AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS

The Voice of the International Trade Community Since 1921

January 28, 2013

Via E-Mail (publiccomments@bis.doc.gov)

Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce
Room 2099B
Washington, DC 20230

Re: Comments on BIS Proposed Rule on Revisions to the EAR to Make the CCL Clearer
Docket No.: 110818512-2136-01
RIN: 0694-AF37

Dear Sir or Madame:

On behalf of the American Association of Exporters and Importers (AAEI), we respectfully submit these comments to the Bureau of Industry and Security (BIS) concerning the proposed rule on Revisions to the EAR to Make the CCL Clearer published in the *Federal Register* on November 29, 2012 (77 Fed. Reg. 71214) (hereafter "Federal Register Notice").

AAEI has been a national voice for the international trade community in the United States since 1921. AAEI represents the entire spectrum of the international trade community across all industry sectors. Our members include manufacturers, importers, exporters, wholesalers, retailers and service providers to the industry, which is comprised of brokers, freight forwarders, trade advisors, insurers, security providers, transportation interests and ports. Many of these enterprises are small businesses seeking to export to foreign markets. AAEI promotes fair and open trade policy. We advocate for companies engaged in international trade, supply chain security, export controls, non-tariff barriers, import safety and customs and border protection issues. AAEI is the premier trade organization representing those immediately engaged in and directly impacted by developments pertaining to international trade. We are recognized as the technical experts regarding the day-to-day facilitation of trade.

1. General Comments

AAEI appreciates the opportunity to comment on the Revisions to the EAR to Make the CCL Clearer under the President's Export Control Reform Initiative. AAEI strongly supports the President's export control reform effort. AAEI has participated in consultations with Administration and Congressional staffs regarding recommendations for export control reform of the current statutory and regulatory regime.

We understand the enormity of undertaking the task of modernizing the U.S. export control system which has developed over 50 years and reforming it in three years.

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2. Specific Comments

While we strongly support BIS's goal to provide clarity to the Commerce Control List ("CCL") we have significant concerns with many aspects of this proposed rule and we urge BIS to reconsider this effort during the middle of the current United States Munitions List ("USML") and CCL list reform.

A. CCL Clarifications

1. Ensuring Relevant ECCNs Cover Parts <u>and</u> Components

After consulting with our members, AAEI believes that the proposed rule tries to accomplish far too much at one time. The proposed rule to add hundreds of references to "parts" and "components" will significantly change many well-established Export Control Classification Numbers ("ECCNs"). By trying to tackle all of the CCL categories at once, which is a huge task, there is a significant likelihood that affected companies will not have an adequate opportunity to respond and that numerous unintended errors and new ambiguities will be created.

We are concerned that BIS believes that the addition of the term "parts" or "components" to numerous ECCNs, to ensure they include both terms, will not change the CCL substantively. We believe that this premise is not accurate. Even if BIS sometimes interprets the terms "parts" and "components" interchangeably, the new proposed definitions of those terms describe very different items and will, therefore, require that those terms cover different items. To add one or the other of those terms to an ECCN in which it does not currently appear will dramatically change the scope and coverage of the ECCN.

For example, the proposal to add "parts" to ECCN 3A001.c. so that it covers "specially designed 'parts' and 'components'" for listed acoustic wave devices instead of covering only specially designed components, new compliance obligations would arise for companies that deal in less complex elements ("parts") of a covered wave device. Whereas, using the proposed definitions, that ECCN would currently give rise to compliance obligations, in relevant part, only with respect to more complex elements ("components") of covered devices.

In addition, adding one term or another to an ECCN's heading as a matter of course to ensure the heading includes both terms will inevitably create new ambiguities in interpreting an ECCN. For example, the rule proposes to add "parts" to the scope of ECCN 2B116, which currently covers only "components" for relevant vibration test systems. None of the items listed in the ECCN, however, would likely be considered a "part" under the new definition. Exporters would then be left with uncertainty as to whether an item that could be considered a "part" of a covered vibration system is controlled.

One would need a long time to analyze all of the changes and issues of interpretation this proposed rule creates. We expect that exporters will require substantially more time to evaluate whether the numerous additions of "parts" or "components" will change the scope of an ECCN in a material way for their operations. A substantial

amount of time will also be required for exporters to evaluate the numerous inherent ambiguities the additions create in given ECCNs.

Moreover, at this time the United States Munitions List ("USML") of the International Traffic in Arms Regulations ("ITAR") maintains separate definitions of the terms "parts" and "components". Since one of the goals of export control reform is to harmonize terms and concepts across regulatory regimes, the notion that "parts" and "components" is an "interchangeable" term in the EARs will potentially create confusion and drafting problems as items move from the USML to the CCL or should a consolidation of the two control lists eventually occur.

For these reasons, we propose that BIS consider an alternative approach to addressing whether "parts" and "components" need to be addressed in ECCNs. One alternative would be to propose parts and components rules for fewer ECCNs at a time, and possibly only pertaining to similar products or industries, so that BIS can be more confident that exporters will have identified and evaluated all the unintended scope changes and ambiguities that arise.

2. Avoiding Errors and Inconsistencies

Reviewing the proposed changes to numerous ECCNs at issue in smaller batches organized around some common theme (such as product type or industry, as noted) would also help ensure that inadvertent errors and inconsistencies in the current proposal are avoided. The following are a few examples.

- In ECCN 1A002, "parts" is to be added so that a phrase in the Related Controls reads "specially designed subsystems, and 'parts' and 'components'." Presumably "specially designed" is meant to apply to subsystems, parts and components. If so, the first "and" should be deleted, and a comma should appear after "parts." In addition, this phrase lacks a "therefore" at the end. Likewise, ECCN 1A004 is supposed to have "parts" added to the heading, but it also needs the "and" deleted and comma added to give the heading meaning.

