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Ambassador Bonnie D. Jenkins
Under Secretary
Arms Control and International Security
U.S. Department of State

Electronic Submission: www.regulations.gov, Docket DOS-2024-18043

Re: NDIA comments on the interim final rule to amend the International Traffic in Arms Regulations (ITAR) to facilitate defense trade and cooperation among Australia, the United Kingdom, and the United States (DOS-2024-18043)

Dear Ambassador,

The National Defense Industrial Association (NDIA) appreciates the opportunity to provide comments on the interim final rule for the International Traffic in Arms Regulations (ITAR): Exemption for Defense Trade and Cooperation Among Australia, the United Kingdom, and the United States.

NDIA is the nation's oldest and largest defense industry association, representing over 1,700 corporate and over 65,500 individual members from small, medium, and large contractors, a majority of which are small businesses. NDIA members design, manufacture, apply, and maintain the cutting-edge technologies, systems, and platforms that our armed forces rely upon to deter aggression and defend our nation and its interests. As such, our members' professional and informed views on this request for information reflect the complexity and nuance of the issues under discussion.

General Comments and Recommendations:

Congressional Notification (CN) Requirements Continue to Undermine Utility of Exemption: The AUKUS exemption is not eligible for transfers that would require certification to Congress pursuant to Sec. 36(c) and 36(d) of the Arms Export Control Act. Most defense program cooperation with our closest allies will involve high-value items and/or significant military equipment (SME) that triggers a CN requirement. Nearly all manufacturing license agreements (MLAs) will include SME, even if the value is below the CN threshold. This greatly undercuts the utility of the new exemption and the intent of the new statutory authority.

- **Recommendation:** The State Department should work with Congress to remove CN requirements for exports otherwise eligible for the AUKUS exemption.

“Regular Employee” Definition Revision: Under 22 CFR 120.64(a)(2), a “regular employee” is an individual in a long-term contractual relationship with the company where the individual works at the company's facilities, works under the company's direction and control, works full time and exclusively for the company, and executes nondisclosure certifications for the company, and where the staffing agency that has seconded the individual has no role in the work the individual performs (other than providing that individual for that work) and the staffing agency would not have access to any controlled technology (other than where specifically authorized by a license). If a U.S. Person contract employee meets the definition of a regular employee in ITAR § 120.64, that person is treated like any other regular employee of the Authorized

User. However, if the contract employee is a foreign person, that natural person must become an Authorized User prior to the transfer of technical data, under the authorities of Sec. 126.7, from the employer to the contract employee. Certain contractors for the Australian and UK governments do not meet the definition of regular employees because they are sole proprietors. In those situations, the employee cannot meet the Sec. 120.64(a)(2) definition of a regular employee based on the requirements established for a staffing agency. To be able to receive any non-excluded technology under the Sec. 126.7 exemption, it is a requirement to be an “authorized user,” a regular employee (as defined by Sec. 120.64) of an authorized user, or a non-regular employee (contractor) who is registered as an authorized user.

- **Recommendation:** Amend Sec. 120.64 to include Sec. 120.64 (a) (3): “Staffing agency includes other contract employee providers and individuals trading as a sole proprietorship and seconded by the staffing agency and meet all requirements of Sec. 120.64 (a) (2) are deemed to be a regular employee.” In addition, the DDTC FAQ on contract employees should be modified to include foreign persons who meet the definition of a regular employee in Sec. 120.64.

Inclusion of Affiliates and Subordinates in Registration: The preferred and fastest method for DDTC U.S. registrants to provide their current registration status to Australian or UK Authorized Users is to furnish a redacted copy of their most recent DDTC registration acknowledgment letter directly to Australian or UK Authorized Users. The DDTC registration acknowledgment letter, however, does not identify U.S. Affiliates or Subsidiaries identified in block 8 of the company's DS-2032. Accordingly, a registrant's generated certification does not confirm DDTC acknowledgment that the affiliate or subsidiary is included as part of a U.S. person's registration.

- **Recommendation:** Publish a FAQ verifying that U.S. Affiliates or Subsidiaries identified in block 8 of the company's DS-2032 are included as Authorized Users in the parent's registration with DDTC. Modify the DDTC registration acknowledgment letter to include a list of U.S. Affiliates or Subsidiaries by legal Name and Address from DS-2032 as part of the letter to ensure that all are captured under the DDTC letterhead or provide accounts to Authorized Users in DECCS and create a consolidated look-up for U.S. registrants to include U.S. registrant Affiliates and Subsidiaries.

