

# **Testimony**

**of the Honorable John Engler**  
*President and CEO*

*on behalf of* the National Association of Manufacturers

*before the* House Committee on Foreign Affairs, Subcommittee on  
Terrorism, Nonproliferation and Trade

U.S. House of Representatives

*Hearing on* the Export Administration Act: American Jobs and  
Security in the 21<sup>st</sup> Century

**July 9, 2009**

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President and CEO  
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Washington, DC**

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**Thursday, July 9, 2009**

Mr. Chairman, members of the Subcommittee: I am John Engler, President of the National Association of Manufacturers (NAM). I want to thank you for holding this hearing on export controls and for offering me the opportunity to testify before you today. The NAM has worked with the Executive Branch to make improvements in the present system, and we will continue to do so. However, it is our belief that fundamental revision of the export control system is needed, and that can come only from a new and thoughtfully considered Export Administration Act (EAA).

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 defense industries.

This hearing is an important part of the process of seeking what we hope will be a total revamping of U.S. export control policies and practices that will protect our national security without hampering the growth and competitiveness of American technology and manufacturing jobs. My statement will focus primarily on the importance of modernizing the Commerce Department system for export licensing and the impact that deficiencies in the current system have on manufacturers’ ability to support a strong national defense and build jobs in the high technology industries.

Two years ago the NAM joined with over two dozen other leading organizations to establish the Coalition for Security and Competitiveness (CSC) to seek the modernization of export controls. The present export control system is hampering our ability to innovate and to compete in world markets by maintaining too many policies and practices that are outmoded – and that contribute little to national security.

Over the past two years the NAM, working with the CSC, has promoted steps that lower the costs and inefficiencies of the existing export control system without impairing the level of security. These steps included developing 19 specific recommendations that the Administration could implement without legislative change to make the export control system more predictable, transparent and efficient.

Throughout 2007, I met with many high level administration officials including the top levels of the National Security Council and the Departments of Commerce, Defense, and State to advocate for changes that would simultaneously improve national security and economic competitiveness. Both the administration and the Hill complimented the NAM for putting forth balanced and practical recommendations to improve the system. As result, the President issued two National Security Presidential Directives (NSPDs), which represent the most substantial improvements to the system since the end of the cold war.

Although the 19 recommendations did not require legislation to enact, the NAM also engaged with the Congress to discuss the need for export control modernization and future legislative efforts. My staff and I met multiple times with the Chairman and Ranking Member of the House Foreign Affairs Committee as well as members of this Subcommittee, including you, Mr. Chairman, and Congressman Manzullo. We seek a new era of collaboration between the Hill, the Administration, and industry to develop a new export control system that works for the 21<sup>st</sup> century.

Since 2007, the increased attention by the NAM, the Administration, and this Subcommittee have led to many reforms, including the NSPDs and this Subcommittee's compromise with the State Department on the classification of civil aviation components (the so-called "17 (c)" issue) as well as legislation to improve license processing at the State Department. These are important improvements, but much more remains to be done to protect the national and economic security of the United States.

The degree of change needed is nothing short of a major revamping of the export control philosophy, policies, and implementation mechanisms. These changes cannot be made by the Administration within the present framework, and can only come from a new Export Administration Act (EAA). While the NAM appreciates the difficulties facing the Congress on this legislation, now is the time to develop a new EAA that will enact changes to bring the law into alignment with the current threats to our security, the realities of the global economy, and the interdependency between economic competitiveness, technological innovation and national security.

## **Cold War Relic**

The current export control system was developed six decades ago to address threats our nation faced during the Cold War. The first export control act was passed in 1949, and renewed repeatedly with little change until the EAA of 1979, which attempted to bring the system into conformity with the realities of that period – though even that was 30 years ago. That legislation remains the basis of today’s export control system even though the Act has long since expired and the Administration is managing the export control system under the International Economic Emergency Powers Act (IEEPA).

While the export control system has remained essentially the same for 60 years, the threats to our security have not. The Soviet Union is gone, but our export control policies are still largely those designed for the Soviet threat. The United States faces new—and in many ways more complicated—threats to its security than in the past.

