicly available or accessible software.
- Remove encryption controls on products that do not have cryptography as their core function.
- Review all encryption regulations to make them more clear and concise so that the actual regulation itself is not overly burdensome.
- Streamline encryption reviews, crypto-aware notifications, license applications so that industry can reference previously reported information without re-applying for approval. This would allow the government to focus limited resources on encryption items of higher-level concern.
- Streamline encryption exceptions to reduce the burden of complying with the different provisions on market availability. For example, we recommend harmonization on treatment of software that is widely available.

Recommendation #4: Systematic Review of the Commerce Control List (CCL)

Lifecycles for many new technologies are now six months to a year. Yet many of the controls set by the government were implemented years, if not, decades ago. Many of the controlled technologies are no longer sensitive while some technologies that are sensitive are not controlled. BIS has begun a process to systematically review the CCL but a more robust process should be implemented. Moreover, as part of the review, the government should apply “sunset” requirements to unilaterally U.S. controlled items absent a countervailing national security concern. The review of all controls should be disciplined, regularly scheduled, and based on a presumption that a listed item will be removed from control unless a rational justification can be presented for maintaining it on the list.

Systematic review should include:

- Creation of a “sunset” rule under which every item on the CCL will be taken off the list at a specified time unless a justification can be presented for maintaining the status quo.
- Apply the improved foreign availability standard to all items and technologies on the CCL. Where foreign availability is found, the item should be removed from the list or be subject to a license exception absent a countervailing foreign policy or national security concern or requirement for other domestic and international public policy initiatives.
- Move items that do not belong on the U.S. Munitions List (USML) to the CCL at an appropriate level of control by December 31, 2010.
- Ensure that the items controlled on the CCL are consistent with domestic and international public policy initiatives.
- Removal of controls on items where there is foreign availability or indigenous production or where global production is so wide and diverse that unilateral controls do not effectively limit access to the item or technology, unless there are reasons to impose foreign policy controls (e.g., related to anti-terrorism, non-proliferation or missile technology control).

Recommendation #5: Promote Greater Multilateral Cooperation with our Friends and Allies on Export Controls

National security rests on the foundation of global security. It requires effective multilateral cooperation that enables the collaborative development and advancement of common strategic goals, policies, and practices. Multilateral cooperation levels the international playing field for U.S. exporters and makes the nation and the world more secure through increased coordination and harmonization of export controls.

To encourage greater coordination and harmonization the government should:

- Urge multilateral regimes to expand membership to countries that are trusted to enforce controls.

- Create a new country group on the CCL for countries that are not able to join all the multilateral control groups but have a proven record of compliance (e.g., South Korea, India, Brazil, South Africa, Singapore, etc).
- Actively encourage countries to adopt and enact the controls that the multilateral groups promulgate.
- Seek agreement on the appropriate licensing policies for specific technologies with the regime members who produce those items, in order to increase substantially the effectiveness of U.S. controls.

Recommendation #6: Enhance the Commerce Department’s Role in the Commodity Jurisdiction Process

In 2008, the National Security Council (NSC) instructed the Departments of State, Defense, and Commerce to work together to increase interagency coordination of the commodity jurisdiction (CJ) process and to submit a plan for moving forward. While much work has been done since 2008 more is needed. The CJ process still faces interagency conflicts over determining into which licensing system a product, service, or technology falls and determining the precise classification of an item. This continues to result in delays, confusion, and lost opportunities. Therefore the export control reform initiative should:

- Improve the interagency CJ process through continued enhancements in interagency coordination, deepening expertise on new technologies, and consideration of collocation of technical experts.
- Create objective definitions for defense articles/services/end items. The basis for a decision should focus on critical military functionality as well as controllability, reflecting a policy to designate only those items as US Munitions List (USML) controlled when they are multilaterally controlled as munitions items or support critical US military capabilities.
- Provide detailed responses to CJ applicants outlining the national security and/or foreign policy rationale for retaining USML control, including an explanation of the critical military function, finding of a lack of commercial availability and the USML category number.
- Seek to ensure that the Commerce Department and Defense Department have full transparency into the State Department CJ process.
- Work with participants in the Wassenaar Arrangement and other international regimes to harmonize approaches to classification and control of dual-use items.
- Ensure appropriate participation by AT&L in the work of the Defense Technology Security Administration (DTSA) so that DTSA has better visibility into and accountability for defense procurement and the health of the defense industrial base.
- Affirm and solidify the NSC’s role as the final arbitrator to resolve conflicting claims of agency jurisdiction.

Recommendation #7: Enforcement

Compliance with export control regulations is an integral part of the overall system. U.S. companies have developed extensive compliance programs to prevent the export of items or technologies contrary to the interest of the United States and continue to work with the government to make their programs best-in-class. To improve transparency and outreach and to encourage increased cooperation and dialogue with industry, BIS should:

- Increase both domestic and global outreach to companies.
- Improve the voluntary self disclosures (VSD) process by:
 - Dedicating staff from the office of exporter services to process VSDs,
 - Creating a reasonable timeline for resolution and closure of VSDs,
 - Establishing specific criteria for the issuance of VSD penalties, and
 - Allowing for discretion in deciding to publicize VSD cases.
- Establish an appeals process for penalty decisions.

Recommendation #8: Improve Outreach to and Resources for Small and Medium-sized Manufacturers

Small and medium-sized manufactures (SMM) are disproportionately disadvantaged by the current export control system. SMMs do not have the compliance staff typical of larger corporations and companies thus making compliance efforts even more difficult. Additionally, most SMMs also lack Washington offices and government affairs staff, and therefore often do not have direct access to the agencies with licensing authority. The inability to get a license approved in a timely manner and the lack of transparency often results in significant financial loss to the company. It is critical for the government to development a mechanism to focus greater resources towards working with SMMs to improve outreach and transparency.

For exporters meeting the Department of Commerce's definition for SMM, BIS should:

- Provide a staff of dedicated counselors/license officers specialized in SMM exporter issues.
- Establish an interagency task force to develop recommendations within 60 days on how BIS and DDTC can be made more accessible, responsive, and user-friendly for SMMs.