

**UPDATE 2008
CONFERENCE ON EXPORT CONTROLS AND POLICY
GLOBALIZATION, NATIONAL SECURITY AND TECHNOLOGY
LEADERSHIP**

The Export Administration Agenda

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It is a great pleasure for me to speak to you this morning to launch the 2008 Update Conference. I have attended many Updates in the past as a member of the audience just like you. It's an honor for me to be speaking to you now from my new vantage point since my Senate confirmation. I am pleased to be able to draw upon my years of experience in the private sector working on regulatory, compliance and enforcement issues to help shape export administration policy and regulations. I am keenly aware of the significance of the oath of office I took and I am privileged to have the opportunity to serve in the Administration.

I would also like to say what a privilege and pleasure it is to work with the Export Administration staff as a colleague. I have known and worked with many over the years and we are now putting our shoulders to the wheel together to push forward important Administration initiatives. I

appreciate their knowledge and professionalism even more. They are serving the country well.

Export Administration Priorities

At Update, it's only appropriate for me to speak about just that – what initiatives we are advancing within Export Administration, where they stand at present, and where the road leads from here.

When I was sworn in last July, I set out three main areas to focus my attention because of their critical importance to U.S. export control policy.

First, with Congress in session, I focused on strengthening the dialogue with key congressional leaders regarding the importance of reauthorizing the Export Administration Act (EAA). As all of you know, the EAA expired years ago. EAA reauthorization is crucial to BIS's activities and operations. It would provide the necessary legal foundation for U.S. export controls to address the new threats and realities of today's world, which are very different from those that existed at the time the law was enacted. Realistically, EAA reauthorization will not be possible in this congressional session, but it is important to continue this dialogue to prepare for future congressional action. Hope springs eternal.

Even if EAA reauthorization is not possible now, it remains critically important to enact permanent export enforcement authority. My area of

responsibility, of course, is policy and administration, but these go hand in hand with strong and effective enforcement measures that give the regulations credible authority and real teeth. Export Enforcement agents have been working very effectively with the authorities they have, but they could be even more effective with the same authority that other law enforcement agents have in terms of conducting wiretaps, undercover investigations and using other law enforcement tools.

Second, and most importantly, I have focused on the regulatory initiatives stemming from the President's export control reform directives issued in January 2008. Over the last months, we have been working hard to finalize a number of regulations, which are designed to target more precisely the threats we face, to ensure proper levels of control for continued U.S. economic competitiveness and innovation while protecting national security, and to improve the efficiency and transparency of the export licensing process.

When I came on board, a great deal of work had already been done by Export Administration staff in terms of preparing drafts and moving them through the interagency process. I can't take credit for this initial work. By the time I arrived on the scene, these regulations were already, so to speak, on the 80-yard line. My role has been to get them down the last 20 yards

and into the end zone, helping to shape the final product in the process. A few of the regulations have been published. Within the last several days, I have signed and sent a number of others to the Federal Register for publication and they will be appearing on the BIS website as well. Others are in the queue and will be published soon.

Drafting and finalizing regulations is a time-consuming interagency exercise. The issues raised are serious and require careful thought. The outcome of such a process is rarely perfect, but I believe these regulations make substantial improvements in the administration of export controls and they prepare the foundation for further regulations and improvements.

Regulatory Initiatives

Let me turn now to some of our major regulatory initiatives and give you an overview. You will have an opportunity to discuss them in more detail in the presentations and breakout sessions during the conference. My purpose now is to touch on a few highlights, showing how they fit into the overall picture and how they point the way towards the future of U.S. export control policy and administration.

The January 2008 Presidential export control reform directives signaled a shift in export controls away from a country- and technology-based system to one that targets more precisely the risks we now face.

These risks stem primarily from: (1) non-state actors rather than countries (obviously with some exceptions) and (2) specific technologies that can be used in lethal activities, particularly nuclear and missile proliferation and weapons of mass destruction. This shift continued a process that began after the end of the Cold War (which the EAA was originally designed to address) with the 1992 Enhanced Proliferation Control Initiative (EPCI) and its focus on end-uses and end-users of NP, MT and CBW products and technology.

The President's export control reform directives also addressed the realities of technological innovation and the critical importance of keeping export controls up to date with the rapid pace of technological change. Failing to do so could stifle innovation, which could have a longer term negative impact on our national security. Finally, the directives mandated improvements in transparency and efficiency. Getting right the questions of "who" and "what" we control is essential, but that doesn't help much if "how" the controls are administered is inefficient or ineffective.

