RECORD OF COMMENTS: EFFECTS OF FOREIGN POLICY-BASED CONTROLS
(Due November 29 2002)

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Availability of Notice of Proposed Rulemaking's (NPRM's)

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Internet users may reach the Government Printing Office's Web page for access to recently published rulemaking documents at *http://www.access.gpo.gov/su_docs/aces/aces140.html.*

Any person may obtain a copy of this NPRM by submitting a request to the Operations Branch, AAL–530, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587. Communications must identify the docket number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should contact the individual(s) identified in the **FOR FURTHER INFORMATION CONTACT** section.

The Proposal

The FAA proposes to amend 14 CFR part 71 by revising Class E airspace at Point Hope, AK. The intended effect of this proposal is to extend that Class E controlled airspace above 1,200 feet to enable IFR operations at Point Hope, AK to be contained within controlled airspace.

The FAA Instrument Flight Procedures Production and Maintenance Branch has developed two new SIAPs for the Point Hope Airport. The new approaches are (1) Area Navigation (Goblal Positioning System) (RNAV GPS) Runway 1, original; and (2) RNAV (GPS) Runway 19, original. In addition, two SIAPs are being amended: (1) The Non-directional Radio Beacon/Distance Measuring Equipment (NDB) or GPS Runway 1 approach will become the NDB Runway 1 approach, and (2) the NDB or GPS Runway 19 approach will become the NDB Runway 19 approach. Navigation intersections on existing airways have also been created to initiate transitions to the new SIAPs. The transitions require more airspace than currently exists to contain Instrument Flight Rules (IFR) aircraft.

That airspace currently extending upward from 700 feet above the surface within a 6.4 mile radius (with extensions) of the Point Hope Airport will not be affected by this action. That airspace extending upward from 1,200 feet above the surface will be revised and expanded if this action is taken.

The area would be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. The Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005 in FAA Order 7400.9J, *Airspace Designations and Reporting Points,* dated August 31, 2001, and effective September 16, 2001, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9J, *Airspace Designations and Reporting Points,* dated August 31, 2001, and effective September 16, 2001, is amended as follows:

* * * * *

Paragraph 6005 Class E airspace extending upward from 700 feet or more above the surface of the earth.

* * * * *

AAL AK E5 Point Hope, AK—[REVISED]

Point Hope Airport, AK

(Lat. 68°20′56″ N., long. 166°47′58″ W.)

Point Hope NDB

(Lat. 68°20′41″ N., long. 166°47′51″ W.)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of the Point Hope Airport and within 3 miles each side of the 207° bearing of the Point Hope NDB extending from the 6.4-mile radius to 10.3 miles southwest of the airport and within 3 miles either side of the Point Hope NDB 017° bearing extending from the 6.4-mile radius to 9.9 miles northeast of the airport; and that airspace extending upward from 1,200 feet above the surface within lat. 68°45′00″ N, long. 166°00′00″ W; to lat. 68°15′00″ N, long. 165°53′00″ W; to lat. 67°55′00″ N, long. 166°03′00″ W; to lat. 68°01′30″ N, long. 167°25′00″ W; to lat. 68°45′00″ N, long. 166°52′30″ W, to the point of beginning.

* * * * *

Issued in Anchorage, AK, on September 18, 2002.

Stephen P. Creamer,

Assistant Manager, Air Traffic Division, Alaskan Region.

[FR Doc. 02–24452 Filed 9–26–02; 8:45 am]

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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Chapter VII

[Docket No. 020725178–2178–01]

Effects of Foreign Policy-Based Export Controls

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Request for comments on foreign policy-based export controls.

SUMMARY: The Bureau of Industry and Security is reviewing the foreign policy-based export controls in the Export Administration Regulations to determine whether they should be modified, rescinded, or extended. To help make these determinations, BIS is seeking public comments on how existing foreign policy-based export controls have affected exporters and the general public.

DATES: Comments must be received by November 29, 2002.

ADDRESSES: Written comments (three copies) should be sent to Sheila Quarterman, Regulatory Policy Division, Office of Exporter Services, Bureau of

Industry and Security, Department of Commerce, P.O. Box 273, Washington, DC 20044. Comments may also be e-mailed to Brian Nilsson, Office of Strategic Trade and Foreign Policy Controls, at *BNilsson@bis.doc.gov.*

FOR FURTHER INFORMATION CONTACT: Joan Roberts, Director, Foreign Policy Controls Division, Office of Strategic Trade and Foreign Policy Controls, Bureau of Industry and Security; Telephone: (202) 482–5400. Copies of the current Annual Foreign Policy Report to the Congress are available at *www.bxa.doc.gov/press/2002/ForeignPolicyReport02/Default.htm.*

Copies may also be requested by calling the Office of Strategic Trade and Foreign Policy Controls.

SUPPLEMENTARY INFORMATION: The current foreign policy-based export controls maintained by the Bureau of Industry and Security (BIS) are set forth in the Export Administration Regulations (EAR), parts 742 (Commerce Control List Based Controls), 744 (End-User and End-Use Based Controls), and 746 (Embargoes and Special Country Controls). These controls apply to: high performance computers (§ 742.12); significant items (SI): hot section technology for the development, production, or overhaul of commercial aircraft engines, components, and systems (§ 742.14); encryption items (§ 742.15 and § 744.9); crime control and detection commodities (§ 742.7); specially designed implements of torture (§ 742.11); regional stability commodities and equipment (§ 742.6); equipment and related technical data used in the design, development, production, or use of missiles (§ 742.5 and § 744.3); chemical precursors and biological agents, associated equipment, technical data, and software related to the production of chemical and biological agents (§ 742.2 and § 744.4); activities of U.S. persons in transactions related to missile technology or chemical or biological weapons proliferation in named countries (§ 744.6); nuclear propulsion (§ 744.5); aircraft and vessels (§ 744.7); embargoed countries (part 746); countries designated as supporters of acts of international terrorism (§§ 742.8, 742.9, 742.10, 742.19, 746.2, 746.3, and 746.7); and, Libya (§§ 744.8 and 746.4). Attention is also given in this context to the controls on nuclear-related commodities and technology (§§ 742.3 and 744.2), which are, in part, implemented under section 309(c) of the Nuclear Non Proliferation Act.

