

RECORD OF PUBLIC COMMENTS

PROPOSED RULE: EXPORT ADMINISTRATION REGULATIONS: ESTABLISHMENT OF LICENSE EXCEPTION INTRA-COMPANY TRANSFER (ICT)

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Comments due November 17, 2008.

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Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 740 and 772

[Docket No. 071213838-81132-01]

RIN 0694-AE21

Export Administration Regulations: Establishment of License Exception Intra-Company Transfer (ICT)

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend the Export Administration Regulations (EAR) to establish a new license exception entitled "Intra-Company Transfer (ICT)." This license exception would allow an approved parent company and its approved wholly-owned or controlled in fact entities to export, reexport, or transfer (in-country) many items on the Commerce Control List (CCL) among themselves for internal company use. Prior authorization from the Bureau of Industry and Security (BIS) would be required to use this license exception. This rule describes the criteria pursuant to which entities would be eligible to use License Exception ICT and the procedure by which they must apply for such authorization. This proposed rule is one of the initiatives in the export control directive announced by the President on January 22, 2008.

DATES: Comments must be received by November 17, 2008.

ADDRESSES: You may submit comments, identified by RIN 0694-AE21, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *E-mail:* rp2@bis.doc.gov. Include "RIN 0694-AE21" in the subject line of the message.

- *Fax:* 202-482-3355

- *Mail/Hand Delivery:* Steven Emme, U.S. Department of Commerce, Bureau of Industry and Security, Regulatory

Policy Division, 14th & Pennsylvania Avenue, NW., Room 2705, Washington, DC 20230, ATTN: RIN 0694-AE21.

FOR FURTHER INFORMATION CONTACT: Steven Emme, Regulatory Policy Division; Telephone: 202-482-2440; E-mail: semme@bis.doc.gov.

SUPPLEMENTARY INFORMATION:

Background

Presidential Directives on U.S. Export Control Reform and Deemed Export Advisory Committee

On January 22, 2008, the President announced a package of directives to ensure that the export control policies and practices of the United States support the National Security Strategy of 2006, while facilitating the United States' continued international economic and technological leadership. These directives focus the export control system to meet the unprecedented security challenges as well as the economic challenges faced by the United States, due to the increasing worldwide diffusion of high technology and impact of global markets.

The directives recognize that the economic and technological competitiveness of the United States is essential to meet long-term national security interests. Export controls must, therefore, cover the export and reexport of sensitive items without unduly burdening U.S. economic competitiveness and innovation. This is particularly critical in light of the current and increasing globalization of research, development, and production, as well as the rise of new economic competitors and the diffusion of global supply networks that challenge U.S. economic and technological competitiveness.

Shortly before the President announced the package of directives on U.S. export control reforms, the Deemed Export Advisory Committee (DEAC) presented its findings to the Secretary of Commerce on deemed export controls. The DEAC, a federal advisory committee established by the Secretary, undertook a comprehensive examination of the national security, technology, and competitiveness aspects of the deemed export rule. A deemed export is the release of technology and source code subject to the EAR to foreign nationals in the United States that is "deemed" to be an export to the home country or

countries of the foreign national. In its final report, which was issued in December 2007, the DEAC concluded that the deemed export rule "no longer effectively serves its intended purpose and should be replaced with an approach that better reflects the realities of today's national security needs and global economy." In order to address this concern, the DEAC made several recommendations, including creating a category of "Trusted Entities" that voluntarily elect to qualify for streamlined treatment after meeting certain criteria. Further, the DEAC recommended that these "Trusted Entities" include subsidiaries abroad so that individuals and ideas could move within the company structure without the need for separate deemed export licenses.

It is in the context of the President's directives on U.S. export control reforms and with respect to the DEAC's recommendations on deemed export controls that BIS is proposing this rule creating a license exception for intra-company transfers.

The Impact of U.S. Export Controls on Intra-Company Transfers

As global markets and manufacturing continue to evolve, many parent companies have numerous operations in multiple countries for distribution, service and repair, manufacturing and development, product testing, and other uses. In this environment, parent companies increasingly export commodities, software, and technology to their foreign branches, subsidiaries, and/or ultimate foreign parent companies around the world. Consequently, many companies may need multiple export licenses from BIS under a variety of scenarios for their own internal operations. For example, to conduct day-to-day operations, many companies in the United States must export commodities, software, and technology to their foreign branches and subsidiaries, resulting in the need for export licenses. In addition, companies may also require reexport licenses to transfer items among their foreign branches, foreign subsidiaries, and/or their ultimate foreign parent companies, located in multiple countries. On occasion, a company will have several branches or subsidiaries within the same foreign country and must then seek authorization to make in-country

transfers of technology and other items between those entities. Finally, releasing technology and source code subject to the EAR to foreign national employees at locations of the company in the United States or at the location of another foreign branch or subsidiary could generate the need for deemed export or deemed reexport licenses.

Generally, obtaining these licenses for intra-company transfers can negatively impact transactions due to the delay involved in waiting for a licensing decision. Moreover, obtaining licenses for intra-company transfers can hinder more than just individual transactions; they can also hinder product development and the ability to be first to market—activities key to the competitiveness of U.S. companies. For many companies, product development entails large capital investments, compressed product cycles, and intensive coordination of research and development. With the current licensing requirements in place, however, many companies with U.S. operations may be forced to segregate their research and development activities. For instance, while waiting for the approval of a deemed export license, U.S. employees and certain foreign national employees would be precluded from collaborating together on projects. Furthermore, once the license is approved, companies may still need to segregate their research and development activities in the future because product breakthroughs could exceed the licensing parameters and require a new round of export licensing.

Establishment of License Exception ICT

In order to facilitate secure exports, reexports, and in-country transfers to, from, and among a parent company and its wholly-owned or controlled in fact entities, the Bureau of Industry and Security is proposing to amend the Export Administration Regulations (EAR) to create License Exception Intra-Company Transfer (ICT). License Exception ICT, which would be set forth in new § 740.19 of the EAR, would provide companies a process for intra-company exports, reexports, and in-country transfers without individual licenses. This license exception would allow parent companies and the entities that the parent company wholly owns or controls in fact to export, reexport, and transfer (in-country) many items on the Commerce Control List (CCL) among themselves for internal company use. The grant of ICT would be restricted to those approved companies and those Export Control Classification Numbers (ECCNs) that are authorized by BIS.

Companies authorized to use License Exception ICT would benefit because it

would relieve them of some of the administrative requirements of obtaining, tracking, and reporting on individual licenses and would reduce the lag time, expense, and uncertainty in the licensing process. This license exception would also improve research and development and other internal company activities, thus leading to improved competitiveness and innovation for companies with operations in the United States.

In proposing this license exception for intra-company exports, reexports, and in-country transfers, BIS recognizes that industry and government share the goal of protecting controlled commodities, software, and technology, since these often represent proprietary information and property. Moreover, BIS also recognizes that many companies devote considerable financial and workforce resources to ensuring compliance with export controls. BIS would authorize License Exception ICT for those companies that demonstrate effective internal control plans, submit annual reports on their use of ICT, and agree to audits by BIS officials as requested.

By authorizing this license exception for companies that have effective internal control plans and have agreed to audits, BIS can focus its resources on evaluating transactions involving lesser-known items and entities to better prevent exports to persons who may act contrary to U.S. national security and foreign policy interests. Greater focus on such transactions would increase the national security value of the remaining reviews of individual license applications.

Definitions

For purposes of this rule, BIS is defining multiple terms used with respect to License Exception ICT. These terms are “controlled in fact,” “employee,” and “parent company.” This rule would amend § 772.1 of the EAR to include these new definitions as described below.

First, BIS is amending the definition of “controlled in fact” in § 772.1 by applying aspects of the definition of the same term set forth in § 760.1(c) of the EAR to specify the circumstances in which one entity will be presumed to have control over another entity for purposes of License Exception ICT. In order to include any entity in its application to use License Exception ICT, the parent company must either wholly own or control in fact that individual entity.

Next, BIS is amending § 772.1 to add the term “employee,” for purposes of License Exception ICT, to refer to persons who work, with or without

compensation, in the interest of an entity that is an approved eligible user or an approved eligible recipient of ICT. Such persons must work at the approved eligible entity’s locations, including overseas locations, or at locations assigned by the approved eligible entity, such as at remote sites or on business trips. This definition may include permanent employees, contractors, and interns.

Finally, BIS is amending § 772.1 to add the term “parent company,” which will be defined for purposes of License Exception ICT, to mean any entity that wholly owns or controls in fact a different entity, such as a subsidiary or branch. The parent company does not have to be an ultimate parent company, as that term is referred to in the definition of parent company; it may be wholly-owned or controlled by another entity or other entities. Also, the parent company does not need to be incorporated in or have its principal place of business in the United States. However, in order to be eligible for and use License Exception ICT, the parent company must be incorporated in or have its principal place of business in a country listed in Supplement No. 4 to part 740 (see new § 740.19(b)(1)). This definition does not include colleges and universities. Thus, the research conducted by colleges and universities that is not fundamental research (see § 734.8(a) of the EAR) and that requires a license would not qualify for License Exception ICT. However, a university professor who enters into a contractual relationship with a company to conduct proprietary research could qualify as an “employee” if all conditions in that definition are met.

Information Required for Submission to BIS for Review to Use License Exception ICT

In order to avail themselves of License Exception ICT, a “parent company” and the entities that it wholly owns or “controls in fact” must maintain an internal control plan, hereinafter referred to as an ICT control plan. Upon implementation of the ICT control plan, the parent company, as the eligible applicant under new § 740.19(b)(1), must submit the plan to BIS for review pursuant to new § 740.19(e). Additionally, the eligible applicant must submit documentation showing that the ICT control plan has been implemented. Such documentation should include a representative sample of records showing effective compliance with the screening, training, and self-evaluation elements of the ICT control plan, as described below in further detail.

Along with the ICT control plan and supporting documentation, the eligible applicant parent company must list the wholly-owned entities and controlled in fact entities that the applicant parent company intends to be eligible users (see new § 740.19(b)(2)) or eligible recipients (see new § 740.19(b)(3)(i)) of this license exception. It is possible for an entity to be both an eligible user and an eligible recipient. For itself, and for each eligible user and eligible recipient entity, the eligible applicant parent company must list any individual or group that has at least a 10% ownership interest. Finally, the eligible applicant parent company must list the ECCNs of the items it plans to export, reexport, or transfer (in-country) under ICT; provide a narrative describing the purpose for which the requested ECCNs will be used and the anticipated resulting commodities, if applicable; disclose its relationship with each entity that is intended to be an eligible user and/or eligible recipient; and provide a signed statement by a company officer of the eligible applicant parent company stating that each entity will allow BIS to conduct audits on the use of License Exception ICT.

ICT Control Plan

An ICT control plan seeks to ensure that items on the Commerce Control List will not be exported, reexported, or transferred in violation of this license exception. As this license exception may be used for commodities, software, and technology, the ICT control plan must address how the parent company and the entities that it wholly owns or controls in fact, as eligible users and eligible recipients, will maintain items authorized for export, reexport, or transfer by this license exception within the company structure, as authorized by BIS.

Within the ICT control plan, eligible applicants must describe how certain mandatory elements will be met. These mandatory elements, which are listed in new § 740.19(d)(1), include corporate commitment to export compliance, a physical security plan, an information security plan, personnel screening procedures, a training and awareness program, a self-evaluation program, a letter of assurance for software and technology, non-disclosure agreements, and end-user list reviews. All of these elements are aspects of export control compliance programs that establish effective internal control plans. In turn, these internal control plans generate an increased level of awareness of export control compliance issues among employees and help secure a company's proprietary information.

For the required ICT control plan elements in paragraphs (d)(1)(i) through (d)(1)(vi) of new § 740.19, BIS is not specifying how each company must achieve them due to the varying characteristics of companies. However, paragraphs (d)(1)(i) through (d)(1)(vi) do contain illustrative examples of evidence that a company may use in its descriptions detailing how it will implement those mandatory elements. While companies may include additional elements in their ICT control plan, they must, at a minimum, describe how the minimum mandatory elements set forth in § 740.19(d)(1) will be met. One mandatory element—the self-evaluation program in paragraph (d)(1)(vi)—requires the creation and performance of regular internal self-audits, creation of a checklist of critical areas and items to review, and development of corrective procedures or measures implemented to correct identified deficiencies. If any identified deficiencies rise to the level of a violation of the EAR, the company should make a voluntary self-disclosure pursuant to § 764.5.

If a company plans to use this license exception for commodities only, then the company may state in the ICT control plan that the mandatory elements of the ICT control plan set forth in paragraphs (d)(1)(iii) (information security plan), (d)(1)(iv) (personnel screening procedures), (d)(1)(vii) (letter of assurance for software and technology), (d)(1)(viii) (signing of non-disclosure agreements), and (d)(1)(ix) (review of end-user lists) are not applicable because the license exception will be used for commodities only and not used for software or technology. Similarly, if a company plans to use this license exception for software (excluding source code) only, or if a company plans to use this license exception for commodities and software (excluding source code) only, then the company may state in the ICT control plan that the mandatory elements found in paragraphs (d)(1)(iv) (personnel screening procedures), (d)(1)(viii) (signing of non-disclosure agreements), and (d)(1)(ix) (review of end-user lists) are not applicable because the license exception will be used for software (excluding source code) only, or, if appropriate, for software (excluding source code) and commodities only, and not used for technology or source code.

Mandatory Requirements for Technology and Source Code Under an ICT Control Plan

Entities that seek to be approved eligible users and/or eligible recipients of this license exception must ensure

that non-U.S. national employees, wherever located, sign non-disclosure agreements before receiving technology or source code under this license exception. Such non-disclosure agreements must state that the employee agrees not to release any technology or source code in violation of the EAR, and such agreements must be binding as long as the technology or source code remains subject to export controls, regardless of the signatory's employment relationship with the employer. In other words, even if the signatory's employment relationship with the employer were severed, the signatory would remain prohibited from releasing any technology or source code received under License Exception ICT while employed. The non-disclosure agreement must also specify that the prohibition would remain in effect until the technology or source code no longer required a license to any destination under the EAR.

In addition, entities that seek to be approved eligible users and/or eligible recipients of ICT must screen non-U.S. national employees who are also foreign national employees in the country in which they are working against lists of end-user concern. This screening requirement applies if such individuals are to receive technology or source code under ICT. The lists of end-users of concern are compiled by the U.S. government and may be accessed at the BIS Web site at <http://www.bis.doc.gov>. Upon publication of a final rule, BIS plans to provide guidance on its website with respect to screening such employees for purposes of ICT.

Non-U.S. national employees are those employees who are not U.S. citizens, U.S. permanent residents, or protected individuals under the Immigration and Naturalization Act (8 U.S.C. 1324b(a)(3)). Foreign national employees are those non-U.S. national employees, wherever located, who are not citizens or legal permanent residents of the country in which they work. For instance, a German national working in the United States and a German national working in France are both considered foreign national employees for purposes of this rule (and more generally for purposes of the EAR). However, a French national working in France is not a foreign national employee from the perspective of BIS. Therefore, all foreign national employees are non-U.S. national employees, but not all non-U.S. national employees are foreign national employees. This distinction is important because the non-disclosure agreement element in an ICT control plan applies to the German national working in France as well as to the French national

working in France. Thus, it applies to non-U.S. national employees who would otherwise be permitted to receive technology or source code subject to the EAR, if not for the grant of ICT, under a deemed export license, deemed reexport license, license to a facility where the employee works, or other license exception.

Unlike the non-disclosure agreement requirement, the screening element applies only to foreign national employees. Hence, it would apply to a German national working in France but not to a French national working in France. The release of technology or source code subject to the EAR to a foreign national employee may occur under a deemed export or deemed reexport license or by operation of a license exception, but it may also occur under a license that has been issued to a facility. For example, a technology license approved for a French facility may have a condition allowing all EU nationals to receive the technology as well as the French employees. The screening requirement is intended to apply to all foreign national employees receiving technology or source code under ICT that would otherwise require a license, whether it be through a license for a deemed export or deemed reexport, a license issued to a facility, or other license exception.

Additionally, foreign national employees of companies located in the United States must comply with U.S. immigration laws and maintain current and valid visa authorization.

Authorization From BIS to Use License Exception ICT

Following receipt of the ICT control plan and all information required under new § 740.19(e)(1), BIS will review and refer the submission to the reviewing agencies consistent with §§ 750.3 and 750.4 of the EAR and Executive Order 12981, as amended by Executive Orders 13020, 13026, and 13117. In order to determine ICT eligibility, BIS will consider prior licensing history of the eligible applicant parent company and its wholly-owned or controlled in fact entities that are part of the authorization request, demonstration of an effective ICT control plan, need for this license exception within the company structure as articulated by the applicant parent company, and relationship of the wholly-owned or controlled in fact entities to the eligible applicant parent company.

Upon reaching a decision, BIS will inform the eligible applicant parent company in writing if it may use this license exception pursuant to new § 740.19(f). BIS will specify the terms of

the ICT authorization, including identifying the wholly-owned or controlled in fact entities of the eligible applicant parent company that may use ICT and the ECCNs of the items that may be exported, reexported, or transferred (in-country) for internal company use under ICT. After receiving authorization, approved parent companies and their approved wholly-owned or controlled in fact entities, if covered under the ICT control plan, may use this license exception to export, reexport, or transfer (in-country) approved commodities, software, and/or technology among themselves for internal company use only. Any entity that seeks to become an eligible user and/or eligible recipient, as described in new §§ 740.19(b)(2) and 740.19(b)(3)(i), must be specifically covered by the ICT control plan submitted to BIS and maintain the ICT control plan of the eligible applicant parent company.

Exports, reexports, and in-country transfers for any purpose other than internal company use are not authorized under License Exception ICT. With respect to an item that has been exported, reexported, or transferred (in-country) pursuant to License Exception ICT, the entity must submit a license application if required under the EAR before using the item for a purpose other than that covered by this license exception. Also, should control of the approved eligible applicant parent company change, then use of License Exception ICT is no longer valid. The newly-controlled eligible applicant parent company must re-submit the information required for ICT authorization, as described in new § 740.19(g)(3).

Annual Reporting Requirements

After submitting a request for authorization to use License Exception ICT pursuant to new § 740.19(e) and after receiving approval from BIS, approved eligible applicant parent companies must submit an annual report to BIS on the use of this license exception by itself and by its approved wholly-owned or controlled in fact entities. Specifically, approved eligible applicant parent companies must list the name, nationality, and date of birth of each foreign national employee, as described in note 2 to new § 740.19(b)(3)(ii), who has received technology or source code under this license exception. The requirement is limited to those employees, who would have required a license to receive technology or source code if not for ICT, and who are not citizens or legal permanent residents of the country in which they are employed. Therefore, it

applies to foreign national employees working in the United States and to foreign national employees working outside of the United States.

Also, approved eligible applicant parent companies must submit the names of those foreign national employees, as described in note 2 to new § 740.19(b)(3)(ii), who previously received technology or source code under this license exception and have ended their employment. This requirement does not apply to those who have merely switched positions within the company structure of the parent company, so long as the new employer is an approved eligible entity under the same parent company. BIS is requesting this information in order to examine the use of License Exception ICT and measure its effectiveness. Further, a company officer must certify to BIS that the approved eligible applicant parent company and its approved eligible users and eligible recipient entities are in compliance with the terms and conditions of ICT. This certification should include the results of the self-evaluation described in paragraph (d)(1)(vi) of this section.

Auditing Use of License Exception ICT

BIS will conduct audits of approved eligible applicant parent companies and their approved wholly-owned or controlled in fact entities to ensure proper compliance with License Exception ICT. These reviews will take place approximately once every two years. Generally, BIS will give notice to the relevant parties before conducting an audit. However, if BIS has reason to believe that an entity is improperly using ICT, BIS may conduct an unannounced audit at its discretion that is separate from the biennial audit.

Restrictions on the Use of License Exception ICT and the Direct Product Rule

Consistent with other license exceptions, License Exception ICT is subject to the restrictions on the use of all license exceptions, which are set forth in § 740.2 of the EAR. Therefore, ICT cannot be used for certain items, such as items controlled for missile technology reasons or certain items that are "space qualified." Moreover, ICT is subject to revision, suspension, or revocation, in whole or in part, without notice.

Also, new § 740.19(c) lists restrictions on using ICT. For instance, items controlled for Encryption Items (EI) reasons and items controlled for Significant Items (SI) reasons are ineligible for export, reexport, or transfer (in-country) under ICT. At this

time, License Exception ENC will remain the primary resource for providing the authorization necessary for many intra-company transfers of encryption items. Further, no items exported, reexported, or transferred within country under this license exception may be subsequently exported, reexported, or transferred for purposes other than internal company use, unless done so in accordance with the EAR. However, items that have been exported, reexported, or transferred (in-country) under License Exception ICT may not be subsequently exported, reexported, or transferred (in-country) under License Exception APR (see § 740.16).

Finally, note that whether the foreign direct product of U.S. software or technology exported from abroad, reexported, or transferred under License Exception ICT is subject to the EAR is determined under § 736.2(b)(3) of the EAR, when the foreign direct product is exported from abroad, reexported, or transferred (in-country) for other than internal use within a Country Group D:1 country or Cuba.

Although the Export Administration Act expired on August 20, 2001, the President, through Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as extended by the Notice of July 23, 2008, 73 FR 43603 (July 25, 2008), has continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act.

Rulemaking Requirements

1. This proposed rule has been determined to be significant for purposes of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This proposed rule contains a collection previously approved by the OMB under control numbers 0694–0088, “Multi-Purpose Application,” which carries a burden hour estimate of 58 minutes to prepare and submit form BIS–748. Miscellaneous and recordkeeping activities account for 12 minutes per submission. In addition, this proposed rule contains a new collection for reporting, recordkeeping, and auditing requirements, which would be submitted for approval to use License Exception ICT, carries an estimated

burden of 19.6 hours for companies having an existing internal control plan and 265.6 hours for companies not having an existing internal control plan in place. A request for new collection authority will be submitted to OMB for approval. Public comment will be sought regarding the burden of the collection of information associated with preparation and submission of these proposed voluntary requirements. BIS estimates that this rule will reduce the number of multi-purpose application forms that must be filed by 582 annually. Send comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing the burden, to Jasmeet K. Seehra, Office of Management and Budget (OMB), and to the Regulatory Policy Division, Bureau of Industry and Security, Department of Commerce, as indicated in the **ADDRESSES** section of this proposed rule.

3. This rule does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

4. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553) or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Under section 605(b) of the RFA, however, if the head of an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, the statute does not require the agency to prepare a regulatory flexibility analysis. Pursuant to section 605(b), the Chief Counsel for Regulations, Department of Commerce, certified to the Chief Counsel for Advocacy, Small Business Administration, that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities for the reasons explained below. Consequently, BIS has not prepared a regulatory flexibility analysis.

The EAR applies to all entities that export, reexport, or transfer commodities, software, and technology that are subject to the EAR. The EAR potentially affects any entity in any sector that chooses to export, reexport, or transfer items subject to the EAR. Thus, while this proposed rule could potentially have a significant economic impact on small entities, BIS believes

that this proposed rule will not impact a substantial number of small entities.

BIS does not have data on the total number of small entities that are potentially impacted by the requirements of the EAR, but BIS does maintain data on actual licenses applied for by entities of all sizes. In order to examine the number of small entities that would be impacted by this proposed rule, BIS examined the licensing data to find approved licenses that would potentially qualify as an intra-company transfer. Using this data as well as using estimated burden hours in gaining ICT authorization, BIS conducted a cost-benefit analysis to see which entities would likely choose to apply for authorization. BIS also examined all approved licenses that could qualify as intra-company transfers to determine whether any entities were small entities.

Upon initial examination of licensing data from 2004 to 2006, BIS found that approximately 200 companies had licenses approved that could potentially qualify as an intra-company transfer. Of those companies, the vast majority consisted of large parent companies, medium-sized companies, or companies that were owned by larger domestic or foreign companies. This result supports the premise that entities that would avail themselves of ICT must be large enough to have subsidiaries or branches located in different countries that the entities control in fact.

To look at which of those approximately 200 companies would most likely choose to apply for ICT authorization, BIS conducted a cost-benefit analysis by estimating the burden hours involved in gaining ICT authorization as well as with complying with recordkeeping and reporting requirements under ICT. BIS determined that over a three-year period it would take 280.8 hours (or 16,848 minutes) for a company without an internal control program to seek ICT authorization and 34.8 hours (or 2088 minutes) for a company with an existing internal control program to seek ICT authorization. The threshold by which companies would likely be inclined to apply for authorization to use ICT is the point at which the burden of applying for licenses over a three-year period (at 70 minutes per license) exceeds the total ICT burden hours over three years (at 16,848 minutes for companies without an existing internal control program or at 2088 minutes for companies with an internal control program). In order to meet that threshold, companies without an internal control program would have to apply for about 241 licenses over a three-year period, and companies with

an existing internal control program would have to apply for about 30 licenses per year over a three-year period. Only two companies meet the 241 license threshold, and those companies are not small entities under the North American Industry Classification System (NAICS) standards. Sixteen companies meet the 30 license threshold or come close (within five licenses) of meeting the threshold, and none of those companies is a small entity under the NAICS standards. In addition to burden hours, companies without an existing internal compliance program may be less likely to choose to seek ICT authorization because additional investments would likely need to be made to implement an internal control program. While these upfront investments could greatly vary depending on company size as well as the type and number of items in the company portfolio, it is likely that companies would need to invest in physical and information security as well as incur travel expenses to visit overseas facilities to ensure that the internal compliance program is operating effectively. All of these additional costs would likely increase the burden in any cost-benefit analysis and would likely make an entity of any size that does not have an internal compliance program less likely to seek ICT authorization and thus not be impacted by this proposed rule.

Even if an entity without an internal compliance program utilizes a different cost-benefit analysis and decides to apply for ICT authorization, BIS licensing data shows that the potential ICT candidate would not be a small entity. Only four companies, for which public information was available, were found to qualify as small entities under the NAICS. However, the potential intra-company licenses approved for these four entities would all be ineligible under License Exception ICT. The items approved for export were all items listed under § 740.2 that are restricted for export, reexport, or in-country transfer under all license exceptions. Therefore, no small entity was found to have licenses that were approved by BIS over a three-year period that would qualify under ICT. Consequently, this proposed rule would not affect a significant number of small entities.

This proposed rule was mandated by the President in National Security Presidential Directive (NSPD) 55. While this proposed rule will increase burden hours for those entities choosing to seek authorization for License Exception ICT, BIS licensing data and publicly available information show that no

small entities in the period of review received approved licenses for intra-company transfers that would be eligible for License Exception ICT. Thus, a substantial number of small entities will not be impacted by this proposed rule.

List of Subjects

15 CFR Part 740

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

15 CFR Part 772

Exports.

For the reasons set forth in the preamble, parts 740 and 772 of the Export Administration Regulations (15 CFR 730–774) are amended as follows:

PART 740—[AMENDED]

1. The authority citation for 15 CFR part 740 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 7201 *et seq.*; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008).

2. Section 740.19 is added to read as follows:

§ 740.19 Intra-Company Transfer (ICT).

(a) *Scope.* This license exception authorizes exports, reexports, and in-country transfers of items on the Commerce Control List for internal company use among approved eligible applicants, eligible users, and eligible recipients, as described in paragraphs (b)(1), (b)(2), and (b)(3) respectively, of this section. Use of License Exception ICT is limited to those entities and those ECCNs that are authorized by BIS, pursuant to paragraph (f) of this section.

(b) Eligibility.

(1) *Eligible applicant.* The eligible applicant is the “parent company,” as that term is defined in section 772.1, that institutes an ICT control plan, as described in paragraph (d) of this section, and that applies for authorization from BIS to use this license exception. The eligible applicant must be incorporated in or have its principal place of business in any country listed in Supplement No. 4 to part 740. In addition, the eligible applicant may be, but is not required to be, the ultimate parent company, as that term is referred to in the definition of “parent company” set forth in section 772.1; hence the eligible applicant may be owned or controlled by other entities. However, the ultimate parent company cannot be an eligible user under this license exception unless it is also the

eligible applicant. Application requirements are set forth in paragraph (e) of this section.

(2) *Eligible users.* Eligible users may be eligible applicants, as described in paragraph (b)(1) of this section, and their wholly-owned or “controlled in fact” entities that implement and maintain the ICT control plan of the eligible applicant and that are included in the applications submitted by eligible applicants pursuant to paragraph (e) of this section. Eligible applicants must ensure that each eligible user implements the eligible applicant’s ICT control plan, including the use of non-disclosure agreements as described in paragraph (d)(1)(viii) of this section.

(3) Eligible recipients.

(i) *Entities.* Eligible recipients of items under this license exception may be eligible applicants as described in paragraph (b)(1) of this section, eligible users as described in paragraph (b)(2) of this section, and eligible applicants’ other wholly-owned or controlled in fact companies that implement and maintain the ICT control plan of the eligible applicant and that are named in the applications submitted by the eligible applicant pursuant to paragraph (e) of this section. Eligible applicants must ensure that each eligible recipient, as described in this paragraph, implements the eligible applicant’s ICT control plan, including the use of non-disclosure agreements as described in paragraph (d)(1)(viii) of this section.

(ii) *Non-U.S. national employees receiving technology or source code.* Non-U.S. national employees (wherever located) of entities that are eligible applicants, eligible users, and/or eligible recipients of this license exception may be eligible recipients of technology and source code under this license exception provided the non-U.S. national employees sign non-disclosure agreements with their employer in which the non-U.S. national employees agree not to release any technology or source code in violation of the EAR. Additionally, if non-U.S. national employees are also foreign national employees in their country of employment, then such non-U.S. national employees must also be screened by the appropriate eligible user against end-user lists compiled by the U.S. government. For further information on employees, non-disclosure agreements, and screening requirements, see §§ 772.1, 740.19(d)(1)(viii), and 740.19(d)(1)(ix) respectively.

Note 1 to Paragraph (B)(3)(II) of this Section: Non-U.S. national employees are those employees who are not U.S. citizens, lawful permanent residents of the United

States, or individuals protected under the Immigration and Naturalization Act (8 U.S.C. 1324b(a)(3)). Non-U.S. national employees include those working in the United States and outside of the United States. Furthermore, non-U.S. national employees include those employees who would otherwise be permitted to receive technology or source code only under: (1) A deemed export or deemed reexport license; (2) a license issued to a facility, and the employee is a citizen or legal permanent resident of the same country where the facility is located; and (3) a license issued to a facility, but the employee is not a citizen or legal permanent resident of the country where the facility is located; (4) another authorization such as a license exception other than ICT.

Note 2 to Paragraph (B)(3)(II) of this Section: Foreign national employees are those non-U.S. national employees who are not citizens or legal permanent residents of the country in which they are employed. Foreign national employees include those employees who would otherwise receive technology or source code under: (1) A deemed export or deemed reexport license; or (2) a license to a facility, but the employee is not a citizen or legal permanent resident of the country where the facility is located; or (3) another authorization such as a license exception other than ICT.

(4) *Eligible uses.* Items exported, reexported, or transferred within country under this license exception may be exported, reexported, or transferred only for purposes of the internal company use by approved eligible applicants and approved eligible users of this license exception, as described in paragraphs (b)(1) and (b)(2) respectively, of this section.

(c) *Restrictions.*

(1) No item may be exported, reexported, or transferred within country under this license exception to destinations in or nationals of Country Group E or North Korea.