Trusted Exporters and Recipients

The Presidential directives made clear that U.S. export control policy should focus more on end-uses and end-users. At BIS, we look at end-uses and end-users in both a positive and negative sense – positive in the sense of trusted exporters and recipients of products and technology, and negative in

the sense of individuals and entities acting against U.S. national security and foreign policy interests.

Yesterday, I signed and sent to the Federal Register a regulation creating a new intra-company transfer (ICT) license exception. This license exception will authorize companies with demonstrably effective internal compliance systems to ship within their corporate families a wide range of products and technology for their internal use. For companies with global R&D and manufacturing operations, this authorization should greatly simplify dealing with licensing issues, including deemed exports, that arise in connection with their internal operations. At the same time, it will allow BIS to focus its licensing attention on other transactions where there is potentially a greater risk.

The innovative Validated End User (VEU) program that has been established for China and India also embodies this positive approach. VEU is available for trusted recipients of controlled U.S. products and technology in these countries. In order to be eligible, VEU participants are vetted internally by BIS and then by the interagency End-Use Review Committee (ERC). VEU candidates must demonstrate that they have effective internal control programs to ensure that the products and technology will be used in accordance with the terms of their authorizations and they must agree to

periodic on-site reviews. There are currently five companies in China that have VEU status.

The negative side of the end-use/end-user equation is also important. We recently published a new Entity List regulation that sets out in one place the criteria for designation or removal from the list and we populated the list with entities that had been listed in other parts of the regulations. The Entity List provides a new, more flexible tool to use in establishing a licensing requirement for products or technology that otherwise would not be controlled for entities that have been found, based on specific and articulable facts, to be acting contrary to the national security or foreign policy interests of the United States.

Notably, 108 entities were recently added to the list with the unsealing of the Mayrow indictment in Miami targeting entities involved in illegally exporting/reexporting items through third-country front companies to produce IED's used against our troops in Iraq. This indictment and the investigation that preceded it, in which Export Enforcement agents as well as Customs, Justice and Treasury personnel were involved, should be singled out as a model of interagency cooperation in dealing with one of the most serious threats of our time.

Technological Innovation

Another group of regulations responds to the current realities of technological innovation.

The President's export control reform directives emphasized the need to keep the Commerce Control List (CCL) up to date. At the end of last week, I signed a regulation implementing Wassenaar Arrangement 2007 changes to the CCL, as well as another regulation making changes to unilateral CCL controls based on responses to a Notice of Inquiry. An Export Administration team is already working on proposals for Wassenaar 2008.

Also last week, I signed and sent to the Federal Register a regulation addressing *de minimis* requirements for U.S. reexports, as required by the President's directive, to ensure that these requirements reflect global market conditions. Specifically, this regulation modifies EAR Section 734.4, which required separate calculations for hardware and software incorporated in foreign manufactured end products. In the global market, products are often manufactured with embedded software. It is impossible to disentangle the value of each and unrealistic to control the two separately.

Regulatory reform of controls on encryption items has also been a priority. This issue has proved difficult both because of the rapidly

expanding use of encryption in so many items as well as the highly sensitive nature of the technology. Consequently, the work has progressed in stages. I signed and sent to the Federal Register last week an interim final rule that will streamline the requirements of License Exception ENC and make a few other changes such as eliminating notifications for ECCN 5D992 software, permitting self-classification for low level encryption items without review, and adding several ENC-eligible countries. These are not fundamental reforms, but they are a start. Still to be addressed are issues related to open cryptographic interface requirements, reporting of exports under License Exception ENC, national security controls on TSU-eligible encryption source code, and controls on chips and other encryption components and technology for mass market products. A more comprehensive approach to encryption simplification will take time, but we are already beginning that process.

The overhaul of deemed export policy has also been a major focus of BIS's work. As you know, this is a complex and evolving subject. The Deemed Export Advisory Committee (DEAC), which grew out of a 2004 Inspector General Report and a 2005 BIS Notice of Inquiry, conducted an extensive study and issued a report at the end of last year thoughtfully addressing a range of important issues. In a nutshell, the DEAC report

recommended that any regulation that controls deemed exports, i.e., transfers of technology to foreign nationals in the United States, must be crafted so that it targets only those individuals who would do us harm and controls only those technologies where there is the greatest risk. At the same time, export controls must not stifle the depth and diversity of research that takes place in our universities, federal laboratories and corporations, at the risk of harming our national security for years to come.