Clarify Department-Level Authorization: The Australian and UK government entities currently listed as authorized users appear to be at the Department or Ministerial level. U.S. exporters consider that components of a Department or Ministry are covered by the identification of their parent organizations.

- **Recommendation:** Provide clarification that government agencies that report to the Australian Department of Defense, the UK Department of Defense, and the other AU and UK government departments are included as Authorized Users.

Provide an Interface for Real-Time Transactions: The utility of the proposed exemption will be undermined by the lack of integration of the authorized user lists into a common screening tool. U.S. companies may have thousands of hardware shipments to AUKUS partners that must be validated for the AUKUS exemption. The current method of Manual Authorized User validation via DECCS will likely reduce the usage of the exemption. Certain high-volume users may opt to obtain authorization that can be evaluated once at the time of application instead of manually looking up authorized users repeatedly each time they

utilize the exemption. In addition, the requirement to use DECCS will likely increase the number of DECCS users, adding strain on the DECCS infrastructure and support requirements for the DDTC Help Desk team.

- **Recommendation:** DDTC should provide an API interface between DECCS and industry authorization management and shipment systems to verify Authorized users at the time of export. As an alternative, DDTC could also provide a downloadable Excel document with all AUKUS Authorized Users. For interested registrants, the capability promotes real-time compliance while enabling high-volume use of the exemption.

Return Without Action or Deny: NDIA would also recommend that a U.S. government response to return without action or deny an application would have to be a decision reviewed and approved at the Deputy Assistant Secretary level. NDIA also proposes a monthly or quarterly review by the Deputy Assistant Secretary of State for Defense Trade Controls, of all applications not approved in that period, be it monthly or quarterly. This would ensure that applications are not rejected simply because the deadline is approaching, which would force companies to begin the process all over again.

Specific Comments and Amendment Recommendations:

In regard to adding an expedited licensing process for certain defense articles and defense service exports to Australia, the United Kingdom, and Canada, adding a list of defense articles and defense services excluded from eligibility for transfer, and more:

- 123.10(a) – Concur and appreciate the removal of the requirement for DSP-83 for ITAR Exemptions 126.5 and 126.7 (Canada, UK, Australia).
- 124.8(a)(5) – Concur and appreciate the clarification that 126.7 can be used to retransfer and reexport defense articles pursuant to this exemption that were originally exported via an agreement.
- 126.1(a), Concur and appreciate 126.18(e) being added to the list of excepted exemptions from the section's country-based prohibitions.
- 126.7(b)(4), Concur and appreciate the recordkeeping requirements in proposed § 126.7(b)(4) are removed in this interim final rule other than 120.15(e).
- 126.15(d), Concur and appreciate the expedited export license processing times for Australia, UK, and Canada requiring approval, RWA, or denial within 30 days of submission, and any provisos must be levied within 45 days of submission. However, for applications pertaining to Australia, the United Kingdom, and Canada, the 30-day and 45-day parameters are already routine. NDIA would request proposing parameters of 15 days and 21 days, respectively, which would serve as a true expediting of these existing processes.

In regard to the Excluded Technologies List Changes for UK and Australia Exemption:

- Concur and appreciate that the MTCR exclusion no longer applies to UAS flight control systems and vehicle management systems. NDIA recommends that the Department consider removing the MTCR exclusion entirely for UAS systems.



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- For the anti-tamper exclusion, the exclusion should be expanded to include anti-tamper technologies verified & validated by the U.S. Department of Defense to control those technologies that are not U.S. Programs of Record and do not have a Department of Defense Program Protection Plan.
- Concur and appreciate the removal of the exclusion of classified manufacturing know-how for USML XI and XII.
- Concur and appreciate the refinement of classified countermeasures and counter-countermeasures.
- For the NSA classified exclusion added to XI(a)(4)(i), recommend rewording the exclusion to state “... and classified, directly related classified technical data and classified defense services to the previously proposed exclusions.” This is to ensure that the only commodities excluded are classified in nature.

Closing:

NDIA appreciates the opportunity to present our comments and recommendations for the interim final rule. If you have any questions related to these comments, please reach out to Michael Seeds at mseeds@ndia.org.

Sincerely,

National Defense Industrial Association