(2) No item exported, reexported, or transferred within country under this license exception may be subsequently exported, reexported, or transferred for purposes other than the internal company use of approved eligible applicants, eligible users, and eligible recipients, as described in paragraphs (b)(1), (b)(2), and (b)(3)(i) respectively, of this section, unless done so in accordance with the EAR. See paragraph (c)(3) of this section for further restrictions.

(3) No items that have been exported, reexported, or transferred (in-country) under License Exception ICT may be subsequently exported, reexported, or transferred (in-country) under License Exception APR (see § 740.16).

(4) No release of technology or source code is authorized under this license exception to foreign national employees whose visa or authority to work has

been revoked, denied, or is otherwise not valid. It is the responsibility of the exporter to ensure that foreign national employees working in the United States maintain a valid U.S. visa if they are required to hold a visa from the United States.

(5) No release of technology or source code is authorized under this license exception to a foreign national employee, as described in note 2 to paragraph (b)(3)(ii), if that employee or a prior employer of that employee is listed on any of the end-user lists of concern compiled by the U.S. government. In such instances, eligible applicants (or eligible users, as appropriate) should obtain the appropriate authorization required under the EAR.

(6) No items controlled for Encryption Items (EI) reasons under ECCNs 5A002, 5D002, or 5E002 may be exported, reexported, or transferred (in-country) under this license exception.

(7) No items controlled for Significant Items (SI) reasons may be exported, reexported, or transferred (in-country) under this license exception.

(d) *ICT control plan.* Prior to submitting an application to BIS under paragraph (e) of this section, and before making any exports, reexports, or in-country transfers under this license exception, eligible applicants must implement an ICT control plan that is designed to ensure compliance with this license exception and the EAR. In addition, eligible users and eligible recipient entities must implement the ICT control plan of the eligible applicant. Under an ICT control plan, which may be a component of a more comprehensive export compliance program, all entities that seek to use this license exception must ensure that commodities, software, and technology, where applicable, will not be exported, reexported, or transferred in violation of this license exception. With their application for authorization (as described in paragraph (e) of this section) to use this license exception, eligible applicants must submit a copy of the ICT control plan and must specifically note which of their wholly-owned or controlled in fact entities are covered by the plan. BIS may require the eligible applicant to modify the ICT control plan before authorizing use of this license exception. Paragraph (d)(1) of this section lists the mandatory elements of an ICT control plan. Paragraph (d)(2) of this section lists exceptions to addressing certain mandatory elements in paragraph (d)(1) in the ICT control plan.

(1) *Mandatory elements of an ICT control plan.* The following elements are

mandatory, subject to the exceptions in paragraph (d)(2) of this section. The ICT control plan must describe how each mandatory element will be implemented. In order to provide guidance, the mandatory elements described in paragraphs (d)(1)(i) through (d)(1)(v) include illustrative examples of evidence demonstrating how the element may be addressed. Note that these illustrative examples are guidelines only; satisfying the five required elements in paragraphs (d)(1)(i) through (d)(1)(v) of this section is dependent upon the nature and complexity of company activities, the type of items that will be exported, reexported, or transferred under this license exception (i.e., commodities, software, and/or technology), the countries involved, and the relationship between the eligible users and eligible recipients of this license exception, as described in paragraphs (b)(2) and (b)(3)(i) respectively of this section. With respect to the other four elements of the ICT control plan, eligible applicants must fulfill certain specified requirements. For paragraphs (d)(1)(vi), (d)(1)(vii), (d)(1)(viii), and (d)(1)(ix) of this section, no illustrative examples are included. Note, however, that to satisfy the self-evaluation element in paragraph (d)(1)(vi) of this section, establishing self-audits, creating a checklist, and developing corrective measures are required, but the self-audits may be structured in a manner that works best for the eligible applicant and its wholly-owned or controlled in fact entities. In order to use this license exception for technology or software, a letter of assurance, consistent with §§ 740.19(c) and 740.6, must be provided by a company officer of the eligible applicant. Additionally, in order to use this license exception for non-U.S. national employees, wherever located, to receive technology or source code under this license exception, submitting a template or sample of the non-disclosure agreement to be used is a mandatory element. Also, in order to use this license exception for non-U.S. national employees who are also foreign national employees, reviewing lists of end-users of concern compiled by the U.S. government is a mandatory element.

(i) *Corporate commitment to export compliance.* Evidence of a corporate commitment to export compliance may include: An organizational chain of command for export controls compliance issues and related issues of concern; senior management member(s) responsible for export controls compliance, who are able to

demonstrate how compliance issues are resolved; internal recordkeeping requirements in accordance with the EAR; maintenance of a sound commodity classification methodology; and commitment of resources to implement and maintain an ICT control plan.

(ii) *Physical security plan.* Evidence of a physical security plan may include: Methods of physical security that prevent the transfer of commodities, software, and technology on the Commerce Control List outside of the internal company structure; and organization and maintenance of up-to-date building layouts, including a description of physical security measures, such as secured doors and badges as well as biometric, guard, and perimeter controls.

(iii) *Information security plan.* Evidence of an information security plan may include: Organization and maintenance of up-to-date virtual security layouts and descriptions of what information security methods are in place, such as password protection, firewalls, segregated servers, non-network computers, and intranet security.

(iv) *Personnel screening procedures.* Evidence of personnel screening procedures may include: Thorough pre-screening analysis of new foreign national employees, as described in note 2 to paragraph (b)(3)(ii), which includes, but is not limited to, criminal background, driver's license, and credit history, before allowing them to receive technology or source code through a license or license exception.

(v) *Training and awareness program.* Evidence of a training and awareness program may include: Creation, scheduling, and performance of regular training programs (for all employees working in areas relevant to export controls) to inform employees about export controls and limits on their access to technology or source code.

(vi) *Self-evaluation program.* Evidence of a self-evaluation program must include the following three components: Creation and performance of regular internal self-audits, which may be conducted through the use of internal and/or external resources depending upon the needs and demands of the organization; creation of a checklist of critical areas and items to review, including identification of any deficiencies; and development of corrective procedures or measures implemented to correct identified deficiencies. **Note:** Disclosure of identified deficiencies and corrective actions will be considered when evaluating effective ICT control plans

under paragraph (f)(2). Failure to disclose this information could result in revocation, as noted in paragraph (j). Any violations of the EAR that are uncovered in the process of conducting this self-evaluation should be disclosed to BIS in accordance with the voluntary self-disclosure procedures found in section 764.5.

(vii) *Letter of assurance for software and technology.* A company officer of the eligible applicant must submit a signed statement on company letterhead stating that under this license exception, the eligible applicant and each eligible user and/or eligible recipient entity will not export, reexport, or transfer (in-country) software (including the source code for the software) and technology, consistent with paragraph (c)(1) of this section and consistent with paragraphs (a)(1) and (a)(2) of § 740.6.

(viii) *Signing of non-disclosure agreements.* Non-disclosure agreements not to release any technology or source code must be binding with respect to any technology or source code that has been released or otherwise provided to any non-U.S. national employee, wherever located, on the basis of this license exception, until such technology or source code no longer requires a license to any destination under the EAR, regardless of whether the non-U.S. national's employment relationship with the company remains in effect. Non-disclosure agreements should be completed in both English and the non-U.S. national employee's native language.

(ix) *Review of end-user lists.* Foreign national employees, as described in note 2 to paragraph (b)(3)(ii), who are eligible to receive technology or source code under this license exception, must be screened against all lists of end-users of concern compiled by the U.S. government. In addition, prior employers of the foreign national employees must also be screened. These lists can be accessed at <http://www.bis.doc.gov>. See paragraph (c)(5) of this section for specific restrictions.

(2) *Exceptions to certain mandatory elements of an ICT control plan.*

(i) If this license exception will be used only for commodities, then the ICT control plan elements described in paragraphs (d)(1)(iii), (d)(1)(iv), (d)(1)(vii), (d)(1)(viii), and (d)(1)(ix) are not mandatory. In this situation, the ICT control plan must state that this license exception will be used for commodities only and not used for software or technology.

(ii) If this license exception will be used only for software (excluding source code), or if this license exception will be used only for commodities and software

(excluding source code), then the ICT control plan elements described in paragraphs (d)(1)(iv), (d)(1)(viii), and (d)(1)(ix) are not mandatory. In this situation, the ICT control plan must state that this license exception will be used for software (excluding source code) only, or will be used for commodities and software (excluding source code) only, and not used for technology or source code.

(e) *Information required for grant of ICT authorization.*

(1) Prior to the export, reexport, or in-country transfer of items on the Commerce Control List under this license exception, an eligible applicant, as described in paragraph (b)(1) of this section, must submit the following information to BIS:

(i) For the eligible applicant: Full name of company; location of company headquarters; location of principal place of business; complete physical addresses (listing a post office box is insufficient) of company's headquarters and principal place of business; post office box if used as an alternate address; location of registration or incorporation; ownership of company, including listing all individuals or groups that have at least a 10% ownership interest; and need for License Exception ICT, including listing the ECCNs of the items that will be exported, reexported, or transferred (in-country) under this license exception and a detailed narrative describing the intended use of the items covered by the listed ECCNs and the anticipated resulting commodities, where relevant;

(ii) For each company, separate from the eligible applicant, that is intended to be an eligible user or eligible recipient that will export, reexport, transfer (in-country), or receive items under this license exception: Full name of entity; location of entity's principal place of business; complete physical address (listing a post office box is insufficient) of entity's principal place of business; post office box if used as an alternate address; location of entity's registration or incorporation; relationship of the entity to the eligible applicant; and ownership of company, including listing all individuals or groups that have at least a 10% ownership interest, where relevant;

(iii) Name and contact information of the employee(s) responsible for implementing the ICT control plan of the eligible applicant and its wholly-owned or controlled in fact entities that are eligible users and/or eligible recipients;

(iv) A full copy of the ICT control plan, as described in paragraph (d) of this section, covering the eligible

applicant and its wholly-owned or controlled in fact entities that are eligible users and/or eligible recipients;

(v) Documentation showing implementation of screening, training, and self-evaluation elements in the ICT control plan, as described in paragraphs (d)(1)(iv), (d)(1)(v), (d)(1)(vi), and (d)(1)(ix), where applicable; and

(vi) A signed statement, on company letterhead, by a company officer of the eligible applicant that states each eligible user and/or eligible recipient entity will allow BIS, at the agency's discretion, to conduct audits to ensure compliance with this license exception.

(2) Submit all required information to: Bureau of Industry and Security, Attn: License Exception ICT, HCHB Room 2705, 14th Street & Pennsylvania Ave., NW., Washington, DC 20230.

(f) *Review of License Exception ICT submissions.* Upon receipt of completed information required under paragraph (e)(1) of this section, BIS will conduct a review described in paragraph (f)(1) of this section. During the review, BIS will use the factors described in paragraph (f)(2) of this section to determine authorization. In addition to informing the eligible applicant whether it may use this license exception, BIS will provide the terms of the ICT authorization including which wholly-owned or controlled in fact entities may use this license exception and the ECCNs of the items that may be exported, reexported, or transferred under this license exception. BIS will respond in writing to the eligible applicant once a decision is reached.

(1) *Processing procedures.* For purposes of review only, License Exception ICT submissions will be reviewed in the manner that license applications are reviewed pursuant to §§ 750.3 and 750.4 of the EAR and Executive Order 12981, as amended by Executive Orders 13020, 13026, and 13117.

(2) *Review factors.* The following factors will be considered in determining License Exception ICT authorization: Prior licensing history; demonstration of an effective ICT control plan; and need for the license exception, as expressed in the submission for ICT authorization, including the requested ECCNs and the relationship of the wholly-owned or controlled in fact entities to the parent company or other entities of national security or foreign policy concern. BIS will also consider any deficiencies, including violations of the EAR, that are uncovered as part of the self-evaluation element of the eligible applicant's ICT control plan described in (d)(vi) of this part, and, if appropriate, disclosed to

BIS in accordance with section 764.5, as well as any corrective action that was subsequently taken.

(g) *Changes to Submitted Information Following Receipt of Authorization.*

(1) Before an entity not previously identified in an approved eligible applicant's initial submission under paragraph (e) of this section may use this license exception, the approved eligible applicant must submit the information regarding the new entity in accordance with paragraph (e)(1)(ii) of this section to BIS at the address listed in paragraph (e)(2) of this section. This submission will undergo the same process of review as the initial submission, which is described in paragraph (f)(1) of this section.

(2) After obtaining authorization to use this license exception, an approved eligible applicant may request License Exception ICT eligibility for additional ECCNs that were not previously identified in its initial submission. To make such a request, the approved eligible applicant must submit the necessary information required under paragraph (e)(1)(i) regarding the additional ECCNs to BIS at the address listed in paragraph (e)(2) of this section. This submission will undergo the same process of review as the initial submission, which is described in paragraph (f)(1) of this section.

(3) If control of an approved eligible applicant changes after obtaining prior authorization to use this license exception (e.g., through change of ownership, acquisition, or merger), authorization to use this license exception will no longer be valid. Under such circumstances, the new eligible applicant must submit all information required under paragraph (e)(1) of this section to obtain new authorization to use this license exception. This submission will undergo the same process of review described in paragraph (f)(1) of this section. The new eligible applicant and its wholly-owned or controlled in fact entities may export, reexport, or transfer within country items under this license exception only upon receipt of written authorization from BIS. See the definition of "controlled in fact" in § 772.1 for further information regarding changes in ownership.

(4) If an approved eligible applicant's control of an approved eligible user or eligible recipient entity changes after obtaining prior authorization to use this license exception (e.g., through a different organization's acquisition or merger of the approved eligible user or eligible recipient entity), the newly-controlled eligible user or eligible recipient entity must immediately

terminate use of this license exception. In addition, the approved eligible applicant must notify BIS in writing of the removal of the newly-controlled entity from use of this license exception within fifteen (15) days after the change in control. Notification letters should be submitted to the address in paragraph (g)(5) of this section. Subject to paragraph (g)(3) of this section, the approved eligible applicant and its other approved eligible users and/or eligible recipient entities may continue to use this license exception. See the definition of "controlled in fact" in § 772.1 for further information.

(5) After obtaining authorization to use this license exception, if the legal name of an approved eligible applicant, eligible user, or eligible recipient entity of this license exception, as described in paragraphs (b)(1), (b)(2), and (b)(3)(i) of this section respectively, changes, the approved eligible applicant must notify BIS of the name change within fifteen (15) days after the name change. Subject to paragraph (g)(3) of this section, the approved eligible applicant may continue to use this license exception after the name change but must submit a letter informing BIS of the name change to the Director of the Office of Exporter Services at: Office of Exporter Services, HCHB Room 2705, 14th Street & Pennsylvania Ave., NW., Washington, DC 20230.

(h) *Annual reporting requirement.*

(1) After receiving authorization to use License Exception ICT pursuant to paragraph (e) of this section, approved eligible applicants must submit the following information to BIS on an annual basis:

(i) The name, nationality, and date of birth of foreign national employees, as described in note 2 to paragraph (b)(3)(ii) of this section, who have received technology or source code under License Exception ICT during the prior reporting year.

(ii) The name, nationality, and date of birth of foreign national employees, as described in note 2 to paragraph (b)(3)(ii), who are subject to the reporting requirement in paragraph (h)(1)(i) of this section and who have terminated their employment with the approved eligible applicant, eligible user, or eligible recipient entity. This requirement does not apply to employees subject to the reporting requirement in paragraphs (h)(1)(i) and (h)(1)(ii) of this section who have changed positions within the parent company's structure (i.e., among the approved eligible applicant parent company's wholly-owned or controlled in fact entities that are approved eligible

users and/or eligible recipients of this license exception).

(iii) A certification signed by a company officer stating that the approved eligible applicant and its approved eligible users and eligible recipient entities are in compliance with the terms and conditions of License Exception ICT. This certification should include the results of the self-evaluations described in paragraph (d)(1)(vi) of this section.

(2) Annual reports must be submitted to and received by BIS no later than February 15 of each year, and must cover the period of January 1 through December 31 of the prior year. Reports must be submitted to the address listed in paragraph (e)(2) of this section.

(i) *Auditing use of License Exception ICT.*

(1) *Biennial audit.* BIS will review the use of License Exception ICT by the approved eligible applicant and its approved eligible users and/or eligible recipients approximately once every two years. Generally, BIS will give reasonable notice to approved eligible applicants in advance of an audit of their use of License Exception ICT. As part of the biennial audit, BIS may request that an approved eligible applicant and its approved eligible users and/or eligible recipient entities submit all or part of their records described in paragraph (h) of this section.

(2) *Discretionary audit.* BIS may conduct special unannounced system reviews if BIS has reason to believe an approved eligible applicant or one of its approved eligible users and/or eligible recipients has improperly used or failed to comply with the terms and conditions of License Exception ICT.

(j) *Revision, Suspension, and Revocation of License Exception ICT.* Consistent with § 740.2(b), BIS may revise, suspend, or revoke authorization to use License Exception ICT in whole or in part, without notice. Factors that might warrant such action may include, but are not limited to, the following: use of ICT for other than internal company use, release of controlled items to unauthorized entities or destinations, failure to maintain the ICT control plan initially submitted to BIS as part of the application, and failure to comply with reporting and recordkeeping requirements.

(k) *Recordkeeping requirements.* In addition to the recordkeeping requirements set forth in part 762 of the EAR, entities that are approved eligible applicants, eligible users, and/or eligible recipients of this license exception, as described in paragraphs (b)(1), (b)(2), and (b)(3)(i) of this section respectively, must retain copies of their ICT control

plan and associated materials, including signed non-disclosure agreements. Entities that are approved eligible applicants, eligible users, and/or eligible recipients must also maintain records, by ECCN, of the items on the Commerce Control List that have been exported, reexported, or transferred within country under the authority of this license exception. For foreign national employees receiving technology or source code under ICT, approved eligible applicants, eligible users, and eligible recipient entities are required to record only the initial release of such technology or source code to a given foreign national employee; subsequent release of the same technology or source code to that same foreign national employee does not require additional recordkeeping. However, if a foreign national receives technology or source code under ICT that is controlled under a different ECCN, then the initial receipt of the different technology or source code must also be recorded. Such records must be made available to BIS on request.

3. Supplement No. 4 to part 740 is added to read as follows:

**Supplement No. 4 to Part 740—
Countries in Which Eligible Applicants
Must Be Incorporated In or Have Their
Principal Place of Business in For
License Exception Intra-Company
Transfer (ICT) Eligibility**

Argentina
Australia
Austria
Belgium
Bulgaria
Canada
Cyprus
Czech Republic
Denmark
Estonia
Finland
France
Germany
Greece
Hungary
Iceland
Ireland
Italy
Japan
Korea, South
Latvia
Lithuania
Luxembourg
Malta
Netherlands
New Zealand
Norway
Poland
Portugal
Romania
Slovakia
Slovenia
Spain
Sweden
Switzerland

Turkey
United Kingdom
United States

PART 772—[AMENDED]

4. The authority citation for part 772 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008).

5. Section 772.1 is amended:
a. By amending the definition of “Controlled in fact” as set forth below; and

b. By adding, in alphabetical order, the definitions of “Employee” and “Parent company”, as follows:

**§ 772.1 Definitions of Terms as Used in the
Export Administration Regulations (EAR).**

* * * * *

Controlled in fact. For purposes of License Exception ICT only (see § 740.19 of the EAR), the term “controlled in fact” means the authority or ability of an entity, which has been routinely exercised in the past, to establish the general policies or day-to-day operations of a different organization, such as a subsidiary, branch, or office. An entity will be presumed to have control over a different organization when:

(a) The entity beneficially owns or controls (whether directly or indirectly) more than 50 percent of the outstanding voting securities of the different organization;

(b) The entity operates the different organization pursuant to the provisions of an exclusive management contract; or
(c) Members of the entity’s governing body (*i.e.*, board of directors) comprise a majority of the comparable governing body of the different organization.

For purposes of the Special Comprehensive License (part 752 of the EAR), controlled in fact is defined as it is under the Restrictive Trade Practices or Boycotts (§ 760.1(c) of the EAR).

* * * * *

Employee. For purposes of License Exception ICT only (see § 740.19 of the EAR), “employee” means any person who works, with or without compensation, in the interest of an entity that is an approved eligible user (see § 740.19(b)(2)) or an entity that is an approved eligible recipient (see § 740.19(b)(3)(i)). The person must work at the approved eligible entity’s locations or at locations assigned by the approved eligible entity, such as at remote sites or on business trips. This definition may include permanent employees, contractors, and interns.

* * * * *

Parent company. For purposes of License Exception ICT only (see § 740.19 of the EAR), “parent company” means any entity that wholly-owns or controls in fact a different entity, such as a subsidiary or branch. The parent company may be incorporated in and conduct its principal place of business inside the United States or outside of the United States, but certain location restrictions apply (see § 740.19(b)(1) and Supplement No. 4 to part 740). The parent company itself may also have an ultimate parent company, meaning the parent company is wholly-owned or controlled in fact by another entity or other entities. See also the definition of “controlled in fact” in this section for further information.

* * * * *

Dated: September 29, 2008.

Christopher R. Wall,

Assistant Secretary for Export Administration.

[FR Doc. E8-23506 Filed 10-2-08; 8:45 am]

BILLING CODE 3510-33-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 8360

[WO-250-1220-PM-24 1A]

RIN 1004-AD96

Visitor Services

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed rule.

SUMMARY: The Bureau of Land Management (BLM) proposes to amend its regulations to remove the Land and Water Conservation Fund Act (LWCFA) as one of the authorities of our Recreation regulations, in accordance with the Federal Lands Recreation Enhancement Act of 2004 (REA). The rule will also amend and reorder the prohibitions to separate those that apply specifically to campgrounds and picnic areas from those with more general applications. The reordering is necessary to broaden the scope to include all areas where standard amenity, expanded amenity, and special recreation permit fees are charged under REA. The proposed rule would remove an unnecessary provision that has been interpreted to require the BLM to publish supplementary rules concerning failure to pay fees established by the recreation regulations, thus relieving the BLM from publishing such separate specific supplementary rules for each

area. Finally, it will make technical changes to maintain consistency with other BLM regulations.

DATES: We will accept comments and suggestions on the proposed rule until December 2, 2008. The BLM will not necessarily consider any comments received after the above date in making its decision on the final rule.

ADDRESSES: You may submit comments by any of the following methods listed below:

Mail: U.S. Department of the Interior, Director (630), Bureau of Land Management, Mail Stop 401 LS, 1849 C St., NW., Attention: [RIN: 1004-AD96] Washington, DC 20240.

Personal or messenger delivery: 1620 L Street, NW., Room 401, Washington, DC 20036.

Federal eRulemaking Portal:
www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: For information on the substance of the proposed rule, please contact Hal Hallett at (202) 452-7794 or Anthony Bobo Jr. at (202) 452-0333. For information on procedural matters, please contact Chandra Little at (202) 452-5030. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 to contact the above individuals during normal business hours. FIRS is available twenty-four hours a day, seven days a week, to leave a message or question with the above individuals. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION:

- I. Public Comment Procedures
- II. Background
- III. Discussion of Proposed Rule
- IV. Procedural Matters

I. Public Comment Procedures

Electronic Access and Filing Address

You may view an electronic version of this proposed rule at the BLM's Internet home page at www.blm.gov or at <http://www.regulations.gov>. You may comment via the Internet to: <http://www.regulations.gov>. If you submit your comments electronically, please include your name and return address in your Internet message.

Written Comments

Confine written comments on the proposed rule to issues pertinent to the proposed rule and explain the reason for any recommended changes. Where possible, reference the specific section or paragraph of the proposal which you are addressing. The BLM need not consider or include in the

Administrative Record for the final rule comments which it receives after the comment period close (see **DATES**), or comments delivered to an address other than those listed above (see **ADDRESSES**).

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Reviewing Comments Submitted by Others

Comments, including the names and street addresses, and other contact information, will be available for public review at the address listed under **ADDRESSES** during regular business hours (7:45 am to 4:15 pm), Monday through Friday, except holidays.

II. Background

The passage of the REA, 16 U.S.C. 6801 *et seq.*, required the BLM to change its fee management regulations, policies, and procedures to bring them into compliance with this law. The BLM has already accomplished this by including in part 2930 all recreation fee management regulations including the requirement that visitors pay fees before occupying a campground or picnic area. The BLM is now amending part 8360 to complete the regulatory changes made necessary by the law, including removal of any language pertaining to recreation fees. In addition, the section dealing with the collection of fossils was modified to include common plant fossils, reflecting long established BLM policies. Other changes were made to group related regulations in the same section to simplify language and clarify the intent, and to resolve inconsistencies between existing provisions.

III. Discussion of Proposed Rule

Section 8360.0-3 Authority

The proposed rule removes the Land and Water Conservation Fund Act (LWCFA) (16 U.S.C. 4601-6a) as an authority for the regulations. The enactment of the REA changed the BLM's authority to collect recreation fees. Recreation fees that were previously authorized under the LWCFA are now included under REA. The BLM's policies and procedures have also been revised to reflect this new and revised authority.

From: <Andy_Wall@amat.com>
To: <rpd2@bis.doc.gov>
Date: Wed, Oct 22, 2008 8:53 PM
Subject: Feedback on RIN 0694-AE21 (ICT Proposal)

To Whom It May Concern,

I find the requirement to disclose identified deficiencies in Section 740.19 (d)(1)(vi) Self Evaluation Program problematic as this clause discourages companies from doing honest and detailed self assessments and rewards those companies which keep their self assessments superficial.

The foundation of a strong compliance program is detailed internal self assessments conducted at the business unit level with corporate level assessments supplementing and verifying these assessments. Very few business unit people would be willing to disclose a finding to the corporate compliance group if they knew that group would disclose the issue to the government.

Having managed various compliance programs, one of my greatest challenges is ensuring there is an environment of "no retribution" to encourage honest and meticulous self assessments. Those conducting self assessment should be awarded, not punished, for finding problems. This clause creates potential retribution to those business personnel aggressively identifying problems.

This requirement also discourages companies from digging deep into their systems to find issues that no outsider could find as we would be penalized for excessive due diligence.

Thanks for your consideration of this matter,

Andy Wall
Senior Manager - Technology Exports
Business Transformation Project Manager
Corporate Trade Group
512-272-7139 (office)
512-659-7278 (mobile)
512-272-6515 (fax)

CC: "Horning, Eric R LCDR OSD POLICY-DTSA" <Eric.Horning@osd.mil>, "Minnifield, Tracy, CIV, OSD-POLICY-DTSA" <Tracy.Minnifield@osd.mil>, <mhershey@semi.org>, <Karen_Murphy@amat.com>, <Jeff_Rogers@amat.com>, <tmika@tegal.com>, Vicki Hadfield <vhadfield@semi.org>, <william.humber@vsea.com>, <William_Morin@amat.com>

November 4, 2008

To: rp2@bis.doc.gov
From: Bill Root, waroot@aol.com; tel. 301 987 6418;
419 Russell Avenue #214 Gaithersburg MD 20877
Subject: Intra-Company Transfer RIN 0694-AE21

Comparison of Proposed ICT License Exception with Special Comprehensive License (SCL)

Exporters are unlikely to use proposed License Exception ICT, because the same result could, in most instances, be achieved with fewer restrictions by using the SCL.

The proposed ICT would be more restrictive than SCL in the following respects:

- It would control in-country transfers generally, whereas SCL 752.6(b)(1) prohibits transfers or resales of only "CB" items, most of which are totally ineligible for SCL per 752.3(a)(2,3);
- It would be limited to entities in the countries listed in proposed 740 Supplement 4 (see below), whereas SCL may be used for entities in any country not in Country Group E:1, per 752.4(a)(1);
- It would omit the following third option for eligibility as a SCL consignee (besides wholly owned subsidiary or controlled in fact affiliate), per 752.5(b)(2)(i)(C);
 - Evidence of an established, on-going business relationship with the proposed consignee;
- Its "controlled-in-fact" definition would omit the following three options which are included in the SCL 760.1(c) definition:
 - Ownership or control of 25% or more of voting securities if no other entity owns or controls a larger percentage;
 - The domestic concern has authority to appoint the majority of the members of the board of directors of the foreign subsidiary or affiliate; or
 - The domestic concern has authority to appoint the chief operating officer of the foreign subsidiary or affiliate;
- 740.19(a), (b)(2), and (e)(1)(iv) would require specification of "users" as well as of "recipients," whereas SCL requires specification only of "consignees," defined in 752.1(a)(2)(ii) as "any party authorized to receive items under the SCL ...";
- 740.19(d)(1,2) would require the following features for an ICT internal control program (ICP) which are not required for an SCL ICP:
 - Applicability to users as well as to applicants and recipients;
 - Signing of non-disclosure agreements by non-U.S. nationals receiving technology or source code;
 - Three other mandatory elements for technology and source code (self-evaluation, letter of assurance, and review of end-user lists), of which self-evaluation is also mandatory for commodities and self-evaluation and letter of assurance are also mandatory for other software, whereas 752.11(c) makes

applicability of all elements of the SCL ICP “depend upon the complexity of the activities authorized

..., the countries and items involved, and the relationship between the SCL holder and the approved consignees”;

-It would restrict the scope of other licenses or license exceptions (see below), whereas the SCL regulations state no impact on other licenses and explicitly authorize reexports that qualify for a License Exception;

-740.19(c)(4) would make the exporter responsible “to ensure that foreign national employees working in the United States maintain a valid U.S. visa if they are required to hold a visa from the United States”;

-740.19(h) would require annual reports of foreign national employees receiving technology or source code and certification of compliance with terms and conditions of License Exception ICT, whereas, under 752.14(b) for SCL, BIS “may” require submission of a list of transactions during a specified period;

-740.19(i)(1) would require a biennial audit, whereas, under 752.14(a) for SCL, BIS “may” conduct system reviews.

The list of ineligible items for the SCL in 752.3 appears to be more restrictive than the list of ineligible items for proposed ICT in 740.19(c)(6) and (7); but many of the additional SCL ineligible items would be ICT ineligible pursuant to 740.2 restrictions on all license exceptions and, for the remaining SCL ineligible items, BIS could deny ICT eligibility when acting on the ICT application (see, in particular, 750.3(b)(2) re inter-agency review of items and countries of concern, which is cited in proposed 740.19(f)(1)).

The ICT would omit the SCL 752.9(a)(1,2) four year validity period; but 740.19(j) would provide that “BIS may revise, suspend, or revoke authorization to use License Exception ICT in whole or in part, without notice.”

Even if proposed ICT were revised to be no more restrictive than SCL, ICT would be no more attractive than SCL is now. Although established many years ago, only a very few companies have decided to use SCL.

Eligible Countries

The list of eligible countries in proposed 740 Supplement 4 is far more restrictive than comparable SCL and ENC subsidiaries rules (752.4(a)(1) and 740.17(a)(2)), under which all but Country Group E:1 countries are eligible. Even if 740 Supplement 4 were revised to include all countries not listed elsewhere in the EAR as being of concern for other reasons, *i.e.*, Country Groups D:1, 2, 3, 4 as well as E:1 or Computer Tiers 3 and 4, this would be inconsistent with eligibility of China and India for VEU and with cooperation of Belarus, China, Kazakhstan, Russia, and Ukraine in one or more multilateral export control organizations (Ukraine is a member of all four regimes). A longer list of countries eligible for ICT than proposed 740 Supplement 4 would not preclude BIS denial, when justified, of some listed country or countries in responding to an individual ICT application.

Imposition of Restrictions on Activities Not Now Requiring a License

Proposed 740.19(b)(3)(ii), including Notes 1 and 2 to (b)(3)(ii), would impose new restrictions on transfers of technology or source code otherwise permitted under a license or another license exception and 740.19(c)(3) would invalidate permissive reexports otherwise authorized by 740.16, whereas, in 752.6(a)(1), SCL explicitly authorizes “Reexports that qualify for a License Exception authorized by part 740 of the EAR.” If the restrictions proposed in 740.19(b)(3)(ii) or (c)(3) are necessary, they should be described in the relevant licenses or other License Exceptions.

