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To: PublicComments@bis.doc.gov
Date: Mon, Feb 7, 2011 4:04 PM
Subject: RIN 0694-AF03

Bill,

Please find attached DuPont's comments regarding the proposed STA License Exception.

Thank you,

Mark Sagrans

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February 7, 2011

Mr. William Arvin
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VIA E-MAIL: *publiccomments@bis.doc.gov*

Re: RIN 0694-AF03

Dear Mr. Arvin,

E.I. DuPont de Nemours and Company (DuPont) welcomes the Administration's export controls reform initiative and recognizes the commitment of the Department of Commerce's Bureau of Industry and Security (BIS) to quickly implement the changes necessary to meet the President's goal of doubling U.S. exports while increasing the national security of the United States through building "higher walls around fewer items." This letter provides DuPont's comments on the "Export Control Modernization: Strategic Trade Authorization License Exception," 75 Fed. Reg. 76653 (Dec. 9, 2010) proposed rule.

If it became final, the proposed License Exception Strategic Trade Authorization (STA) could support increased exports for several DuPont businesses, especially for the DuPont Protection Technologies (DPT) business. DPT manufactures and sells a wide range of protective garments including Tychem® encapsulated Level A and Level B suits and accessories used for chemical and biological protection. These Tychem® items are classified under ECCN 1A004(b), are controlled for NS2, and would be eligible for STA under the proposed Section 740.20(c)(2)(ii).

Like many of DuPont's customers, DPT's customers need just-in-time supply. The customers keep little stock on hand and must get new products quickly when needed. Today, comparative export licensing review processes place U.S. exporters at a competitive disadvantage, especially when adding new customers. Specifically, DuPont

has lost business to competitors in France and the United Kingdom, and is beginning to lose to emerging competitors in Asia. By our estimates, if STA were implemented as DuPont proposes below, DPT would need 75% fewer licenses and this would greatly contribute to DPT expanding its global sales and market penetration with no diminution in national security.

The potential benefits of STA could be significantly less unless BIS consider partially revising STA's proposed conditions. To explain, DuPont notes that STA would be available to two different classes of controlled commodities and technologies ("transactions" as termed in the proposed rule). The first class of transactions are those controlled for multiple export control reasons available only to a limited number of multiple or cross-multilateral regime partners (see STA Section 740.20(c)(1)).[1] The second class of transactions are those for which the sole reason of control is national security (NS) and is available to a much greater number of destinations similar to those in Country Group B (see STA Section 740(c)(2) and Supplement 1 to Section 740 of the Export Administration Regulations (EAR)).

STA also imposes two new obligations ("conditions") equally on both classes of transactions: first, a Prior Consignee Statement (PCS) (see STA Section 740.20(d)(2)), and second, a new type of Destination Control Statement (DCS) (see STA Section 740(d)(3)). The PCS requires each up-chain party - the chain of possession being exporter, first consignee, second consignee, and end-user, for example - to obtain a certification from the following down-chain party that they:

1) recognize they are in receipt of a controlled item under STA,
2) are informed of the item's Export Control Commodity Number (ECCN),
3) will not re-export under APR Section 740.16(a),
4) will not export, re-export or transfer item for a prohibited end-use or to a prohibited end-user,
5) will not incorporate the item into a USML-defined military end-product or use it in the development of weapons of mass destruction,[2] and
6) agree to provide copies of any and all related export, re-export or transfer records to the U.S. Government upon request (per Section 762.7).

The new DCS requirement can be read to essentially mirror the PCS restrictions with the exception of specifying the "civil end-use" requirement (#5).[3]

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[1] This list of eligible countries is essentially all the Country Group A:1 – A:4 and cooperating countries except Hong Kong (see Supplement 1 to Part 740 of the EAR).

[2] The proposed regulation states "civil end-use" but this term is not defined directly. Instead it is defined as "...other than a military end-use per Section 744.21(f) or a proliferation activity per Part 744 of the EAR." (see STA Section 740(c)(2))

[3] We also note that the new DCS would apply to all invoices "...and any other "export control document"..." which may be a broader interpretation then the current EAR-required DCS which applies to invoices, bill of lading, airway bills or other export control document (see Section 758.6 of the EAR). DuPont would prefer following the existing DCS requirement language of "and."