Under the provisions of section 6 of the Export Administration Act of 1979, as amended (EAA), export controls maintained for foreign policy purposes require annual extension. Section 6 of the EAA requires a report to Congress when foreign policy-based export controls are extended. Although the EAA expired on August 20, 2001, the President invoked the International Emergency Economic Powers Act and continued in effect the EAR, and, to the extent permitted by law, the provisions of the EAA, in Executive Order of August 17, 2001 (66 FR 44025, August 22, 2001), as extended by the President's Notice of August 14, 2002 (67 FR 53721, August 16, 2002). In January 2002, the Secretary of Commerce, on the recommendation of the Secretary of State, extended for one year all foreign policy-based export controls then in effect. The Department of Commerce, insofar as appropriate, is following the provisions of Section 6 of the EAA in reviewing foreign policy-based export controls, requesting public comments on such controls, and submitting an annual report to Congress.

To assure maximum public participation in the review process, comments are solicited on the extension or revision of the existing foreign policy-based export controls for another year. Among the criteria considered in determining whether to continue or revise U.S. foreign policy-based export controls are the following:

1. The likelihood that such export controls will achieve the intended foreign policy purpose, in light of other factors, including the availability from other countries of the goods or technology proposed for such controls;

2. Whether the foreign policy purpose of such controls can be achieved through negotiations or other alternative means;

3. The compatibility of the export controls with the foreign policy objectives of the U.S. and with overall U.S. policy toward the country subject to the controls;

4. Whether reaction of other countries to the extension of such export controls by the U.S. is not likely to render the controls ineffective in achieving the intended foreign policy purpose or be counterproductive to U.S. foreign policy interests;

5. The comparative benefits to U.S. foreign policy objectives versus the effect of the export controls on the export performance of the United States, the competitive position of the United States in the international economy, and the international reputation of the United States as a supplier of goods and technology; and

6. The ability of the United States to enforce the export controls effectively.

BIS is particularly interested in the experience of individual exporters in complying with nonproliferation export controls, with emphasis on economic impact and specific instances of business lost to foreign competitors. BIS is interested in industry information relating to the following:

1. Information on the effect of foreign policy-based export controls on sales of U.S. products to third countries (*i.e.,* those countries not subject to sanctions), including the views of foreign purchasers or prospective customers regarding U.S. foreign policy controls.

2. Information on export controls maintained by U.S. trade partners (*i.e.*, to what extent do they have similar controls on goods and technology on a worldwide basis or to specific destinations).

3. Information on licensing policies or practices by foreign trade partners of the United States which are similar to U.S. foreign policy export controls, including export license application review criteria, use of export license conditions, and requirements for pre- and post-shipment verifications (preferably supported by examples of approvals, denials and foreign regulations).

4. Suggestions for revisions to foreign policy-based export controls (in the event there are differences) that would bring them more into line with multilateral practice.

5. Comments or suggestions as to actions that would make multilateral export controls more effective.

6. Information that illustrates the effect of foreign policy controls on the trade or acquisitions by intended targets of the controls.

7. Data or other information as to the effect of foreign policy-based export controls on overall trade, either for individual firms or for individual industrial sectors.

8. Suggestions as to how to measure the effect of foreign policy-based export controls on U.S. trade.

9. Information on the use of foreign policy-based export controls on targeted countries, entities, or individuals.

BIS is also interested in general comments relating to the extension or revision of existing U.S. foreign policy-based export controls.

Parties submitting comments are asked to be as specific as possible. In the interest of accuracy and completeness, BIS requires written comments. Oral comments must be followed by written memoranda. All written comments received before the close of the comment period will be considered by BIS in reviewing the foreign policy-

based export controls and in developing the annual report to Congress.

All written comments and information submitted in response to this notice will be a matter of public record and, therefore, will be available for public inspection and copying. The BIS does not maintain an on-site facility for the public to inspect public records. All public records are posted on the BIS' Web site which can be found at *www.bis.doc.gov* (click on the FOIA Reading Room link under the section of Public Information and Events). Copies of the public record may also be obtained by submitting a written request to the Bureau of Industry and Security, Office of Administration, U.S. Department of Commerce, Room 6883, 1401 Constitution Avenue, NW, Washington, DC 20230.

James J. Jochum,

Assistant Secretary for Export Administration.

[FR Doc. 02–24458 Filed 9–26–02; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM01–12–000]

Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design

September 20, 2002.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice, agenda, and staff paper for the October 2nd staff conference on market monitoring.

SUMMARY: On July 31, 2002, the Commission issued a Notice of Proposed Rulemaking proposing to amend its regulations to remedy undue discrimination through open access transmission service and standard electricity market design (67 FR 55452, August 29, 2002). As announced in the Commission's August 28, 2002, Notice of Staff Conference on Marketing Monitoring (67 FR 57187, September 9, 2002) the Commission is convening a technical conference on October 2, 2002 to discuss and further develop the essential elements that should be required in a standard market monitoring plan. By this notice, the Commission is providing an agenda for the conference and a staff discussion paper on standard market metrics information.

DATES: Conference will be convened on October 2, 2002.

ADDRESSES: Federal Energy Regulatory Commission, 888 First Street, NE., Room—2C, Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT: Saida Shaalan, Office of Markets, Tariff and Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8278, email: *saida.shaalan@ferc.gov*.

SUPPLEMENTARY INFORMATION:

Notice, Agenda, and Staff Paper for the October 2nd Staff Conference on Market Monitoring

As announced in the Notice of Staff Conference on Market Monitoring, issued August 28, 2002, the staff of the Federal Energy Regulatory Commission (Commission) will hold a conference on Wednesday, October 2, 2002 to discuss and further develop the essential elements that should be required in a standard market monitoring plan. The conference will be held at FERC, 888 First St. NE, in Washington DC, in the Commission Meeting Room.

Staff is convening this conference to get additional public input on developing a standard market monitoring plan. The staff may then propose additional detail for such a plan, on which the public will then be given opportunity to comment.

The goal of this conference is to discuss the development of a standardized market monitoring plan to assist in evaluating the performance of wholesale electric markets and the conduct of individual market participants. The conference will include a discussion of standard indices, data and reporting needed to implement the market monitoring plan effectively. Attached is the conference Agenda as well as a staff discussion paper on standard market metrics.

The public is invited to attend. There is no registration or fee.

The conference will be transcribed. Those interested in acquiring the transcript should contact Ace Reporters at 202–347–3700, or 800–336–6646. Transcripts will be placed in the public record ten days after the Commission receives the transcripts. Additionally, Capitol Connection offers the opportunity for remote listening and viewing of the conference. It is available for a fee, live over the Internet, via C-Band Satellite. Persons interested in receiving the broadcast, or who need information on making arrangements should contact David Reininger or Julia Morelli at the Capitol Connection (703–993–3100) as soon as possible or visit the Capitol Connection Web site at *http://www.capitolconnection.gmu.edu* and click on ''FERC.''