November 7, 2008

To: rpd2@bis.doc.gov
From: Bill Root, waroot@aol.com; tel. 301 987 6418;
419 Russell Avenue #214 Gaithersburg MD 20877
Subject: Intra-Company Transfer RIN 0694-AE21

Since sending comments on this proposal on November 4, a company with an SCL license has advised that, although the SCL regulation in the EAR does not prohibit its use for technology, BIS has consistently denied SCL eligibility for technology items.

Under these circumstances, it would be desirable to review the long list of proposed ICT features which are more restrictive than SCL in my November 4 comments to determine how many are really necessary in order to expand *de facto* coverage of SCL to include technology.

Given the very little use now being made of SCL, it would also be desirable to review SCL restrictions to see how many might be relaxed to make that license more reasonable for applicability to commodities and perhaps also to technology.



Legal Department

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Via Telefax: 202-482-3355

November 13, 2008

Steven Emme
U.S. Department of Commerce
Bureau of Industry and Security
Regulatory Policy Division
14th & Pennsylvania Avenue, N.W.
Room 2705
Washington, D.C. 20230

BROAD BASE | **BEST SOLUTIONS**

ATTN: RIN 0694-AE21.

Re: Proposed License Exception – Intra Company Transfer (“ICT”)

Dear Mr. Emme:

SGL Carbon, LLC submits the following comments regarding the above-referenced license exception ICT.

Background

SGL Group is a global group of affiliated companies under common ownership by SGL CARBON AG, a company organized under the laws of, and headquartered in, Germany. SGL Group is in the business of manufacturing carbon and graphite products around the world with 40 production sites located throughout Europe, North America, and Asia, 10 of which are located in the United States. While SGL Group's product research and development center is headquartered in Germany, its global research and development organization includes individuals that are located in other European Union member countries, the United States, Canada, and, most recently, Asia. Participation and contribution of SGL Group personnel in the U.S. is generally limited to SGL Group research and development projects that would not trigger export licensing issues, as the technology and engineering talent available in the EU is qualified and capable of conducting such activities without U.S. input, and the regulatory restrictions and limitations on exchange of goods and technology within the EU are minimal.

SGL Group was initially established in 1992 by a joint venture that combined the operations of Sigi GmbH, a German-based carbon and graphite manufacturer, with the operations of Great Lakes Carbon Corporation, a U.S.-based carbon and graphite manufacturer, under common ownership. The production and associated technology for

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carbon and graphite products utilized in a wide variety of industries was separately known to each of these entities prior to the joint venture and can be, and in many instances is, independently developed in the European and North American arena, respectively, based on such prior knowledge base without an exchange between the two. However, development and innovation through cooperation and exchange of ideas and information, is always desirable.

SGL Carbon, LLC, the SGL Group member company that is the ultimate parent to all of the U.S. legal entities within the SGL Group, has implemented and undergone both successful validation under the U.S. Customs and Border Protection's C-TPAT program in the U.S. at its Charlotte, NC headquarters and its Morganton, NC production facility, and within its supply chain at its German affiliate company, SGL Carbon GmbH in Meitingen, Germany. It underwent successful C-TPAT revalidation within its supply chain at its French affiliate company, SGL Carbon S.A. in Chedde, France. SGL Group has implemented and, for many years has had, in addition to its C-TPAT security compliance, an effective export compliance management program throughout its organization, which it has recently updated to include an SAP module to identify products which incorporate U.S. materials or technology for compliance with U.S. export and reexport regulations and which will now automate the process of end-user checks against both U.S. and international end user lists. This automated process has initially been implemented only in Germany, with roll-out to other countries scheduled for 2009 and 2010.

In other words, SGL Group is an international organization that takes its global obligations of secure import and export transactions seriously, putting significant commitment into those systems and resources necessary for an effective compliance program. It is also an organization that would welcome U.S. regulations that ease the administrative requirements associated with U.S. regulatory compliance for the conduct of business between its member companies.

Comment on Preregistration of ECCNs

Carbon and graphite are versatile materials that are useful in numerous applications and SGL Group provides products for industries involved in aerospace, aluminum and non-ferrous metals, automation and robotics, automotive, chemical, construction and building services engineering, defense technology, electronics, energy technology, environmental technology, glass and ceramics, high-temperature technology, iron, steel and ferro-alloy, measuring technology and optics, mechanical engineering, medical technology, nuclear technology, plastics technology, power generation, process equipment engineering, racing sports, sealing technology, semiconductor technology,



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solar technology, sports equipment, tool and mold manufacture, and wind energy technology. Our research and development organization is constantly working with new industries and new product applications.

To require preregistration of all ECCN's to be exported, reexported, or transferred in-country between approved entities would seem to defeat several of the hurdles that this exception seeks to alleviate regarding research and development, identified by the BIS under "The Impact of U.S. Export Controls on Intra-Company Transfers" at 73 Fed. Reg. 57554 at 57555, specifically:

"obtaining licenses for intra-company transfers can hinder more than just individual transactions; they can also hinder product development and the ability to be first to market—activities key to the competitiveness of U.S. companies."

"while waiting for the approval of a deemed export license, U.S. employees and certain foreign national employees would be precluded from collaborating together on projects."

"once the license is approved, companies may still need to segregate their research and development activities in the future because product breakthroughs could exceed the licensing parameters and require a new round of export licensing."

As indicated in the foregoing statements, BIS has clearly considered that research and development activities may result in activities that exceed licensing parameters, and such changes could easily include a change of ECCN classification during the course of the project. SGL's business is the manufacture and sale of carbon and graphite products to a broad spectrum of industries, which includes development of products for its existing and potential customers that have not previously used graphite for specific products and/or applications. While research and development at SGL is not likely to result in changes to our carbon and graphite material classifications, application of those materials for use in specific industrial equipment components may very well entail additional ECCN classifications for SGL.

Under "Establishment of License Exception ICT", the BIS states that "Companies authorized to use License Exception ICT would benefit because it would relieve them of some of the administrative requirements of obtaining, tracking, and reporting on individual licenses and would reduce the lag time, expense, and uncertainty in the licensing process." 73 Fed. Reg. 57554 at 57555. Requiring registration under ICT of a particular ECCN before transfer to an approved affiliate, which would require submission, processing, and approval of a new application to add such ECCN to the applicant's registration under the same procedure currently utilized for license applications, does not reduce the current burden of obtaining an export license. SGL would encounter the very hindrances and delays described as those that are supposed to be resolved by enactment of the ICT exception. The administrative requirement, lag



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time, expense and uncertainty of the licensing process is merely replaced by the prerequisite of obtaining ICT approval for disclosure under ICT of the specific ECCN, where the regulations already provide for what ECCN's are eligible for disclosure under ICT.

Where a group of global affiliate companies have been vetted as "Trusted Entities" by the BIS under the required pre-approval process and eligible to utilize the ICT exception, and the Item's ECCN appears on those ECCN's eligible for the ICT exception, we would suggest that a more useful and realistic approach is accomplished by adding new ECCN's through the annual reporting on actual use of the ICT exception (see comments below regarding annual reporting).

Comment on Exclusion of MT Controlled Items

The single commodity most frequently exported by SGL in the US to its foreign affiliates that requires licensing is fine grain graphite (ECCN 1C107), which is MT controlled. This commodity is actually manufactured by an SGL Group affiliate in Bonn, Germany and imported in bulk by SGL in the US for use in a variety of machined graphite product applications. SGL Carbon, LLC exports random pieces of fine grain graphite that are "scrap" resulting from machining or breakage back to its Bonn affiliate for reuse in their fine grain graphite manufacturing process. Since the sizes of these scrap pieces vary and sorting and measuring the scrap to determine whether or not each individual piece meets the size dimensions set out in ECCN 1C107 would require too much time and manpower to be cost-efficient, we export all such scrap back to our German affiliate under a Commerce Dept. export license.

Use of the ICT exception would appear to be tailor-made for just such an export and would certainly be useful to SGL for return of this fine grain graphite scrap to its German affiliate, eliminating the burden of monitoring the volume so as to ensure compliance with the license by not exceeding the quantity permitted. However, under the current proposal, this commodity would be excluded from the ICT exception eligibility. Given the limitations placed on Items exported under the ICT exception for transfer and/or use by and among the pre-approved recipients/users only, and the extensive review and pre-approval of the entities eligible to utilize the ICT exception, we question why MT controlled Items are excluded. It would seem that MT controlled items could be eligible for the ICT exception because if a recipient/user were approved under the pre-authorization process for the ICT exception, such recipient/user would likewise be approved as an end user under an export license. While we recognize that many MT controlled items are not generally eligible for License Exceptions pursuant to EAR 740.2(a)(5), there are a number of exceptions to this rule for particular ECCNs. ICT



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would be an appropriate exception to this general rule for many ECCNs, with perhaps a limitation on use for intra-company transfers between and among countries that participate in the Missile Technology Control Regime. The rigorous vetting of all participating companies under the proposed ICT rises to the level of a license review, so concerns about diversion would be minimal, even for MT controlled items.

Comment on Distinction Between Eligible "User" and "Recipient"

The distinction between eligible users and eligible recipients appears to unnecessarily complicate the vetting process for the ICT exception, as well as the compliance process. The distinction is unclear, but seems to imply that some of the entities identified in the registration of affiliated organizations will be authorized only to receive commodities, technology and/or software ("Item") from others within the registered group but (1) will not be authorized to use the Item (i.e. participate in further development of technology from the source technology or manufacture commodities from the source technology, or use a commodity received under ICT) or (2) will not be authorized to use the ICT exception to reexport or transfer (in-country) such commodities, technology and/or software to others within that same pre-approved group.

The situation contemplated under (1) above seems to negate any reason for receiving the Item. Why would one seek authorization to receive a cell phone if denied the privilege to turn it on?

Likewise, in the situation contemplated under (2) above, where the recipient is part of a group of affiliates that has been deemed "Trusted Entities", why would the ability to transfer of an Item within the group of Trusted Entities be denied to another Trusted Entity within the group, especially when it appears that the item could be sent to the same Recipient after being returned to the Applicant or a User? For Example, if Applicant A is authorized to send an Item to Recipient B and also to Recipient C – and all are within the "trusted" group of companies – it would undercut the intended efficiencies of ICT to prohibit Recipient B from sending the Item on to Recipient C; rather it appears that Recipient B would be required to return it to User A, who would then send it to Recipient C. We see no policy basis for imposing this extra leg into the transfer, since all of the companies are within the trusted group. This implies that some companies within the trusted group are less trustworthy than others.

Comment on Implementation of Eligible Applicant's ICT Control Plan

Proposed Sections 740.19(b)(2) and (3) require that each eligible user and eligible recipient implement the eligible applicant's ICT Control Plan while, at the same time,



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proposed Section 740.19(d)(1) recognizes that while the essential elements of the plan must be addressed, the manner in which they are addressed is "dependent upon the nature and complexity of company activities, the type of items that will be exported, re-exported, or transferred, the countries involved, and the relationship between the eligible users and eligible recipients..." U.S. Customs and Border Protection has recognized some of these same distinctions that would make implementation of a single security plan unfeasible across national borders and, under C-TPAT, permits security plans and procedures which, while they must meet certain minimum criteria in addressing the various elements such as physical security, personnel security, access security, and information technology security, address the security needs specific to the site involved. It is based on this flexibility that the SGL Group, through SGL Carbon, LLC's C-TPAT membership, has been able to participate in the partnership with U.S. Customs to provide for a more secure supply chain and protection of U.S. borders. Likewise, we would suggest that same flexibility in implementation of a local plan meeting the ICT requirements and utilizing an Eligible Applicant's ICT Control Plan as the guide without requiring implementation of the Eligible Applicant's ICT Control Plan.

Comment on End User Check as to Prior Employers

Proposed Section 740.19(d)(1)(ix) would require employers to screen not just foreign national employees, but also the former employers of those employees as a mandatory element of an ICT Control Plan if controlled technology or source code will be shared with foreign national employees. It is an extraordinarily burdensome requirement to require an end user list check against a foreign national employee's prior employers. The days of long-term employment with any single employer are behind us. Today's workforce changes employers frequently. With the ease of global travel and freedom of movement within the European Union and within North America between Canada, U.S. and Mexico under NAFTA, the volume of individuals that would fall under the definition of "foreign national employee" is significant. While the foreign nationality of an employee would likely be readily accessible from centralized employment records maintained to monitor eligibility for employment within the country of the employer, the checking of which would be part of due diligence for deemed exports in the export compliance process, no such records are centrally maintained regarding prior employment history. Compilation of prior employment information would require manual review of employee applications and resumés to compile such information for each individual foreign national employee.

Further, in our opinion, to deny an individual an employment or advancement opportunity requiring participation in a technology development project based on a negative end user check resulting not from the individual's prior acts but acts of a former



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employer with which he or she was associated and which check is performed solely on the basis of being a foreign national in the country of employment may constitute a discriminatory employment practice. In fact, both U.S. nationals and non-U.S. national employees that are not "foreign national employees" could have been employed at any given time by an employer whose name appears on an end user list and we fail to see the benefit or purpose of penalizing any employee and risking an employment discrimination claim based on such employee's prior employment with a restricted or denied end user.

Comment on Personnel Screening Component of Internal Control Plan

It is suggested that evidence of personnel screening procedures may include a thorough pre-screening of new foreign national employees (i.e. non-U.S. employees who are not citizens or legal permanent residents of the country in which they are employed) that should include a criminal background, driver's license and credit history check. Imposing such requirements within foreign countries may be contrary to or in violation of the legally permissible activities of an employer or prospective employer within such countries and we suggest that such recommendations contain the caveat "in accordance with and as permitted by the laws of the country of employment."

Comment on Annual Reporting

We focus again on the BIS statement that companies using "License Exception ICT would benefit because it would relieve them of some of the administrative requirements of obtaining, tracking, and reporting on individual licenses...." As indicated above, the pre-registration requirement of ECCN's for which eligible applicants/users/recipients intend to use the ICT exception merely mirrors the current licensing requirements under another name and, based on the proposed post-approval reporting requirements for ICT use, the level of detail in reporting under ICT is actually increased. We recognize the desire of BIS to track the destinations and types of technologies that may be exported, reexported, and transferred (in country) under ICT, which information would not, unlike actual commodity exports under ICT as identified in Shipper's Export Declarations, be otherwise available. In that regard, we would suggest that the pre-registration of eligible ECCN's *intended to be exported, reexported or transferred in country* (which pre-registration and pre-approval does not alleviate the current licensing process burdens) be eliminated in favor of an actual ICT usage reporting as to technology, listing the ECCN and the eligible legal entity recipient/user to whom it was disclosed.

Again, with flexibility of employment within the EU, the example provided in the opening statements regarding "foreign national employees" of a German working in France, such



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"foreign national employment" is a commonplace occurrence within both the EU and, under NAFTA – particularly to professionals such as engineers – North America. To require a reporting at the level of detail proposed, with the names, nationality, and birth dates of foreign national employees of the eligible recipient/user who had either (1) received technology in the reporting year or (2) previously received technology and left the employ of the authorized parent company structure, would be extremely burdensome, potentially violating local country privacy laws, and goes well beyond the burden currently placed on an exporter under export licensing reporting requirements.

Comment on Biennial Audit

The process for application and approval for use of the ICT exception by authorized users and recipients is clearly intended to provide the process envisioned by the DEAC recommendation for creation of a category of "Trusted Entities" that meet certain criteria. A goal of this exception expressed in the Presidential Directives is to facilitate U.S. continued international economic and technological leadership. At the present time, the EU and its member countries have adopted a General License policy that permit the free exchange between its members, which are considered trusted partners, of a wide variety of otherwise controlled technology and commodities that would otherwise require individual export licenses. Here the U.S. seems to seek a similar "trusted partnership" and proposes a process through which it can verify and assure itself of the trustworthiness of specific global organizations to conduct transactions among members of the organization in a safe, secure, and legally compliant manner. The U.S. process asks for assurance of these legal entities' intent to continue doing so in a manner of "partnership" with the U.S. government, in exchange for which the U.S. government will ease the administrative burdens associated with conducting those transactions. To conduct such a thorough review and, even after determination that the legal entities are "Trusted Entities" require that a foreign company subject itself to a regularly scheduled mandatory audit by a foreign government is contrary to the theory of "trust" and will likely be rejected by the international community.

From personal experience, having entered into and remaining validated within the voluntary partnership program with U.S. Customs and Border Protection under C-TPAT, when asked to participate in, rather than told they must submit to, a meeting to provide evidence of, review, and discuss with U.S. government agency representatives their compliance with established criteria required for participation in such a partnership program, the foreign legal entity is accommodating and extremely willing to comply with the request. Under the existing Sentinel Program, we have also found that, when approached with a "request" for access to verify end use, unrelated foreign customers have also been willing to grant such access.



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While continued participation in and receiving the benefit of the partnership is certainly linked to both the willingness of the foreign partner to acquiesce to the request and compliance with the necessary criteria, the atmosphere of partnership through random-selection verification similar to the Sentinel Program or C-TPAT supply chain validation is much better received than the authoritarian demand for audit.

Conclusion

U.S. members of the SGL Group are currently excluded from much of the development activity conducted by its EU affiliate companies regarding controlled technologies, in large part due to the burdens and controls associated with U.S. licensing requirements and restrictions. We believe that a license exception such as ICT could alleviate those burdens and concerns of our foreign affiliate companies and allow for increased participation and development of U.S. technology and innovative products. However, the time, expense, and effort necessary to meet the requirements for pre-approval of ICT usage and the post-approval process that transmits a clear message of mistrust of such pre-approved users as currently proposed make ICT unattractive and more burdensome than simply applying for licenses.

We encourage amendments to the proposed rule to make it more flexible and less cumbersome as indicated by our comments above. If we can provide any information or additional input to assist in that process, please do not hesitate to call on us.

Very truly yours,

A handwritten signature in black ink that reads "Katherine Prosser". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

Katherine Prosser
Legal Services Manager



November 14, 2008

Posted on Federal eRulemaking Portal: <http://www.regulations.gov>

U.S. Department of Commerce
Bureau of Industry and Security
Regulatory Policy Division
14th St. and Constitution Ave. NW, Room 2705
Washington, DC 20230

**RE: Request for Public Comments on Export Administration Regulations:
Establishment of License Exception Intra-Company Transfer (ICT)**

Federal Register: October 3, 2008 (Volume 73, Number 193) RIN 0694-AE21

Dear Sir or Madam:

AeA (formerly the American Electronics Association) welcomes the opportunity to comment on this proposed rule which would amend the Export Administration Regulations (EAR) to establish a new license exception entitled "Intra-Company Transfer (ICT)." This license exception would allow an approved parent company and its approved wholly-owned or controlled in fact entities to export, reexport, or transfer (in-country) many items on the Commerce Control List (CCL) among themselves for internal company use. Prior authorization from the Bureau of Industry and Security (BIS) would be required to use this license exception. The rule also describes the criteria pursuant to which entities would be eligible to use License Exception ICT and the procedure by which they must apply for such authorization.

AeA members have identified the following concerns with the ICT license exception in its proposed form:

While ICT is proposed as a license exception, in reality it is a comprehensive export management procedure, not at all structured as a standard license exception. The advantages of a license exception such as ENC are flexibility and predictability, which are closely related. Rules for use are laid out in regulations in advance and US companies that comply with them can build requirements into their business models. If conditions change, they can adjust internal procedures to accommodate them, provided that the standards of the authorization continue to be met.

While we recognize that certain classes of US or other national companies should not be eligible to use such an authorization (i.e., those controlled by target countries), this could be avoided by a simple notification procedure. As the government has opted for approval of detailed control plans, reporting, screening standards, etc., any such submissions would be considered continuing representations, meaning that business conducted under the whole authorization would be at risk if even minor changes were needed. In addition, the government anticipates issuance of conditions, which limits the usefulness of the license (exception) even further.

In practice, there is little difference between the Special Comprehensive License procedure and this ostensible license exception, although more geographies and ECCN's are theoretically eligible. We would note that the SCL is rarely used for the reasons outlined above.

Examples of how an ICT license exception should operate are found in the ICP requirements for physical security and Infosec. Ways in which companies address these issues are very dynamic. Government approval of specific measures is inappropriate; even review places an unacceptable burden if changes require further review and approval by the interagency process. Specifics outlined in the rule for certain control elements (e.g., credit checks for employees) may be completely irrelevant in some environments.

We do not believe that recording the first transfer of restricted data is onerous. However reporting this data to BIS might violate an organization's Technology Control Plan, which in many cases places strict confidentiality ("need to know") limits surrounding technology the organization is involved with.

Requirements to report at the individual-employee level will cause unintended consequences. Due to the strict European privacy regulations, we foresee ICT licenses being granted to subsidiaries in Country Group D1 destinations; while license conditions might prevent transfers of the same technology to European subsidiaries and other Country Group B destinations, since in these latter destinations the reporting of individual employee citizenship and employment status is protected by regulation.

In addition, industry views reporting requirements serving no purpose. Activities are subject to audit and the immense amounts of data transmitted to BIS for this authorization could not be processed or analyzed in any useful way. Companies are already subject to recordkeeping requirements that are subject to audit.

Finally, the requirement for biennial audits for all facilities is gratuitous. BIS already has the authority to conduct audits as needed when there is reason to believe there are compliance issues, as is the case today for license exceptions like ENC.

Fundamentally, the BIS approval process coupled with the level of detail required for the submission makes individual IVL'S and site licenses more logical than the company-wide ICT. With a series of IVL's and FN reviews for deemed export, approval and

conditioning is dealt with in specific, compartmentalized circumstances. While difficult to administer, this decreases the risk that issues arising in one area would cause delays or interruptions in business in a range of others.

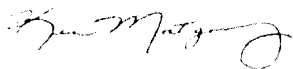
AeA recommendations for improving the ICT license exception proposal include the following:

- Make the license exception as self-executing as possible. This includes enabling companies to flexibly qualify for the ICT exception via their existing compliance procedures as opposed to having to comply with rigid and new requirements for control plans, screening, self-evaluation, “mandatory” voluntary disclosure, etc. In sum, ICT requirements should be as non-redundant as possible with respect to existing compliance practices.
- Eliminate the requirement for reporting, since ICT license exception holders would otherwise be subject to recordkeeping that is subject to audit.
- Ensure that government authority to revoke the ICT license exception is not used frivolously, since revocation is a single point of failure that could severely harm a company’s global intra-company operations.
- Establish a requirement for the US government to approve ICT applicants within a 30-day time frame.
- Ensure that the ICT license exception avoids IVL-type conditions to the maximum extent possible, since the predicate for ICT is that companies will have compliance programs in place to prevent unlawful reexports or re-transfers outside intra-company perimeters authorized under this license exception.

As a result, we would conclude that this proposal provides little value added over the existing system, and does not address the competitive needs of globalized US operations.

AeA members appreciate the opportunity to provide comments on the ICT license exception proposed rule, and stand ready to work with BIS in making modifications which will make the ICT more beneficial to industry.

Sincerely,



Ken Montgomery
Senior Director, International Trade Regulation



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November 17, 2008

Mr. Steven Emme
U.S. Department of Commerce
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Regulatory and Policy Division, Room 2705
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VIA Federal Express and E-Mail

ATTN: RIN 0694-AE21

RE: Comments on Proposed License Exception Intra-Company Transfer ("ICT")

Dear Mr. Emme:

E.I. du Pont de Nemours and Co. ("DuPont") appreciates this opportunity to comment on the Department of Commerce, Bureau of Industry and Security's ("BIS") proposed amendment to the Export Administration Regulations ("EAR") to establish a new Intra-Company Transfer ("ICT") license exception. DuPont lauds the President's Directive to reform the export control rules and DuPont submits these comments to urge BIS to revise the terms of the proposal to more faithfully implement the true spirit and intent of the President's Directive. For an ICT License Exception to satisfy this intent, and the reasonable expectations of the exporting community, it should be less burdensome and rigid than Individual Validated Licenses ("IVLs") or Special Comprehensive Licenses ("SCLs"). The proposal as published does not meet this standard and must be revised if it is to be attractive and useful to companies like DuPont.

I. DuPont's Stake in the ICT

DuPont was founded in 1802 and is a world leader in science and engineering. DuPont has over 60,000 employees and operates in more than 70 countries. Furthermore, DuPont has 40

research and development laboratories in the United States and another 45 such laboratories located in 11 other countries. DuPont is constantly exploring ways to administer this vast and important research network while enhancing cooperation among these laboratories. The better DuPont can be at this process, the more competitive it can be in developing and offering a wide range of innovative products and services in the global marketplace, including agriculture, nutrition, electronics, communications, safety and protection, home and construction, transportation, and apparel. Our annual statistics and studies regularly indicate that the more successful we are in developing and marketing our products around the world the more U.S. jobs we create and keep.

As a large U.S. parent company with subsidiaries located throughout the world, DuPont should be an ideal candidate for use of the ICT license exception. DuPont now routinely obtains approximately eight IVLs annually for exports of controlled items and technologies between its businesses for joint research, development, and testing, the production of pre-cursor materials, the development of commercial end-products, and the related equipment and processes necessary to such efforts. The IVL application process, requirements and limitations, however, actually limits the degree of cooperation and interrelationships between such entities as businesses prefer often to avoid even these additional efforts and costs – thus crucial potential synergies are lost. In two further examples, the ICT license exception could be of great benefit to DuPont in its emergent collaborative efforts with its Swiss and European operations in the development of protective materials (controlled for NS and RS reasons) used to shield both buildings and individuals from a variety of natural and man-made threats, and in its efforts with its Brazilian operations to develop more efficacious production and equipment (controlled for CB reasons) for biofuels. Both of these areas are of great import not only to DuPont, but to the economic and security well-being of the nation as a whole. And in a particular ironic consequence of export controls, foreign nations have significant potential contributions if not leadership in these areas that become more difficult and expensive for DuPont to leverage because of the export control restrictions on the U.S. contribution to these efforts. DuPont therefore, finds little value in the ICT exception as proposed because the compliance burdens imposed – such as the audit, recordkeeping, and reporting requirements – greatly outweigh any anticipated benefit.

II. Introduction

The proposed ICT license exception originates from the President's U.S. Export Control Reform Directives¹ and recommendations issued by the Deemed Export Advisory Committee ("DEAC").² As originally conceived, an ICT license exception would allow parent companies and their foreign subsidiaries to export, reexport, or transfer controlled commodities, technologies or

¹ See U.S. Export Control Reform Directives, The White House, Office of the Press Secretary (Jan. 22, 2008), available at http://www.bis.doc.gov/pdf/us_export_control_reform_directives.pdf.

² See The Deemed Export Rule in the Era of Globalization, Submitted to the Department of Commerce, The Deemed Export Advisory Committee (December 20, 2007), available at <http://tac.bis.doc.gov/2007/deacreport.pdf>.

source code among themselves without having to obtain Individual Validated Licenses either on a transaction-by-transaction or a project-by-project basis. Because there is an existing set of legal and security obligations within the corporate setting – legal ownership and control with parents located in countries of shared multilateral regime membership, inherent restrictions on access to and transfers of proprietary technology, etc. – the concept of the ICT license exception gained ground and captured the imagination of the President, the DEAC, and industry. Industry would clearly support the President’s and BIS’ efforts to balance the legitimate dual interests of lowering export controls on routine, minimal-risk transfers of controlled commodities and technology while continuing to safeguard the interests of national and global security and the objectives of allied foreign policies.

Unfortunately, the proposed ICT fails to meet this goal because it goes well beyond the existing obligations imposed under IVLs. Instead, it imposes even greater compliance burdens on parent and subsidiary companies it seeks to aid. And it imposes those burdens on both the exporting U.S. parent (or subsidiary) as well as those foreign subsidiaries (or parents) that may be located in the most trusted countries – those who are members of the same multilateral export control regimes as the U.S. as on those that are not.

Under the proposed ICT license exception, U.S. exporters would also be exposed to greater potential liability for re-exports than what exists for transfers conducted under the authority of an IVL. Under an IVL, the exporter’s responsibility is limited to the initial transfer of the technology. After an exporter notifies the recipient of the item or technology’s control status, and the prohibitions against further transfer or re-export, it becomes the recipient’s responsibility to ensure further compliance with the EAR. Absent some special knowledge on the part of the exporter, liability for any diversion thus lies solely with the recipient. Under the ICT, however, the whole corporate entity becomes responsible for any diversions or violations that may occur no matter how minor – including failing to provide a required report regarding the retirement of a “foreign national” employee or other similar administrative violations. Furthermore, under the proposed ICT license exception, subsidiaries of U.S. companies in E.U. and non-E.U. Europe – which generally should pose the least national security or foreign policy concern to the United States – will face the greatest challenges in implementing the ICT’s requirements due to conflicts with European privacy and discrimination laws.

III. Conflict between the ICT Requirements and E.U. Privacy and Human Rights Laws

The ICT license exception as proposed presents another set of challenges for exporters, challenges that could not arise under IVLs. These challenges arise from the strong privacy and antidiscrimination laws in Europe. Exporters using ICT would be required to report to BIS annually the name, date of birth, and nationality of all “foreign national employees,” as defined uniquely by BIS, who have received controlled technology and source code exported pursuant to the exception. In addition, the license exception requires a pre-screening analysis of new foreign national employees who will be exposed to controlled technology, which includes a criminal background check, driver’s license check, and credit history screening. These requirements, and

the reporting of this data to the U.S. Government, not only go beyond what most businesses already undertake but will either run afoul of various E.U. and European privacy and discrimination laws, or at the very least, impose significant costs on businesses to ensure that they do not. Even the expense of convincing E.U. regulators and the European employees of those businesses will carry significant costs that could be avoided through the use of IVLs.

A. E.U. Privacy Law

In the E.U., national data protection laws restrict the circumstances under which an individual's "personal data" may be collected and used by organizations.³ "Personal data" generally includes any information capable of identifying a living individual – such as that required to be reported under ICT – and may only be collected and used for purposes of compliance with foreign law (*e.g.*, compliance with ICT) if a company adopts a valid "data transfer system." Valid data transfer systems for multinational companies typically involve one of the following four legal mechanisms: (1) the adoption of intra group "data transfer contracts"; (2) certification by the U.S. entity that it is in compliance with Commerce's safe harbor scheme, which imposes data handling restrictions on the U.S. recipient entity; (3) adopting an organization-wide legally binding code of conduct mandating the safe handling of personal data which must then submitted to E.U. regulators for approval; or (4) the written consent of the individuals involved. With the exception of the consent approach, these mechanisms will permit the transfer of personal data within a multinational entity, but they will not allow the transfer of such data to the U.S. Government.

Under the consent approach, the collection of personal data for compliance with a U.S. law ordinarily is not permissible unless the organization informs and obtains consent from all affected employees. In most of Europe, however, the relevant national privacy laws presume that employees have little bargaining power in the employment context, so consent is often regarded as not being "freely given" and accordingly may be considered by European authorities as invalid. U.S. companies wishing to use the ICT license exception to transfer controlled technology to subsidiaries in the E.U. therefore, are left with a Hobson's choice: attempt to obtain consent to the transfer from the relevant data protection authorities (which is a time consuming, uncertain and unreliable process), or breach E.U. or local law. Accordingly, U.S. exporters will be better off relying on IVLs for intra-company transfers which do not trigger such privacy concerns or carry the risk of having all of its additional compliance efforts and expense go for naught.

