Mark E. Sagrans
1007 Market Street
D-7054-1
Wilmington, DE 19898
Telephone: (302) 774-4356
Fax: (302) 774-1398

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BY E-MAIL

Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce
14th & Pennsylvania Ave, NW
Washington, DC 20230

ATTN: RIN 0694-AF58

RE: Comment on Revisions to the Export Administration Regulations

Dear Mr. Rithmire:

E.I. du Pont de Nemours & Co. ("DuPont") supports the Administration's Export Control Reform Initiative ("ECRI") and welcomes the opportunity to respond to the July 7, 2012 proposed rule on protective equipment.[1] In DuPont's view, the proposed rule should not be adopted in its current form because (1) it significantly expands controls on commodities and technology currently captured on the Commerce Control List ("CCL") and (2) it is vague and thus undermines the ECRI goal of a positive list- based Commerce Control List ("CCL"). In addition to preserving the availability of License Exception TSR for technology already captured under the CCL, we believe the proposal should also be revised to better align with Wassenaar Arrangement controls.

[1] "Revisions to the Export Administration Regulations (EAR): Control of Personal Protective Equipment, Shelters, and Related Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML)" and the Department of State's proposed rule on the same date titled, "Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category X." 77 Fed. Reg. 33688 and 33699 (June 7, 2012)

I. Expanding Technology Controls on Existing CCL Military Helmet Technology

In its June 7, 2012 proposed rule, BIS would move military helmets that are currently captured under ECCN 0A018, controlled for NS, AT and UN reasons, to the proposed ECCN 1A613, controlled for NS, AT and Regional Stability ("RS") reasons. Related technology for the development or production of such items would be moved from ECCN 0E18 to ECCN 1E613 which both: 1) adds "operation, installation, maintenance, repair, overhaul or refurbishing"[2] to the existing EAR-controlled technology categories of development, production and use, and 2) eliminates License Exception TSR through the addition of RS controls. Furthermore, replacing License Exception TSR with STA(c)(1) as proposed in the rule is no panacea as this latter license exception is applicable only to 36, mostly NATO, countries, thus effectively enacting new license requirements on exports (real and deemed) of military helmet technology on 140, mostly non-NATO, countries. This is not merely narrowing license exception availability "somewhat;" nor can this burden be credibly offset by either an inapplicable reduction of ITAR licensing or the convenience of having CCL ECCNs merged.[3]

II. Vagueness

If implemented as proposed, the rule would revise ECCN 1A005.a to read:

> a. Soft body armor not manufactured to military standards or specifications that provide ballistic protection equal to or less than NIJ level III (NIJ 0101.06, July 2008).[4]

It would also add a reference in the Related Controls paragraph of ECCN 1A005 to the body armor captured under ECCN 1A613 and the following language at ECCN 1A613.d.1:

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[2] DuPont notes that there are no definitions within the EAR for these ITAR-borrowed classes of controlled technologies as they would be new to the CCL. DuPont also asks BIS to consider how adding these new classes of controlled technologies may be contradicting its current interpretation of the definition of "use" technology otherwise applicable to the whole CCL.

[3] 77 Fed. Reg. 33694.

[4] Id. at 33688.

> d.1. Soft body armor and protective garments manufactured to military standards or specifications that provide ballistic protection equal to or less than NIJ level III (NIJ 0101.06, July 2008)…[5]

The proposed language would only identify soft body armor controlled by 1A005 or 1A613 by whether or not the armor was "manufactured to military standards or specifications." In effect, this introduces differentiated controls based on classes of end-users (for example, police vs. military) rather than on specific countries or individuals, contrary to the history and traditional clarity of the EAR, thus borrowing one of the structural flaws of the ITAR that the ECR and the creation of 600-level CCL categories are intended to address. Ambiguous end-user standards such as "military" will create unnecessary difficulty for both industry and the government. In contrast to reliance on clear technical standards, reliance on class-of-end-user standards makes compliance much more subjective and difficult. Determinations about the characteristics of an end-user will be made based upon local considerations of location, intent, culture, role and end-use purpose. Government enforcement based on these good-faith local determinations will become more subjective and difficult as well.[6]

Furthermore, while the proposed language of ECCN 1A613.d.1. closely mirrors that of the Wassenaar Arrangement Munitions List ("WAML") at ML13.d.1., it neglects to include a relevant and significant WAML Note (referenced below). This note distinguishes WAML soft body armor from dual-use soft body armor by defining military standards or specifications as having to include, at a minimum, specifications for fragmentation protection.[7]

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[5] Id.

[6] As an example of the difficulty such ambiguity would create, DuPont asks BIS to consider the manufacture of NIJ Level II or III soft body armor for use by a private security contractor, a national coast guard or paramilitary and a domestic intelligence agency. In all of these circumstances, manufacturers and exporters are faced with the burden of determining whether or not the same body armor was manufactured to an undefined "military specification or standard."

[7] DuPont notes that this critical footnote was also not included in the most recent Wassenaar Arrangement 2011 Plenary Agreements Implementation rule, published solely as a Final Rule with no opportunity for comment, at 77 Fed. Reg. 39354.

IV. Proposed Revisions

In order to maintain the current level of control on military helmet technology and to resolve the vagueness the proposal introduces regarding soft body armor, DuPont proposes two revisions to the July 7, 2012 proposed rule by adding:

1) "TSR: Yes for paragraph (c), except N/A for Rwanda" under the License Exceptions heading at ECCN 1E613 to preserve existing military helmet technology controls; and,

2) the WAML ML 13.d.1 fragmentation note to the existing Notes to ECCN 1A005 in order to clarify the phrase "military standards or specifications" and to delineate more clearly the line between ECCN 1A005 and the proposed ECCN 1A613, as follows:

4. For the purposes of ECCN 1A005.a and ECCN 1A613.d.1., military standards or specifications include, at a minimum, specifications for fragmentation protection.

V. Conclusion

DuPont wishes to express its support for the ECRI achievements of this Administration and respectfully requests that, in order to maintain the current level of technology controls of the CCL and to more accurately conform to the Wassenaar, BIS adopt the two changes proposed above to the forthcoming proposed rule creating ECCN 1A613 and 1E613. Should you have any questions or require further information, please do not hesitate to contact the undersigned at (302) 774-4356.

Respectfully submitted,

Mark E. Sagrans, Esq.
Corporate Counsel