From: <WARoot@aol.com>
To: <publiccomments@bis.doc.gov>
Date: Sat, Aug 4, 2007 1:03 PM
Subject: June 7, 2007, Proposed Rule on Entity List RIN 0694-AD83

William A. Root
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August 4, 2007

publiccomments@bis.doc.gov (mailto:publiccomments@bis.doc.gov) RIN 0694-AD82

Comments on June 5, 2007, Proposed Rule on Entity List

I suggest adding 744.20 to the proposed 744.11(b) list of 744.12, .13, .14, or .18 sections to which 744.11 may not be used and requiring State Department concurrence in the listing of any entity under 744.11 for foreign policy reasons. Otherwise, the result might be inclusion in the EAR of differences of opinion between Commerce and State as to which entities were 744.20 or otherwise of foreign policy concern.

The first paragraph of the Background states that the reasons for which BIS may place an entity on the 744 Supp.4 Entity List are stated in 744.2, .3, .4, .6, .10, and .20. However, only 744.10 and 744.20 now refer to Supp 4 and Supp. 4 makes no reference to any of the 744 sections. It is therefore suggested that 744.2(b), 744.3(b), 744.4(b). 744.6(b), and proposed 744.11 refer to 744 Supp. 4 and that a column be added to Supp.4 to identify which 744 section is applicable to each listed entity.

The Boeing Company
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August 17, 2007

Regulatory Policy Division
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Attention: Mr. Mike Rithmire

Re: Proposed Rule: Authorization to Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States -
Published in the Federal Register on June 5, 2007
Regulatory Identification Number (RIN): 0694-AD82

Dear Mr. Rithmire:

Thank you for the opportunity to comment on the above-referenced Proposed Rule, which would establish new licensing requirement for foreign entities that the Bureau of Industry and Security (BIS) has reason to believe pose a risk of being involved in activities that are contrary to the national security or foreign policy interests of the United States.

The Boeing Company (Boeing) supports the national security and foreign policy goals of the U.S. Government and, in principle, Boeing supports the emerging trend in the U.S. export control system to focus on individual end users for additional requirements--or benefits, such as the Validated End User (VEU) concept in the dual-use exports area.

However, Boeing is concerned that the unprecedented scope of this Proposed Rule could have unintended consequences that could present a problem for exporters, not only in terms of compliance but also with respect to their ability to remain competitive in the international business arena. Specifically, we have the following concerns:

The Rule states that a decision to place a party on the List would be made on the basis of "specific and articulable facts". However, it would be important

for industry to know what standard those specific and articulable facts would have to meet, i.e., what universe of conduct would lead to the imposition of a licensing requirement. While we understand the dynamic nature of foreign policy, U.S. industry must also have articulable facts in hand in order to make long range business planning decisions.

Of particular concern are the types of conducts that could trigger placement on the List. Specifically, conducts (iii), (iv) and (v), as follows:

- Conduct (iii), "Transferring, developing, servicing, repairing, or producing conventional weapons in a manner that is contrary to United States national security or enabling such transfer, development, service, repair or production by supplying parts, components, technology, or financing for such activity."

  In our view, such broad language has the potential to capture entities that are involved in legitimate conventional weapons programs in countries which may be major trading partners and/or major allies who are responsible members of the international community. The Proposed Rule has the potential of suddenly subjecting them to export and re-export licensing requirements. The question is, then, in what "manner" would the target entity have to be involved in such activity to warrant placement on the List.

- Conduct (iv), deliberately failing or refusing to comply with an end use check conducted by or on behalf of BIS or the Department of State by denying access, by refusing to provide information about parties to a transaction, or by providing information about such parties that is false or that cannot verified or authenticated. The language appears too broad, since inability to verify would be in the same category as providing false information.

  There is already a mechanism under the Export Administration Regulations for addressing entities in countries in which BIS has been or is unable to conduct pre-license checks or post shipment verifications, which in our opinion is more adequate because it requires enhanced due diligence on the part of the U.S. company, rather than an automatic licensing requirement. Establishing new licensing requirements on U.S. companies for actions that could be seen by other countries as their sovereign right could have consequences for U.S. manufacturers in that those companies could decide to "design-out" their products.

- Finally, with respect to conduct (v), acting a manner that poses a risk of violating the EAR, we believe it would be better for BIS to engage in a partnership with U.S. industry in order to find ways to prevent

potential violations, rather than impose additional licensing requirements on the U.S. company.

Our conclusion in this regard is that this regulation lacks clarity with respect to what types of entities could be subject to this Proposed Rule. More importantly, it would appear that the types of conduct that could lead to placement on the Entities List are too disparate to warrant placement on one single list.

Another issue of concern is whether parents and subsidiaries of the listed companies would also be subject to the same licensing requirements.