B. E.U. Discrimination Law

Compliance with the proposed ICT license exception would also violate E.U. and/or local European discrimination laws, as it treats nationals of the E.U. differently depending on where they reside. Under ICT, foreign national employees "are those non-U.S. national employees, wherever located, who are not citizens or legal permanent residents of the country in which they work." The ICT imposes a screening requirement with respect to foreign nationals who are not nationals of the

³ See Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

country in which they are employed, but not to foreign nationals who work in their country of nationality. Accordingly, the proposed license exception treats, for example, Italian nationals working in France differently than French nationals working in France. This disparate treatment may be seen by E.U. nationals and/or authorities as violating E.U. discrimination laws and therefore would discourage U.S. exporters, such as DuPont, from using ICT for transfers of technology to subsidiaries located in the E.U. No U.S. parent company is going to want to be the first to face such legal challenges from either their E.U. employees or E.U. national authorities.

Because DuPont would not be able to uniformly and consistently comply with E.U. privacy and discrimination laws, related national laws, and the requirements of the ICT without significant risk of legal challenge, DuPont will be forced to continue to obtain IVLs for exports that should otherwise logically be permissible under a true license exception – particularly one that specifically concerns the transfer of proprietary technology between related parents and subsidiaries in allied - often NATO - countries that, again, are parties to the same multilateral export control regimes. The threat to national or global security of deemed re-exports under such circumstances hardly seems to justify these requirements.

IV. The Proposed ICT Is A More Restrictive Form of the SCL and is, Therefore, of Even Lesser Value to Exporters than BIS Predicts

Under the EAR, BIS maintains the Special Comprehensive License. Like the Distributor's License and previous incarnations of "bulk" licenses the SCL is posed as a means to eliminate multiple IVLs. The SCL is intended to benefit those exporters that have large-scale export business, to allow for re-exports between subsidiaries or distributors and to reduce the related export and re-export licensing burdens. Unlike those previous forms of "bulk" licensing however, both the SCL and the proposed ICT require all end-users and in-country transfers to be individually and specifically authorized and approved. Further, SCLs require periodic audits, reporting and repeated revisions of reformed compliance programs to address shifting U.S. Government concerns. As a practical matter therefore, the SCL is actually more burdensome and costly than seeking multiple IVLs with overlapping end-users. The SCL regime is a well-intentioned one that has proven to be ineffective and over-burdensome in practice.

As proposed, the requirements for operation under license exception ICT are even more restrictive than the alternative of using multiple IVLs is therefore, all too similar to the SCL. BIS has found that between 2004 and 2006 approximately 200 companies obtained licenses that could qualify for the ICT. This suggests a real need for an alternative to multiple IVLs. However, the lesson of the SCL does not support the proposed solution; there is a reason that there are only about a dozen SCLs currently in use. Furthermore, the proposed ICT format is, in a number of ways, even more restrictive than the SCL. First, it imposes stricter compliance and reporting requirements on in-country transfers. Second, it is limited to entities headquartered in just 38 countries. Third, while both the ICT and an SCL require control plans (to ensure that controlled items are not exported, re-exported or transferred within country in violation of the terms of the "bulk license"), the ICT control plan imposes additional burdens, including:

- (1) a requirement to obtain non-disclosure agreements from all non-U.S. national employees who receive controlled technology or source code;
- (2) a restriction on the usage of other license exceptions;
- (3) a requirement that foreign companies screening their “foreign national” employees (employees not of local nationality) against U.S. end-user lists;
- (4) a requirement of annual reporting of “foreign national” employees who receive controlled technology;
- (5) the imposition of a self-evaluation program;
- (6) the requirement of an additional letter of assurance for software and technology; and
- (7) the imposition of regular biennial audits.

V. DuPont’s License Exception Recommendations

DuPont’s recommendations flow from a simple premise: compliance with the ICT license exception should be less burdensome than obtaining Individual Validated License export or re-export authority for transfers to unrelated third parties. This is especially so when the parties are related, one controls the other, the parties have significant commercial imperatives to protect their commodities and technology from transfer to un-related third parties, and the parties themselves are located in nations where concern of diversion and misuse is substantially lower. DuPont respectfully offers the following suggestions to bring the ICT license exception more in line with the President’s Directive and the DEAC’s recommendations.

A. Authorized End-Users and Recipients of Controlled Items and Technology

In the place of the proposed ICT license, we recommend that BIS adopt an approach that combines elements of the License Exceptions for Technology and Software Under Restriction (“TSR”) and Shipments to Country Group B Countries (“GBS”) license exceptions extended to a broader scope of commodities and technologies, most controlled for non-NS reasons. Under TSR and GBS, eligible items and technology may be exported to any country or person whose nationality is listed in Country Group B; the items or technology may then be re-exported to any country or nationality except those identified in Country Groups D:1 or E:2. These license exceptions only require a Letter of Written Assurance from the recipient with no additional tracking, reporting (for deemed exports, re-exports and “deemed re-exports), or auditing requirements – and no added liability on the part of the U.S. exporter. Under the ICT, however, eligible parent companies are responsible for the actions of their foreign subsidiaries, even those located in trusted countries who are members of same export control multilateral regimes, for even minor, administrative violations such as failing to report the retirement of an authorized end-user employee. These additional obligations and liabilities under the ICT are inconsistent with to the President’s Directives, and the DEAC’s recommendations, that call for export control reforms that allow trusted entities to more easily share information with foreign subsidiaries.

The ICT license exception would be far more efficacious – less burdensome on exporters yet as effective from a compliance standpoint – if BIS were to merely require exporters to identify the parties, products and technologies involved in the transfers and to limit the end-users to entities

and their employees who are located in, and nationals of, Country Group B countries. Strict reporting and tracking of transfers should only be required for entities located in, and employees who are nationals of, countries in Country Groups D (or in the alternative, not in or of Country Group B). Stricter compliance and control plan elements could be separately negotiated between BIS and the applicant for the authorization of transfers outside this Country Group.

We note for comparison that under the Technical Assistance Agreement requirements of the Department of State, the Directorate of Defense Trade Controls will permit retransfers of technical data controlled under the International Traffic in Arms Regulations (“ITAR”), without condition, to *unidentified* employees of *unrelated* foreign third parties who are exclusively nationals of NATO countries, E.U. countries, Australia, Japan, New Zealand or Switzerland. It simply does not make sense for the ICT to be more restrictive than licensing under the ITAR. Nor does it make sense to control exports in the same overly restrictive fashion from a national security, foreign policy or business perspective when one compares the list of countries named under the proposed Supplement 4 to Part 740, who are all members of all the multilateral control regimes, as well as the remainder of those listed in Country Group B from the more obvious countries of concern listed in the Country Groups D:1 through D:4 in Supplement 1 to Part 740.

B. Other Requirements

Some of the proposed mandatory elements of the ICT license exception are reasonable: requiring a demonstrated corporate commitment to export controls, data and physical security, employee screening, and training and awareness programs. These elements should not, however, be defined by regulation but instead be based on best business practices that are subject to review, and bolstering as necessary, by BIS upon application. The degree of bolstering should depend on the specific circumstances, commodities or technologies as well as the location of non-Country Group B subsidiaries under mutual consideration during the application process.

The voluntary disclosure, periodic self-evaluation, annual reporting and **biennial** audit requirements should be eliminated completely. Under the proposed ICT license exception as published, a company “should” voluntarily self-disclose violations of the ICT. This requirement, however, in obvious combination with the audit requirement, arguably imposes an affirmative obligation to disclose any level of violation, so that disclosures in the context of the ICT would in fact not be voluntary. Assuming BIS’s current enforcement policy, where voluntary disclosures may or may not be subject to significant financial penalty on bases that are not transparent or predictable, disclosures of violations of the ICT should not be mandated. Furthermore, reviewable self-evaluation programs and annual reporting requirements merely add additional compliance costs and redundancy greater than the harm they seek to cure when these same concerns can be sufficiently addressed through the other elements of a robust internal control program and discovered via internal and/or BIS audits. It would simply be more reasonable and less burdensome if facilities located in trusted countries (*e.g.*, Country Group B countries) were exempt from these extraneous requirements. Last, the biennial audit requirement is also administratively burdensome and unnecessarily costly to both applicants and regulators. Instead of regular audits, BIS should conduct random, unplanned company audits and visits similar to Post Shipment

Verifications under BIS Individual Validated Licenses or State Department visits under the Blue Lantern Program.

VI. Conclusion

DuPont appreciates BIS's significant efforts in seeking to provide a license exception that aims to protect our country's national security, non-proliferation and foreign policy interests while not unduly burdening industry in the competitive global research, development and market places. We hope our comments will assist BIS in establishing an ICT license exception that is more aligned with the President's Export Control Reform Directive and the DEAC's recommendations - one that is more effective and streamlined and less burdensome on both industry and BIS. We appreciate BIS's consideration in this rulemaking process.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark E. Segrans". The signature is fluid and cursive, written over a white background.

Mark E. Segrans
Senior Counsel



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November 14, 2008

Mr. Steven Emme
Regulatory Policy Division,
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Department of Commerce, Room 2705
14 St. and Pennsylvania Ave. NW
Washington, DC 02030
Attn: RIN 0694-AE21

Re: Establishment of License Exception Intra-Company Transfer (ICT),
(Docket 071213838-81132-01), Federal Register, October 3, 2008, Volume
73, No. 193.

Dear Mr. Emme,

Sun Microsystems, the world's leader in networked systems, welcomes the opportunity to comment on this initial draft of BIS's License Exception Intra-Company Transfer (ICT).

Sun has long recognized the need to facilitate the transfer of technical data within U.S. companies. We applaud the Department of Commerce, as well as the other interagency participants, in the production of this proposal to address this problem for technologies in addition to encryption. However, we are disappointed to note that essential features of the long-standing and successful model for such a license exception, ENC, are hardly in evidence in this draft. As a result, much work needs to be done to make ICT relevant and useful.

In principle, most technologies that are needed for the development, production and maintenance of controlled dual-use items are available to subsidiaries of U.S. companies in non-embargoed countries, and to their non-U.S. national employees in the U.S. and abroad. However, some subset of these transfers must currently be accomplished under some form or validated authorization. These may include individual validated licenses for deemed re-export, "site" licenses for individual facilities, foreign national reviews for deemed export, special comprehensive licenses, and others.



Companies can and do avail themselves of these authorizations. However, as is the case with all validated authorizations, these carry the significant disadvantages of:

- Unpredictability- while only a very small percentage of applications is denied, denial must always be considered as a possibility and could result in a repeat of the application process under different conditions.
- Lack of flexibility- the authorization is specific to a particular person, place and set of business conditions; even a minor change requires repetition of the entire process.
- Conditioning- conditions can be extremely detailed and degrade the flexibility of the license. Sun, for example, has been asked to specify details as granular as the types of locks provided on specific doors of overseas facilities for site license approval. Again, any future modification, including those on unanticipated insignificant details, would require repeat of the entire licensing process.
- Delay- while it is commonly believed that the only delays involved in licensing involve the interagency review period (which on average has improved in recent years), the need to collect required detailed data for some types of license is also an important factor.

License exceptions normally address these disadvantages, while retaining a structure of control. Eligibility in terms of technical scope, geographic availability, and conditions of use are spelled out in advance. Users are subject to explicit EAR recordkeeping requirements, and may be subject to audit at any time. While the user is squarely responsible for meeting the terms of the license exception, adjustment of the details of execution may be made quickly as business conditions and technologies change. Unlike license approval, which is essentially a serial process, companies can prepare for contingencies in advance that meet the requirements of the license exception.

A license exception approach is the ideal control format for technology transfers, which are ongoing and quickly changing. In the context of research and development, it is often hard to predict how and when a specific individual may need access to a particular licensed technology; contingency access may be necessary precisely because of unforeseen problems. The inability of an individual or group to participate in a discussion of a particular problem or product may be the difference between bringing a competitive product to market or failing to do so.



Complicating this issue is the typical structure of intracompany employee communications, which is now built on safeguarded internal networks with access controls. While actual controlled technologies represent a small subset of potential internal communications, a series of complex internal firewalls must be constructed to restrict access of certain technologies to employees in certain geographic areas and of certain nationalities. The fact that the lines separating controlled and decontrolled technologies is often ambiguous and subject to interpretation exacerbates the difficulty of constructing and maintaining such systems.

These issues were considered in the creation of license exception ENC, which permits internal transfer of cryptographic technology within U.S. firms. This model has been very successful, and in our opinion, has been an important factor in maintaining the dominance of U.S. companies in encryption products in the last decade.

The present draft of License Exception ICT exhibits features of a Special Comprehensive License rather than ENC. The proposal does address a wide range of technologies, products and geographic areas. However, we fear that the desire to broaden its scope has resulted in many license-like restrictions that make ICT an illogical choice for intracompany technology transfers in many industries.

As example, while Sun recognizes the usefulness of knowledge by the Government of users of the License Exception, this could be accomplished by a detailed notification rather than an approval process. This notification could include ECCN's and subsidiary entities eligible for use of ICT, and serve as a basis for a notice of ineligibility if necessary and for future government review. However, a formal application process at the level of detail specified in the control plan elements, along with the intent to condition any specific characteristic or activity, is extremely problematic.

The level of detail required for the ICT control plan submission is unprecedented, and exceeds that specified for the Special Comprehensive License in Part 752 of the EAR. As an example, descriptions of physical and IT security are a mandatory part of the ICT submission.

Moreover, while references exist in this proposal to amend the ICT submission by changing eligible entities and adding or subtracting ECCN's, there is no attempt (as there is in existing SCL provisions) to differentiate material vs. non-material changes in the control plan or other data submitted for review. As a result, all information might be interpreted as a continuing representation, and a change as insignificant as changing a lock in an overseas facility could invalidate use of the authorization.



While this may not have been the intent of the draft, use of this authorization in its current form would, in our opinion, create an unacceptable level of uncertainty in the global operations of businesses in our industry. As a result, most companies would be well advised to compartmentalize the uncertainty posed by these requirements by applying for multiple, site-specific or person-specific authorizations, as is typically done today.

We would also comment on the biennial audit requirements under ICT, which appear to be redundant in view of self-certification requirements, mandatory recordkeeping requirements, and potential for discretionary audits.

Sun recognizes that the overall structure of this authorization may have been designed for some types of U.S. industry where product cycles are not dynamic and where the national security risk of adverse transfers is substantial for single transactions in normal business activities. However, in our opinion, these conditions do not apply in most information technology businesses.

Sun suggests that a distinct authorization be developed for the IT industry, limited to the internal transfer of technology and software in those ECCN categories (primarily Category 3 and 4). This license exception should be similar in structure and no more restrictive than License Exception ENC, and could be executed via an addenda to the existing License Exception APP.

We cannot overemphasize the importance of a solution to the problem of outdated controls on intracompany technology transfers. Globalization of corporate activities, the complexity of communication, the dynamic nature of product development and the increasing capabilities of foreign competition have created the need for a more adaptable approach to technology controls within U.S. IT enterprises. The current system places a substantial drag on the efficient management of modern global companies, and can be greatly improved without harm to the national security of the United States.

Sun is grateful for this opportunity to comment, and stands ready to work with the Department to develop control tools that will ensure continued U.S. leadership of the IT industry.

Sincerely,

Robert Rarog
Export Policy Manager
International Trade Services,
Sun Microsystems



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November 17, 2008

Mr. Steven Emme
Office of Exporter Services
Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce
14th St. and Pennsylvania Ave., NW Room 2705
Washington, DC 20230

Attn: RIN 0694-AE21

Re: Comments on Proposed EAR License Exception Intra-Company Transfer (ICT),
73 Fed. Reg. 57,554 (Oct. 3, 2008)

Dear Mr. Emme:

Tokyo Electron U.S. Holdings, Inc ("TEL US"), is pleased to submit to the Commerce Department's Bureau of Industry and Security ("BIS") the following comments on the proposed new Export Administration Regulations ("EAR") License Exception ICT.

Introduction and Overview

TEL US is the holding company for United States-based subsidiaries of Tokyo Electron Limited's ("TEL"). These companies include not only TEL US, but also Tokyo Electron America, Inc., TEL Epion, Inc, TEL Technology Center America, LLC, and Timbre Technologies, Inc. These companies are engaged in the sales, service, manufacturing, and research and development of equipment used to manufacture semiconductors ("SPE"). TEL is the second largest manufacturer of this equipment and has operations worldwide. TEL's US operations work collaboratively with engineers in Japan and other parts of the world to assure TEL's products are leading edge and meeting the demands of the semiconductor manufacturers it serves. The products made by TEL are designed and used to manufacture wholly commercial and civilian electronic devices that are mass produced and mass marketed.

TEL US, and TEL, support sensible, well-designed and implemented export controls as needed to preserve U.S. security interests as well as its strategic allies and trading partners such as Japan. Furthermore, we support recent improvements in U.S. export controls, including shortening of EAR license application processing periods and the validated end-user initiative.

We view this proposal as a positive direction but would also encourage BIS to engage its Wassenaar partners and conduct a complete review and reform of the current export controls, particularly semiconductor production equipment as found in category 3 of the US CCL. Many current controls appear to be largely unnecessary. We cannot

see how the unlicensed dissemination of commercial, civilian SPE products and related technologies can harm national security of the U.S. and her strategic allies. Our industry as a whole is unaware of any U.S. government analysis to support the rationale for these controls. TEL, and our competitors, produces semiconductor production systems which are highly visible and sold to a relatively small group of semiconductor manufacturing companies. That they are straightforward to monitor and track makes the argument for controls on them unconvincing.

It may seem unusual that a Japanese-owned company would support efforts by the U.S. Government to lessen the burden on US Exporters, many of which are competitors; however, TEL US views the ICT as an opportunity to improve efficiencies in our global intra-company operations both in the export of items but also in the transfer of controlled technologies. The United States is TEL's second largest market. There are also significant research and development activities occurring here in the United States that often involve employees from TEL's Japan operations. The possible use of ICT to transfer controlled technologies that may result from these research activities is of particular interest.

Consequently, TEL US supports the concept of license-free treatment for exports and re-exports among members of a corporate family. Given that a single set of owners and senior management controls the corporate family, there is no need to license exports and re-exports between members of the corporate family. Intra-company license-free treatment could enable the company to substantially to reduce unnecessary costs associated with licensing of transfers of parts, components, software and technology among subsidiaries and other affiliates.

We are, however, concerned about the workability of the proposal and fear that the many requirements of the ICT may outweigh the expected benefits. Whether the initiative will fulfill its promise depends on whether shortcomings in the proposed regulatory text are corrected and whether the license exception is administered in a constructive manner.

License Exception ICT: Issues and Recommendations

ICT has enormous potential to improve our operations but we are concerned that the proposed license exception will be encumbered by costly and time-consuming conditions and restrictions to such an extent that it is not an improvement over transaction-by-transaction licensing. We urge BIS to consider the issues raised and recommendations set forth below in the interests of making License Exception ICT a useful option with mutual benefits.

Application and Approval Process

Any need to obtain U.S. government approval to secure license-free treatment tends to make the new policy more like a licensing arrangement than a license exception. Questions are raised, then, whether the new policy is an improvement over current

licensing policies. We do, however, understand the logic behind the application and approval process but it is critical that the ICT application and approval process be straightforward, streamlined, flexible, and expedited.

Proposed sections 740.19(e) and (f) would not assure a workable application and approval process. For example, the need for "documentation showing implementation" of control plan elements (740.19(e)(v)) could be overly costly and time-consuming. In addition, the identified processing procedures cannot be counted on to result in streamlined, expedited processing of applications (740.19(f)(1)).

Identity of "Eligible Applicant"

We are pleased to read in the proposal that non-US based parent companies would be considered as an eligible applicant if they met the additional requirements including being incorporated in, or principal place of business, in one of the countries listed on supplement no. 4 to part 740. However, the requirements placed upon the eligible applicant's parent company would present challenges for companies based outside the United States to the extent that burdensome and uncertain commitments must be made by the applicant. Non-U.S. parent companies will tend to view those extraterritorial requirements as involving too much cost and legal risk.

We would suggest including an option to allow the US-subsubsidiary of the foreign parent company to be considered an eligible applicant if the parent and the US subsidiary can establish the existence of agency relationship where the US subsidiary is authorized by the parent company to accept service of process. This would be analogous to US Customs' Entry by Nonresident Corporation provisions (ref: 19 CFR 141.18) which allow a nonresident corporation the ability to be the importer of record even though they have no presence in the United States other than an agent who has agreed to accept service of process. Of course we realize, from US Customs perspective, there is a revenue concern so the additional requirement of this regulatory provision is the posting of a bond. Loss of revenue would not be of concern in the case of an export.

Under this option, the application process should factor in the strength of the export control regulatory body within the parent company's home country (i.e., Japan's METI-Ministry of Economy, Trade and Industry) coupled with the corporations' internal controls for export control in general and other controls such as intellectual property controls, employment screenings, and physical and information systems security practices. If the combination of these factors provides BIS sufficient evidence that the parent company has strong controls and the government of the home country of the parent company exercises sufficient regulatory oversight of export controls, then BIS should grant the US subsidiary status as the "Eligible Applicant" under this scenario. The US subsidiary would then be the responsible party for conducting internal audits, screenings, filing reports, and the focus of the biannual audit by the BIS. In the event BIS suspects violations of the EAR has occurred within the ICT-Eligible corporate family, the enforcement actions would start with the US-subsubsidiary.

Scope of License-free Treatment

BIS should ensure that the scope of license-free treatment under the License Exception ICT is sufficiently broad to make the program useful. Scope restrictions that could make ICT not useful include limitations on: 1) coverage of items to be exported and reexported, 2) coverage of members of a corporate family and their employees, and 3) availability of other EAR paths for license-free treatment. We recommend BIS remove the proposed provision that would withhold ICT coverage for Encryption Items (740.19(c)(6)) and the provision that would eliminate coverage by License Exception APR of items previously exported or reexported under ICT (740.19(c)(3)). As a related matter, it would be helpful for the final rule expressly to establish that items exported or reexported under ICT may subsequently be reexported under a license exception if the subsequent reexport comports with the terms of the license exception. Finally, we see no legal basis for EAR licensing of non-export/reexport in-country transfers and recommends elimination of all references to them.

Employees

We are extremely pleased with BIS's proposed non-technical definition of an "employee" of an eligible user or eligible recipient (772.1). The proposal helpfully specifies that the definition would cover not just individuals who are employees within the meaning of labor laws, but also "contractors" and "interns" who function like employees. We urge the BIS to reinforce that the definition would also include other types of agents if they perform at the direction of the company.

Non-disclosure agreements ("NDAs") with all non-U.S. national employees should not always be a condition for approval (740.19(b)(3)(ii)). At minimum, there should be flexibility for the BIS to issue ICT approvals without NDAs for all non-U.S. national employees if the circumstances warrant. An NDA should be required only if there are circumstances that indicate a concern about diversion. We would also suggest the proposal provide some flexibility in the structure of the NDA such as allowing an addendum to the corporations' standard NDA forms that specifically addresses the agreement not to release controlled technology in violation of the EAR and the duration of the binding of the agreement extending beyond the employees employment with the company as detailed in the proposal.

Internal Use Standard

It is critical that the limitation of ICT to exports and reexports for "internal company use" not be overly restrictive. The final regulation should expressly establish that internal company use includes export or reexport of a part or component for incorporation into a product that will be sold internationally.

Certification

ICT approval should not be conditioned on certifications that the corporate family is in compliance with ICT (740.19(h)(1)(iii)), except perhaps in special circumstances. Given uncertainties about interpretation and implementation of the regulations, the legal risk involved in such certifications is too large a burden for company officers to incur. Such certifications are generally not required in connection with other forms of export and reexport authorization. As is normally the case, the obligation to comply with legal requirements should be adequate.

ICT Control Plan

We would like to see the ICT control plan requirements be less rigid. We feel that applicants should be given an internal control standard (i.e, COSO, ISO, etc.) that BIS expects the internal control plan of the applicant to meet. As part of the application review, BIS would evaluate the ability of the applicant's control plan to address the control elements needed to meet and maintain compliance with the requirements of ICT. Then, if needed, BIS should work with the applicant to help them address areas of the internal control that BIS feels are not adequate to meet the ICT requirements and EAR. This should be a collaborative effort because of the mutual benefits the ICT has for both the exporter and BIS. Inadequacies of a company's controls should not be immediate grounds for rejection of the application for ICT, but rather an opportunity for both parties to work out a suitable compromise.

Companies should have discretion in determining how best to ensure compliance. They know best how to develop and implement an internal control plan that meets their business operations as well as maintains compliance with the ICT and the EAR. If the proposed requirements of section 740.19(d) become law, it will make ICT more like a licensing arrangement than a license exception and prove to be a disincentive to pursuing ICT.

Obligation to disclose EAR violations

On particular requirement of the proposed ICT, that the control plan obligate the applicant to report *any* type of EAR violation to the government through the voluntary self-disclosure process (740.19(d)(1)(vi)) is the type of overreaching that could make the ICT initiative unsuccessful. Disclosure of trivial, technical irregularities would often not be helpful to the company or the government and an understanding among company staff that reported infractions will necessarily be disclosed to the government would tend to chill disclosure to management by staff. The proposed arrangement would render the EAR self-disclosure program non-voluntary, which would beg the question as to its legality under current EAR self-disclosure regulations.

Reporting and Recordkeeping

We believe that the proposed annual reporting requirement is unnecessary and burdensome. Approved companies would have to provide detailed information about, among other things, *former* employees who have received information under License

Exception ICT (740.19(h)(1)(ii)). Tracking the information at issue in a form needed for reporting to the BIS would add substantially to costs and make ICT considerably less useful. There may also be national privacy laws that prevent the release of the personal information required by the proposal such as a person's date of birth.

Limited recordkeeping requirements would be adequate to serve the objectives of reporting. Even as to recordkeeping, though, it is important to keep company obligations at a reasonable level. It might be appropriate to ensure that companies maintain records that identify foreign national employees who had accessed information under License Exception ICT. But it is too much to expect companies, as seems to be proposed, to track precisely what information was disseminated to which employees.

Auditing

The BIS should clarify that exporters that avail themselves of ICT will not be subject to intrusive auditing policies. We believe there is no need for a policy of auditing beyond the BIS's normal enforcement practice. A special program of audits once every two years and special, unannounced auditing would tend to make ICT unworkable in comparison to conventional licensing.

Conclusion

As described above, we support the concept of license-free exports among the members of corporate families. But we urge that the proposed regulation be improved and implemented appropriately such that an ICT license exception would represent an improvement over current EAR arrangements. Thank you for the opportunity to comment on the proposed rule

Please feel free to contact the undersigned if you have questions regarding these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Craig McClure". The signature is fluid and cursive, with a long horizontal stroke at the beginning.

Craig McClure
Program Manager, International Trade Compliance
Tokyo Electron U.S. Holdings, Inc.



Office of the Director, Export Regulation

1301 K Street, Northwest, Suite 1100
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November 17, 2008

Mr. Steven Emme
U.S. Department of Commerce
Bureau of Industry and Security
Regulatory Policy Division
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Room 2705
Washington, DC 20230

ATTN: RIN 0694-AE21

Dear Mr. Emme:

IBM submits this letter in response to the request for comments by the Bureau of Industry and Security (BIS) regarding the proposed rule for the establishment of License Exception (LE) Intra-Company Transfer (ICT), as published in 73 Fed. Reg. 57554 (October 3, 2008). IBM appreciates BIS's attempt to streamline the licensing requirements for internal development purposes, as stated in the proposed rule; however, LE ICT, as currently drafted, fails to alleviate the fundamental burdens associated with export compliance: the continuous and meticulous, intra-company tracking of each employed foreign national and the technical data transferred or made accessible to foreign affiliates and their employees. Moreover, the LE ICT application and ongoing administrative reporting, certification and audit requirements appear more onerous than the current use of export licenses. Although LE ICT is targeted toward global companies with sophisticated export compliance programs, such as IBM, we do not see this license exception, as currently drafted, as freeing the flow of data and ideas intra-company. For the rule to be viable for IBM's use, several changes and points of clarification need to be made prior to publishing the final rule. Provided below are our comments.

1. New Defined Terms – Section 740.19 (b)(2) and (3)

- Eligible recipients versus eligible users

The proposed rule refers to these two, newly defined terms: eligible recipients and eligible users. IBM submits that, for practical purposes, there is no distinction between an eligible "recipient" and an eligible "user." Introducing both terms into LE ICT is unnecessary and adds confusion for applicants. For example, during the internal development process, there is never an instance where the exchange of technology and source code goes in one direction only. It would be prohibitive for the applicant to try to delineate which of its subsidiaries are eligible only to receive technology and source code

and which are eligible to export and reexport. We suggest that you remove the “eligible recipient” term for simplification purposes.

- Definition of non-U.S. nationals and foreign national employees

These definitions are well crafted and provide clarity throughout the regulation. We appreciate the inclusion of these definitions and recommend that these remain in the final rule.

2. Restrictions – Section 740.19 (c)(6)

- Encryption Items

IBM understands that the restriction on Encryption Items (EI) is due to the availability of LE ENC; however, for individuals not as familiar with the regulations it may be helpful to include a reference to Section 740.17(a)(1) so that they understand another authorization is available for internal development of items controlled for EI purposes.

3. ICT Control Plan – Section 740.19 (d)(1)

- Review of end-user lists

The proposed rule requires a company to screen previous employers of foreign national employees against all U.S. government lists of end-users of concern. We find this requirement problematic for several reasons. First, it seems to be an unnecessary task. Companies are already required to perform personnel screening as a mandatory element of the ICT Control plan as stated in 740.19 (d)(1)(iv). Given this thorough vetting of potential employees, this additional screening requirement is not needed. Moreover, if the individual is no longer working for a company, his or her obligations to that company cease to exist. Second, the prohibition appears overly broad, as it denies every past employee of a listed entity from using LE ICT, regardless of his or her past roles, responsibilities, or activities. If BIS or other U.S. government agencies are concerned about certain individuals, they should add these names to the relevant end-user lists, rather than punish all former employees of listed entities. Third, the breadth of the request is unduly burdensome and poses practical, administrative challenges. It appears to require screening of all prior employers. For large, global companies, such as IBM, with nearly 400,000 employees, this is a forbiddingly arduous task. It is not a normal business practice to obtain every past employer of an employee, and such information gathering would require additional human resource personnel.

Although the proposed rule limits the screening requirement to “foreign national” employees, local discrimination laws may require that IBM treat its employees equally and not discriminate based on national origin. In other words, the data collection and screening burden on companies may have to be adopted for all employees, depending on local laws and regulations. Even if it were administratively feasible to obtain this information, the information may be impossible to obtain and/or verify, given local

country data privacy laws. We recommend that BIS delete the previous employer screening from the ICT Control Plan requirements.

- Self-evaluation program

The proposed rule requires that export violations uncovered via a company's self-evaluation program "should be disclosed to BIS in accordance with the voluntary self-disclosure procedures found in section 764.5." See section 740.19(d)(1)(vi); see also section 740.19(f)(2). In essence, this appears to create a mandatory self-disclosure requirement for users of LE ICT. Instead of rewarding companies that have been thoroughly vetted and approved as "trusted entities" under LE ICT, this apparent mandatory disclosure requirement may expose these companies to increased enforcement actions for administrative errors.

We request that BIS clarify that the disclosure requirements under proposed section 740.19(d)(1)(vi) are not mandatory and users of LE ICT may decide whether to submit a voluntary self-disclosure without forfeiting the conditions of use of LE ICT or otherwise subjecting the license holder to civil or criminal liability from a decision not to declare a voluntary self-disclosure.