For additional information, please contact Saida Shaalan at 202–502–8278, or by e-mail to *saida.shaalan@ferc.gov.*

Magalie R. Salas,

Secretary.

Agenda for the SMD Conference on Market Monitoring; Wednesday, October 2, 2002

Panel I—Academics, FTC, DOJ, and others—9:30 a.m.–11:00 a.m.

- Paul Joskow, Massachusetts Institute of Technology, Economics
- John Hilke, Federal Trade Commission
- Jade Eaton, Department of Justice, Attorney
- Kenneth Rose, National Regulatory Research Institute
- Kristin Domanski, Energy Security Analysis Inc.
- Scott Harvey, LECG

Panel II—Market Monitoring Units—11:00 a.m.–12:30 a.m

- David Patton, Independent Consultant, MISO
- Anjali Sheffrin, CAISO
- Frank Wolak, Stanford University, CAISO
- Robert Ethier, ISO NE
- Steve Balser, ISO NY
- Joseph Bowring, PJM ISO

Both panels will cover the same topics, but from a different perspective: The first will be a theoretical discussion of what needs to be done as we move towards establishing a standard set of metrics. The second panel will discuss what has been done in practice, what successes they have had, what impediments they have encountered, and what can be done to assist in resolving the difficulties.

The first half hour of each panel will address the first set of issues (below) and whether the ''strawman'' we issued includes the topics that need to be addressed. The second hour can then deal with a variety of issues associated with using a standard set of metrics such as data availability, regional differences, etc. as well as broader issues addressing market participant access to the data.

First half hour of each panel—standard set of metrics and the strawman:

- What aspects of the market should MMUs be monitoring and what are the metrics?
- Does the ''strawman'' capture these?
- Are there metrics which are missing?
- To what degree should MMUs be monitoring general market behavior vs. individual market participant behavior?

Last hour *of each panel*—data and regional issues and market participant accessability to the data:

- What data limitations are there in monitoring and what can FERC do to address them ?
- What, if any, differences in monitoring are appropriate by region? (Are some additional metrics likely to be needed in some regions?)

October 30, 2002

Ms. Sheila Quarterman
Regulatory Policy Division, Office of Exporter Services
Bureau of Industry and Security
Department of Commerce
PO Box 273
Washington, DC 20044

Subject: Effects of Foreign Policy-Based Export Controls

Reference: Federal Register Notice of September 27, 2002

Dear Ms. Quarterman:

The Sensors and Instrumentation Technical Advisory Committee (SITAC) respectively submits this letter in response to the referenced request for comments on the effects of foreign policy-based export controls. The SITAC appreciates the opportunity to comment. The Committee also appreciates the fact that comments it submitted in 2001 figured prominently in Chapter ***3*** of the BIS ***2002 Report on Foreign Policy Export Controls.*** Although no changes were made as a result, it is good to know that our inputs are being read and repeated!

The six recommended criteria are essentially the same as included in the request of a year ago. Alas, none of the issues facing the industry have gone away. So, much of what follows is repeated from our 2001 comments. Some additional comments about foreign competition have been added. The current request lists nine additional guidelines for input. We attempt to address those where we have pertinent information.

Of the controls subject to extension, those of most concern to the industry represented by the SITAC are the Regional Stability (RS) controls outlined in Part 742.6 and applying to commodities in categories 6A002, 6A003, 6E001 and 6E002, all related to commercial night vision and thermal imaging equipment. Part 742.6 states that these controls are

"maintained in support of the U.S. foreign policy to maintain regional stability".

Over the past year, the SITAC has continued to question the legitimacy of RS controls applied to thermal imaging technology. The effects of world events on our licensing system have interrupted this dialog and forced the thermal imaging industry to fight for the basic right to export, even within what it deems to be inappropriate RS controls. The comments below are all directed toward RS controls.

1. **Will the controls achieve the intended foreign policy purpose, in light of other factors, including the availability from other countries of the goods or technology proposed for such controls?** It is important to note that Category 6 is subject to RS Column 1 controls, that is to say exports are controlled to all countries

except Canada. By treating all regions with the exception of Canada as being potentially unstable this would seem to dilute the focus on regions where stability may truly be in question. Further it is important to note that Category 6 technologies have been the subject of significant turmoil and unpredictability in the licensing process over the past several years. This has created a ripe environment for foreign sources pursuing similar technology. The proliferation of image intensifier night vision devices-from non-Wassenaar countries in recent years is easily recognized due to their presence in the US consumer market. In the area of infrared (IR) thermal imaging devices, foreign sources are growing in size and number. The past year has seen a remarkable increase in the presence of foreign competition. A French focal plane array manufacturer reports several thousand units produced this year and a capacity to produce 25,000 units per year. Several thermal camera makers in the People's Republic of China have become very visible in the past year. Previously reported efforts in the UK and Japan continue to grow. These are the fruits of RS controls that limit the ability of US exporters to meet the worldwide demand. Distributors in the EU advise that intra-EU exports of uncooled IR cameras are unrestricted creating greater advantage for European suppliers.

3. **Can the foreign policy purpose of such controls be achieved through negotiations or alternative means?** The SITAC believes the purpose as stated in the EAR is not served in this case so, if served, must be served by alternative means.

4. **Are the controls compatible with the foreign policy objectives of the US and with overall policy of the US toward the country subject to the controls?** The SITAC believes that with respect to our closest allies, specifically those countries included in RS1 but not included in RS2, the controls are not compatible with the stated objective. These are not countries or regions whose stability can be threatened by export of these commodities. It is abundantly clear that a top current US foreign policy objective is to build a large international coalition to combat terrorism in both offensive and defensive terms. The public message from our government is that we must share resources and intelligence among this coalition to fight a common foe. Much of the RS-controlled equipment is sought after by law enforcement, fire-fighting and security organizations throughout the world. By restricting our allies' access to available US technology our calls for cooperation seem hollow.

5. **Is the reaction of other countries to such controls by the US likely to render the controls ineffective in achieving the intended foreign policy purpose or be counterproductive to the US foreign policy interests?** The reaction of other countries includes attempts to seize the market opportunity created by restrictingthe availability of US technology while the US industry demonstrates the growing commercial application of this technology. This is clearly counterproductive and diminishes the effectiveness of the US controls. The growth of the foreign industry in the past year demonstrates the ineffectiveness in achieving the foreign policy purpose.

