Response to:
Bureau of Industry and Security

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Retrospective Regulatory Review under E.O. 13563

The comments below are suggested input in response to the U.S. Department of Commerce's (DOC) Notice of Inquiry cited above. DOC has solicited public comment on its existing regulations, including the Export Administration Regulations (E.A.R.). DOC "seeks comments on aspects of the E.A.R. . . . that could be clarified or streamlined to be more effective or less burdensome." In addition, DOC "seeks comments identifying any unnecessary compliance burden caused by rules that are unduly complex, outmoded, inconsistent, or overlapping, and comments identifying ways to make any aspect of the E.A.R. more effectively protect the national security or advance the foreign policy of interests of the United States. Comments must be received by DOC no later than February 1, 2012.

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The views expressed herein are our own and do not necessarily represent the views of, and should not be attributed to, PNNL.

1. The first proposed improvement to the E.A.R. consists of a request to clarify the application of "*use*" "*technology*" as it pertains to certain items such as Materials, Chemicals, Microorganisms and Toxins. But the question here could also easily apply to other categories as well such as Materials Processing. As an example, ECCN 1C202 applies to aluminum and titanium alloys with certain specific characteristics. Under this entry, "*Related Controls"* are found listed for 1E001 ("*development*" and "*production*") and 1E201("*use*"). Since "*use*" is defined as the specific information necessary for all six criteria: "operation, installation (including on-site installation), maintenance (checking), repair, overhaul and refurbishing." While none of those six terms earns their own definition in Part 772, the precise definition of what might be meant by a material being operated, repaired, or overhauled is unclear. Thus, what the critical issues associated with a deemed export of such alloys is also not perhaps as well defined as it could be. The answers become no clearer when applied to chemicals, mircroorganisms, toxins, or materials processing. Technical information for such items is more easily construed for the other definitional terms of technology ("*development*" and "*production*"), but in the interest of national security, it seems

that new dedicated terminology focused on technologies applicable to weaponizing of microorganisms or toxins might be more *apropos*. At the same time, perhaps the "*use*" ECCNs for these items (e.g., 1E201, and their ilk) might be considered as candidates for streamlining (deletion).

2. A second area with room for improvement in making the regulations more effective and less burdensome would be for consistency in the listings of "*Related Controls*." Sometimes related technology controls are stated within an item entry, and yet other times the compliance staff only find related items by conducting an exhaustive, manual review of the category's technology listings. Inasmuch as some controls are listed for whole groups of ECCNs (e.g., "all 1C (except. . .)), or by ranges (e.g., "1A225 to 1A227"), in this format only doing a tedious manual search works; automated searches are precluded. A small grid of controlled ECCNs might be one solution, or simply an exhaustive paragraph listing all related, *full* ECCNs. In short, any reformatting of the affected ECCN listings in such a way as to enable a fully automated search would be helpful.

3. On the Commerce Country Chart, of the E:1 countries listed, Syria states a specific subparagraph (§746.9),and North Korea gives two subparagraph references (§§ 742.19 and 746.4), whereas Cuba and Iran both simply refer to "part 746" rather than giving the specific subsections (746.2 and 746.7 respectively). For consistency and ease of use, recommend that the subparagraph level reference be used for all entries.

4. Another area that could benefit from additional clarity is the current confuscation of CCL and USML found under certain ECCN numbers. 6A004 is one such example where under "*Related Controls*" we learn that optical systems defined by 6A004.c.1-c.4 and 6A004.d are all USML items under the jurisdiction of DDTC. If it has an ECCN, then why is it ITAR? Conversely, if it is ITAR, why is it given an ECCN rather than just a related controls note reminding readers that "*space qualified*" optics are regulated under the USML? Although "*space qualified*" is found as a defined term in Part 772, the definition given could benefit from a more positive listing of technical criteria rather than the current rather generic verbiage "*designed, manufactured and tested to meet requirements . . .*" Exactly what those technical requirements are would be most helpful. If only the criteria already mentioned in Category XV of the ITAR are intended, then making that point explicit would be helpful. If other, please specify.

5. Information does not always appear to be located in the most appropriate section within the CCL. Cameras controlled under 6A003 are one such example. Rather than including technical classification criteria information inside the "*Reason for Control*" for cameras such as 6A003.b.4.b that have "*a frame rate greater than 60 Hz or that incorporate a focal plane array with more than 111,000 elements . . .,*" why not create a new ECCN sub-listing that addresses those cameras that fit these technical criteria. Then simply state the affected ECCN numbers under "*Reason for Control*" rather than turning "*Reason for Control*" into a *de facto* "*List of Items Controlled*." Under the current arrangement, our calls to the manufacturer yielded the ECCN

6A003.b.4.b.. However, upon closer review of the CCL, we discovered that we needed additional information from the vendor to determine the actual reasons for control in the format published currently in the E.A.R. Specifically, we needed to ask the frame rate in hertz and we had to ask one of our scientists how to calculate the number of focal plane array elements. A thorough description of all technical aspects of the items controlled in the "*List of Items Controlled*" would be preferred and would save time and effort by allowing those who classify (technical specialists) to focus on the "*List of Items Controlled*" and those who are reviewing export licensing requirements (export compliance specialists) to focus on the "*Reasons for Control*"

6. While the online version of the E.A.R. is normally used, sometimes the paper version is easier and quicker to navigate when flipping between multiple regulatory Parts. However, our experience with both NTIS and GPO is we haven't received a single printed update to the E.A.R. in two years running. If Commerce is going to continue to offer a paper version of the regulations, then it stands to reason that such copies ought not to be obsolete four months before they are mailed to customers. The advertised email change updates from NTIS were never received to support our 2011 subscription. While we monitor the *Federal Register* daily, cutting and pasting FR notices into the E.A.R. is not a productive or practical solution. In 2011, there were at least a baker's dozen worth of changes to the E.A.R. just in the first six months, some of which were quite substantial such as the update in May which revised 53 ECCNs throughout the CCL to implement all the changes to the Wassenaar list. None of the thirteen changes were ever issued by NTIS before we finally cancelled our E.A.R. subscription with them last summer.

7. Kudos to BIS for standing up the online E.A.R. in a more readable and searchable format at http://www.bis.doc.gov/policiesandregulations/ear/index.htm. Thanks very much.