4. Required Information for Submission to BIS for Review to Use LE ICT – Section 740.19 (e)

- A listing of the wholly-owned entities and controlled in fact entities

IBM has offices in more than 140 countries around the world, and, in many of these countries, there are several locations. The physical addresses of the locations can change frequently due to a variety of reasons, including: change of mission, lease costs, tax advantages, new space requirements, etc. Though we do not expect that IBM will need to transfer controlled technology and software with all of our offices, it would be inefficient to exclude a location from the application if we could conceivably need to move technology or source code to that location. We submit that a more manageable approach would be to provide the requested information under 740.19(e)(1)(ii) for the headquarters or the principal place of business location within each country only, instead of providing a listing of all offices worldwide. This will minimize the amount of detail needed in the application as well as the information that will need to be resubmitted for subsequent changes.

- A listing of the ECCNs of the items it plans to export, reexport or transfer (in-country) under LE ICT

For a large, global company, it will require significant, time intensive efforts to gather the data needed to identify the particular ECCNs of items intended to be covered by LE ICT. For companies to be willing to undertake this massive endeavor, they need the upfront assurance that the critical ECCNs and countries to which they seek to use LE ICT are "in

scope” for authorization and approval. As drafted, the proposal rule does not indicate which ECCNs will be accepted, without reservation. Thus, a company can put enormous effort into the application only to be told that the ECCNs they are primarily interested in are excluded from export, reexport, or transfer to their affiliates in certain countries or their foreign nationals from certain countries. Companies will need greater transparency and predictability. We recommend that BIS revise the proposed rule to identify any other prohibited ECCNs or potential limitations on the transfer of particular ECCNs to certain countries or their foreign nationals.. For all other ECCNs and countries, BIS should automatically deem these to be acceptable under LE ICT, provided that the ICT application meets all other requirements. We suggest expanding section 740.19(c) to include any additional, restricted ECCNs and countries.

Similarly, the proposal does not indicate if BIS will place thresholds within the approval for any given ECCN. If the LE ICT approval mirrors what industry is currently receiving in the conditions placed on individual validated licenses (IVLs) with thresholds and limitations, it will not provide any real relief to the applicant, as they will have to continue to do cyclical submissions to increase the limits. If this is the expected outcome of the LE ICT approval, it would be simpler for companies to continue to use the IVL process.

- Name and contact information of the employee(s) responsible for implementing the control plan

The proposed rule requires the listing of the individual responsible for implementing the control plan. The control plan will cover the applicant as well as the eligible users and recipients. A point of clarification is requested on whether an individual must be named for each recipient and user or a single name of the individual from the eligible applicant is sufficient. To streamline the requirement for administrative purposes, IBM requests that BIS require one single point of contact only from the applicant.

5. Changes to Submitted Information – Section 740.19 (g)

- Addition of an entity

To add eligible users and recipients under LE ICT, the proposed rule requires that an eligible applicant provide additional information on those entities prior to using LE ICT. This requirement is administratively burdensome for companies that engage in frequent acquisitions, if an eligible applicant must list every affiliate of an acquired entity. Clarity is needed on this point. For example, if IBM acquires a company headquartered in Germany, with a main office in Berlin, and additional offices in Mainz, Dusseldorf and Stuttgart, would IBM need to request all of these locations or be able to list only the main offices in Berlin? If the company is a multinational company, must every office be listed or only the worldwide headquarters? IBM is requesting that the regulation limit this to the headquarters of the acquired company.

In addition, IBM considers the 15 days reporting requirement for changes under acquisition or merger to be insufficient. "Transfer of trade" from the acquired company to the new parent may sometimes take up to six months. We recommend adjusting the wording to state that it is required 15 days after the transfer of trade.

6. Annual Reporting Requirement – Section 740.19 (h)

- Foreign Nationals

The foreign national reporting requirement proposed in section 740.19(h)(1)(i) is similar to current reporting requirements for deemed export licenses within the U.S.; however, this requirement would be an additional, administrative burden for site licenses we obtain for our foreign locations. Specifically, site export licenses do not require us to maintain this information for individuals working under those licenses. Instead, the current requirement is only to sign the NDAs and maintain certain information per recordkeeping requirements. In other words, there would be little reason for companies to switch from an export license to reliance on LE ICT. Given that BIS intended to facilitate inter-company transfers with greater ease through LE ICT, IBM suggests that this reporting requirement, as well as the requirement to report termination dates under 740.19(h)(1)(ii), remain a recordkeeping requirement only.

- Certifications

The proposed rule requires both the annual certification by a company that it and its users and recipients are in compliance with LE ICT and the inclusion of results of the applicant's self-evaluations. We recommend that the certification statement be revised by adding a statement that it is to the best of the signatory's knowledge. Companies may be unwilling to certify to the statement as currently proposed, given its breadth and the liability that could attach to the signatory and the company in the event of a subsequently discovered compliance issue. In addition, to be administratively feasible for large companies, we recommend that the proposed rule permit the applicant to summarize the results of the self-evaluations of the eligible users and recipients at a high level.

7. Biennial Audits – Section 740.19 (i)

- Audit framework

As proposed, BIS would conduct biennial audits of the applicant and eligible users and recipients. IBM respectfully submits that BIS would need at least a continuous half year period to review all of the more than 100 IBM U.S. sites and worldwide locations. Based on our experience, the U.S. government review team would need to consist of two to three highly trained people, and IBM would need to accompany them with two to three highly trained people with corporate export experience. This is a tremendous resource requirement involving a great deal of international travel. This needs to be understood by BIS when determining the framework for the audits as well as reflected in the

Rulemaking Requirements resources section as referenced on page 57558 of the proposed rule.

8. Recordkeeping Requirements – Section 740.19 (k)

One of the purposes of LE ICT is to allow movement of personnel and technology within the company structure without the need for separate deemed export licenses or other detailed tracking of foreign national employees post-hire. However, the recordkeeping requirement for LE ICT, as written, is more burdensome than current deemed export license conditions by requiring a company to maintain records by ECCN of items transferred under the license exception. In addition, these recordkeeping requirements effectively require a company to continue to track each foreign national during their tenure with the company, including documenting their job assignments, the meetings they attend, logs of computer access, etc. This is no different than what is required today. Corporations are looking for relief from this type of burdensome activity.

We submit that BIS should clarify the recordkeeping requirements in a manner that is more administratively feasible for large, global corporations. The possible solution for this burden would be to allow a company to provide a listing of the foreign national employees hired during the previous year and eliminate the requirement to provide also the specific ECCNs for each foreign national. The reason being is that BIS has already approved the scope of available ECCNS via the underlying LE ICT application for the company's foreign nationals. Please note this will be a significant factor in our decision to use LE ICT.

9. Rulemaking Requirements - 73 Fed. Reg. at 57558

- Burden hour estimates

The time frames listed within this paragraph do not adequately address the amount of effort it will take to prepare the required documentation. The regulation states that it will only take 58 minutes to prepare and submit the application. It does not account for the amount of time that it will take to document all the eligible recipients and users, detail the owners of each location, and obtain the necessary documents to prove that the LE ICT control plan is in place. We estimate that, for our company, it will take up to several months for two people well versed in U.S. export regulations to complete the application process. In addition, each company identified as either an eligible user or recipient will need to allocate two full weeks each for preparation of specific requirements. Furthermore, the annual assessment will, in our opinion, take altogether two weeks for one person for the applicant and one week for one person for each of the users/recipients.

- See also comment 7 above.

10. Supplement 4 Countries – Part 740, Supplement No. 4

- BIS Administrative burden

IBM has no concerns with the listing of countries provided in section 740, Supplement 4; however, we did note that the listing – with the additions of Argentina and South Korea – is the same as the Supplement 3 countries. It would be less burdensome for companies to reference one country listing; therefore, we suggest allowing Argentina and South Korea to become eligible for LE ENC and use the Supplement 3 country list for both exceptions.

* * *

For companies to undertake an exhaustive application process, execute burdensome reporting and recordkeeping requirements, and open themselves to BIS audits and mandatory disclosures, companies have to see tangible benefits. The proposed rule states that the primary benefits from LE ICT, if approved, will be that it replaces the need for export licenses. The corporate perspective is different; in our view, the primary benefit of an intra-company license exception would be to avoid the necessity to screen and track all technologies and all foreign nationals post-hire. Today, companies have to evaluate continuously the flow of all technology to all subsidiaries and foreign nationals – even though these efforts may result in a need for only a few licenses. That is an enormous effort that the LE ICT, if constructed correctly (much like LE ENC), could alleviate. As discussed in our comments above, we respectfully submit that the current proposed rule does not alleviate this critical burden. Absent substantial revisions and clarifications, LE ICT is not an improvement over the status quo.

Thank you for the opportunity to comment on this regulation. We hope that the comments provided will assist in the revisions needed to make the finalized rule a viable option for industry.

If you have any questions, please contact Lillian Norwood at lnorwood@us.ibm.com or 202-515-4373.

Sincerely,

Thomas M. D. Vincenzo
for

Vera A. Murray
Director
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November 17, 2008

Mr. Steven Emme
Office of Exporter Services
Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce
14th St. and Pennsylvania Ave., NW Room 2705
Washington, DC 20230

Attn: RIN 0694-AE21

Re: Comments on Proposed EAR License Exception Intra-Company Transfer (ICT),
73 Fed. Reg. 57,554 (Oct. 3, 2008)

Dear Mr. Emme:

Semiconductor Equipment and Materials International ("SEMI") is pleased to submit to the Commerce Department's Bureau of Industry and Security ("BIS") the following comments on the proposed new Export Administration Regulations ("EAR") License Exception ICT.

Introduction and Overview

SEMI is the industry association of companies that supply equipment, materials and services used to manufacture semiconductors, displays, nano-scaled structures, micro-electromechanical systems and related technologies. SEMI represents large and small companies that contribute enormously to the advancement of microelectronic technologies in many regions of the United States. The products made by SEMI companies are overwhelmingly designed and used to manufacture wholly commercial and civilian electronic devices that are mass produced and mass marketed.

SEMI supports sensible, well-designed and implemented export controls as needed to preserve U.S. security interests. Furthermore, SEMI supports recent improvements in U.S. export controls, including shortening of EAR license application processing periods and the validated end-user initiative.

But export control reform and streamlining are needed with regard to semiconductor equipment and materials ("SEM"). Many current controls appear to be at least largely unnecessary. SEMI cannot see how unlicensed dissemination of commercial, civilian SEM products can harm U.S. national security. For many SEM products, SEMI is unaware of U.S. government analysis in support of applicable controls. Modern semiconductor production

systems are highly visible and used by a relatively few fabrication facilities. That they are straightforward to monitor and track makes the argument for controls on them unconvincing.

In addition, unnecessary SEM controls are contrary to important U.S. interests. United States SEM companies are world leaders in many technologies. And U.S. SEM companies contribute greatly to U.S. centers of technology advancement and communities of highly educated and well-compensated technologists. As U.S. producers face ever more competition from non-U.S. competitors, though, the costs entailed by unneeded export controls undermine U.S. SEM leadership and the benefits that that leadership brings.

Consequently, SEMI supports the concept of license-free treatment for exports and reexports among members of a corporate family. Given that a single set of owners and senior management controls the corporate family, there is no need to license exports and reexports between members of the corporate family. Intra-company license-free treatment could enable SEM producers substantially to reduce unnecessary costs associated with licensing of transfers of parts, components, software and technology among subsidiaries and other affiliates.

It is unclear from the published proposal, though, whether the ICT initiative will result in a workable, useful addition to the regulations. It appears that the many requirements of the ICT may outweigh the expected benefits. Whether the initiative will fulfill its promise depends on whether shortcomings in the proposed regulatory text are corrected and whether the license exception is administered in a constructive manner.

License Exception ICT: Issues and Recommendations

Notwithstanding its potential, SEMI is concerned that the proposed license exception will be encumbered by costly and time-consuming conditions and restrictions to such an extent that it is not an improvement over transaction-by-transaction licensing. SEMI urges BIS to consider the issues raised and recommendations set forth below in the interests of making License Exception ICT a useful reform.

Application and Approval Process

Any need to obtain U.S. government approval to secure license-free treatment tends to make the new policy more like a licensing arrangement than a license exception. Questions are raised, then, whether the new policy is an improvement over current licensing policies. It is critical that any ICT application and approval process be straightforward, streamlined and expedited.

Proposed sections 740.19(e) and (f) would not assure a workable application and approval process. For example, the need for “documentation showing implementation” of control plan elements (740.19(e)(v)) could be overly costly and time-consuming. In addition, the identified processing procedures cannot be counted on to result in streamlined, expedited processing of applications (740.19(f)(1)).

Identity of "Applicant"

Requiring that the "applicant" for ICT approval be a parent company (740.19(b)(1)) would present challenges, particularly for companies based outside the United States and to the extent that burdensome, uncertain commitments must be made by the applicant. Non-U.S. parent companies will tend to view those extraterritorial requirements as involving too much cost and legal risk.

Scope of License-free Treatment

BIS should ensure that the scope of license-free treatment under the License Exception ICT is sufficiently broad to make the program useful. Scope restrictions that could make ICT not useful include limitations on: 1) coverage of items to be exported and reexported, 2) coverage of members of a corporate family and their employees, and 3) availability of other EAR paths for license-free treatment. SEMI urges omission of the proposed provision that would withhold ICT coverage for Encryption Items (740.19(c)(6)) and the provision that would eliminate coverage by License Exception APR of items previously exported or reexported under ICT (740.19(c)(3)). As a related matter, it would be helpful for the final rule expressly to establish that items exported or reexported under ICT may subsequently be reexported under a license exception if the subsequent reexport comports with the terms of the license exception. Finally, SEMI sees no legal basis for EAR licensing of non-export/reexport in-country transfers and recommends elimination of all references to them.

Employees

SEMI applauds the BIS's proposed non-technical definition of an "employee" of an eligible user or eligible recipient (772.1). The proposal helpfully specifies that the definition would cover not just individuals who are employees within the meaning of labor laws, but also "contractors" and "interns" who function like employees. SEMI urges that the BIS reinforce that the definition would also include other types of agents if they perform at the direction of the company.

Non-disclosure agreements ("NDAs") with all non-U.S. national employees should not always be a condition for approval (740.19(b)(3)(ii)). At minimum, there should be flexibility for the BIS to issue ICT approvals without NDAs for all non-U.S. national employees if the circumstances warrant. An NDA should be required only if there are circumstances that indicate a concern about diversion.

Internal Use Standard

It is critical that the limitation of ICT to exports and reexports for "internal company use" not be overly restrictive. The final regulation should expressly establish that internal company use includes export or reexport of a part or component for incorporation into a product that will be sold internationally.

Certification

ICT approval should not be conditioned on certifications that the corporate family is in compliance with ICT (740.19(h)(1)(iii)), except perhaps in special circumstances. Given uncertainties about interpretation and implementation of the regulations, the legal risk involved in such certifications is too large a burden for company officers to incur. Such certifications are generally not required in connection with other forms of export and reexport authorization. As is normally the case, the obligation to comply with legal requirements should be adequate.

ICT Control Plan

Proposed ICT “control plan” requirements are likewise too rigid and burdensome to be conditions for ICT approval. Companies should have broad discretion in determining how best to ensure compliance. The detailed requirements of proposed section 740.19(d) are another factor that would make ICT more like a licensing arrangement than a license exception.

In particular, a requirement that the control plan obligate the applicant to report any type of EAR violation to the government through the voluntary self-disclosure process (740.19(d)(1)(vi)) is the type of overreaching that could make the ICT initiative unsuccessful. Disclosure of trivial, technical irregularities would often not be helpful to the company or the government. And an understanding among company staff that reported infractions will necessarily be disclosed to the government would tend to chill disclosure to management by the staff. Finally, the proposed arrangement would render the EAR self-disclosure program non-voluntary, which raises legal and fairness concerns.

Reporting and Recordkeeping

SEMI believes that the proposed annual reporting requirement is unnecessary and burdensome. Approved companies would have to provide detailed information about, among other things, *former* employees who have received information under License Exception ICT (740.19(h)(1)(ii)). Tracking the information at issue in a form needed for reporting to the BIS would add substantially to costs and make ICT considerably less useful.

Limited recordkeeping requirements would be adequate to serve the objectives of reporting. Even as to recordkeeping, though, it is important to keep company obligations at a reasonable level. It might be appropriate to ensure that companies maintain records that identify foreign national employees who had accessed information under License Exception ICT. But it is too much to expect companies, as seems to be proposed, to track precisely what information was disseminated to which employees.

Auditing

The BIS should clarify that exporters that avail themselves of ICT will not be subject to intrusive auditing policies. In SEMI's view, there is no need for a policy of auditing beyond the BIS's normal enforcement practice. A special program of audits once every two years and

special, unannounced auditing would tend to make ICT unworkable in comparison to conventional licensing.

Conclusion

SEMI appreciates the opportunity to comment on the proposed rule. As described above, SEMI supports the concept of license-free exports among the members of corporate families. But we urge that the proposed regulation be improved and implemented appropriately such that an ICT license exception would represent an improvement over current EAR arrangements.

SEMI looks forward to continuing a dialogue with the BIS on this subject. Please feel free to contact the undersigned if you have questions regarding these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan Davis', with a stylized flourish at the end.

Jonathan Davis
Executive Vice President, SEMI

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November 17, 2008

Mr. Steven Emme
U.S. Department of Commerce
Bureau of Industry and Security
Regulatory Policy Division
14th & Pennsylvania Avenue N.W., Room 2705
Washington, DC 20230

Re: Export Administration Regulations: Establishment of License
Exception Intra-Company Transfer (ICT), Proposed Rule, **RIN 0694 –AE21**

Dear Mr. Emme,

Intel is pleased to provide comments on the above-referenced proposal, which would establish a license exception for intra-company transfers of commodities, software and technology. The proposed ICT license exception is a valuable catalyst for discussion of ways to maximize administrative efficiencies and economies of scale relative to export control requirements affecting intra-company transfers. It is, however, overly complex, burdensome and inflexible as currently drafted. Accordingly, our comments will address various aspects of the proposed rule with a view toward optimizing chances that an ICT license exception will be used, while recognizing the need to prevent transfer of sensitive items to unauthorized destinations or individuals.

We begin by commending BIS for pursuing a license exception to facilitate secure intra-company transfers of commodities and technologies on a global basis. The broad license exception contemplated in the proposal, which spans both deemed and actual exports, is a sound concept that Intel embraces and has been supporting for years. For example, in the context of deemed exports, Intel believes that a workable implementation of an ICT license exception could deliver a number of benefits:

- Removing the transactional elements of our current intra-company export control program, allowing Intel to manage one centralized license exception vs. hundreds of licensing events.
- Eliminating the need to renew/upgrade export license submissions.

- Eliminating the need for employees to wait upon a license approval prior to starting their employment.
- Including interns and contingent workers/contractor employees within its scope.

The overall utility of an ICT license exception to Intel, however, is a function of whether it can actually deliver material advantages over existing case-by-case licensing transactions for intra-company transfers of technologies and commodities. Will it simplify existing export control requirements applicable to both deemed and actual exports occurring within the perimeter of a global company's operations? Will it impose added compliance procedures or requirements not faced today? Will it be flexible and comprehensive enough to realistically accommodate the ever-changing needs of worldwide intra-company operations over time? In sum, will it yield a worthwhile return on company efforts to obtain authorization for an ICT license exception and administer related screening, self-evaluation, reporting, audit and other requirements?

As the world's largest chipmaker, Intel must look at this litmus test through the prism of substantial intra-company R&D, production and other operational activities that trigger the need for export licenses. Intel conducts such activities at numerous facilities in the U.S. and a variety of foreign countries. Licenses needed to support intra-company activities cover both deemed and actual exports. In the deemed export area, Intel applies to BIS for many licenses, renewals and upgrades on an annual basis. This licensing activity typically applies to transfers of advanced chip- and computer-related technologies to controlled country foreign nationals working in the US, as well as to a smaller number of deemed reexport transactions applicable to foreign nationals working at Intel's non-U.S. facilities. In the area of actual exports, Intel applies for licenses related to transfers of chip technology, production equipment, spare parts, and other items to its sites in various countries. While these licenses (including renewals and upgrades) are significantly fewer in number than for our deemed exports, they are critically important to the functioning of Intel operations abroad and can entail submission of highly detailed information to BIS.

Individual licenses for Intel's intra-company activities are in any case routinely accompanied by conditions that vary from license to license. Conditions imposed on a given license can be numerous, ranging from limitations on technology access to specialized compliance procedures to recordkeeping requirements. The lack of standardization in imposing license conditions adds idiosyncratic complexities and burdens to a license process already grounded in case-by-case submissions of individual validated licenses (IVL's).

In the aggregate, the transactional nature of the IVL process has saddled Intel's existing intra-company licensing activities with administrative burdens, operational delays and inconsistencies. These encumbrances have nevertheless been mitigated over the years due to internal streamlining of license application routines, improved Intel efforts to familiarize licensing officials with Intel's business, increased use of automation, and other factors. Five years ago, the disruptive impact of the licensing process relative to Intel's intra-company transfers of technology and commodities was quite considerable. For example:

- Without current IVL site licenses, large numbers of individual licenses were required to export a single document and separate licenses for individuals to attend training sessions and conferences at Intel.
- We experienced long license approval times due to extensive negotiations of standardized and sensible conditions
- License upgrades resulted in detailed justification requirements and often an escalation to the Operating Committee.

Today, the overall impact is significantly lower due to the aforementioned efficiencies. This is not to assert that our current intra-company license caseload is devoid of significant problems. It is not. Rather, it is to say that our intra-company licensing activities have become more manageable, creating a more rigorous Intel standard for assessing the merits/demerits of the ICT proposal than would have been the case some years ago.

Intel's current IVL workload for intra-company transfers (both deemed and actual exports) consumes thousands of hours a year and requires direct and indirect efforts by numerous employees, costing the company millions of dollars a year. This workload includes preparing and submitting license applications (including first time licenses as well as license renewals and upgrades), follow-up with the government to ensure receipt of licenses, ensuring compliance with their terms and conditions, and continual efforts to research and classify Intel's ever advancing technologies and commodities to ensure they are covered under existing licenses.

The cost of Intel's intra-company IVL requirements, however, transcends the administrative overhead associated with the licensing process. With respect to deemed exports, for example, the licensing process also negatively affects Intel's ability to deploy foreign nationals in important technology projects. Licensing delays have been a salient problem in this area, since they prevent controlled country foreign nationals from being used in key Intel technology projects in a timely manner. Technology and equipment restrictions on approved licenses, moreover, limit Intel's flexibility to use controlled country foreign nationals on such projects. While the U.S. government's current practice is to establish license conditions that generally do not stop controlled individuals from working on a particular project, these employees by definition lack the freedom to access certain technologies and equipment that may be useful in an existing project or required for a more advanced project in the future.

The inability of Intel to take full advantage of highly qualified and creative talent on a global basis places a drag on its operational efficiency and ability to innovate. The resultant cost to Intel in terms of lost scientific, economic or other contributions is difficult to peg specifically, but the toll could be very substantial when one considers that the annual revenue generated by a given employee may exceed his or her salary by several multiples. Yet even that impact fails to account for potential breakthrough contributions by controlled country foreign nationals that may influence the direction of an entire product line or business model. The overall toll is exacerbated by the problem of

an un-level playing field because other countries do not impose an equivalent to the deemed export rule.

ICT ISSUES AND ANALYSIS

A key question, then, is the extent to which an ICT license exception can reduce the foregoing costs and burdens by eliminating the need to deal with case-specific license requirements. The answer to this query depends on how the license exception is structured, recognizing that it should not eliminate or weaken an exporter's existing internal compliance programs and responsibilities for preventing unauthorized export or reexport of controlled items.

The optimal approach to a license exception is the self-executing model represented by TSR or ENC for U.S. subsidiaries. License exceptions grounded in this model enable exporters to take advantage of them without rigid prescriptions for authorization and maintenance. Yet, the exporter autonomy afforded by self-executing license exceptions in no way compromises the integrity of extant corporate programs for ensuring compliance with export control regulations, since the Export Administration Regulations otherwise require adoption of strict internal compliance procedures that are reinforced by tough penalties. This flexible model allows a company to tailor compliance procedures to its unique business circumstances without sacrificing export control safeguards, thus protecting national security interests while permitting companies like Intel to be more competitive than under rigid license or license-like requirements.

If an ICT license exception were configured as a "clean" self-executing model on the order of License Exception TSR or the ENC license exception for U.S. subsidiaries, Intel estimates that its current IVL burdens/costs could be pared substantially. In contrast to case-by-case licensing, this model would create substantial efficiencies by enabling Intel to rely upon its existing global internal compliance program, physical/IT security safeguards, and extant BIS capabilities to audit Intel's practices.

The proposed ICT license exception, by contrast, imposes authorization, personnel screening, reporting, self-evaluation, audit, physical/IT security and other requirements that run counter to a self-executing model and in many instances are more stringent than under existing IVL practices. These requirements would inflict substantial investment overhead, operational uncertainties and other difficulties on the use of License Exception ICT. Following are our assessments of particular provisions in the ICT proposal:

Authorization Process. Intel is concerned that the process for authorizing applicants for License Exception ICT will produce various burdens, uncertainties and potential restrictions that do not attach to its existing intra-company IVL caseload, including:

Administrative burdens: It could be an insurmountable task to gather data of the magnitude required for the submission of the ICT as well as continue to manage all processes for existing intra-company IVL's that Intel currently possesses. Examples of

requirements that are problematic and beyond what Intel normally provides to support an IVL application are: the requirement to submit ICT control plans for each individual entity; documentation substantiating that entities have instituted these control plans; and a letter from a corporate officer certifying that each entity will allow BIS to conduct audits.

Potential for lengthy approval processing time: We are concerned over the open-ended timeline for reviewing and approving an application for ICT license exception treatment. Our experience with today's licensing process suggests that the ICT approval process may not only be unpredictable, it could surpass the time required for an IVL approval in light of the global scope of the license exception as well as the size and complexity of a company like Intel. These concerns contrast with the need for predictability and speed in the conduct of Intel's business operations.

Conditions/restrictions: As with existing case-by-case licensing, any imposition of conditions on an ICT license exception will add burdens and likely delays to the approval process. The negotiation of conditions can be very cumbersome and time consuming, since conditions are extra-legal measures that offer no regulatory predictability and consistency. In addition, conditions increase the complexity of managing technology transfers and can lead to restrictions that stymie technological development and leadership. Obstacles to technological progress could be especially pronounced to the extent ICT-related conditions exclude various items through technology or other restrictions and/or deny ICT treatment to legal entities within certain countries. In sum, any imposition of ICT conditions and restrictions that are worse than under our existing IVL's (or, indeed, fail to improve upon the status quo) would act as a disincentive to the use of License Exception ICT.

Detailed Narratives for ECCN's. The license-like requirement for ICT applicants to "...provide a narrative describing the purpose for which requested ECCNs will be used and the anticipated resulting commodities" poses two significant problems. First, transfers of technology almost always involve abstract concepts and research that are not easily linked to a specific product. Even if attempts are made to tie a set of concepts and research to a tentative purpose and an anticipated resulting commodity, the convergence of technologies over the last few years (both within Intel and in the industry as a whole) makes it impossible to provide an accurate forecast of the uses to which a given technology will ultimately be put. Second, this rigid requirement appears to force companies to share detailed confidential technology, development data, and planning data with BIS – a process that could run counter to very strict confidentiality requirements associated with corporate technology control plans.

Impact of revocation of an ICT license exception: If an ICT license exception approved for a company such as Intel were ever revoked, the impact could cripple its global business model. Supply lines could be disrupted, transfer of critical technologies to foreign workers could halt, and both advanced R&D and production in controlled countries could cease. IVL's, of course, offer protection against such outcomes due to their targeted and dispersive nature. By contrast, the centrality of an ICT license

exception creates a single point of failure. A key measure of ICT viability is therefore whether the potential for revocation is a high vs. low risk proposition.

Foreign National Non-Disclosure Agreements and Screening. Intel has developed a robust global internal program around screening employees prior to hiring them for export licensing and other reasons. Intel is concerned over the following additional screening requirements that would be imposed by the ICT license exception proposal:

Non-Disclosure Arrangements (NDAs): This requirement appears excessive and burdensome due to the need for ICT-qualified companies to track and monitor non-U.S. national employees wherever located. Intel's hiring process already requires all employees prior to employment to sign a number of mandatory documents, which include NDAs specific to protecting Intel's IP. The ICT proposal's NDA requirement is worse than the status quo because it would require Intel to change its entire employee screening/hiring process to insert the additional language in Section 740.19(3)(ii). To illustrate the burdensome nature of this requirement, Intel would need to screen a list of many tens of thousands of employees and contract workers to determine which worldwide employees would be required to fill out the new NDA form. The company would then need to find an efficient mechanism to ensure that every employee identified actually signed and submitted the form to the Export Compliance Group.

Valid visa requirement: This appears to be a new requirement that would again compel Intel to implement elaborate monitoring and tracking processes that do not exist today. The requirement would include training export staff to first understand various visa definitions and their qualifications, establishing business processes with 3rd party immigration suppliers to track visa expiration dates and new application statuses, and collecting visa documentation as proof of legal status.

Third country national screening: This requirement is confusing and seems excessive. For example, the proposed rule regarding screening 3rd country nationals ties back to note 2 to paragraph (b)(3)(ii), which provides an explanation of a non-US person. The note conveys a clear example of a non-U.S. person in the form of a German national working in the United States and a German national working in France. The confusion arises from the need to understand how to distinguish a non-US person in the example related to the non-disclosure agreement requirement. The example involves a German national working in France **and** a French national working in France. It is not clear why the French national working in France would be subject to both the NDA and screening requirement. If the French national working in France requires an NDA and screening, it goes beyond today's deemed reexport license requirements.

Self-Evaluation. Intel is committed to continuously evaluating compliance programs across the corporation, and we enjoy a close working relationship with BIS regarding the structure and administration of these programs. As such, the self-evaluation requirement in the proposal is duplicative and therefore unnecessary.

Intel is also troubled by the mandatory requirement to disclose potential violations, since current regulations allow for voluntary disclosures that already provide substantial impetus to divulge excursions. Moreover, the degree to which a potential violation must be disclosed is unclear. For example, does BIS expect companies to submit a disclosure upon a discovery that an employee failed to sign an NDA? What is the range of tolerances anticipated by the government regarding this requirement?

Annual Reporting. The requirement to report ICT-related data to BIS promises to be hugely burdensome and time-consuming. Intel opposes it. Our submission of onerous encryption reports over many years has never been justified by any visible evidence that the data submitted provides any value of consequence. Today, Intel expends considerable time and effort to both compile and submit semi-annual encryption reports. This is not an exercise that we want duplicated in an ICT context, especially when Intel can make appropriate records available upon request.

Intel is also concerned with the legal risk and difficulty surrounding the collection of employee data such as “date of birth” due to data privacy laws in other countries.

Biennial Audits. Today, Intel manages a large number of intra-company licenses and compliance programs that are subject to audits at any given time. We would naturally expect that such discretionary audits would continue under an ICT license exception. The non-discretionary requirement for biennial audits is thus redundant and unnecessary. It also imposes a “one-size-fits all” audit model on ICT license exception holders, even though compliance track records as well as sensitivity levels of products and technologies can vary by company. Duplicative and inflexible audit requirements work against the ICT-related goal of streamlining today’s intra-company licensing process, while adding no value from a compliance or national security standpoint.