6. **Does the effect of the controls on the export performance of the US, the competitive position of the US in the international economy, the international reputation of the US as a supplier of goods and technology, or the economic**

well-being of individual US companies and their employees and communities exceed the benefit to US foreign policy objective? The SITAC's opinion is that the negative effects on US companies far exceed the perceived benefit to the foreign policy objective. The policy encourages a dismantling of the US industry. It is, again, difficult to separate the effect of the RS controls from the overall condition of the US export licensing system with respect to Category 6 application of these controls, but the damage to US companies is undeniable. To earn and/or maintain a reputation as reliable suppliers, US companies in commercial businesses must be able to provide predictable and timely delivery of products. This is simply not possible, a fact that is well recognized by experienced distributors and customers in foreign countries. The unpredictability of the process strains the credibility of US suppliers. The defense press has reported instances of foreign governments discouraging the purchase of US controlled items due to export difficulties. US companies have been successful in creating explosive growth in the use of thermal imaging in firefighting. This growth has gained the attention of firefighters and manufacturers throughout the world. The US suppliers have been severely restricted in their attempts to export firefighting cameras, even to NATO countries, creating an open door for other countries to fill the demand. There are similar situations in other markets.

8. **Is the US able to enforce the controls effectively?** Given fixed resources, US enforcement ability is directly proportional to the number of commodities controlled and number of controlled destinations. Proliferation of questionable controls diminishes US enforcement ability.

The application of RS controls is further explained in EAR 742.6.b Licensing Policy as follows.

> *(1) Applications to export and reexport items described in paragraph (a)(l) (i.e.* ***RS1 items)*** *of the section will be reviewed on a case-by-case basis to determine whether the export or reexport could contribute directly or indirectly to any country's military capabilities in a manner that would alter or destabilize a region's military balance contrary to the foreign policy interests of the United States.*

Over the past year, the US Defense Department (DoD) has led an effort to place tighter controls on thermal imaging products. This is manifested in more restrictive license conditions, denials of cases identical to previously approved cases and more escalation of cases resulting in significant licensing delays. This is further manifested by attempts to place additional, previously uncontrolled thermal imaging technologies such as silicon focal plane arrays under control. It seems apparent that the reasons for tightened controls have to do with perceived threats to US forces rather than the possibility for destabilizing the balance of foreign countries. Thus RS controls seem misapplied to this industry.

Foreign customers for US thermal imaging products are burdened by what they see as overly restrictive conditions, lack of confidence in their abilities to do business responsibly and unpredictable delays in gaining access to US products. European customers are receptive to European sources due to the openness of intra-EU markets to exports of their products.

Many more prominent US trading partners apply controls that are ostensibly similar to those of the US because of their participation in the Wassenaar Arrangement. However, there is no analog to RS controls in the Wassenaar Dual Use Control List and the similarities are incomplete. As cited above, the EU seems to allow uncontrolled export of these items between countries of the EU.

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The SITAC investigated licensing processes in two countries during the past year. A party from the UK presented a license case study at a **SITAC** meeting and showed license processing times to be approximately half the best cycle times in the US system. The case in point was also devoid of the extensive license conditions common to US licenses in this arena. Another data point came from a Japanese exporter who reported license cycle times of a few days or about one-tenth the best US cycle times. It should be noted that US thermal imaging cases are frequently handled out of normal cycles extending the average time for such a license to well beyond the best cycle times used for comparison above.

The SITAC continues to recommend that the Secretary move Category 6 commodities presently controlled under RS Column 1 to RS Column 2. This would have the effect of putting the US industry on similar footing with its competition in commerce with our closest allies.

The effect of RS controls on trade or acquisitions by intended targets of the controls is most readily demonstrated by the rapid growth of foreign competition within and without the Wassenaar Arrangement as cited above. The success of the last year has not only spawned new markets and competitors in countries like China but it has given historical US customers a credible alternative. This is most problematic with non-US manufacturers currently integrating US technology. Several such manufacturers are openly using or preparing to use the French technology source citing US export difficulties as the principal reason. In one sense, the effect of RS controls can be directly measured by the growth of these foreign sources. At one time, US technology was the only serious offering. That position has eroded and the rate of erosion during the past year is sobering. However, the controls on US technology have retarded the application and market development for many years making the total effect in lost business impossible to measure.

In closing, the SITAC offers these summary comments.

1. **RS control of thermal imaging and night vision technology is inconsistent with stated and implied foreign policy goals. The concerns addressed by US licensing may be more closely related to national security or some other control criterion.**

2. **The application of RS controls in this case has contributed directly to the loss of ground by the US industry to foreign competition.**

3. **It is difficult to separate the effect of RS controls from the overall effectiveness of the US licensing process in assessing challenge to the US**

industry.

5. **The Secretary should consider moving category 6 items from RS1 to RS2 controls as a first step to reconsidering RS controls in entirety. This would not only address fairness issues but also allow a decrease in BIS caseload by decontrolling exports to countries where stability is not at risk.**

Once again, we thank BIS for the opportunity to comment and for the attention given to past comment from the SITAC.

Very truly yours,

Stanley F. Kummer
SITAC Co-chair

cc: Bill Wells, SITAC co-chair

From: John Tundermann <jtundermann@haynesintl.com>
To: <BNilsson@bis.doc.gov>
Date: 11/21/023:36PM
Subject: MTAC Member Comments "Effects of Foreign Policy-Based Export Controls

Dear Mr. Nilsson,

The following are deliberately brief, primarily opinion, comments on Docket No. 020725178-2178-01 "Effects of Foreign Policy-Based Export Controls". The reason for this approach is that the comments requested cover such broad areas and the dynamics in our industry, I believe, hide most of the competitive impact (to us) of US export controls.

In the past five years I have worked for two of the seven US producers of nickel and cobalt superalloys - therefore these comments are from a nickel alloy producer perspective. Critical applications for nickel alloys can be found in the chemical, gas turbine, nuclear, power, electronic and transportation industries. Thirty plus percent of our industry's production is directly exported and an unknown amount of product produced using our alloys is also exported. From the point of view of export controls, we are somewhat fortunate that most customers are end users or direct suppliers to end users, are repeat customers and are fairly stable companies. Where our industry has potential problems is with the never ending barrage of traders (business opportunists) who learn of nickel alloy business and try to get the mills to supply them (they primarily trans ship) - they will sell to anyone and for commercial reasons "cannot reveal" who their customer is or what country the customer is in - the electronic world lets the traders advertise their capabilities and willingness to sell around the world. We try to avoid this type of business and primarily deal through our foreign affiliates and contractual distributors.