- ECCNs 2A292 and 6A992 are to be revised purportedly because in the Units section "components" are given a different unit of measurement from "parts," but these ECCNs actually do not refer to "components" in the Units section. In addition, ECCN 2A292 would be amended to cover "parts" and "components" in the Units section, but the ECCN itself does not cover "parts" or "components."

- In ECCN 2B350 the definition of "chemical warfare agents" is to be changed, but no mention is provided as to whether that definition is also relevant to the use of that expression in 1A004 and 2B351. In addition, the proposed new note saying that ITAR-controlled chemicals are found in USML Categories V and XIV is not correct because such chemicals could conceptually fall within USML Category XXI and possibly others.

- ECCN 5A001 and 5A991 would be amended such that "antennae" become "antennas" "to reflect the intended meaning." There is no indication,

however, as to what the intended meaning is in changing the spelling. Our assumption is that the purpose of the change is to use the word that refers to equipment rather than insects. In addition, there is no indication as to whether the several other references to "antennae" throughout the CCL should be changed as well.

These are just a few examples. Numerous others could be provided. Addressing the issues set out in the proposed rule through a more discrete approach would go a long way towards avoiding new errors and inconsistencies in the CCL.

3. Other Interpretation Issues

The proposed rule addresses the significance of where the phrase "(see List of Items Controlled)" appears in an ECCN's heading. Interpretive guidance on this point should appear in "Reading an ECCN." *See* 15 C.F.R. § 738.2(d)(2). If, however, the intention for certain ECCNs would be for the text in an ECCN's heading that follows "(see List of Items Controlled)" to be controlling without further description, a conflict would arise with the EAR's explanation that all items controlled are set out in "positive list" in the Items section. *See* 15 C.F.R. § 738.2 (d)(2)(iii)(D).

The proposed rule also addresses whether "as follows" should appear at the end of various ECCN headings. The use of this expression in an ECCN heading where "(see List of Items Controlled)" appears other than at the end of the heading would cause a conflict, because the text following the "see List" wording is not supposed to be subject to further explanation as noted above. If "as follows" appears at the end of a heading just after the "see List" wording, it would be redundant.

B. CCL Structural Changes

The proposed rule makes reference to the role of "License Requirement notes" in an ECCN. It should be noted that, unlike the other elements of an ECCN, the EAR do not address what significance exporters should give such notes when interpreting and ECCN. *See* 15 C.F.R. § 738.2 (d). It would stand to reason that these notes are commentary relevant to the "License Requirements" section. That section, however, addresses the reasons why the export of an item might require a license, whereas the notes often purport to address the substantive scope of an ECCN.

For example, License Requirement Note 1 to ECCN 1C351 indicates that certain medical products containing most ECCN 1C351 toxins are excluded from the scope of ECCN 1C351. This creates the impression that 1C351 would control medical products containing some toxins listed in that ECCN, or possibly even other items covered by that ECCN. The Items section of ECCN 1C351, however, covers only stand-alone viruses, bacteria, toxins and fungi.

As noted above, the EAR require that all items controlled under a given ECCN be set out in a positive list in the Items section, but ECCN 1C351's Items section does not identify any item that contains a toxin, virus etc. contrary to the implication created by License Requirement Note 1. We have experienced that BIS takes the position that ECCN 1C351 does control items containing such ECCN 1C351 items. It is impossible, however, for exporters to comply with the EAR if the regulations do not

clearly identify the items that are controlled in a consistent manner. We encourage BIS to address such issues in the CCL and ensure that all items to be classified as other than EAR99 are clearly identified.

C. Impact on Multilateral Regimes

The proposed rule states that BIS:

> would only implement changes that can be made to the CCL without requiring changes to multilateral export control regime guidelines or lists. However, BIS has identified changes that would require a decision of a multilateral regime to implement. For those changes, the U.S. Government is developing regime change proposals for consideration by members of those multilateral export control regimes. BIS will implement those changes in separate rulemakings, if approved by the respective multilateral export control regimes.

Despite the stated intent, the proposed rule makes changes to many ECCNs that are governed by multilateral export control regimes, including the Wassenaar Arrangement (WA). For example, with respect to electronic components, the heading to entry 3.A.1 on the WA Dual-Use list states as follows:

> 3. A. 1. Electronic components and specially designed components therefor, as follows:

BIS's proposed rule would change the corresponding entry on the CCL to read as follows:

> 3A001. Electronic ''components'' and specially designed ''parts'' and ''components'' therefor, as follows (see List of Items Controlled).

Adding the term "parts" to this CCL heading represents a significant change and marked expansion of the scope of the current entry and is not consistent with the specific WA language. We submit that the addition of this change to the WA, and similar other proposed changes, will require the consent of the WA members before it can be made. The same is true with other proposed changes to other CCL entries that are based on other multilateral regimes, such as the Australia Group. We encourage BIS to consult with the other regime members before these changes are made since failing to do so could lead to a different scope of coverage in the U.S.

3. Conclusion

While we have concerns over certain aspects of this proposed rule, AAEI and its member companies greatly appreciate all the work and effort being made by BIS to make the CCL and EAR more clear and more user friendly for U.S. exporters. AAEI would be pleased to discuss these comments in more detail with BIS leadership and staff.

Sincerely,

Marianne Rowden
President & CEO

cc: Douglas N. Jacobson, Co-Chair, AAEI Export Compliance & Facilitation Committee
Phillip Poland, Co-Chair, AAEI Export Compliance & Facilitation Committee