In response to the DEAC's recommendations, BIS established a new Emerging Technologies and Research Technical Advisory Committee (ETRAC) to advise on regulatory reforms dealing with deemed exports and related issues. I was pleased to participate in the selection of the 24 ETRAC members, all of whom are extraordinarily accomplished in their respective fields, and I had the pleasure of speaking at the inaugural ETRAC meeting held last week. The ETRAC will focus on such issues as a "zero based" review of the CCL to determine whether certain technologies currently on the CCL should be excluded from the application of the deemed export rules and how best to determine foreign nationality. BIS and the country are fortunate to be able to draw upon their knowledge and their willingness to serve.

Transparency and Efficiency

Transparency and efficiency have also guided BIS's regulatory initiatives.

License processing times are carefully monitored (averaging about 28 days), and licenses should move through the system even more quickly with the now mandatory requirement to use the SNAP-R electronic system. BIS is continually updating its website to provide guidance to industry through personalized outreach, seminars and webinars. For example, a new feature of the BIS website is a link to company websites with CCATS determinations that companies have agreed to make available to the public.

There is room for improvement in some areas, however, particularly with regard to commodity jurisdictions. One of the realities of today's global economy is that commercial products and technologies may have military applications and military products may have commercial applications. The Export Administration Act and the Arms Export Control Act establish different statutory and regulatory frameworks that overlap in certain areas. This overlap presents a challenge for those at Commerce and State who implement the applicable regulations, as well as companies that must comply with them.

In the aerospace area, jurisdictional issues have been addressed to a large extent by the State Department's issuance of a clarification of the standards it will use in applying Section 17(c) of the Export Administration Act in the context of the International Traffic in Arms Regulations (ITAR). Commerce will soon publish a clarification of its regulations in an effort to harmonize the overlapping EAR and ITAR provisions.

Similarly, we are in the process of addressing with our State Department colleagues commodity jurisdiction issues dealing with thermal imaging and night vision equipment. This issue is especially difficult because many of these products were designed exclusively for civil applications but some could be diverted to uses contrary to our interests, including against our forces in combat. The consequences of over-regulation are serious because subjecting all such products to ITAR jurisdiction will reduce R&D by U.S. companies and limit their ability to export. Comparable quality equipment is also available from foreign sources. In part to address this issue, Export Administration recently initiated a Foreign Availability Assessment requesting a foreign availability determination under EAR Part 768. This is the first such assessment conducted in the last 14 years.

Country Policy and Treaty Compliance

This is an ambitious agenda – it’s been called a “sprint to the finish”– but it is not all that we have on our plates. There are a few additional initiatives I would like to touch upon.

Export controls are a key foreign policy tool and, to be effective, they obviously need to reflect current policy. A number of items on the CCL are controlled for Crime Control (CC) reasons, which is a foreign policy-based control. We published a Notice of Inquiry asking for comments on the list of CC-controlled items and will publish soon a regulation that will make some clean up changes to the list. Before the end of the year, we hope to publish in proposed form for public comment a more comprehensive regulation that will address whether certain products should be added or deleted from the CCL and whether the current licensing policies for different countries should be revised.

Iran’s nuclear program is a matter of the greatest concern and we are reviewing measures that may be taken together with other agencies with different regulatory responsibilities, including changes to the EAR, and we are working with other countries to address transshipment concerns. We published Iran transshipment guidance on the BIS website last week.

In order to fulfill U.S. treaty obligations, we published proposed regulations implementing the Additional Protocol to the International Atomic Energy Act, which we hope to issue in final form within the next few weeks.

Last but not least, we are actively participating in the Treasury Department's work to finalize the CFIUS regulations, and we have a role in all CFIUS cases. There have never been more transactions under review or subject to investigation at any time.

The Road Ahead

At the beginning of these remarks, I mentioned three priority areas, including legislation and regulatory initiatives. The third is the transition to a new Administration. There will still be a great deal of work left unfinished for the next team to pick up. Whoever will be the next President, we will do everything possible to make sure the transition is smooth.

The next Administration's agenda may be similar or different. What is certain, however, is that the same forces shaping the future of export controls will exist before and after next January: rapidly advancing technology; threats to our security from terrorists and other non-state actors; the globalization of research, development, production and marketing; the migration of civilian to military technology and vice versa; the ability to

transmit vast amounts of data around the world with the click of a computer mouse; and evolving relations with our partners in the multilateral control regimes. None of these will go away after Inauguration Day. A new EAA will still be necessary.

I hope these remarks and others I plan to give over the next months will help shape the initial work of the next Administration, and perhaps plant some seeds that will grow in future years. For now, I hope these remarks have provided you with an overview of our work today. I know you will learn more about these developments as well as the specifics of the new regulations during the conference. My thanks to the Export Administration staff for making the arrangements for another successful event. Thank you very much.