Item numbers refer to those on page 61048 Federal Register Vol 67 No 188 Friday September 27, 2002 / Proposed Rules

Item 1 (Column 2). Through the not unexpected efforts of foreign governments (national reasons), universities (research) and industries (commercial), supported in many cases by US users of nickel alloys, eg GE & PWA (gas turbine component cost reasons), equipment manufacturers (underlying process technologies), US Universities (research), US publications (eg, technical papers and patents) US Government (supply agreements, policy and foreign "aid"), today the majority of nickel alloys are available from many other countries not bound by US export controls - China, India, Italy, Germany, France, Russia, Brazil, Japan .....

Item 2 (Column 2). There appear to be are too many holes in the "sieve" to effectively stop the transfer of technology in our industry. Trade secrets, mainly processing, seem to have had a slowing effect on the rate of transfer.

Item 3 (Column 2). The US swings from friend to foe and the reverse is a complicating factor. I believe this is especially true for customers in foreign countries that we trade with. Their international and commercial concerns do not match ours and just because the US shifts friendships doesn't mean that their loyalty and willingness to trade

with a newly listed US foe has changed -- no matter what we say about trading restrictions or the questions we pose on identifying actual end use and point of sale for our products.

Item 4 (Column 2). I only have personal confidence in the UK and Australia - the actual trade actions vs reported policy in all the others is not clear.

Item 5 (Column 2). We presently have a competitive edge on some proprietary products in processing and quality, but with the financial performance (market, competition, and customer base impacts) of the primary US nickel alloy producers over the past decade, investment into basic research has been dramatically reduced. This change will result in the nickel alloy industry moving into an industry primarily producing international commodities.

Item 6 (Column 2). The penalty threat for individualsof export control violations will keep the "nervous honest" "honest".

Item 1 (Column 3). I believe that with our company policy (stated and by action) of enforcing the US trade restrictions for our US operations, foreign affiliates and distributors, we see very few requests for products to restricted individuals, companies and countries. Prospective customers have other routes to secure what they want. We focus our resources on working successful business opportunities and do not tract or log-in lost business due to export controls.

However, here is an example of how our system works. We believe that Iran is trying to construct and acetic acid plant which, along with a wide range of other alloys, requires specific alloys we produce (B-2/B-3, C-276 and G30). We, through a direct contact, contacts to our UK affiliate, Germany distribution company and Singapore sales office have been approached by a Chinese company, a Korean company, and a Japanese company to supply product for fabrication of components for a plant in various areas of the world. Based on the bill of materials and knowledge of the acetic acid plant construction plans in most countries of the world, we believe that the ultimate use of the alloys is to produce components for a project in Iran - we no quoted. I am confident that the above fabricators did get quotes from foreign competition.

Item 2 (Column 3). See Item 4 (Column 2)

Item 3 (Column 3). With the exception of the UK, I am not aware of the export controls of other countries. It does appear from a competitive position that German companies have an competitive edge in this regard.

Item 4 (Column 3). I have no specific suggestions. However, I suspect that those involved in export control enforcement and analysis have the insight, from actual cases where restricted materials/products have gotten into the "wrong" hands, to provide an array of suggestions to plug the holes in policy-based foreign export controls.

Item 5 (Column 3). See Item 4 (Column 3) above.

Item 6 (Column 3). For all the attention and discounting the news media rhetoric about the human and economic damage being inflicted by

embargoes, look at the ability of Cuba, Iraq, Iran, North Korea to get what they want in military hardware, chemicals, technology

Item 7 (Column 3). What we don't know we don't know. We stay away from targeted export control entities and do not have access to their nickel alloy consumption data; in addition, our competitors don't share what they know. We are therefore not in a position to assess the level of lost business that is involved.

An example of how the export controls compound lost business is:

On 31 October 2001, we learned from our forwarder that in checking the receipt of a shipment of Rene' 41 sheet sent to a customer location in Cyprus, they were informed by the forwarder in Cyprus that the material had been received and trans shipped to Tehran. Upon learning this, we froze all business to the customer headquartered in the UK with operations in the UK and Cyprus, pulled an air shipment already at JFK airport, notified our UK Affiliate, notified the DOC, US Customs and Dept of the Treasury of the incident. Our Forwarder also notified the BXA and our UK Affiliate notified the UK Security Service.

Finding out that their shipments had been stopped, our customer informed us that the information our forwarder had received was in error and that the material was being used for the originally stated purpose of producing gas turbine engine parts for Israel. - We didn't budge!!!!

After many contacts, we are now in Nov 2002 (1+ years) with no feedback, not status information, sales to the customer still blocked in our system ----- we don't know if the customer is "innocent", "guilty" ..... and we don't have their business (and after blowing the whistle probably won't get back). Business we desperately need with our 2002/2003 business off by over 30% from 1998-2001/2002 levels, US employees already placed on lay off, financial performance not far from red numbers and more US employees facing termination (salaried) and lay off. Note: the UK Security Service has not responded either.

Item 8 (Column 3). In most of the developed countries Universal Tariff Code export data is collected. Although a horrendous task, knowledgeable indigenous and US export personnel should be able to interpret the information, recognize "'miss" coded transactions and estimate the ongoing trade in restricted items to restricted countries. If you assume that the US is an equal competitor, perhaps 50% of the trade involved would have been US sourced.

Item 9 (Column 3). If we were to depend on a voluntary, pro American attitude on the part of US companies to control the use of our commercial capabilities to produce products that could be purchased by countries to be used against us, we would find that the justification of commercial profit would come before security.

From: <peter.dumoulin@philips.com>
To: <BNilsson@bis.doc.gov>
Date: 11/26/028:48AM
Subject: Comment on Foreign Policy-base Export Control Regulations

Dear Sir,

I do not know whether a foreign multinational is allowed to react on mentioned Regulations. But I would like to use this opportunity, based on the fact that your Internet site not only is visited by US companies, but also by a lot of foreign companies, which I think is also the purpose of that Website.

The Foreign Policy-based regulations in the EAR can be divided in two parts:
The embargo part of the EAR in which the embargoes and terrorist supporting countries are dealt with.
The Export Classification Numbers in Supplement No 1 to part 774 which are not covered by the Wassenaar Arrangement.