DuPont believes the new proposed PCS and DCS conditions support both of the Administration's modernization goals when applied to STA Section 740.20(c)(1) transactions. However, this is not as true, or as necessary, for the transactions concerning lesser-controlled items authorized to the much broader class of nations under STA Section 740(c)(2). The Export Administration Regulations (EAR) already impose most of these requirements at least for the initial export. This includes conveying the ECCN to the foreign consignee on export documents as well as imposing a requirement of a DCS prohibiting diversion (PCS elements #2 and #4). Part 744 of the EAR prohibits transfer to restricted end-users or for restricted end-uses including the development of weapons of mass destruction (PCS elements #4 and ½ of #5) on all consignees. Prohibiting the use of APR for almost all of STA Section 740(c)(2) countries is superfluous because they are not APR-eligible Country Group A:1 and cooperating countries (PCS element #3). Finally, BIS has ample existing authority to manage risks of diversion through pre-license and post-shipment verification. If any recipient of U.S. controlled items refuses to cooperate with these verifications, they can be placed on the "Unverified List" thus restricting future receipt of controlled items. This existing enforcement mechanism can easily be interpreted to include items received under STA.

The remaining flow-down condition of certification of "civil-end use" (PCS element #5) places an unreasonable burden on exporters' consignees. This element actually requires certification that the receiving party will not incorporate a U.S. origin item into a USML-defined defense article. This condition as stated, however, will be problematic for consignees of manufacturers of both materials and end-products. For example, DuPont Circuit and Packaging Materials may export an aromatic polyimide film to a company who applies a paste or glue. This company may then re-export the film to another company that makes printed circuit boards (PCBs). The PCB manufacturer may then re-export the PCBs to a variety of companies who incorporate them into discrete products. The discrete products may get re-exported to end-users or incorporated into a larger system. In contrast, DPT's protective apparel are discrete end-products that are not designed as military items, yet may be exported to a distributor who may re-export to a variety of customers, most civil but some civil defense or paramilitary. Under the PCS, consignees along both these multinational multi-lingual value chains will have to be able determine, and be willing to certify to the U.S. Government during a document review, that these sales are clearly for "civil end-use" - a term which has a specific and more limited regulatory meaning then even an average English speaker would assume. STA's proposed conditions will, therefore, only serve as incentives for our customers, and their customers, to source products from other regime partners (or non-regime countries) who will not impose such conditions.[4]

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[4] DuPont's cyanides business learned this exact lesson after the U.S. Government published "Revisions and Clarification of Export and Reexport Controls for the People's Republic of China (PRC); New Authorization Validated End-User" rule at 71 Fed. Reg. 38313 (July 6, 2006) which imposed a unilateral import certificate requirement for controlled U.S. chemicals. Rather then deal with this additional bureaucracy and delay from their own Ministry of Commerce most of our Chinese customers simply stopped purchasing from us and purchased instead from other Australia Group regime suppliers (Korea, Germany) who did not impose this requirement.

There is also a significant cost to integrating STA's conditions for companies with existing export control compliance processes, databases and training programs. Even something as seemingly minor as programming an alternative DCS to be printed on export documents for only some items when going to only some destinations, while continuing to use the current EAR-required DCS for all other items and destinations is no small matter. The value of STA for business must include weighing the cost of revising these materials and processes. But if STA Section 740(c)(2) simply mirrored existing EAR compliance requirements the transition for business would be smooth and the benefit to both business and the U.S. Government secured.

Therefore, while DuPont endorses the goals of STA, we request that BIS consider eliminating STA's PCS and DCS requirements for eligible Section 740(c)(2) transactions. DuPont would urge this position even if eligibility under Section 740(c)(2) were to be further restricted to NS2 controlled transactions only rather than the proposed NS1 and NS2 levels of eligibility. This proposed modification to STA would significantly enhance its value to DuPont as well as assist BIS in its effort to help meet the Administration's goal of increasing exports by enacting "higher walls around fewer items."

Respectfully submitted,

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Corporate Counsel