RECOMMENDATIONS/CONCLUSIONS

Intel finds that the foregoing burdens, costs and uncertainties significantly detract from the value proposition offered by an ICT license exception. In particular, they act together to significantly reduce the advantages of a License Exception ICT relative to existing transactional licensing requirements. The basic problem is that the proposed license exception criteria would compel Intel to undertake substantial time and effort to recalibrate existing procedures, assume new ongoing burdens (e.g., self evaluations, reporting), and potentially face more conditions/restrictions on intra-company transfers than is the case today.

To meaningfully increase the allure of an ICT license exception, Intel recommends the following modifications to the ICT proposal:

- Make License Exception ICT self-executing as possible. This includes giving companies the flexibility to qualify for the ICT exception under their existing compliance procedures as opposed to contending with new and rigid requirements related to control plans, screening, biennial audits, self-evaluation, mandatory

- disclosure, special corporate officer certifications, and so on. In sum, ICT requirements should be as non-redundant and non-additive as possible with respect to existing compliance practices that already satisfy ICT requirements.
- Eliminate conditions that attach to today's IVL's for deemed and actual exports, since the core premise behind License Exception ICT is that companies will have compliance programs in place to prevent unlawful re-exports or re-transfers outside intra-company perimeters authorized under this license exception. (To the extent any conditions are imposed, they should be wholly consistent with our current IVL conditions and agreements. This will eliminate the need to start over again and duplicate past efforts.)
 - Adjust ICT revocation parameters to focus on the specific area of non-compliance. For example, approved recipients who do not comply could be removed from the ICT instead of penalizing an entire corporation.
 - Remove the valid visa requirement from the ICT and require U.S. Immigration and Naturalization (INS) to ensure all foreign nationals are properly authorized to work and live in the U.S. This should not be an export control-related responsibility.
 - Remove the 3rd country national screening requirement. Denied Party List screening is already mandatory in today's current environment, rendering the 3rd country screening requirement superfluous. (In fact, the ICT screening requirement may even lead exporters to believe that no other screening is required.)
 - Require the U.S. government to approve ICT applicants within a 30 day timeframe.
 - Remove all reporting requirements and instead require ICT holders to make records available to the U.S. government upon request.
 - Remove the non-discretionary requirement for biennial audits. The government will always have the capability to conduct audits on a discretionary basis.
 - Remove the proposal's self-evaluation requirements, including "mandatory" voluntary self disclosures. For purposes of ICT approval, exporters should be able to demonstrate that they have robust compliance programs (including discretionary self-disclosure procedures) that are continuously evaluated and improved upon. However, this objective is better achieved through flexibility rather than a one-size-fits-all approach, since business models differ widely.
 - Remove the requirement for detailed ECCN-related narratives and depend instead on a company's internal compliance program for managing ECCN's. To foster usage of ICT, it is important for this license exception to avoid license-type processes and duplication of effort that adds no security-related value.
 - Simplify the proposal's employee screening requirements by allowing companies to use their own non-disclosure documents and procedures rather than having to provide such documentation in a rigid format. Intel does not have to furnish prescribed non-disclosure documents to the government today.
 - Submission of data elements like date of birth should be eliminated to the extent they run afoul of data privacy laws in other countries. Moreover, a company should not have to submit any data element that is otherwise available to the government on request.

- Substantially reduce the overall ICT text of Section 740.19 for the sake of promoting clarity and simplicity. Our experience is that other countries frequently cover their requirements for export control programs on a single page.

The adoption of these improvements, while falling short of the self-executing ENC treatment of foreign subsidiaries, could potentially reduce existing transactional license burdens/costs significantly. At the same time, as with the ENC license exception for US subsidiaries, the recommended improvements would not diminish our current IVL-related compliance programs and, hence, should not present a security concern. To the extent the U.S. government can make these changes, Intel would be more inclined to consider use of License Exception ICT across its worldwide operations in lieu of current case-by-case licenses, renewals and upgrades.

In conclusion, Intel recognizes that any establishment of a License Exception ICT must address legitimate national security equities in the course of streamlining the intra-company licensing process. The challenge is to avoid redundancies, needless burdens and unwarranted costs that serve neither national security interests nor the goal of licensing process efficiencies. This includes making the license exception as simple as possible and optimizing company compliance processes by allowing flexible rather than one-size-fits-all approaches. Importantly, the value of an ICT license exception for Intel will rise in direct proportion to changes that move the proposal closer to the self-executing model of the ENC “U.S. subs” provision. We believe that such changes can be made while preserving the integrity of our existing rigorous internal security safeguards, which are otherwise subject to government scrutiny. Indeed, maximizing scale economies and efficiencies under the license exception would actually strengthen internal compliance efforts by removing bureaucratic, transactional requirements that unnecessarily constrain corporate resources.

Thank you for the opportunity to provide comments on the ICT license exception proposal. Intel appreciates the efforts of BIS to introduce this important proposal with the ultimate goal of creating a workable intra-company license exception.

Sincerely,

Jeff Rittener

Jeff Rittener
Global Export Compliance Manager, Intel Corporation

**COMMENTS OF THE NATIONAL ASSOCIATION OF MANUFACTURERS
ON
NOTICE OF PROPOSED RULEMAKING
BY THE BUREAU OF INDUSTRY AND SECURITY
DEPARTMENT OF COMMERCE
“ESTABLISHMENT OF LICENCE EXCEPTION INTRA-COMPANY TRANSFER
(ICT)”
DOCKET NO. 071213838-81132-01
RIN 0694-AE21**

The National Association of Manufacturers (NAM) is providing the following written comments in response to the Notice of Proposed Rulemaking (NPRM) on “Establishment of License Exception Intra-Company Transfer (ICT)” (Docket ID: 071213838-81132-01) that was issued by the Bureau for Industry and Security (BIS) on October 3, 2008. The NAM represents a broad spectrum of U.S. manufacturers with members in every industrial sector and every state. Its membership includes both large multinational corporations with operations in many foreign countries and small and medium manufacturers that are engaged in international trade on a more limited scale.

The NAM commends the Commerce Department for the procedural improvements it has implemented since the issuance of National Security Presidential Directive (NSPD) 55 in January. The strides BIS has made thus far have increased the predictability and transparency of the licensing process for NAM members.

We also note and appreciate the increased interagency collaboration, particularly between the Commerce, Defense and State Departments, on important export control policy issues. These improvements are noteworthy, and we look forward to working closely with the Commerce Department as it proceeds with implementation of further reforms mandated by NSPD 55.

Creation of the ICT is a significant step forward for BIS and export control modernization as a whole. The NAM applauds BIS for its leadership on the ICT. We are hopeful the ICT will lay the foundation for further reform at BIS and the State Department. The ICT represents a significant paradigm shift that focuses limited government resources on truly high risk transactions while facilitating legitimate trade from trusted exporters.

The NPRM provides many of the necessary building blocks for the establishment of a robust rule that will strengthen the defense industrial base, increase U.S. competitiveness and place U.S. manufacturers at the fore front of technological innovation all of which are critical for the national security of the country. Our comments address the short-comings of the proposed rule, the likely benefits from an enhanced rule and a comparison of the ICT to existing licensing authorities as well as to the policies of Wassenaar member countries.

Overview of the Manufacturing Environment

To compete in the global marketplace, U.S. companies increasingly depend on a network of facilities located in countries around the world to develop, produce and service their products. Efficient operation of the network requires that companies be able to move products, technology and personnel between their U.S. and foreign facilities in a timely and cost-effective manner.

Current dual-use regulations do not distinguish between transfers of controlled items and technology within U.S. companies and those with non-U.S. entities. U.S. companies exporting dual-use goods or technology to their foreign subsidiaries, or transferring technology to their foreign nationals in the U.S., may still be required to obtain individual export licenses. The regulations do not take into account the fact that many U.S. companies have company-wide internal control programs for export compliance that apply to their foreign facilities and non-U.S. employees which can effectively serve to protect national security concerns. Nor do they recognize that U.S. companies have their own incentives to maintain strong controls to protect their intellectual property and other proprietary information, for example, on the introduction of new products. Transfers between corporate entities represent low-risk transactions.

Even though license applications are still required for these intra-company transfers, there is a very high rate of export license approvals—over 99 percent according to recent Commerce Department data. This high rate of approval gives strong support to the view that intra-company transfers of products and technologies pose minimal security risk and that U.S. companies are capable of maintaining effective controls over foreign national access to sensitive goods and technology. Yet the current licensing process does have adverse consequences for U.S. companies. The extensive documentation requirements, license application preparation time, the long interagency review delays, and additional costs associated with obtaining export authorizations for intra-company transfers taken together put U.S. companies at a significant competitive disadvantage vis-à-vis their foreign competitors.

Not only are 99% of all license applications approved but intra-company trade represents nearly 50% of U.S. global trade¹. For high tech² manufacturers, 28% or \$101 billion of intra-company trade is subject to export controls³. Under the current licensing regime, high tech manufacturers must commit considerable time, resources and personnel to control items that by all accounts are low-risk exports within the corporate family. This limits the ability of the corporate family to collaborate on projects, on R&D and on other activities crucial to the company's bottom line. It also creates significant compliance barriers as companies have to design elaborate control plans to guarantee that specific employees do not have access to certain controlled technologies.

¹ U.S. Census Bureau.

² The NAM defines "high tech" by the following thirteen NAICS numbers: 3332, 3339, 3341, 3342, 3343, 3344, 3345, 3346, 3353, 3359, 3364, 5112, and 5415.

³ See *Supra* at 1.

The U.S. is entering serious economic downturn that could well be the worst since the Great Depression. While the high tech sector is in a stronger economic position comparably, it is still feeling the pinch of the downturn. Several NAM member companies have stated that they have made hard decisions to stop development of the next generation of several products to cut overall operating costs. This will have a serious impact of the strength of the U.S. and our industrial base. Implementation of a robust ICT has the potential to alleviate some of the anxiety felt by the high tech sector.

For U.S. companies that have established and recognized strong export control compliance programs in place, the ICT license exception program will make it easier and less costly to transfer controlled items and technology to their foreign subsidiaries and foreign nationals in the US or foreign subsidiary which will allow companies to invest more money in R&D. It is critical at this juncture that a paradigm shift occurs with regard to licensing protocols.

An ICT will allow U.S. manufacturers to continue to grow their share of the global market, develop new technologies and contribute to the overall well-being of the U.S. If companies are required to continue operating under the status quo or the ICT is implemented in a way that reduces its usefulness, American companies will continue to lose market share that is critical to the national security of the U.S. Most high tech companies engage in the development of both dual-use and military items. Lost sales and decreased market share for dual-use technologies result in a net loss for the U.S. military as less money is funneled into R&D for cutting edge military equipment. Therefore it is important to find a way to facilitate low-risk intra-company trade to increase the competitiveness of American companies vis-a-vis their counterparts in Europe and Japan that are not subject to as stringent intra-company controls without jeopardizing the need to control the truly critical technologies.

Many NAM members have commented that a properly structured and implemented ICT would drastically reduce their licensing volumes and costs. For one member, the ICT could eliminate all of its current deemed export licenses. In these uncertain time, when our national security is threatened by the economic downturn, important changes such as the ICT have the potentially to have a substantial impact not only for companies facing economic hardship but more importantly for the government.

The ICT is an important then for the U.S. government and national security as well. Many U.S. government officials and private analysts expect the U.S. government to cut spending on defense, intelligence and foreign aid in the wake of the financial crisis.⁴ There will be less money for development of new technologies that are critical to DOD's security operations. Over the last several years, DOD has become increasingly dependent on commercial-off-the shelf (COTS) technologies for its operations. COTS will be more important than ever as government budgets are cut. Therefore it is necessary to foster an environment that encourages the private sector to continue to develop new technologies. It is also equally important for U.S. companies to be at the forefront of innovation. If they are not and as foreign companies continue to gain market share, DOD will have access to fewer and fewer cutting edge technologies.

The ICT has the potential to substantially change the licensing landscape, allow the government to focus on high risk transactions that threaten the U.S., improve the defense industrial base and increase the competitiveness of U.S. high tech manufacturers who are vital to U.S. economy.

However for the ICT to do so, it is imperative that several key improvements and adjustments are made to the NPRM before a final rule is issued. The final rule must be implemented in a manner that does not create new, more stringent regulatory compliance requirements than exist under the status quo. Below are the areas the NAM feels must be addressed and modified for the ICT to be meaningful and used by our members.

Authorization Process

The utility of the ICT is dependent upon how the requirements are implemented. It is important to ensure in the final rule that the burden of applying for and maintaining the ICT is less than existing licensing mechanism. Failure to do so will not improve upon the status quo and companies will be less inclined to use the ICT.

The NAM supports subjecting ICT applications to the processing and review times currently in place for individual validated licenses (IVLs) if the government deems prior authorization necessary. However, we would prefer for the ICT to be a self-executing exception. Therefore we encourage BIS and the interagency to adopt a protocol similar to the approach used for license exception ENC, which provides for an approval time and then a presumption of approval if the application is not denied in 30 days.

If BIS and/or the interagency are unable to agree upon the self-executing model it is imperative that the review and approval of an ICT application not languish if the clock is stopped. Review of ICT applications must be predictable, transparent and efficient. An ICT application must not be treated like an IVL application. If ICT applications are not approved in a timely manner, companies are less likely to use the new exception.

⁴ Joby Warrick, "Experts See Security Risks In Downturn," The Washington Post, November 15, 2008 at A01.

The NAM understands that applicants are only required to list the five-digit ECCN when applying for the ICT. We fully support this requirement. However, we are concerned by the requirement for the applicant to provide a detailed narrative describing the intended use of the items covered by the listed ECCNs. Clear expectations as to the level of detail must be established. The more detail that is required to satisfy BIS and the interagency, the more the ICT begins to look like the existing licensing mechanisms that do not provide the flexibility intended by the ICT. In order to strike the necessary balance for the government, BIS and the interagency team should rely on the Internal Control Plan (ICP) of a company and not micro-manage the technical details of an application. All efforts must be made to prevent the ICT review process from becoming as detailed as the IVL process.

Amendments to an Approved ICT Application

An important feature of the ICT is the ability to amend it. High tech manufacturing and development is extremely dynamic and as new technologies are developed, new facilities added and new employees are hired, the ICT must allow amendments without applying for a new authorization. Equally important, a company should be able to amend the ICT with minimum red tape and time.

This is especially critical for non-material changes to the ICT. A company, once authorized to use the ICT, should be able to add new facilities with relative ease. It is common for companies to routinely open new facilities or to acquire them. The NAM suggests that for a country already approved under a company's original ICT application, adding new facilities should be pro forma—the company would be required to submit the name of the facility--providing the key information but not be required to seek full reauthorization of eligibility. A similar process is also needed for adding new non-U.S. nationals. A streamlined amendment process is important not only for participating companies but also for the government's limited resources.

Another area that needs to be addressed is the case of mergers and acquisitions that result in a change of control of a company. The NAM is concerned that requiring a company to immediately terminate the use of the ICT in the case of a change in control as §740.18 (g) currently mandates could have a negative impact on R&D. According to §740.18 (g) a company's ICT authorization becomes invalid due to change in control, and a company would be obligated to terminate its exporting operations for an indefinite period of time until the new authorization is issued. Until then, the company would have to revert back to IVLs. BIS should develop a process to allow an orderly transition in the case of a change in control of a company – allowing exports to continue under the prior ICT Control Plan for a period of time and transitioning to the new owners ICT Control Plan within, perhaps 90 days, upon notice to BIS. This will allow companies time to make an orderly transition without significant interference in internal operations.

Elimination of the Distinction b/w Non-U.S. National and Foreign National

The NPRM creates an artificial distinction between non-U.S. national employees and foreign nationals. It is necessary to eliminate the distinction for many reasons and to treat all foreign nationals as non-U.S. nationals.

First, the distinction greatly reduces the attractiveness of the proposed ICT. The distinction increases the reporting and screening requirements for U.S. companies. Under existing regulations, companies are not required to report on foreign nationals working abroad. Why should companies need to report on foreign nationals if they are not currently reporting on those foreign national under current licensing authorities? (For example, site licenses do not require companies to submit the nationality of the employees).

Second, legal barriers may exist in foreign countries that will prevent U.S. companies from reporting the requested information on foreign nationals. Many countries have stringent privacy and labor laws making it extremely difficult or impossible to obtain the information, particularly the European Union⁵. The final rule must square the reporting requirements⁶ of the ICT with the legal rights of foreign nationals. Failure to do so will severely limit the applicability of the ICT.

Lastly, the definition of foreign nationals does not distinguish between permanent and temporary assignments, further increasing the onerous nature of the requirements. It is not uncommon for corporate employees to be transfer temporarily to another subsidiary or branch for a short term assignment. For example, an employee who is a national of country A may be transferred to country B for a three month project. Upon transfer, the employee becomes a foreign national for the duration of the project in country B. Is a company required to screen and report on that employee during his temporary assignment in country B? If so companies will need to build extensive additional compliance tools and mechanisms to track the physical location of employees to ensure compliance. This type of compliance far exceeds any requirements that currently exist in the export administration regulations (EAR). If companies will be required to report on employees who become foreign nationals during a temporary assignment, use of the ICT will become too burdensome. The final rule should clarify that the screening and reporting requirements do not apply to employees on temporary assignments.

The NAM believes the reporting requirement should be changed to a recordkeeping requirement generally. We offer the following alternatives, assuming the reporting is changed to recordkeeping, in descending order of preference to the NPRM on this issue:

1. The distinction between non-U.S. nationals and foreign nationals should be removed from the final rule. The requirements should be the same across the board for all non-U.S. nationals.

⁵ See Directive 95/46/EC.

⁶ The NAM believes the reporting requirement should become a recordkeeping requirement. This is discussed on page 8. If the requirement is switched to recordkeeping the distinction should still be eliminated.

2. In the alternative, if BIS is unable to eliminate the distinction, the requirements should only apply to a small subset of foreign nationals from countries of concern as suggested below in descending order of preference. Reporting requirements should be limited to:

- a. foreign nationals of country group D minus China and Russia, or
- b. foreign nationals of country group D, or
- c. foreign nationals not from country groups A and B, or
- d. foreign nationals from countries not listed in the supplement to part 740 of the EAR.

3. In the alternative, eliminate the distinction based on a “technology carve out” theory. Identify a set of technologies to safe guard and require reporting and screening requirement for foreign nationals who will have access to those technologies. This mirrors the recommendations from the Deemed Export Advisory Committee Report submitted to BIS in 2007.

4. In the alternative, if the reporting and screening requirement does not exist under current regulations for a foreign national, then additional reporting requirements should not apply under the ICT.

Also, the requirement for new non-disclosure arrangement (NDAs) for foreign nationals creates a duplicative requirement for companies. NAM members routinely require employees to sign non-disclosure statements as a condition of employment. The NAM recommends that the final regulation waive this requirement for companies with policies that require non-disclosure statements as a condition of employment.

Elimination of the distinction is critical. If the distinction remains in place as drafted in the NPRM, NAM members believe the ICT will provide little to no benefit over the status quo. The distinction makes it more onerous to implement the ICT than to continue to apply for IVLs.

Auditing

The NPRM requires non-discretionary biennial audits. This requirement should be modified in the final rule. The same auditing standard that currently applies under the EAR should apply to the ICT. The U.S. government already has the authority to audit at its discretion under the EAR. To create maximum flexibility for the government, the ICT should be subject to same existing audit standards. Under existing authority, BIS would be able to conduct audits of the ICT based on need, which will allow for optimal use of limited government resources.

Audits require significant investments of time and money on the part of the company and the government. An ICT audit has the potential to be an extremely extensive and detailed process requiring considerable man power, money and time to prepare for it and execute it. An ICT audit is likely to include review of both licensing for items and technology as well as deemed exports. Typically an audit is focused on one or the other and is not corporate wide. For a company with subsidiaries that number in the double and triple digits preparation would be prohibitively extensive on a biennial basis. Additionally, conducting ICT audits will require a significant investment from the government as well that is likely to exhaust resources apportioned for such activities. Therefore the NAM recommends that the ICT be subject to the auditing standards that already exist in the EAR. This provides the necessary flexibility for both the government and industry while providing the necessary checks on the exception to protect the security interests of the country.

Reporting Requirements

The NPRM creates onerous reporting requirements for companies. First, the reporting requirements make the ICT less attractive than already existing licensing mechanisms such as IVLs. Second, the annual reporting requirements for foreign nationals may contravene local labor and privacy laws. These burdens reduce the likelihood that NAM members will gain any benefits from the ICT.

The NAM suggests that the reporting requirement should be converted into a record keeping requirement. The record keeping requirements should be limited to the requirements that already exist in part 762 of the EAR. It is important for the record keeping requirements to:

- Only require companies to maintain record of the individuals approved for access to a technology and not records of each time a person accesses or receives the approved technology.
- Not require linking a specific technology to a specific foreign national. Rather, a company should be allowed to track a group of ECCNs and foreign nationals associated with a specific project.
- Not require a company to track the ECCN through every form of release. The initial release should be interpreted to cover the release of the ECCN regardless of the form.
- Only require a company to maintain records at the top level of ECCNs and not at the subparagraph level.

If the reporting requirement is not converted to record keeping and the above changes are not made to the reporting/record keeping requirements, many NAM members said they will be less inclined to use the ICT. Simply put, the compliance burden will be too unwieldy.

Screening Requirements

The screening requirements for foreign nationals are unclear in the NPRM. The NPRM states that foreign nationals and their former employers must be screened against the end-user lists.

First the restriction is difficult for compliance regimes within companies. While it is standard procedure to scan an applicant against end-use lists, it is not standard to procedure to screen prior employers of the foreign national against the same lists. Prior employment history is only evaluated during the hiring process and is based solely on the resume of the candidate. Resumes are not maintained by human resources as to allow screening against an end-user list at some point in the future.

Second, to what degree of separation must a company screen a foreign national against the end-user lists? The most recent prior employer, the prior employer twice removed or the foreign national's entire employment history? Moreover, end-user lists are dynamic. From which point in time is a company supposed to screen against the lists? Is a company required to conduct periodic checks for the duration of the foreign national's employment?

Therefore the NAM suggests that the screening requirement should only be applicable where the company has knowledge that a foreign national had a prior relationship with an end-user of concern.

Voluntary Self Disclosures (VSD) and Self-Evaluations

The final rule should clarify the requirement for companies to voluntarily disclose any violations. The NPRM is unclear and appears to imply that a company has the legal responsibility to disclose any violations identified through a self-evaluation thus making a discretionary action obligatory. This obligation is not equivalent to and is contrary to existing requirements in the EAR. The standard should match and not impose any further requirements than are already required by the EAR in section 764.5. VSDs should not be made mandatory.

This requirement has the potential to discourage NAM members from applying for the ICT because of the fear that it creates a new legal obligation to disclose any violation regardless of how minor or administrative. Under the existing voluntary disclosure standard, companies have significant incentive to disclose any violations. BIS routinely conducts audits to review a company's exporting history and to make sure it is not violating the EAR. This ability is more than sufficient to guarantee that companies voluntarily disclose any violations. Therefore there is no need to implement a new stricter standard for the ICT. Existing enforcement mechanisms encourage companies to comply with the law and disclose violations if they occur.

Further, BIS should also state in the final rule that a company is only required to disclose actions that are material, that is, a company should not be penalized for failure to file a VSD for administrative or technical violations that are insignificant to an internal control plan.

Automatic Exclusions from ICT Eligibility

The NAM does not support the categorical restrictions on technologies eligible for the ICT. We support the restriction on technologies that have statutory limits such as missile tech (MT) controlled items, however, the NPRM also restricts the eligibility of significant (SI) controlled technology. While the NAM fully understands the strategic role of SI-controlled technologies, the release of SI-controlled technologies across the board is not so much of a concern as is the release of such technologies to a select few countries of concern. The categorical restrictions greatly reduce the attractiveness of the ICT.

The NAM believes that a compromise can be reached on this issue that addresses the R&D needs of companies while respecting the government's need to prevent countries of concern from gaining access to the technology. The NAM provides the following alternatives to the categorical restriction in descending order of preference:

1. SI technology eligibility should be reviewed on a case-by-case basis considering the specific company and its ICP; or
2. SI technology should be eligible for export to country groups A&B and nationals thereof.

Further, BIS should take action to ensure that items controlled under ECCNs 2A983, 2D983 and 2E983 will be eligible for license exception ICT, either by adding ICT to the list under 740.2(a)(8) or deleting paragraph 740.2(a)(8) and its subparagraphs restricting license exception use for these items entirely. There should be no concern about including these items in ICT eligibility.

Export Control Policies of Wassenaar Members for Intra-company transfers of Dual-use items and technology

Many members of Wassenaar have licensing mechanisms that allow for license free intra-company trade. American companies are at a competitive disadvantage, as foreign companies have a greater ability to work collaboratively with their subsidiaries abroad. It is vital for the ICT to be implemented in a manner that levels the playing field for U.S. companies.

Below is an overview of the licensing mechanism in some Wassenaar member countries.

European Union (EU)

EU members can freely transfer dual-use technology and items among members of the EU except for a short list of limited items.⁷ Moreover, the EU also has a community general export authorization, whereby, no export authorizations is required for the export of the less

⁷ Council Regulation (EC) No 1334/2000.

sensitive dual-use items to certain EU trading partners (namely, Australia, Canada, Japan, New Zealand, Norway, Switzerland and United States of America) once an exporter is authorized.

Japan

In Japan, bulk licenses are equivalent to the ICT concept. The bulk license system in Japan allows exporters to export dual-use items without individual license applications once approval has been obtained from the government.⁸

Canada

Canadian companies can use General Export Permits (GEPs) to export dual-use items and technology without individual licenses. GEPs enable an exporter to export certain goods or technologies that are subject to control to eligible destinations without the necessity of submitting individual export permit applications.⁹ GEPs are meant to streamline the export permit process and reduce the administrative burden of applying for individual export permits.

Conclusion

When the NAM and the Coalition for Security and Competitiveness made its proposal, the concept was unmistakably one of a new rule integrated into the existing fabric of the EAR. Yet, as we have detailed in three major dimensions – auditing, reporting requirements, and voluntary disclosures – the NPRM creates what would be essentially a parallel system not integrated into the existing EAR structure. This was not the original concept, and it cannot and will not produce the anticipated benefits.

The test of the ICT rule will be usage. If usage is very low, then any new rule must be judged to have largely failed. The NAM urges BIS to take heed of the experience with the last similar exercise, the Specialized General License (SGL). While worthy in concept and similar in intent to the ICL – to cut down the number of IVLs – the cost of qualifying to meet the SGL requirements has proved so burdensome in practice that only a small number of companies avail themselves of the SGL. It is generally agreed that the SGL affords no new benefit over IVLs.

Without the changes that the NAM is urging, the NAM sadly but confidently foresees a similar result: a grand concept, but with meager results. To avoid a second successive effort to reduce IVLs that would have to be judged more of a failure than a success, the ICT will have to be integrated into the standard EAR rule structure.

⁸ See <http://www.cistec.or.jp/english/export/index.html>.

⁹ See http://www.canadabusiness.ca/servlet/ContentServer?cid=1081944151998&pagename=CBSC_YT%2Fdisplay&lang=en&c=Regs.

The NAM understands the difficulty in balancing the national security interests of the country with the need to maintain a strong, vibrant and innovative industrial base. We strongly believe that national security and economic vitality need not be mutually exclusive. If implemented with the suggestions provided by the NAM and other industry members, the NAM feels strongly that this rule has the potential to set the foundation for implementing policies that simultaneously safe guard our critical technologies while facilitating the creation of the next generation of those technologies. It is critical for this rule and further initiatives to protect a critical set of technologies while allowing legitimate trade that strengthens the able of U.S. manufacturers to compete worldwide.

As always, the NAM stands ready to assist the U.S. government as this rule moves forward.

Thank you,

FROM: WINSTON & STRAWN LLP

ICOTT INDUSTRY COALITION ON TECHNOLOGY TRANSFER

1700 K Street, N.W., Washington, D.C. 20006 (202) 282-5994

November 17, 2008

Mr. Steven Emme
U.S. Department of Commerce
Bureau of Industry and Security
Regulatory Policy Division
14th St. & Pennsylvania Ave., NW, Room 2705
Washington DC 20230

ATTN.: RIN 0694-AE21

Re: **Establishment of License Exception Intra-Company Transfer (ICT)—
Proposed Rule (73 Fed. Reg. 57554 (Oct. 3, 2008))**

Dear Mr. Emme:

The Industry Coalition on Technology Transfer (ICOTT) is a group of trade associations whose members are subject to United States export controls. ICOTT appreciates the opportunity to comment on the proposal to establish License Exception Intra-Company Transfer (ICT).

The concept underlying this proposal is sound and such a license exception is long overdue. We commend the Department for bringing it to this point. We hope that when issued in final form, it will be user-friendly and accessible to far more than the twenty companies that the notice estimates would profit from its promulgation in the proposed form.

We support the following elements of the proposal:

- Availability to foreign subsidiaries of United States entities, even if the United States entity happens to have a foreign parent.
- Coverage of all employees of the subsidiary, including contractors and interns.

We are less sanguine about certain other elements of the proposal:

- Requirement for prior approval of all covered entities, which is inconsistent with the concept of a license exception.
- Prior approval of activities to be undertaken and specific categories of eligible items. As we expressed to Assistant Secretary Wall when he met with us on October 8, 2008, we fear that many individual ICT applications will become

FROM: WINSTON & STRAWN LLP

RIN 0694-AE21
November 17, 2008
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hostage to a continuing effort by certain agencies to restrict the use of the license exception, with the effort being manifested in objections to many individual proposed activities and ECCNs. This also can be expected to appear in the context of requests to amend ICT approvals.

- Employees of foreign entities that receive United States-origin technology under license are not required to execute non-disclosure agreements. We do not see a justification for requiring this in the context of ICT.
- The internal paperwork and related requirements are sufficiently burdensome as to make ICT more trouble than it's worth for many companies. The proposal would require extensive, pre-approved internal control programs, recordkeeping, and reporting.
- The requirement that any violation, no matter how minor, be reported to BIS is overly burdensome and is more likely to discourage use of ICT than it is to generate voluntary self-disclosures.
- The proposal should be revised to permit self-audits by approved entities, subject to BIS's right to conduct its own audits from time to time.
- The proposal would not cover encryption items, items with SI-controls(9E003 technology) and as currently drafted, would exclude security equipment, software and technology (2A983, 2D983 and 2E983). In addition, it would make License Exception APR unavailable for items initially exported under ICT.

Again, we appreciate the opportunity to comment. If you have any questions, please do not hesitate to contact me.

Sincerely,

Eric L. Hirschhorn ^{by KMK}

Eric L. Hirschhorn
Executive Secretary



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November 17, 2008

VIA EMAIL: rp2@bis.doc.gov

Steven Emme
U.S. Department of Commerce
Bureau of Industry and Security
Regulatory Policy Division
14th & Pennsylvania Ave, NW Room 2705
Washington DC 20230
ATTN: RIN 0694-AE21

Dear Mr. Emme:

The General Electric Company (GE) submits the following comments in response to the Commerce Department, Bureau of Industry and Security's (BIS's) October 3, 2008, Request for Public Comments on Establishment of License Exception Intra-Company Transfer (ICT) (73 Fed. Reg. 57,554) ("Proposed Rule").

GE welcomes the opportunity to comment on this important issue. GE believes that the ICT could benefit exporters and government, allowing substantial efficiencies if implemented effectively. ICT is exactly the kind of conceptual improvement that BIS should encourage to focus industry and government on the export transactions that create the most risk. However, if the ICT creates more burdens than benefits it will become an empty box in the EAR.