My comment will not be on point 1 as enbargoes are the explicit right of any country.
My comment will be on point 2. It is clear that it is also the explicit right of a country to enforce such national controls. However, my comment is meant to show that from the viewpoint of the Business community these export controls are a great burden for a commercial company.

It is very well known that the criteria in the Wassenaar Arrangement are continuously challenged by the commercial market. New technologies are being investigated and used to serve the consumer market at best; people want to have the best results in our Home video's, TVs, Camcorders, wireless radio, wireless connection for speakers, mobile phone, etc. And a result of being a "commercial" product is that these products will be available all over the world.
Whenever a certain technological high standard product is used in a commercial product, it can hardly be controlled; the main reason in the Wassenaar Arrangement to decontrol the product.
For a European country this means that most commercial products are not effectively controlled anymore and no administration, reporting, etc, needs to be done.

The Foreign Policy-based regulations in supplement 1 to part 774 of the EAR are construed in such a way that almost all products decontrolled by the Wassenaar Arrangement are caught by the additional national export control numbers in that supplement.
So this means that those products will not become decontrolled in the US Law (decontrolled being EAR99).

Looking into the range of commercial product this means that many, many US-origin commercial products, not only new ones, but also technological generations ago, which were manufactured years ago, are controlled by the Foreign Policy export controls.

Looking into the databases of US companies and also foreign companies using US-origin products it is a tremendous burden to maintain those ECCN's worldwide in every local database. In addition the US-based

companies have to report the export of such materials.
Any time a new product is developed a company has to take into account that US-origin products could be under US-Foreign Policy controls and that these products have to be cumulated to investigate the 10 or 25% “de minimis" rule.
These controls are not important for export from the US itself. Any export from the US to the embargoed 6 or 7 is forbidden. They are only important for the re-export of those products or the incorporation of those products in foreign-made products.
Moreover when importing non-US-origin products in the US, they must be reclassified according to those Foreign Policy-based export controls when they will be incorporated in a sales product or being used for resale.

The export control issues of a commercial company (foreign and US-based) consists, for over 90%, of maintaining US foreign policy-based controls. Sometimes a reason to look for other resources.

I my opinion it would be better to raise other foreign-policy-based export controls, which will reach the same goal as you have today, but gives far less complexity and burden for the commercial companies.
No direct export of US-origin products to several embargoed countries.
No re-export of US-origin products to several (other) embargoed countries
For listed countries, having a good “origin” or “made in” rule, and having a good export control system, the 25% “de minimis" rule should be available for US-origin Wassenaar controlled articles.
For all other countries the “de minimis" rule should read as follows: The foreign made product is subject to US law when having incorporated 25% or more of the following US-origin products: Microprocessors, d/a/ or a/d convertors,....(list of products without criteria or just having simple criteria), products as listed by Wassenaar Arrangement.

Best regards

Peter C.M.Dumoulin
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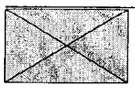

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November 26, 2002

Via E-mail and Overnight Mail

Att: Ms. Sheila Ouarterman
Regulatory Policy Division
Office of Exporter Services
Bureau of Industry and Security
U.S. Department of Commerce
P.O. Box 273
Washington, D.C. 20044

Ladies and Gentlemen:

The Section of International Law and Practice of the American Bar Association is pleased to submit the attached comments in response to the Bureau of Industry and Security, United States Department of Commerce, inviting public comment on the Effects of Foreign Policy-Based Export Controls.

The views expressed herein are being presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,

Don S. De Amicis, Chair
Section of International Law and Practice

November 26, 2002

Effects of Foreign Policy-Based Export Controls

The American Bar Association's Section of International Law and Practice appreciates this opportunity to present its views on the effects of foreign policy-based export controls. These views are presented only on behalf of the Section of International Law and Practice of the American Bar Association ("ABA"). They have not been approved by the House of Delegates or the Board of Governors of the ABA and should not be construed as representing the policy of the ABA.

BACKGROUND

The Export Administration Act of 1979 (the "EAA") at Section 6 grants the President the authority to "prohibit or curtail the exportation of any goods, technology, or other information subject to the jurisdiction of the United States . . to the extent necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations.? Section 14 of the EAA requires the Secretary of Commerce to provide an annual report to Congress on "the effectiveness of export controls imposed under Section 6 in furthering the foreign policy of the United States." Pursuant to that statutory requirement, the Bureau of Industry and Security of the U.S. Department of Commerce seeks public comments on how existing foreign-policy based export controls have affected exporters and the general public. ("Effects of Foreign Policy-Based Export Controls," 67 Fed. Reg. 61047, dated September 27, **2002)**

The foreign policy-based controls authorized by Section 6 of the EAA typically are U.S. unilateral controls that are designed to support a variety of U.S. policy objectives, including, e.g., encryption controls; crime control; controls on items that promote regional stability; controls on U.S.-embargoed countries; and controls on countries designated as supporters of acts on international terrorism. These foreign policy-based controls exist in parallel with other U.S. export controls that reflect U.S. participation in various multilateral regimes, including the Nuclear Non-Proliferation Treaty, the Australia Group, the Missile Technology Control Regime, and the Wassenaar Arrangement.

In 1997 the ABA adopted a resolution put forward by the Section of International Law and Practice ("International Law Section") that opposed the use of extraterritorial trade controls

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1 The EAA of 1979 expired on August 20, 1994 and reauthorized by Pub. L. 106-508 (Nov. 13, 2000). The Act lapsed again on August 20, 2001 but was continued in effect by Executive Order 13222 (August 17, 2001) under the International Emergency Economic Powers Act, which was further extended in 2002 ("Continuation of Emergency Regarding Export Control Regulations," 67 Fed. Reg. 53721 (Aug. 16, 2002)).

that depart from international law jurisdictional norms and create the potential for conflict with other nations.

DISCUSSION

The International Law Section does not endorse, or criticize, the various unilateral U.S. foreign policy export controls that have been promulgated under Section 6 of the EAA. Similarly, the ABA Section of International Law does not have access to sufficient commercial data that would permit the Section to render a meaningful evaluation of the efficacy of these various unilateral controls in achieving the foreign policy objectives of the United States. Nonetheless, the International Law Section believes that the Export Administration Regulation's ("EAR") foreign policy controls do raise several legal issues that warrant appropriate revisions to the relevant portions of the EAR. These issues are presented below.