To address these evolving threats whether from terrorist groups, rogue states or other potential adversaries, we need an export control system that can keep genuinely sensitive technologies out of the hands of those who seek to harm us. This is critical for our national security, and U.S. industry supports that effort.

It is not only the security threat that has changed. Technology and the development of technological progress are fundamentally different from that for which the current export control system was designed many decades ago. Technology evolved slowly back then, but today it evolves at rates that frequently make high technology products obsolete in months.

Importantly, back then the United States dominated high-technology industries. Our export control system was – and to a large extent still is – based on the philosophy that if the United States won’t let countries have our technology, they can’t get it anywhere else because no one else has it. To a degree not recognized by our export control system, those days are gone. Now, while the United States is still a technological leader, it is but one of many. And in a growing range of technologies, other countries are leading the United States. It is not just Japan, Germany, France, and Britain that have among the best technologies today – increasingly South Korea, Taiwan, China, India and others are entering the field. The world has fundamentally changed. No longer is the United States the only country able to develop, design and manufacturer cutting-edge technology. This is the reality of a globalized world and of the 21<sup>st</sup> century and these trends will accelerate.

Additionally, back then U.S. technology was developed almost exclusively in U.S. labs, and produced in U.S. factories. That is all changed in this new era of globalization. Today, the development of new technology and advanced products largely occurs through international collaboration, either through a network of company manufacturing and R&D facilities around the world or partnerships with foreign companies or research centers. As technological capabilities have increased abroad, the outdated control system has cost U.S. manufacturers global market share, lost sales and jobs – and has cut funds available to invest in developing the next cutting-edge technologies.

### **Changed Global Competition**

The economic future of the United States depends on our ability to compete in world markets. We are still the world's largest manufacturer, producing about one in every five dollars of all manufactured goods made globally. But our share of world exports of manufactured goods has been falling steadily, and we now account for only about 10 percent of world manufactured goods trade – half of what it was several decades ago.

We will never be the world's low-cost producer, and we have to compete on the basis of our technology, the quality of our products, and our marketing and distribution skills. The ability to innovate and to develop new technologies is absolutely key to our future. If we fail here, the decline of America as a world power, the decline in our ability to maintain the best military forces in the world, and the decline in our living standards will become inevitable. We simply must be the best in technology and innovation. We do not have a choice.

An efficient export control system that carefully focuses on truly sensitive and unique technologies without hampering other exports is essential to this objective as America competes in an increasingly crowded world market for high technology goods and services. But the present system restricts too many technologies, is costly, and creates delays and uncertainties for foreign customers. In fact, it is fairly common to see U.S. competitors advertising that their products are totally free of U.S. components and U.S. export controls. In this sense our export control system is a great export promotion program – for our competitors, not for us.

The current system is at odds with the way companies develop new cutting-edge technology today through international cooperation. U.S. companies collaborating on new technologies with their wholly-owned foreign subsidiaries may be required first to obtain an export license even to send an email, provide information over the telephone, or transfer a product across the Atlantic to its facility in another NATO country. These delays and uncertainties create a significant commercial disadvantage.

Competitors in Europe and Asia are designing out American products, components and technology due to the lack of transparency, efficiency and predictability in the current system. For example, one European company recently made a corporate decision to not allow *any* U.S.-made products in their systems because of the burdens of obtaining U.S. export licenses from the U.S. I have been told of instances in which customers in other countries have put provisions in their contracts that explicitly forbid the use of U.S. manufactured articles.

One of the principal concerns of U.S. industry is that the U.S. export control system does not effectively distinguish between items that are truly sensitive and those that are, in effect, commercial products widely available in the global marketplace. Control lists are out of date, and procedures to examine foreign availability are cumbersome and out of synch with what is widely produced and available from other countries. The question of foreign availability was a relatively ancillary one when the United States first started controlling exports, but today both foreign availability and the foreign capability to produce sophisticated technologies represent one of the dominant facts of global commerce. Restricting U.S. exports of products that others make (or could make, if they chose) and sell freely does not benefit U.S. security. Rather it only harms our economic strength and our ability to continue to develop technologies. This must be addressed as one of the core elements of any revision of the Export Administration Act.