GE strongly supports the ICT concept and believes that the Proposed Rule outlines what could become a very useful license exception: several critical improvements are necessary to make the ICT usable by industry. As set forth in the Proposed Rule, the ICT is teetering on the edge.

We urge BIS to consider GE's comments and those of other exporters and industry associations to ensure that the ICT evolves into the useful device we believe it could be to transform dual use export compliance in practice.

Background on GE

GE is one of the oldest, largest and most innovative companies in the United States, with operations in over 100 countries, more than 300,000 employees and 2007 revenues of more than \$170 billion.

As a company dedicated to technology leadership and innovation, with significant worldwide operations and sales, all of GE's diverse businesses deal with some form of export controls making us a key stakeholder in export control issues. GE has a strong commitment to integrity and requires all employees to abide by and periodically reaffirm their responsibilities under our compliance policies, including GE's International Trade Controls Policy. The GE businesses are constantly striving to maintain world-class standards in the critical area of export controls.

A significant portion of GE's current licensing burden relates to intra-company transactions related to internal research and product development activities that are conducted on multiple continents. Accordingly, the ICT could be very useful to GE.

Benefits of ICT License Exception

We believe that the proposed license exception ICT will benefit GE, particularly if amended as we are suggesting in these comments. We believe that the ICT could have the following benefits:

- Save the company resources needed to obtain at least 35 licenses per year for internal company transfers, including deemed export licenses, based on analysis of 2006-08 licensing data (*if ICT eligibility includes SI-controlled and ECCNs covered by 740.2(a)(8)*).
- Save the time it takes to develop and process individual applications, which takes on average 9 weeks including license preparation time. From a productivity perspective that means that the business must wait 9 weeks to deploy an internal non-US person employee in the US or to share with a non-US affiliate. In some instances, an entire project must be put on hold until a license can be obtained.
- License applications take an estimated 50 hours on average by GE employees to develop, submit, process and implement (including the hours of business and compliance personnel involved in the process).
- Allow streamlined allocation of technology resources across the company, regardless of the country in which the resources are located. The ICT could particularly benefit our global engineering operations in the GE Global Research Center, GE Aviation, GE Energy, and GE Security.
- Allow resources devoted to license acquisition to be redeployed, additional incentives for the company to focus scarce resources on compliance, particularly to drive consistency across businesses and global operations.

Significant Concerns with Proposed Rule

However, GE has significant concerns with aspects of the Proposed Rule. We urge BIS to address these important issues in any final ICT rule:

- If BIS or the interagency reviewers require exporters to submit an equivalent level of technical detail on particular ECCNs, that will make the ICT akin to an individual validated license (IVL), but with the additional auditing and compliance burdens specified under the ICT license exception. This will defeat the program.
- The exclusion of the SI-controlled items and 2A983/2D983/2E983 (per 740.2(a)(8)) would reduce the benefit of ICT to GE's operations by at least one-half. Without the inclusion of those ECCNs, we will likely not find it of value to participate in the program.
- The requirement to report and screen "foreign nationals" is burdensome, has no clear value and will create local privacy concerns in several jurisdictions. BIS should not draw a distinction between "non-US nationals" and "foreign nationals" and should eliminate the requirement to screen prior employers of individual employees against lists of entities of concern.

Expanded Comments on Specifics of Proposed Rule

For convenience, these detailed comments largely track the sections of the ICT as outlined in the proposed rule.

Eligibility: 740.19(b)

First, we support the basic definition of eligible application and eligible user as defined in proposed 740.19(b)(1) and (2). GE supports expanding the possibility of "eligible applicants" to be organized in countries other than the US, per Supplement No. 4 to part 740. However, certain parties in the export community have commented that Eligible Recipients must be from those countries (which GE understands to be incorrect). BIS should clarify that the Supplement No. 4 countries provide a limitation on "eligible applicants" *only* for the final rule and that there is no country restriction for other ICT eligible parties other than that they cannot be located in or nationals of Country Group E or North Korea (proposed 740.19(c)(1)).

Given how GE entities are involved in internal technology development, it is unlikely that we would distinguish between "eligible users" and other "eligible recipients." We do not think most industry would take the time to add a recipient who otherwise would not be able to utilize the ICT for exports or reexports such as the eligible applicants and eligible users may.

BIS may want to simplify this concept by collapsing the notion of eligible users and other entities that would be eligible recipients.

With respect to the proposed definition of "controlled in fact" related to eligibility, GE would like to see that expanded to entities that are 50 percent owned by the eligible applicant and have implemented the eligible applicant's internal control plan. We do not see a policy distinction to exclude an entity that is at least 50 percent owned by the applicant so long as the entity has implemented the applicant's ICP. Finally, BIS should also clarify that the definition of "employee" may include a contractor that is working on business for the eligible entity at a location assigned by the eligible entity may include a dedicated space at the contracting company's own facility, so long as the eligible entity's ICP applies fully to that location as well.

Foreign Nationals

Considering proposed 740(b)(3)(ii), GE respectfully submits that it is unnecessary to impose special requirements for "foreign nationals" as defined in Note 2 to Para (b)(3)(ii). This appears to reflect the distinction drawn under current BIS licensing practices as to when a "deemed export" or "deemed reexport" IVLs would be required. BIS should reject that distinction and eliminate the additional reporting, recordkeeping and screening requirements for "foreign nationals" for the following reasons:

First, there appears to be no benefit to the US Government of requiring information on such individuals, except that it reflects information that is currently shared through license applications. Why would a German national living in France or a Chinese national living in Canada as opposed to a Chinese national in China provoke more interest? The need for such additional information is not well explained.

The requirement would pose a fairly significant compliance burden, requiring significant changes to our existing systems. For example, one of our global operations estimated that in order to implement the foreign national screening and reporting requirements it would need to implement additional compliance systems controls around their existing time tracking system. This implementation would need to be done solely to manage this ICT requirement and would not serve a separate business purpose. This operation estimated that at least a weekly review of generated reports (once programming changes were initiated) would be required to manage this control, which would take valuable compliance resources away from training, classification and other tasks. This operation does not believe it would be possible to implement such a system retroactively so the system would have to be prospective only.

Further, the proposed definition of foreign national does not distinguish between permanent and temporary assignments, making the requirements even more complex. If a GE engineer who is a Mexican national permanently residing in Mexico transfers on a bubble assignment

to the US for three months, does the company need to screen and report that individual? What if during the bubble assignment this engineer travels temporarily for a technical meeting in France? These situations arise on a regular basis. Companies will need to build additional compliance tools and mechanisms to track physical location of individuals to ensure compliance with such a requirement, which goes far beyond what exists today under some licenses and license exceptions, such as TSR.

GE doesn't see why it should be required to take additional compliance precautions simply because the same person is temporary located in another country. The ICT concept should promote controlled technology exchange within the company, regardless of the country border, because as a category such exports are lower risk to industry and government.

Further, this requirement is likely to create friction because of requirements under local laws, particularly in EU member states. Employers face risks under EU privacy requirements when asking for nationality information that is not required for compliance with domestic laws. Further, these inquiries can raise the possibility of a discrimination suit. In most circumstances, the company would need to obtain consent from the employee to obtain the data and in some jurisdictions consent is presumed not freely given due to the nature of the employer-employee relationship. If the employee opts out, there is no way the company could compel disclosure of the information and the company would instead have to restrict the individual from participation in a program involving the license-required technology. In addition, the company would need to consult with Works Councils in several jurisdictions before implementing such a requirement. These concerns will significantly add to the costs of implementation in light of local filings and training that will be required in countries such as Belgium, France, Germany, Poland and Sweden.

Finally, these issues are significant even in terms of transferring the nationality data to the US, but the sensitivity and concerns are compounded if we have to transfer the data to the US Government on a regular basis. If BIS must maintain a requirement to track "foreign nationals" in addition to the requirements around non-US nationals, GE submits that it would be adequate for the company to maintain such information in its internal records and attest to BIS on an annual basis its efforts to stay in compliance with this requirement.

If the rule is finalized with the same Foreign National screening, reporting and recordkeeping requirements as described in the Proposed Rule it will reduce the level of participation within GE operations and could cause us to reassess whether the whole program would be worthwhile.

If BIS does not agree that the concept of foreign national should be eliminated from the ICT rule, it should consider whether this requirement could be limited to a subset of nationalities. For example, if BIS limited the foreign national requirement to Country Group D nationals, that would alleviate the burden associated with tracking and managing temporary relocations by other individuals.

Restrictions: 740.19(c)

Prior employment by an end-user of concern

BIS has proposed that license exception ICT could not be used for an export to a company employee who was previously employed by a listed entity. This will be a very difficult restriction to implement in practice. Further, it is not clear why BIS or the interagency team believes that an individual who was previously employed by a designated party would continue to pose a security risk when hired by a company eligible for ICT. If it is a significant concern, why is it proposed to apply solely to *foreign nationals* and not to other non-US nationals or to all employees? This proposed restriction should be eliminated. BIS could instead revise the restriction so that it would apply only if a company had knowledge that the individual would share controlled technology with a designated party. (Of course, this situation would be restricted by the non-disclosure agreement signed by the individual regardless.)

The implementation of this restriction will pose significant compliance burdens for US exporters. While GE currently does screen certain employees and candidates for employment against US Government and other watchlists, we do not require screening of the prior employer. We evaluate previous employment history solely during the hiring process and based on the resume of the candidates. The resumes are currently not retained by human resources. Decisions regarding export authorizations and the need to grant access to controlled technology are not always made during the hiring process, so it would be difficult to implement this screening requirement in practice. Further, we would have no ability to implement this screening for current employees based on records maintained by the company.

Hypothetically, what would be the screening requirement if GE were to employ someone who had previously worked for a party that was designated on a watchlist several years after the person joined GE? Would we be required to screen every foreign national employee's resume in perpetuity? While we believe this restriction should be eliminated entirely, at a minimum BIS should (1) limit any screening requirement to the immediately prior employer; and (2) make clear that there would be no enduring screening requirement related to past employers once the individual is employed by the ICT holder (including employees in place as of the time of ICT enactment). Finally, BIS should specify which particular end user lists must be included for any screening.

No categorical restrictions on technology appropriate

GE respectfully submits that BIS should delete the product/technology related restrictions in paragraphs (6) and (7). As a matter of principle, BIS should not exclude particular technologies from eligibility for the program, except as reflects statutory limitations, such as

with MT-controlled items. For SI controlled technology, this will result in a significant limitation in terms of usefulness for companies involved in commercial engine technology development on a global basis, such as GE. It is also possible for BIS and interagency reviewers to examine requests to authorize SI-controlled items on a case-by-case basis depending on the individual merits of a company's ICT application. An ICT applicant may be willing to address specific concerns to an extent that the interagency might be willing to approve SI-controlled technology in a limited form, such as with an across the board exclusion of technology related to design methodologies and practices. Accordingly, a categorical prohibition seems overly restrictive.

If BIS decides to maintain this exclusion, it should consider whether it would address the US Government concerns about this technology if eligibility were limited for exports to country groups A & B and nationals thereof. At the very least, ICT should be eligible for deemed exports (inside the US) for nationals of country groups A and B.

Further, BIS should take action to ensure that items controlled under ECCNs 2A983, 2D983 and 2E983 will be eligible for license exception ICT, either by adding ICT to the list under 740.2(a)(8) or deleting paragraph 740.2(a)(8) and its subparagraphs restricting license exception use for these items entirely. There should be no concern about including these items in ICT eligibility. Further, BIS should consider whether other limitations under 740.2 could be lifted for license exception ICT considering the lower risk nature of the intra-company transaction involved.

If both SI-controlled and 2A983/2D983/2E983 ECCNs remain outside of the eligibility for license exception ICT, it will greatly reduce the incentives for GE to participate, basically excluding our Security business and reducing the level of participation by GE Aviation and the GRC. We estimated that we would save 35 license applications a year if these ECCNs are included but that would reduce by half if these ECCNs excluded. Without these ECCNs, it is doubtful whether GE would view the benefits of the program as outweighing the costs.

ICT Control Plan: 740.19(d)

GE agrees that the proposed mandatory elements of the ICT Control Plan make basic sense, though companies with existing compliance programs will likely need to make some adjustments to align their controls with the requirements of the Proposed Rule. Companies will likely need to change existing internal control programs, procedures and implement additional training. These changes will require a material amount of time and cost to implement, meaning that there will need to be a real benefit in terms of licensing and other savings to justify adopting the ICT model.

We appreciate that BIS has defined these with examples and not mandated specific criteria for each element. As BIS has recognized, compliance plans must be tailored to the

particular risk environment and structure of an individual company. The discretion to satisfy these elements according to company-specific judgment is essential.

With respect to individual elements, GE would propose to satisfy the personnel screening procedures element with its existing background checking and screening program, which does not apply in different form for foreign national employees. BIS should allow a company to satisfy this requirement with any screening procedure that applies to at least the foreign national group, and may include others. Further, BIS should clarify that the phrasing in proposed (d)(1)(iv) "which includes, but is not limited to" does not make mandatory each of the elements specified in the personnel screening procedure paragraph, in light of the guidance under (d)(1) that "illustrative examples" are included.

We agree that self-evaluation is an important criterion for the ICT Compliance program, but this could be a potentially difficult one to implement in practice. First, the current draft implies that companies have a duty to disclose deficiencies identified during the course of the self-evaluation program. BIS should confirm in the Final Rule that it has no expectation beyond what already exists in the EAR, that it encourages voluntary self-disclosure, in accordance with section 764.5. Without this clarification, BIS may discourage companies from applying for the ICT program solely because of concern over a mandatory disclosure requirement. Companies will have ample incentive to disclose any violations identified given that there is an expectation of BIS audit of activities under the ICT.

BIS should also clarify that it will be particularly focused on disclosure of deficiencies/corrective actions that are *material* when evaluating effective ICT control plans.

GE supports the letter of assurance requirement signed by a company officer. It is appropriate to have a company officer sign this document and this will help to ensure leadership oversight of the ICT program within the company.

Finally, GE does not object to the requirement to have non-US national employees sign a non-disclosure agreement for access to controlled US technology, though it will take time to implement for most of our operations. However, it is duplicative and a waste of resources to require such agreements to be completed in both English and the employee's native language. Certain of our operations currently maintain a requirement that all "legal" documents are executed in English, including letters of assurance under license exception TSR. The employees who execute these documents speak English well enough to understand the meaning of what they are executing. For BIS purposes, execution in either English or the employee's native language should be adequate. Further, BIS should clarify that NDAs do not need to be executed again if the eligible applicant adds additional ECCNs to the ICT approval.

ICT Application: 740.19(e)

We understand the need to provide detailed information to BIS concerning company names, locations, etc. for an ICT application. However, BIS will need to work closely with US exporters to communicate more fully the expectation for the "detailed narrative describing the intended use of the items covered by the listed ECCNs." The more detail that BIS and the interagency reviewing community expect, the more the experience becomes like preparing an IVL application, which could greatly hamper the success of the program. BIS and the interagency should focus on the ICT Control Plan for detailed review, not on the individuals involved and technical details submitted. As one of GE's compliance personnel explained, "The burden of mirco-detailing data by individuals involved and the technical details to be submitted and then wait for approval is not worth the effort."

If the ICT Application review process becomes as detailed as the IVL process with respect to individual ECCNs and technology descriptions, we believe that the benefit of the program will be greatly reduced and few, if any, companies will choose to participate. We believe this will be the single most important issue that will determine whether the program is a success – if exporters are forced to detail their ICT applications consistent with the requirements under the current license application process, they will not use this program.

BIS should state a clear expectation that ECCNs may be listed at the five-digit level. This will allow companies greater discretion in reporting and maintaining this information.

Review of ICT Submissions: 740.19(f)

GE would prefer that the ICT to be self-executing, similar to license exception ENC, in that after a 30 day review period there is a presumption of approval. If needed, GE supports the use of the processing procedures and timelines as described in 750.3 and 750.4 of the EAR so long as they are limited to the timelines and escalation procedures and do not result in any reviewers treating the ICT application as an IVL application.

BIS should clarify its expectation regarding violations of the EAR uncovered as part of the self-evaluation program and whether there is an expectation of mandatory disclosure in the context of the ICT application. GE respectfully submits that BIS should not attempt to compel disclosure, even in the context of the ICT application. As discussed, companies will have ample incentive to disclose violations related to the ICT program.

Changes to Submitted Information: 740.19(g)

Once a company becomes an authorized user of the ICT license exception, there should be a quick process to allow for the incremental addition of new entities and ECCNs. In rapidly changing markets, new facilities are opened routinely and GE acquires businesses frequently. Adding a new facility in a country already included in a previous authorization

should be permissible with a reporting requirement prior to use of the ICT for that facility rather than a full reauthorization. Further, allowing a streamlined process will allow for efficient allocation of industry and BIS resources on the most critical aspects of the program.

Mergers/Acquisition Process

BIS's proposal to require immediate termination of the use of ICT if there is a change in the control of a company will be problematic (proposed 740.18 (g)). According to 740.18 (g) an applicant's ICT authorization becomes invalid due to change in control, and an applicant would be obligated to terminate its exporting operations for an indefinite period of time until the new authorization is issued. Until then, the company would have to put its export activity on hold or scramble to obtain licenses. BIS should develop a process to allow an orderly transition in the case of a change in control of a company – allowing exports to continue under the prior ICT Control Plan for a period of time and transitioning to the new owners ICT Control Plan within, perhaps 90 days, upon notice to BIS. This will allow companies sufficient time to make an orderly transition without significant interference in internal operations.

Reporting and Auditing Requirements: 740.19(h) & (i)

BIS should alter the proposed biennial audit requirement specified in Paragraph (i) and make it aspirational that an audit would be conducted every two years. BIS will want discretion to implement the auditing function of the program in the most effective way possible, which may be biennial in the case of some companies or a shorter or longer period in the case of other companies. In addition, GE appreciates that BIS plans to give companies notice of an audit visit.

Further, there is no need to require separate reports to be filed by ICT entities in accordance with paragraph (h). Any reporting requirements should be converted to specific recordkeeping requirements. Reporting requirements will make the ICT less attractive as compared to existing IVLs and other license exceptions.

In particular, we are concerned about the annual reporting requirement including listing of name, nationality and date of birth for all foreign national employees who received technology or source code under the ICT license exception. Due to local privacy laws and other concerns, this information will be difficult to collect consistently with local requirements in all countries. As discussed, it is materially worse under many privacy laws to have to report the information directly to the US Government, rather than to have to maintain such information.

Recordkeeping for individual exports should be able to be satisfied by the initial release only and for a company to track groups of ECCNs and non-US nationals associated with a particular application or project; BIS should not require a one-for-one correlation of ECCN

and individual. Initial release should be interpreted to cover the first release of any technology under the same ECCN regardless of the form of the data exported (manual, blueprint, specification, etc.) and the ECCN subparagraph level. Accordingly, subsequent exports even if in a different form or under a different ECCN subparagraph level would not have a separate recordkeeping requirement. This is particularly the case considering that the vast majority of trade under ICT will likely be in the form of intangible, electronic transfers for which there will be far fewer records. If BIS requires each ECCN be tracked to each individual, it may require companies to implement costly tracking systems or build special tools simply to manage this information. It will also likely discourage individual companies from participating in the program.

Further, BIS should accept records maintained at the top level of ECCN rather than at a subparagraph level, particularly considering how licenses are issued today and how such data are inputted into systems such as AES.

Conclusion

GE strongly supports the proposed ICT concept, with the modest changes suggested in our comments. We believe that this program will provide concrete benefits to industry and government by encouraging companies to invest in their compliance programs rather than license procurement. It will also promote efficient allocation of technology resources worldwide and allow companies to start innovative research programs more quickly involving non-US affiliates and non-US personnel.

We also respectfully submit that the ICT program, if modified as we have suggested in our comments will help to level the playing field as compared to the licensing burden applicable to Wassenaar countries such as the EU member states.

Please feel free to contact the undersigned at 202 637-4206 or kathleen.palma@ge.com if you have any questions about these comments.

Best regards,



Kathleen Lockard Palma
Counsel, International Trade Regulation

November 17, 2008



Sent via E-Mail and U.S. Mail
Steven Emme
U.S. Department of Commerce
Bureau of Industry and Security
Regulatory Policy Division
14th & Pennsylvania Avenue N.W. Room 2705
Washington, D.C. 20230

Re: Request for comment to Proposed Rule Inter-Company Transfer RIN 0694-AE21

Dear Sir/Madam:

Thank you for the opportunity to comment on the Bureau of Industry and Security Proposed Rule to amend the Export Administration Regulations by establishing a new license exception entitled "Intra-Company Transfer" (ICT), published in the Federal Register of September 29, 2008.

The proposed exception is a positive indication that the Commerce Department is seriously considering ways to facilitate controlled exports between US Companies and their international subsidiaries and entities.

In principle, we fully support the concept of an ICT exception and we believe that the proposed rule offers a number of benefits. However, practically speaking, the proposed exception does not offer much more flexibility than existing export authorities. We have listed below the perceived advantages and disadvantages of the rule and made some recommendations as to how to make ICT a more significant license exception that would be broadly utilized by industry.

Benefits of the Proposed Amendment:

- Individual validated licenses normally have a two-year validity period, and the Special Comprehensive License has a four-year validity period. The ICT compares favorably in this regard because it would allow for an unlimited validity period.
- The recipient cannot export under the ICT, unless the eligible user specifically designates a company as both a user and a recipient.



- Internal Control Plan (ICP) requirements are similar to those in place at companies across the United States and, for the transfer of technology, to those imposed under most Commerce licenses pursuant to a Technology Control Plan.
- Non U.S. entities are eligible to use ICT.
- All recipient employees are eligible, including contractors and interns.

Disadvantages of the proposed license exception:

- The unavailability of license exceptions for MT controlled items would impede our use of ICT in a significant way. Having to license certain items and then allow under a license exception other items requires two separate compliance models for the company as the license provisos and the ICT requirements will not always mesh. The result being - it would be easier to license everything and follow one model.
- It requires non-disclosure agreements from all employees of the entity receiving the items authorized under the ICT. This is not a standard requirement under general licenses or under a special comprehensive license authorization, even though items exported under those authorities are not subject to the same oversight and controls that the ICT user could impose in an intra-company transfer scenario.
- It requires name, nationality, and date of birth of employees of the recipient entity. This requirement is only necessary under a deemed export license but not for general licenses or a special comprehensive license. Additionally, this information may be difficult to obtain in some countries, or even contrary to in-country labor or privacy laws.
- It requires audits by the USG every two years. This non-discretionary requirement is unnecessary, as the USG already has authority under the Export Administration Regulations to audit exporters at any given time.
- Strict and onerous reporting requirements, more so than under existing authorities.



- Boeing has determined that the ICT, as proposed, would only cover 6.5% of items subject to controls. This means that companies would not be able to use the ICT exception, as proposed, often enough to benefit from it.
- Boeing has over 250 subsidiaries, entities and joint ventures across the globe; however, after assessing the applicability of the ICT exception, we have determined that only five of our foreign entities would receive benefits beyond what they currently enjoy, due mainly to the limited list of eligible Export Control Classification Numbers (ECCNs) and the fact that the ICT extends only to “Controlled In Fact” entities, and not also to a user’s other affiliated entities into whose compliance and operational processes, tools, and personnel the user has visibility such that it can determine that control requirements are met.

Recommendations:

- Expand country list to Country Groups A and B.
- Expand list of controls to include MT.
- Require a Non-Disclosure Agreement (NDA) from the companies approved under the ICT exception but not down to the staff level.
- Remove the requirement to provide employee name, nationality and date of birth.
- Internal Control Plan (ICP) and training requirements must be established by the company as specified in the proposed rule.
- Remove non-discretionary audit requirements.
- Remove reporting requirements, as the U.S. Government has authority to audit; rather, make it a recordkeeping requirement with proof of compliance.
- Suggest allowing same levels of control for items currently allowable in the EAR under an exception. For example, in the case of encryption items, the levels of control in the proposed rule are significantly higher than what is allowable under the recently revised EAR ENC exception.
- Clarify the language related to voluntary disclosures to avoid the perception that they may be mandatory under the ICT.



As part of our analysis, we conducted a side-by-side evaluation of current requirements under individual validated licenses, the special comprehensive license, and the proposed ICT to provide a comparison of similar areas of licensing control or obligations. We have included this for your information in the attachment to this letter. Important in finalizing this rule is that requirements under this exception be consistent with, and not more onerous than, current licensing authorities. Such requirements coupled with a much higher level of oversight under ICT provide the necessary confidence in an effective set of controls.

In closing, we want to reiterate our support for an intra company transfer exception. Additionally, we respectfully ask that BIS reconsider some of the requirements to make this exception more attractive to the exporter. Also, due to the ownership structure, the exporter will have a much higher level of oversight of the end-user under ICT than it would have with respect to an export to an unrelated entity and therefore eliminating some of the more burdensome requirements of the ICT exception should not present a risk.

We look forward to publication of a Final Rule that addresses industry concerns and hope that the Commerce Department will continue its dialogue with industry until the regulatory process is complete.

Sincerely,

A handwritten signature in black ink that reads "Norma Rein".

Norma Rein
Senior Manager, Global Licensing Compliance and Policy
703-465-3655

Attachment

| Comparison of Requirements: Standard BIS License vs. Special Comprehensive License vs. ICT License Exception | | | |
|--|--|---|---|
| Required Documents | Standard BIS License | ICT License Exception | Special Comprehensive License |
| Pre-application consultation | No | Must obtain BIS approval prior to exporting | Must have a pre-application consultation with BIS to determine eligibility and reliability for all parties under the SCL. |
| License Application | Standard license application 748P | ICT Control Plan | Obtain Pre-Approval from BIS Determine Reliability of Consignee BIS Forms 748P-A & B, 711, 752,752-A Form 711 Comprehensive Narrative Statement Consignee Certifications Internal Control Plan |
| Support Documents | End-User Certificate/Statement, Import Certificates, Letters of Assurance, related licenses, end-user information, technical documents | Reasons for need of ICT License Exception | An overview of the total business activity that will be performed by you and all other parties who will receive items under the authority of your SCL, including consignees, subcontractors, and vessels; |
| | | Name and contact information for the employees responsible for implementing the ICT control plan at all sites | Various certifications required dependent on type of exports |
| | | All eligible applicant parent companies must implement and ICT Control Plan with all eligible recipients and users | |
| | | BIS may require the eligible applicant to modify the ICT Control Plan before authorizing A description of how each mandatory element described below will be implemented | |
| ECCNS | BIS can limit the use of requested ECCNs | Listing of the ECCNs of the items that will be transferred and a description of the intended use of the items covered by the ECCNs | <p>Restricted ECCNS:</p> <p>Hot section technology for the development, production or overhaul of commercial aircraft engines controlled under ECCN 9E003.a.1 through a.12</p> <p>No communications intercepting devices and related software controlled by 5A980, 5D980, or 5E980</p> <p>No Maritime (civil) nuclear propulsion systems identified in 744.5</p> <p>Does not allow Items for SS reasons</p> <p>Does not allow items controlled for EI reasons</p> |
| Parties to the Transactions | End-user, Ultimate Consignee, Applicant | Information on Eligible parent company applicant : location of company headquarters, principal place of business, complete physical address, location of registration or incorporation, ownership of company Information on each eligible user or recipient: full name of entity, location and principal place of business, physical address, locatin of registration or incorporation | End-user, Ultimate Consignee, Applicant |
| Internal Controls Plans | | Mandatory elements of the ICT Control Plan | ICP Required |
| | | Corporate Commitment to Export Compliance | Corporate Commitment to Export Compliance |
| | | Physical Security Plan (description of measure to prevent a violation of EAR as well as physical description of security measures at all sites) | A system of timely distribution or regulatory materials necessary for compliance to consignees |
| | | Information Security Plan (Description of Security methods, firewalls, intranet security, etc) Personnel Screening Procedures (screening of foreign nationals at all sites) | identification of parties in consignee firms responsible for compliance a compliance review program covering SCL holders and all consignees a system for assuring compliance with items and destination restrictions for all exports, reexports, and transfers |
| | | Training and Awareness Program (schedule of regular training programs) | |

| | | | |
|--|--|--|--|
| | | <p>Self Evaluation Program (creation and performan of internal audits, checklist of critical areas and items to review, development of corrective procedures or measures implemented to correct identified deficiencies)</p> <p>Letter of Assurance for software and technology (certification that controlled software, commodities and technologies will not be reexported, exported or transferred in violation of the EAR)</p> <p>Signing of NDA (signed by any non-US national to ensure the protection of technology or source code for as long as it remains controlled by the EAR)</p> <p>Review of End-User Lists (all FN that receive technology or source code must be checked against the appropriate end-user lists. Also the prior employers of foreign national employees must also be screened)</p> | <p>Training and education program</p> <p>A program for recordkeeping as required by the EAR</p> <p>An order processing system that documents employee clearance of transactions in accordance with applicable elements fo the company ICP</p> <p>A system for monitoring in transit shipments and shipments to bonded warehouses and free trade-zones</p> <p>A system for notifying BIS promptly if the SCL holder knows that a consignee is not in compliance with terms of SCL</p> <p>A denied party screening system</p> <p>A system for assuring compliance with control over exports and reexports of chemical precursors and biological agents and related items and end-uses</p> <p>A system for assuring compliance with exports and reexports of missile related end-uses and end-users</p> |
| Validity Period | limited | unlimited | four years |
| Audits | | <p>Biennial audit by BIS</p> <p>Discretionary audit by BIS at any time</p> | |
| Compliance Plan/Recordkeeping/Reporting | Recordkeeping only | Annual reporting requirement to BIS including: name, nationality, and DOB of FN employees that have received technology or source code; name, nationality and DOB of FN employees terminating employment; a letter of assurance from a company officer assuring entities are in compliance with the results of the self-evaluations | A copy of your procedures for screening transactions to prevent violations of orders denying export privileges under the EAR |
| Eligible Destinations | Variable. Based on Contry Group and Commodity Control List | Limited to a small number of approved countries. | All countries except Country Group E, or as deemed by BIS on a case by case basis |



November 17, 2008

Mr. Steven Emme
U.S. Department of Commerce
Bureau of Industry and Security
Regulatory Policy Division
14th & Pennsylvania Avenue N.W., Room 2705
Washington, DC 20230

ATTN: RIN 0694-AE21

Re: Request for Public Comments on Export Administration Regulations:
Establishment of License Exception Intra-Company Transfer (ICT)
(73 Fed. Reg. 57,554)

Dear Mr. Emme:

The Semiconductor Industry Association (“SIA”) is pleased to respond to the proposed rule to amend the Export Administration Regulations (“EAR”) to establish a new license exception, Intra-Company Transfers (“ICT”), which would allow an approved parent company and its approved wholly-owned or controlled in fact entities to export, reexport or transfer in-country many commodities and technologies on the Commerce Control List (“CCL”) for internal company use.

SIA is the premier trade association representing the U.S. semiconductor industry. Founded in 1977 by five microelectronics pioneers, SIA unites over 70 companies that account for nearly 90 percent of the semiconductor production of the United States.

Background

Like the high-technology industry at large, SIA member companies operate globally and must contend with substantial case-by-case export licensing requirements on an intra-company basis. This activity spans “deemed exports” of technology to controlled country foreign nationals as well as actual exports and reexports of commodities and technologies to foreign subsidiaries. It is generally characterized by multiple, repetitive, low risk transactions that require an inordinate amount of export licensing activity and resources.