A. Unwarranted Extraterritorial Effect of U.S. Export Controls.

The International Law Section opposes the inclusion in U.S. unilateral export controls of certain extraterritorial features that are inconsistent with international law. The extraterritorial nature of U.S. export controls is illustrated by the "reexport" scheme embodied in the EAR that prohibits certain unlicensed exports from foreign countries of U.S.-origin and U.S.-content products and technology as well as exports of foreign-produced "direct products" of U.S.-origin technology. The controls on reexports, which are applicable to items controlled for foreign policy as well as national security reasons, have several undesirable consequences.

First, the EAR's reexport controls appear to be inconsistent with generally accepted principles of jurisdiction under international law. Territoriality and nationality have long been accepted as the principal bases in international law to prescribe rules of conduct, although these principles have more recently evolved to embrace principles of reasonableness and fairness as well. Export controls that regulate transactions entirely outside the territory of a state are at odds with the territorial principle, which recognizes the right of a state to prescribe rules of conduct for persons within its borders.

Similarly, the nationality principle, under which a state may prescribe rules of conduct for nationals outside its territory, does not justify applying U.S. export controls to, for example, foreign transactions of a subsidiary of a U.S. company incorporated in France, since such a subsidiary has the nationality of its place of incorporation. International law does not apply the nationality principle to permit a state to regulate transactions in goods or technology outside its territory solely by virtue of their country origin. Thus, the reexport provisions of the EAR, to the extent they regulate conduct entirely outside the U.S. by nationals of foreign states, are not supported by either of these traditional bases for jurisdiction in international law. Further, since they have been frequently challenged by our trading partners, there is clear reason to question whether such reexport controls conform to an evolving standard of reasonableness under international law.

Second, the extraterritorial extension of U.S. export controls, including foreign policy-based controls, leads to serious conflicts with other U.S. trading partners. Several of our most important trading partners, including the United Kingdom, Canada, Mexico and the European Union, have responded by adopting blocking statutes designed to nullify the effect of various U.S. extraterritorial trade controls. In the United Kingdom, for example, blocking orders by the British government are authorized by the Protection of Trading Interests Act of 1980. Canada's Foreign Extraterritorial Measures Act not only permits the issuance of blocking orders but also provides for "claw back" recovery of certain judgments and expenses, and increased penalties for violations of blocking orders. Such extraterritorial trade controls and the responses they engender are contrary to principles of free trade.

Third, although difficult to quantify, extraterritorial trade controls impose certain economic and foreign policy costs as well. Substantial anecdotal evidence clearly indicates that certain foreign parties "design out" U.S.-origin components or technology to avoid the burden of U.S. reexport controls. This places U.S. companies at a clear competitive disadvantage. Further, to the extent that they often become a contentious issue between our trading partners, extraterritorial U.S. foreign trade controls also have a significant foreign policy cost.

A fuller explanation of the ABA Section of International Law's position on extraterritorial U.S. trade controls is contained in a resolution adopted by the ABA House of Delegates, which is available at: www.abanet.org/intlaw/divisions/regulation/export_rec.html.

B. "Controlled U.S.-origin Content" Under the De *Minimis* Rule.

The EAR exempts from U.S. export controls any foreign-manufactured goods, software, or technology that include less than a *de minimis* amount of "controlled U.S.-origin" content. The *de minimis* threshold is 10% controlled U.S.-origin content for items reexported to designated terrorist-supporting countries and 25% for reexports to all other countries. The Section believes that the definition of "controlled U.S.-origin" content as that term applies to the *de minimis* rule should be fully consistent with the authority granted under the EAA.

The Commerce Department takes the position that "controlled U.S.-origin" content is that which would require a license for reexport to the ultimate destination of the foreign-made product if such content were reexported to that destination in the form received. The International Law Section believes that Commerce Department position is inconsistent with the language and intent of the EAA to restrict "controlled U.S.-origin" content to only those items controlled for reasons of national security. The *de minimis* provision is contained in Section 5 of the EAA, which provides the authority for the Commerce Department's national security controls:

> Export controls may not be imposed under this section, or under any other provision of law, on a good solely on the basis that the good contains parts or components subject to export controls *under this section* if such parts or component . . . comprise 25 percent or less of the total value of the good. (EAA, Section 5(m)); emphasis added)

The phrase "under this section" clearly relates to EAA Section 5 on national security controls and not to Section 6, which defines the Department's authority to define controls based on foreign policy reasons. The International Law Section believes that to include within the meaning of the *de minimis* rule "controlled U.S.-origin" content that is subject to control for various foreign policy reasons is beyond the scope of the authority granted by Section 5 of the EAA.

Accordingly, the International Law Section recommends that the Bureau of Industry and Security revise the definition of "controlled U.S.-origin" content under the *de minimis* rule to conform to the authority granted by Section 5 of the EAA.

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From: <RRarog@aol.com>
To: <bnilsson@bis.doc.gov>
Date: 11/29/02 1:07PM
Subject: Sun Microsystems Comments on Foreign Policy Controls

Brian,

Attached are this year's comments by Sun. We will follow up with a hard copy version.

Thanks and Regards,

Bob Rarog --

Ms. Sheila Quarterman,
Regulatory Policy Division,
Office of Exporter Services,
Bureau of Industry and Security,
Department of Commerce,
PO Box 273
Washington, DC 20044

Dear Ms. Quarternan,

Sun Microsystems welcomes the opportunity to comment on the effects of foreign policy-based export controls in response to the solicitation in the Federal Register of September 27, 2002 (Docket No. 020725 178-2178-01).

Sun believes that export controls can serve a valuable purpose in furthering important objectives of U.S. foreign policy. There is no area of higher importance in this regard than the spread of weapons of mass destruction, which export controls have helped to impede.

However such controls must be effective in achieving their stated purpose. As recognized in the Export Administration Act of 1979, controls maintained in the presence of alternative sources of supply, controls that are not adjusted to reflect the advance and spread of technology, or controls that are simply ineffective, needlessly harm the exporting community and must be eliminated.

While progress has been made in recent years in addressing these issues in both the foreign policy and national security categories, much work needs to be done. In this commentary, Sun would like to focus on two areas of continuing concern, Section 744 Proliferation Controls, and controls on High Performance Computers.

1. Section 744 Proliferation Controls

In 1990, provisions were included in the Export Administration Regulations requiring that all items, listed or not, require prior government approval for export or reexport if there is "reason to know" that they will be used to support a proscribed proliferation activity (e.g., Section 744.2(a)). These provisions, collectively known as "EPCI" (the Enhanced Proliferation Control Initiative), were originally intended intended to stop shipments of recently decontrolled items.