High-technology industries play a vital role not only in defending our nation but also in promoting a strong and growing economy. Companies in this sector employ over 2.5 million workers, most of whom receive wages and benefits much higher than the national average. These are the sectors in which our future economic growth will come. Yet instead of seeing rising employment in these critical industries, jobs are falling. I find it shocking that employment in America's high tech industries is almost one-fourth smaller than in 2000.

We are going in the wrong direction, and insufficient growth in our exports is one of the most important reasons for this. In 2008, high-technology exports were \$370 billion – but this was less than one-third of our manufactured goods exports, compared to over 40 percent in 2001. This is not an acceptable trend for the future.

### **Principles for a New Export Administration Act (EAA)**

As I noted at the beginning of my statement, the NAM believes that fundamental change is needed in U.S. export control policies and practices, and we believe this can be accomplished through thoughtful Congressional action on a new EAA.

The findings of numerous reports and statements from national security experts issued over the last few years all conclude that the current system is hindering, not enabling, the ability of the government to safeguard critical technologies and protect our national security. For example, the thorough National Academies of Science (NAS) report produced earlier this year clearly lays out the case that the current system is not producing the degree of security needed for today's threats and is harming our ability to compete economically.

All too often, national security experts and opponents to modernization seek to pit industry against national security interests, but in reality nothing could be further from the truth. Industry is not calling for the government to jeopardize national security, but rather to modernize a system that was created during the Cold War for a world vastly different than the current one, to assess which technologies are critical to national security, to ensure that the proper level of control is in place, and to improve multilateral cooperation with our allies. The NAM is committed to a sustained effort to modernize the export control system so that it is effective in preserving national security and our ability to compete globally.

As the Subcommittee begins to examine the provisions of a modernized system, I would like to highlight the NAM's key goals for a new export control system, which are to:

- Safeguard our national security through more effective and efficient control of sensitive exports. The system must identify and protect critical technologies in a reliable, transparent, and efficient manner. For example, as reflected in the NAS report, the list of controlled items should be narrowed to include only those items that are truly sensitive. Export control modernization will promote more effective deployment of government resources on higher-risk trade.
- Rationalize the export licensing system to reduce costs and processing times, ensure clear lines of agency jurisdiction, increase cooperation and efficiencies among the agencies involved in the process, and promote more responsive and efficient management of controlled exports.
- Institute systematic and regular reviews to update the export control lists and clarify definitions and interpretations so that those items and technologies that pose the greatest risk to national security and foreign policy are controlled and limited resources are focused on safeguarding these sensitive items.
- Create more efficient automated processes for determining what items and technologies are on control lists, applying for licenses, facilitating any necessary interagency reviews and securing export authorizations.
- Institute new licensing protocols to facilitate the transfer of controlled technologies and items between U.S. companies and their foreign partners and within companies' U.S. facilities so long as the companies maintain appropriate standards of internal controls and compliance.

- Strengthen U.S. security and enhance joint operations by facilitating defense trade and technological exchange with allies and trusted partners. Defense trade and advanced technology exchange with allies and friends build the interoperability, trust, and cutting-edge capabilities that are critical to keeping the nation secure, maintaining U.S. influence globally, and advancing our interests abroad.
- Revise the framework for program licensing by eliminating redundancies to facilitate technology-sharing with the nation's closest friends and allies, as these transfers are critical for the U.S. government's own national security programs.
- Improve industry-government cooperation by setting reasonable enforcement standards and practices for punishing bad actors while improving educational programs, outreach, and incentives to help companies that make good faith compliance efforts.
- Establish and apply a more meaningful standard minimizing U.S. controls on items readily available in the global marketplace, including consideration related to availability from foreign sources, the capability of foreign sources to produce an item, and the degree to which widely available items can actually be effectively controlled.
- Promote greater multilateral cooperation with our allies on export controls. Develop a more effective system of multilateral controls, minimize unilateral controls, and seek greater harmonization of export controls among major trading partners to both protect national security interests and level the international playing field for U.S. exporters.