Deemed Exports. From the industry’s perspective, deemed export license applications have resulted in major complications affecting the employment and treatment of foreign nationals in the United States and in overseas facilities. Foreign nationals comprise a major segment of the pool of existing and prospective employees for U.S. technology companies. This situation is driven by the disproportionate number of foreign nationals receiving advanced degrees in technical fields from U.S. institutions,

the need for global companies to have a global workforce and the universal attractiveness of working for world-class U.S. technology companies. These circumstances place the United States in an enviable and fortunate position of having access to many of the most capable and talented technical personnel in the world.

U.S. companies need to hire highly-skilled foreign nationals. U.S. companies dedicate a significant amount of time and effort to attract foreign national employees and must compete against companies globally to hire the most qualified and accomplished employees. Once employees are hired, companies want them to begin working as soon as possible. Unfortunately, U.S. high technology companies often must ask their just hired foreign national employees to sit idle during the lengthy process of obtaining a deemed export license. This is harmful to the company and the employee. It has a disproportionately negative effect on the ability of SIA member companies to attract and retain highly-skilled workers. In these circumstances, SIA welcomes BIS's attempt to create License Exception ICT to authorize U.S. companies to provide access to controlled technology to foreign nationals within their operating units throughout the world.

SIA has long held that the deemed export rule is unnecessary, lacks a compelling national security rationale or justification and deserves fundamental reexamination rather than mere refinement. In December 2007, the Commerce Department's Deemed Exports Advisory Committee ("DEAC") concluded in its report on "The Deemed Export Rule in the Era of Globalization," that the deemed export rule:

no longer effectively serves its intended purpose and should be replaced with an approach that better reflects the realities of today's national security needs and global economy.

The SIA strongly agrees with the DEAC's conclusion. Deemed export licenses are expensive and time consuming, and a new approach is needed. To this end, SIA supports the overarching concept of License Exception ICT and the attempt of the Bureau of Industry and Security ("BIS") to limit the need for duplicative and repetitive licenses, increase certainty and predictability in the export control system and provide companies "streamlined treatment after meeting certain criteria." However, any license exception must in practice deliver tangible improvements over the current export licensing regime in order for companies to consider its use.

Actual Exports. SIA member companies are heavily invested in the United States, but they also operate substantial production, research and development and other facilities around the world. This global reach frequently requires companies to transfer equipment, technology and other items to their foreign sites that require individual licenses.¹ The process necessitates case-by-case filing of license applications as well as requests for license renewals and upgrades. It also entails having to contend with license

¹ While a Special Comprehensive License is currently available for offshore operations, very few companies apply for this license due to its substantial constraints and burdens.

conditions that range from technology limitations to specified operating procedures to record keeping requirements. Such conditions often vary by license, exacerbating the challenges of obtaining licenses on a transaction-by-transaction basis.

As with deemed export licenses, having to obtain transaction-by-transaction licenses for actual intra-company exports that stay within a single controlled corporate structure can be costly, disruptive and of no useful effect. Delays in the issuance of a license can slow production, research and other activities. Similarly, license conditions can constrain the activities of U.S. subsidiaries in ways that limits productivity and innovation. And much of the effort is wasteful –submitting similar information for similar evaluations with similar results, over and over again.

At the same time, there is no compelling reason to believe that the current transactional approach protects U.S. security interests with any greater efficacy than would a holistic intra-company license exception, especially in light of the lower risk of diversion associated with intra-company transfers.

In these circumstances, standing authority to export and reexport items for internal use within a company's controlled overseas subsidiaries is an attractive concept for SIA members. As with deemed exports, SIA supports a license exception for actual exports within a company's subsidiaries, especially if the actual exports do not have to be subjected to the same extensive measures the proposed rule contemplates for deemed exports. Yet once again, this license exception will need to avoid imposing burdens and difficulties that nullify its utility if it is to have any realistic prospect of being used by SIA member companies.

Need for Streamlining and Reducing Burdens

In the absence of fundamental reform, SIA views the creation of an ICT license exception as a positive step to minimize some of the unnecessary problems that accompany the deemed export rule. The proposed rule is acknowledged to focus on about 200 companies with sophisticated export control programs and high volumes of exports. For these companies, many of whom are likely to be SIA members, the proposed rule could provide important advantages in dealing with their overseas subsidiaries. However, the degree to which exporters could actually benefit from the license exception will depend in large part on whether the license exception reduces effort, delay and uncertainty relative to the current licensing alternatives, namely, the use of an individual export license or special comprehensive license.

Unlike the usual license exception, License Exception ICT requires a substantial application process as well as a number of time-consuming and continuing administrative tasks. These measures can greatly impede any streamlining benefits that License Exception ICT might offer over existing licensing alternatives. Indeed, the proposed rule looks less like a license exception and more like today's burdensome Special Comprehensive License with additional requirements.

Several elements of License Exception ICT diminish its utility and hence deserve reconsideration.

- Foreign national screening process. SIA does not object to screening against published government lists of end-user concerns. Such screening is routinely done by exporters. However, SIA questions the purpose and relevancy of the additional foreign national screening process outlined in the proposed rule. Reviews of a foreign national's criminal background, driver's license and credit history can require significant time and effort but offer no clear value. This type of information does not reflect a propensity for a foreign national to reexport technology without proper export authority. Further, the proposed rule does not explain how an exporter is to use such information. Finally, it may be difficult to obtain such information in light of various privacy protections that exist in the United States and around the world.
- Training and awareness. SIA believes that there should be minimal additional training needed with respect to the ICT Exception. The steps required with respect to foreign national employees – screening, obtaining agreement to abide by U.S. export control law, etc. – should be simple and straight forward. The scope of the items subject to the ICT Exception should be clearly articulated so as to be easily understood. Application of an ICT Exception should reduce the complexity of export licensing requirements and, if anything, reduce the need for export control training generally.
- Self-evaluation program. Self-evaluation can be a useful part of a commitment to compliance with U.S. export requirements including those of the ICT Exception. However, it is not clear why a separate self-evaluation requirement is needed in the context of License Exception ICT, since exporters already need to commit to self-evaluation in the context of existing internal compliance programs in general. In any case, BIS goes beyond self-evaluation when it asks that an exporter make a voluntary self-disclosure if it discovers a violation of the EAR. This element, which is a part of a mandatory requirement, would render the EAR self-disclosure program non-voluntary. The decision to file a voluntary self-disclosure should remain with the exporter.
- Terms and conditions. One of the major complications for exporters in utilizing individual export licenses or deemed export licenses is that BIS regularly imposes special terms and conditions on use of the license. The proposed rulemaking states that in reaching a decision on an application for an ICT Exception, "BIS will specify the terms and conditions of the ICT authorization." Should BIS seek to impose special and individual terms and conditions on approval of an ICT Exception, it will drastically reduce the attractiveness of the mechanism to exporters. Rather than constituting an exception of predictable and general

applicability, the ICT Exception would be converted into just another form of individual license.

- Annual Reporting. The annual reporting requirement would be much less onerous if it were changed to a recordkeeping requirement. Annual reporting serves no useful purpose; if the government wants to see an exporter's records, it can always call for them. The EAR already requires that exporters maintain records and produce them for U.S. government officials upon request. No further reporting requirements should be necessary.
- Content of Recordkeeping and Reporting. Companies with a number of overseas subsidiaries operating in a global network would surely find it difficult to keep a record, by ECCN, of when a particular foreign national employee received a particular technology or source code under the ICT Exception. It would be far more efficient for companies to track what technology and source code is available to foreign national employees without regard to if and when an individual foreign national employee actually received the technology.

SIA can discern no national security rationale for why information on the actual transfer of technology or source code to foreign national employees could be of use to BIS. Given the nature of networks and globalized workforces, it would be reasonable to assume that access to a database containing technology and/or source code by an approved eligible foreign national employee is the equivalent of the transfer of all the technology in that database. This would remove a large tracking burden for companies, while still providing BIS upon request with the names and identifying information of foreign national employees that had access to certain technology and source code.

In short, the central value of an ICT Exception for exporters is to establish a predefined universe of items and foreign nationals who can be utilized within the exporter's controlled affiliates without regard to individual transfers. The proposed tracking and record-keeping requirements threaten to eliminate this value.

- Visa Status. Companies should not be required to track the day-to-day visa status of their foreign national employees. Such information is not readily available to a company. As the originator of visa classifications and documentation, the U.S. government itself is in a better position to monitor the visa status of foreign nationals.
- Audits. The proposed rule contemplates non-discretionary, biennial audits for companies using License Exception ICT, a process that implies more scrutiny than should be needed for use of a license exception. This requirement should be eliminated because BIS can already conduct audits at its discretion. At a minimum, a "review" of activity would seem to be a more suitable

characterization than the proposed non-discretionary "audit." Furthermore, SIA believes the review should be directed toward the extent to which a company has maintained the terms for qualification for License Exception ICT rather than an audit of exports or transfers made under the License Exception ICT.

- Large Upfront Cost for Future and Uncertain Benefit. In addition to providing an internal control plan, an applicant for an ICT Exception must also submit evidence that the ICT control plan has been implemented and that the company complies with the mandatory elements. Requiring a company to undertake the cost of implementing a control program prior to knowing if it will obtain the authority to use the license exception creates a significant downside to exporters in pursuing an ICT Exception application. Exporters are put in the uncomfortable position of having to commit substantial resources for the risky prospect of future and uncertain benefits. License Exception ICT would be far more attractive if exporters could submit for approval their plans without the need to implement them. Approval of the ICT Exception could then be conditional upon implementation of the plans.

Other Comments

In addition to the obstacles and burdens inherent in the License Exception ICT proposal, there are certain other aspects of the proposal that deserve comment.

- Company Officer Certification. The requirement that a company officer must certify to BIS that the entire company and its approved eligible users and eligible recipient entities are in compliance with all dimensions of the terms and conditions of the license exception is overreaching. Such an officer certification is not required elsewhere in the EAR.

The certification requirement introduces the potential for liability under the "False Statements Accountability Act" (codified under 18 U.S.C. § 1001), the violation of which could subject an individual to a fine and in the case of a deliberate violation, imprisonment. An officer certification requirement is out of proportion to all other license requirements in the EAR and represents a major obstacle to use of the license exception. The current obligation for companies and officers to comply with export laws and regulations should be sufficient for the ICT Exception.

- Time Commitment. SIA believes that BIS has severely underestimated the time it will take a company to comply with all of the requirements of License Exception ICT. BIS states that:

In addition, this proposed rule contains a new collection for reporting, recordkeeping, and auditing requirements, which would be submitted for approval to use License Exception ICT, carries an

estimated burden of 19.6 hours for companies having an existing internal control plan and 265.6 hours for companies not having an existing internal control plan in place.

It is unlikely that company could update its current internal control plan in only 19.6 hours. Designing and implementing the self-evaluation process alone will greatly exceed this time budget and this is just one of the many elements required for License Exception ICT.

* * *

SIA member companies need flexibility to operate within their global subsidiaries and to organize and rationalize their global workforces. This is essential to their global competitiveness and their global leadership in technology development. Current U.S. export licensing requirements fall short of providing the needed flexibility.

Export authority should be available for exporters who meet defined procedures to engage within their controlled global network in transfers for certain items and with respect to employees who are nationals of certain countries. These transfers can be readily controlled by exporters and present relatively little risk of diversion.

Overall, SIA favors a license exception for intra-company transfers that provides standing authority and is self-executing. This is the approach utilized by License Exception ENC and it has worked effectively.

In its proposed form, License exception ICT is a substantial departure from an authorization under objective and established conditions. To the extent it can move in that direction, License Exception ICT will be far more attractive to and likely to be used by SIA member companies.

SIA appreciates the opportunity to comment on the proposed rule and looks forward to continuing its cooperation with BIS on this subject. Please feel free to contact Clark McFadden, counsel to SIA, or the undersigned if you have questions regarding these comments.

Sincerely,



David Rose
Chairman
SIA Export Controls Committee



Qualcomm Incorporated

5775 Morehouse Drive
San Diego, CA 92121-1714

November 17, 2008

Mr. Steven Emme
U.S. Department of Commerce
Bureau of Industry and Security
Regulatory Policy Division
Attn: RIN 0694-AE21
14th & Pennsylvania Avenue, NW.
Room 2705
Washington, D.C. 20230

Re: Comments on establishment of License Exception Intra-Company Transfer (ICT)

Dear Sir/Madam:

Qualcomm Incorporated (Qualcomm) welcomes the opportunity to respond to BIS's request for comments on the proposed establishment of a new License Exception Intra-Company Transfer (ICT) (73 Fed. Reg. 57554 (October 3, 2008)).

Qualcomm is a leader in developing and delivering innovative digital wireless communications products and services worldwide based on Qualcomm's CDMA digital technology. Qualcomm has licensed its essential CDMA patent portfolio to more than 100 telecommunications equipment manufacturers worldwide. Headquartered in San Diego, California, Qualcomm is included in the S&P 500 Index and is a FORTUNE 500® company traded on The Nasdaq Stock Market® under the ticker symbol QCOM.

Qualcomm is a heavy user of export licenses to release technology and source code to foreign national employees and to our foreign affiliates. Qualcomm is strongly in favor of a license exception which will eliminate the need for so many export licenses to cover intra-company communications and work. Such a license exception would be of great value to Qualcomm, and we appreciate BIS's efforts to ease the burden currently imposed on industry. This proposal is a positive start. We hope our comments below serve to help BIS improve License Exception ICT. The ICT license exception as proposed contains vague terms which make it difficult to follow, requirements that would increase rather than decrease the burden on companies in comparison with individual export licenses, and unclear guidelines which may pose legal risks.

1. Define terms used in proposed ICT

1.1. "Eligible user" vs. "eligible recipient"

The ICT control plan must be implemented by all eligible users, but it is unclear what the difference is between an eligible "user" and an eligible "recipient." We presume that a "recipient" would be authorized to receive controlled items, but it is unclear whether they would be permitted to retransfer them to other authorized parties within the approved group of companies. It also appears that the distinctions, whatever they may be, operate at the level of the authorized affiliated entity. The proposal appears to categorize individual foreign national employees as eligible to be "recipients" only. However, there is confusion on the exact meaning of these terms and the benefit of designating these as separate categories. We question the utility of ICT to enhance intracompany communication and collaborative R&D efforts if eligible "recipients" cannot share the information or items with all other eligible personnel falling under the ICT authorization umbrella. This distinction implies that recipient companies and individual foreign national employees would not be able to exchange

controlled information with other authorized recipients within the group of authorized companies. This would seem to create one-way conversations or a "stovepipe" situation that would severely limit the use of ICT as a means of facilitating worldwide collaborative R&D efforts of a company like Qualcomm.

1.2. "Company Officer"

ICT places new responsibility on a "company officer" of the eligible applicant. This term is not defined in ICT or elsewhere in the EAR. All EAR processes can be managed by a company's appointed lead of export compliance, often also a company's ITAR empowered official. Such personnel are not necessarily "officers" of a company, as that term would be understood in corporate law. While of course corporate officers are expected to be engaged in the export compliance process at the level of setting company export control policy, appointing the lead of export compliance, and allocating appropriate resources to ensure compliance, they may not generally participate in day-to-day compliance matters at larger companies. Requiring operational participation by corporate officers in aspects of ICT compliance limits flexibility and imposes additional training and operational burdens above and beyond that of obtaining licenses.

We believe it would make more sense to require a company to comply with the various provisions of the ICT, and leave it up to the company to appropriately delegate authority to those persons best situated to ensure compliance.

2. Modify parts of ICT that increase rather than decrease current burden without substantial additional benefit

2.1. Annual reporting instead of simple record keeping requirements

ICT requires the reporting of the name, nationality and date of birth for all employees who have received technology or source code under License Exception ICT during the prior reporting year, including those who have terminated their employment with the approved eligible applicant, user or recipient entity. Currently, U.S. companies with individual deemed export licenses must provide this information to BIS at the time of the deemed export license application and also track or maintain this information in their records, but need not update or supplement this information again to BIS during the authorized license period – usually two years. Under ICT, this information would need to be submitted annually to BIS, changing it from primarily a record keeping requirement to an annual reporting responsibility. This doubles the burden as compared to getting individual deemed export licenses, and seems to impose a burden where there previously was none for foreign affiliates. This is a significant disincentive to applying for ICT to cover foreign affiliates instead of getting licenses

Also, ICT requires that companies annually submit a certification, including the results of the self-evaluations, signed by a company officer and stating that the applicant, users and recipient entities are in compliance with the terms and conditions of License Exception ICT. General Prohibition 9 states that a company "may not violate terms or conditions of a license or of a License Exception issued under or made a part of the EAR". As with deemed export licenses, our use of the license exception already requires us to abide by its terms and conditions. It is unnecessary and adds no value for a company to have to continue stating they are complying. This requirement also adds the potential for BIS to determine that a company made a false statement along with a violation of the terms of the ICT license exception in the event of even a minor failure to comply with the extremely complicated terms of the proposed ICT. This only adds to the risk of potential enforcement, including of individual corporate officers. This is a further disincentive to seek ICT authorization, and unusual for a system that is supposed to be available only for "trusted" entities and which also contains periodic compliance audits as part of the compliance requirements.

2.2. Biennial audits

Individual licenses must be tracked so that they do not expire while they are still needed. At a minimum every two years, regular and deemed export licenses must be renewed or extended. This means that BIS and reviewing agencies get a chance to revisit their decisions periodically. This does cause a significant burden in ensuring that appropriate renewals are submitted in a timely fashion, and that all supporting documentation is current. Delays in approvals create the risk of a gap in authorization that could require the employee to be idled pending reauthorization.

ICT has the potential to remove the need to deal with all of the burdens of maintaining and renewing individual licenses by substituting an audit approximately once every two years. An audit is perhaps a bigger burden than individual license maintenance for entities that do not have a significant amount of individual licenses to maintain. Even in the case where an applicant does have a large number of individual deemed export licenses, eligible user or recipient entities may not have a large number of licenses and therefore adding them and subjecting them to the biennial audit would impose significant additional costs. For international locations where the company may possess only a single export license for the entire site, or any location supporting only a minimal number of deemed export licenses, it is much easier to renew these individually versus preparing for a comprehensive compliance program audit every two years.

We believe that compliance audits should be limited to those circumstances where BIS has concerns about lack of compliance with ICT. Prior to conducting any such audits, BIS should also publish clear and comprehensive audit standards, to ensure that all ICT companies are being held to the same standards, while taking into account the various approaches to compliance that may be appropriate. Simply publishing key mandatory elements of a compliance program is not sufficient guidance for ICT companies to know whether they will pass an audit. Such standards must also be applied equally by BIS auditors. Many companies who were subjected to the old Distribution License audits experienced very different standards applied by different auditors.

2.3. Company officer's duties

Depending on clarification of the term "company officer" as questioned in Item 1.2 above, the duties this person must undertake for ICT exceed those currently required for individual licenses, which do not require corporate officers to sign them or actively participate in the license management process. This appears to be an ITAR-like or defense security clearance based requirement as opposed to an EAR requirement.

2.4. Addition of recordkeeping requirement of first transfer to foreign national employee

ICT requires in proposed paragraph (h) an additional recordkeeping requirement to record the initial release of technology or source code to a given foreign national employee. Currently, when an export license is received and the associated riders and conditions have been met, the foreign national is able to join his or her team without further need to track the exact moment where the first transfer is made. Technology transfers are not like shipments, and conversations include decontrolled and controlled technologies, making it difficult to precisely document when a first transfer takes place. Instead of reporting the moment of first transfer, it would be similarly beneficial without increasing burden on companies to require recordkeeping of when an employee has joined his or her team and/or has been given internal accounts, which is likely to coincide with the first day of employment.

2.5. The ICT authorization process in general defeats the purpose of a "License Exception"

Looking at the big picture, we question the utility of a "License Exception" for which an applicant must apply to use, and which is subject to even more stringent compliance requirements than most licenses. With few exceptions, License Exceptions do not require pre-qualification to use them, only confirmation by the exporter that it has met all applicable

requirements, at the risk of enforcement action if they are wrong. Implementing a license application process for ICT really makes it a variation on the Special Comprehensive License already present in the EAR, and which has not been used very much by exporters due to the burdensome application and compliance requirements. While ICT would not be subject to a formal expiration date, the requirements to comply under the proposed rule would exceed those of an SCL, and BIS could terminate the availability of ICT without notice based on an audit or otherwise, creating even less predictability in the proposed process than in an SCL.

3. Clarify guidelines to avoid potential additional legal risks to companies

3.1. Personnel screening guidelines

The proposed ICT license exception's illustrative examples for guidelines only of personnel screening before allowing foreign national employees to receive technology or source code, include but are not limited to criminal background, driver's license, and credit history. These exceed the current background check requirements for deemed export licenses, and likely exceed the background check procedures that most ICT applicants would have in place, due to significant legal concerns under U.S. laws. While the regulations do note that these examples are illustrative, and may not be necessary in light of a company's circumstances, we believe that the practical reality resulting from the enumeration of such requirements in the regulation itself would tend to establish them as a "best practice" from which an ICT company would have to justify deviation.

Many of the suggested techniques seem inappropriate and exceed what most companies do in terms of background checks for personnel who do not have access to classified or other truly sensitive information. For example, checking credit history may be necessary for certain positions which involve the handling of money. However, the relationship between an individual's financial history and the risk of that person diverting export controlled information to which they have access as part of their job would be very difficult to establish.

The U.S. Equal Employment Opportunity Commission has issued guidance suggesting that use of credit checks may have a disparate impact on certain minority groups (available at http://www.eeoc.gov/initiatives/e-race/why_e-race.html). Therefore, requiring U.S. companies to conduct credit history checks as a part of pre-employment screening could put U.S. companies at risk of discrimination claims and lawsuits. Without the U.S. government expressly requiring this to be done, U.S. companies likely cannot do so without exposing themselves to potential discrimination lawsuits. Even in that case, credit history checks can only be done effectively in the U.S. and are therefore limited in their potential findings. Conducting unwarranted financial background checks on employees is also an invasion of their privacy, and would do nothing to enhance the employee's sense of loyalty to the company.

Applying these standards overseas would also be extremely challenging. While it is possible to do background criminal checks in other countries such as China, some countries do not allow criminal checks. It would be difficult to abide by this requirement if the foreign national is from such a country, or if they ever resided in a country which limits our ability to conduct background checks of their time there. In these cases, it would be necessary to apply for an individual export license as a U.S. company would be unable to fulfill this ICT requirement.

Even when a criminal background check is possible, California law dictates that a company can only check back seven years. The California Investigative Consumer Reporting Agencies Act (ICRAA) (CA Civil Code §1786) prohibits background checking entities from conducting a criminal records check for records more than seven years old. This includes international screening if the person lived outside the U.S. within the last seven years. The same would apply to credit checks throughout the U.S. The federal Fair Credit Reporting Act 15 U.S.C. § 1681 et seq. limits all background checking agencies from checking a credit history that is more than seven years old. U.S. companies would need better guidance on what screening is required and what specific criteria to look for in the results when making hiring decisions to

ensure that the U.S. government would not disagree with company decisions during the audits and to minimize the company's risk of allegations of discrimination. While the ICT may state that the definition of employees may include temps and consultants, making the background check for these employee types would be difficult because the agencies they represent have that responsibility, and therefore an individual export license would likely still be required.

3.2. Past employers screening

For all foreign national employees receiving technology or source code under ICT, companies would be required to screen all prior employers against the end-user lists of concern compiled by the U.S. government. Currently with deemed export licenses, resumes are reviewed to ensure there are no unexplained gaps of over 30 days since the beginning of a bachelor's degree program. However, there is a limit to what responsibility a company can take over this, as there is no way to verify the completeness of a person's resume in some cases, especially if there are no time gaps.

While companies may routinely verify someone held a previous position as claimed on a resume, there is no way to verify what may have been left out. As BIS agrees, the percentage of cases where the U.S. government finds something U.S. industry may not have and declines a license is so small that we consider this risk to be small as well. However, companies who, in good faith, screen past employers but miss what may have been left out of a person's resume should not be held liable for such an omission as a violation, or to avoid such a risk it may be necessary to obtain an individual license. The inclusion of such a requirement would merely substitute one arduous task of managing deemed export license for another arduous task of verifying resume information, screening, and resolving potential matches.

3.3. Self disclosures in the application process and annually as part of self evaluation program

The ICT application process requires the submission of a company's internal control plan for review and approval by BIS. This includes information about the past operation of the mandatory "self-evaluation" component of the internal control program. In other words, an applicant must submit the results of prior internal audit activity, along with a summary of any corrective actions or disclosures that resulted from those self-assessments. Although ICT states the BIS voluntary self-disclosure procedures stay the same, if the submission of information about past audits and "corrective measures" is mandatory to receive authorization and also must be subsequently submitted annually, this removes any "voluntary" element of the disclosure process.

The ICT application process itself appears to force applicants to, in essence, voluntarily disclose every process fault and potential or actual violation prior to being authorized to use the License Exception. This could also cause a company to have to waive attorney-client privilege with respect to such self-assessments. This far exceeds any individual license requirements and would discourage the healthy process of self-assessment and improvement of compliance systems. We imagine that only those companies with robust compliance programs would consider using ICT, yet we believe few would find the prospect of disclosing to BIS the results of all their past audit activities as a pre-condition to license exception ICT eligibility to be attractive or beneficial. This would create the potential for costly and time-consuming enforcement activity, even if the disclosed lapses are not significant. Again, this puts companies who are already among the most compliant at greater risk for penalties or added administrative costs, and is much less attractive than simply continuing to apply for licenses.

4. What we like

- 4.1. It appears that the full physical address is only necessary for the company headquarters of each entity, and not for every location of each entity. We believe this is reasonable as the implementation of the ICT control plan and storing of related documentation which may be subject to auditing would likely be at a central location. Also, locations of individual buildings, or even offsite locations, may change more often than the company headquarters.
- 4.2. License exception ENC is still valid. Qualcomm has made extensive use of the intra-company transfer aspects of ENC to authorize transfer of encryption items to its employees and subsidiaries, eliminating the need to obtain Export Licensing Arrangements or deemed export licenses to cover those transfers. We think that ICT should look to the simpler provisions of the intra-company provisions of License Exception ENC as the model, rather than the overly burdensome proposed requirements, which impose requirements that exceed those of individual licenses.
- 4.3. The ability to cover foreign offices.

5. Conclusion

As stated above, Qualcomm is strongly in favor of a license exception which would remove the need for individual export licenses to cover collaborations between employees, and greatly appreciates BIS's efforts on this proposal. Qualcomm thanks BIS for the opportunity to provide these comments, which we hope will be helpful.

6. Contact Points

Should you have any questions regarding these comments, please feel free to contact me at (858) 658-2757, or by e-mail at kgebeau@qualcomm.com.

Sincerely,

Qualcomm Incorporated

Handwritten signature of Kathleen F. Gebeau in cursive script.

Kathleen F. Gebeau
Director, Export Compliance

November 17, 2008

Via E-Mail: rpd2@bis.doc.gov

U.S. Department of Commerce
Bureau of Industry and Security
14th & Pennsylvania Avenue, NW
Room 2705
Washington, D.C. 20230

ATTN: Steven Emme, Regulatory Policy Division

Re: Establishment of License Exception Intra-Company Transfer (ICT)
RIN: 0694-AE21

Dear Sir/Madame:

We are writing to submit comments in response to the above-captioned Federal Register Notice, which specifically solicits comments on the proposed rule establishing a license exception for Intra-Company Transfer ("ICT") of items on the Commerce Control List ("CCL") for internal company use. See, 73 Fed. Reg. 57554 dated October 3, 2008. The American Association of Exporters and Importers ("AAEI") greatly appreciates the opportunity to submit these comments. We hope that our comments below assist the Bureau of Industry and Security ("BIS") of the U.S. Department of Commerce in evaluating its proposed rule.

Introduction

AAEI has been a national voice for the international trade community in the United States since 1921. Our unique role in representing the trade community is driven by our broad base of members, including manufacturers, importers, exporters, retailers and service providers, many of which are small businesses seeking to export to foreign markets. With promotion of fair and open trade policy and practice at its core, AAEI speaks to international trade, supply chain, export controls, non-tariff barriers, and customs and border protection issues covering the expanse of legal, technical and policy-driven concerns.

As a representative of private sector participants engaged in and impacted by developments pertaining to international trade, national security and supply chain security, AAEI is deeply interested in the policies and practices of the U.S. government affecting U.S. companies and their related subsidiaries. Therefore, the comments below (relating to the specific topics in the proposed rule) describe our members' views about how the proposed rule will affect their ability to transfer technology to related companies under the regulatory regime.

1. ICT Control Plan

AAEI believes that BIS' requirement that applicants submit an ICT control plan moves regulation of export control towards account-based management. Account-based management will benefit U.S. exporters manage their export control obligations while enabling the government to allocate scarce resources devoted to enforcement.

Additionally, AAEI appreciates BIS' advocacy of U.S. exporters using voluntary self-disclosure to advise the government when it discovers non-compliance with the requirements of the ICT license exception granted to it by BIS. However, it is not clear from the proposed rule whether BIS contemplates the circumstances under which it will revoke a company's ICT license exception.

2. Mandatory Requirements for Technology and Source Code Under an ICT Control Plan

On September 10, 2007, AAEI testified before the Deemed Export Advisory Committee ("DEAC") and recommended that the Commerce Department consider an ICT license exception. At the time, we suggested that foreign employees of U.S. companies sign an export specific non-disclosure agreement prior to receiving the controlled technical data. We are gratified that BIS has adopted AAEI's recommendation, and we believe it will go a long way toward providing the government with added assurance that U.S. exporters are exercising the necessary control over licensed technology under the ICT license exception.

3. Authorization from BIS to Use License Exception ICT

AAEI believes the proposed regulation and its future implementation in the interagency process could benefit from clarity in the review standard to determine ICT eligibility. Above all, AAEI believes the rule will promote the national security and increase the effectiveness and resources committed to compliance if the sole reason for the interagency review is to evaluate the compliance program. If the interagency review process results in item and country exclusions, the benefits of the program will be lost and business will not use the proposed process and license exception.

4. Annual Reporting Requirements

We note that the Federal Register notice provides that applicants "must list the name, nationality, and date of birth of each foreign national employee." See, 73 Fed. Reg. at 57557. AAEI advises that compliance with this requirement is complicated by the fact that many foreign countries prohibit employers from asking an employee his/her nationality. AAEI members operate in many countries and must comply with the laws of each country in which they have a presence. As a result, complying with this provision of U.S. law will place U.S. companies seeking to benefit from the ICT exception in legal jeopardy of non-compliance with either U.S. or foreign law.

5. Auditing Use of License Exception ICT

AAEI understands the need for BIS to conduct audits of companies that have applied for and received the ICT license exception. Presumably, BIS will review, once every two years, the parent company's ICT control plan audited against specific transactions during a two-year period. AAEI requests BIS to provide to the public additional information concerning the methodology of BIS' audits of U.S. companies for the ICT license exception program.

Conclusion

For these reasons, AAEI is pleased that the Commerce Department has issued this proposed rule for the ICT license exception as we believe it will assist both U.S. exporters reduce the

number of license applications while assisting the government regulate compliance with such licenses by moving toward an account-based management of export licenses.

If you have any questions regarding these comments, or wish to discuss our position in further detail, please do not hesitate to contact us.

Sincerely,

A handwritten signature in black ink that reads "Marianne Rowden". The signature is written in a cursive style with a large initial 'M' and a decorative flourish at the end.

Marianne Rowden
General Counsel

cc: Melvin Schwechter, Co-Chair, AAEI Export Compliance & Facilitation Committee
Phyllis Wigginton, Co-Chair, AAEI Export Compliance & Facilitation Committee