EPCI restrictions logically imply screening requirements, although screening is not explicitly addressed in U.S. regulations. They are complemented by lists of proscribed entities issued by various U.S. agencies, among which is the list of Entities of proliferation concern issued by BIS.

EPCI catch-all requirements, as their name suggests, do no discriminate and in theory

apply to all items subject to the EAR, from pencils to high-performance systems. These secondary controls have inserted substantial unnecessary cost in into export compliance for global IT companies.

Catch-all requirements magnify the internal control burden in a number of ways. Policies, procedures, and automated systems must be constructed to screen thousands of transactions involving uncontrolled or uncontrollable products, and techniques must be devised to stop transactions for which an exporter has "reason to know" that the ultimate end-use will involve weapons of mass destruction.

The complexity of effectively managing a catch-all screening system can be staggering. Sun, for example, makes approximately 7500 separately orderable items available to its customers. In the average week, Sun must process roughly 1500 purchase or sales orders involving these items placed in over 100 countries. This number does not include electronic commerce transactions.

The lack of specificity and discrimination in the EPCI rule poses serious problems not only for the U.S. exporter, but for the Government as well. Spending substantial money and time on screening shipments of de minimis, irrelevant and uncontrollable items, or attempting to enforce compliance with such a system, detracts from the ability of both companies and enforcement authorities to enforce what really matters.

Extensive screening done without reference to control status is also incompatible with E-business models, which operate without human intervention and geographic boundaries. For products that are downloaded, the time required to manually screen, or to evaluate "false hits," directly translates into lost business, as potential customers instantly switch to a competitor.

The problem is not confined to downloads. An increasing proportion or E-commerce orders are placed online, even though physical delivery via more traditional modes is still required. In these modes, only very limited customer data is available. This data is distributed among multiple points in a complex multinational organization where manufacturing, order entry and distribution occur in different geographic locations or in different countries. Techniques must be devised to perform full export screening on all such transactions, regardless of control status; this process impedes and distorts the optimal design of such systems and thus affects overall competitiveness.

While catch-all controls do exist outside the U.S., there is wide variability in their implementation. For example, Article 4 of Council Regulation 1334/2000, which specifies catch all requirements for members of the European Union, requires that national authorities be informed only if the exporter "is aware" that a shipment is destined for a proscribed end-use. While a more stringent standard ("grounds for suspecting") is permitted by this regulation at the discretion of national authorities, this lower threshold is the basis of catch-all systems among many major European exporters such as Germany.

A number of approaches could serve to improve the usefulness of EPCI controls and minimize the unnecessary competitive damage and cost to U.S. exporters. For example, EPCI can work more effectively if U.S. companies are provided with a complete, authoritative list of entities presenting proliferation concerns, including those end-users to whom exports were previously subject to enhanced controls (i.e., export prohibition or licensing). As a matter of transparency, all negative end-user determinations should also be published, including the results of end-user licensing decisions and voluntary end-user reviews.

Existing EPCI procedures can be improved if the Commerce Department (1) processes voluntary company requests to screen individual end-users for a particular transaction in no more than 14 days, and (2) permits voluntary one-time end-user reviews and certifications so that companies can export to a given end-user, free of EPCI liability, until the exporter is notified otherwise.

Regular and predictable procedures should be established within the Government to provide authoritative review of potential proliferation entities, publish them, or remove them from published lists. The German and Japanese Governments now have proscribed lists that at some level are shared with their exporters. Subject to responsible review by the U.S., these could serve as a source for additional entities on the U.S. Entities List.

In addition, the Government has long asserted that intelligence “sources and methods” prevent many proliferation entities from being named on the U.S. Entities List. While this is true in some cases, U.S. companies with long experience in this area view this argument as greatly exaggerated. In point of fact, entities that become subject to an individual licensing requirement, or for which a license is denied, know immediately that they are the targets of additional scrutiny. The failure to responsibly publish their names on an entities list simply allows them to seek the commodity elsewhere.

Substantial differences exist in proscribed entity data originating from different agencies (e.g., geographic localization, presence or absence of addresses, etc.) that raise substantive issues of company compliance responsibility. As a result, an effort should be undertaken to standardize data formats and content for all proscribed entities (including Denied Parties, Specially Designated Nationals and Proliferation Entities), for more effective incorporation into automated company screening processes. Any such effort should include discussion with countries like Germany and Japan that also employ proscribed lists for their proliferation screening.

Another important improvement in EPCI implementation would be to establish a basic list-screening standard for EPCI compliance. Screening orders against an enhanced Proscribed Parties List including Proliferation Entities should be accepted as evidence satisfying the EPCI “reason to know” requirement for delisted (No License Required) transactions.

Finally mitigating factors should be incorporated into EPCI enforcement. Mitigating factors based on the Federal Sentencing Guidelines should be consistently applied in the initiation of enforcement actions, and in assignment of warning letters and civil penalties in EPCI cases. This would result in a more cooperative and pro-active relationship between the enforcement and exporting communities, and a better use of enforcement resources.

2. Section 742.12 on High Performance Computers

Controls on high performance computers encompass a number of objectives, including foreign policy. Ostensibly, these controls are primarily constructed to meet national security/non-proliferation goals. However, the Tier structure has substantially widened the scope and the objectives of controls.

While controls on Tier II have been eliminated, the scope of Tier III controls continue to be problematic. Rather than being focused on countries of proliferation concern, Tier III contains 53 countries, many of which have military cooperation agreements with the U.S.

The scope of Tier III controls should be narrowed substantially in order to recognize the realities of the networked world and to discontinue the dangerous and counterproductive pretension that controlling commercial computing power will be either viable or effective in the coming years. A starting point would be to restrict Tier III to countries identified in the CIA's semiannual WMD report to Congress under Section 72 1 of the Intelligence Authorization Act for FY 1997.

The U.S. needs to instead substantially alter its policies in this area, to include elimination of performance metrics as the dominant control principle, and moving to greater emphasis on ensuring that the U.S. military continues to expand its advantages in the integration and exploitation of information technologies.

We contend that some controls, if applied indiscriminately, can represent an outmoded and narrow view of U.S. national interest that may no longer apply in today's global economic environment. Broad, indiscriminate application of EPCI controls are in this category and performance based controls on IT, should be subject to a fundamental top-down review.

We again appreciate the opportunity to comment on these specific aspects of U.S. foreign policy controls.

Sincerely,

Hans Luemers, Manager
International Trade Services,
Sun Microsystems