### **Specific Suggestions**

It is not my purpose to go into detailed recommendations at this point, and I hope the Subcommittee staff will be agreeable to holding some “roll-up-the-shirtsleeves” session to discuss some concepts with NAM staff and export control practitioners from NAM member companies that are heavily affected by export controls. I would, however, like to identify very briefly some of the key points, elaborating on the principles outlined above.

- ***Enhanced Authority for Licensing.*** The EAA should authorize and encourage the Bureau for Industry and Security (BIS) to implement licensing mechanisms that move away from the current transaction by transaction approach – particularly in intra-company transfers, while still ensuring control of sensitive items. Also, the EAA should encourage expansion of current general license authorities and create new ones for items controlled for other reasons than national security.

- **A New Licensing Mechanism for Deemed Exports.** The current Deemed Export regime should be replaced with a simplified new process that will both enhance national/homeland security and strengthen American's economic competitiveness.
- **Greater Assessment of Foreign Availability.** A better recognition of foreign availability must be a major pillar of any legislation to reauthorization the EAA, considering foreign availability from all countries -- not just from member countries of the international export control regime.
- **Mass Market.** Many technologies are so widely available legally today that U.S. unilateral controls and even existing multilateral controls have little or no ability to control such technologies. If legal mass market status is found, there should be a presumption not to control the item.
- **Encryption.** Many hardware and software products are increasingly being reclassified for export control purposes as "encryption items," due to the rapidly growing incorporation of encryption capability as a commodity feature in commercial hardware and software. These components are also increasingly incorporated into traditionally lower technology products. Publicly available encryption should not continue to be controlled in the current manner, which is creating administrative burdens and delays that can harm U.S. competitiveness and innovation. Major reforms are needed that: remove product review requirements for mass market and other commodity products and components; treat components as mass market items if they are designed for mass market products or are otherwise widely available; eliminate reporting requirements; and end unilateral encryption controls in general on publicly available encryption.
- **Systematic Review of the CCL and Implementation of a "Sunset" Standard.** While lifecycles for many new technologies are now as short as six months, many of the unilateral controls set by the government were implemented decades ago. There should be a "sunset" rule under which every item subject to a unilateral control on the Commerce Control List (CCL) will be taken off the list at a specified time unless a justification can be presented for maintaining the particular item on the list.
- **Review of Catch-all Controls.** Companies must now screen all exports for certain end-users and end-uses even though the items in question may be benign items such as pencils, refrigerators, and consumer goods readily available in almost any foreign market. Catch-all controls need to be focused on items of strategic value.
- **Creation of a Tiered Penalty Approach.** The EAA should authorize BIS to create a tiered penalty structure with self-disclosure being a mitigating factor.

While I understand the delicate nature of reauthorizing the EAA, I encourage the Subcommittee to avoid a piecemeal approach that only addresses changes in enforcement provisions. Both the substance and enforcement provisions are in need of fundamental reform and addressing one without the other will not fix the system. Changing the enforcement provisions of the EAA, while maintaining a broken system of controls, would still have the government enforcing a system that is not adequately designed to address the threats to our national security.

## **Conclusion**

If the United States is to maintain its technological leadership, EAA legislation must acknowledge that other countries can and do compete with the United States, and that many unilateral controls do not improve security but only undermine the ability of U.S. manufacturers to design the next generation of critical technologies. The NAM and our member companies fully acknowledge there are truly sensitive technologies that the United States must safeguard, but the broader policy should fully consider foreign availability, mass market status, and indigenous capabilities before unilateral controls are implemented. A healthy defense industrial base is vital for both our economic and national security. Indeed these are not two separate concepts; economic security is key pillar of, and a prerequisite for, our broader national security.

If careful consideration and study is not given to address national security and economic competitiveness, EAA reauthorization could worsen the current environment. If improperly reauthorized, the EAA could stifle U.S. exports, decrease U.S. competitiveness, and result in a precipitous decline in technological innovation—all of which would have serious negative repercussions for national security. If done correctly, though, the U.S. economy, American high-technology jobs, and national security will benefit significantly for years to come.

Thank you, Mr. Chairman.