Given these concerns, we have the following recommendations:

- Ensure that the criteria for making a decision to list an entity is well defined and clear, to avoid capturing entities that are engaged in legitimate programs in full compliance with their countries' laws and regulations, particularly if those companies are located in countries that are allies or major trading partners of the U.S.

- Ensure that the behaviors that can lead to placement on the List are at a comparable level in terms of failure to comply with U.S. Government requirements.

- Conduct (iii) in particular, and comparable behaviors that may be considered for placement on the List, should be the subject of government to government diplomatic exchanges rather than result in a licensing requirement.

- Foreign availability should be a key factor in all decisions, particularly with respect to items that may pose little or no national security or foreign policy concerns. If a foreign company presents such significant foreign policy or national security concerns that it must be listed, controls should be applied only to items which themselves present a national security or foreign policy concern and which are not readily available in the international marketplace, rather than across the board.

- Avoid capturing parent companies and subsidiaries, and ensure that a decision to do so takes into consideration all potential consequences for legitimate business of the parent or subsidiary, particularly if they could negatively impact additional companies far removed from the behavior that may cause the listing, a scenario that our own experience has shown is quite possible.

- Consider the potential effect of listing decisions on imports from listed companies and resulting consequences for U.S. companies.

- Consult with U.S. companies that might be particularly affected by a listing as much as possible before making a final decision.

- Provide a mechanism to allow a company that may be considered for placement on the List to present arguments against such action.

- Consider including a contract sanctity provision in the new regulations to avoid unnecessary disruptions to collaborative efforts that may have been in place for a long time.

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- Conduct more training overseas on U.S. export control requirements to ensure that foreign companies and governments fully understand the extra-territorial nature of U.S. export controls.

- Designate this Proposed Rule as a major rule because of its broad implications and the economic consequences that could arise for U.S. exporters if the Rule results in a larger effort by foreign companies to design-out U.S. products.

In closing, we reiterate our support for an end user approach to export controls, but want to caution against using this approach so broadly that it could result in compliance or competitive issues for U.S. exporters in the future, as well as in an undue burden on the already limited resources of the export control agencies. Placing entities on a watch list can have important consequences not only for a particular entity but also for the country in which that company is located. Actions that would warrant placement on a List should be examined principally against international standards of business conduct and internationally agreed upon principles for addressing common threats to the world community, rather than on purely unilateral considerations.

Additionally, we hope than in parallel with expanding end user controls BIS will proactively engage in an effort to extend a well implemented Validated End User (VEU) program to all its trading partners.

Again, we thank you for the opportunity to provide comments.

Sincerely,

Norma Rein

Norma Rein
Senior Manager
Global Trade Controls Policy

WISCONSIN PROJECT ON NUCLEAR ARMS CONTROL

August 6, 2007

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Attention: RIN 0694-AD82

RE: Comments on Proposed Rule – Authorization to Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States

Dear Sir or Madam,

The Wisconsin Project on Nuclear Arms Control submits the following comments in response to the Bureau of Industry and Security's June 5, 2007, Proposed Rule (72 Fed. Reg. 31005), which proposes to expand the scope of reasons for which BIS may add parties to the Entity List.

The Project is a non-profit organization that conducts outreach and public education to inhibit the proliferation of mass destruction weapons and their means of delivery. For more than twenty years, the Project has pursued its mission by advocating strong and effective export and transit controls worldwide. The Project commends the Commerce Department for considering measures to strengthen the Entity List, and supports the proposed change in principle. However, additional actions are necessary to ensure that the List serves its original, intended function as a key nonproliferation tool in the U.S. dual-use export control system.

In the Proposed Rule, BIS seeks authorization to add to the Entity List entities that BIS has reasonable cause to believe, based on specific and articulable facts, have been, are or pose a risk of being involved in activities that are contrary to the national security or foreign policy interests of the United States, or those acting on behalf of such entities. This would be a broad and beneficial control, allowing BIS to conduct more prior reviews of exports to risky end-users. In particular, BIS should use the proposed new Section 744.11 to impose export license requirements on entities that have been targeted for nonproliferation-related reasons by other agencies of the U.S. government, and by foreign governments, in cases where other sections in Part 744 do not already allow inclusion of such entities on the Entity List. This approach would become another tool allowing BIS to work with its counterparts within and outside the U.S. government to ensure that entities of proliferation concern worldwide are denied access to controlled goods and technologies.

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In publishing the proposal, BIS seeks to aid the exporting public by simplifying the EAR and providing more information about entities of concern. But in pursuit of stronger, more effective and efficient export controls, BIS should go beyond this proposal, and implement additional measures, most under authorities already in effect.

BIS should institutionalize the practice of supplying as much information as possible in entries on the Entity List – including all known aliases and contact information. This would provide the public with effective notice regarding entities of concern, and make it more difficult for such entities to evade export controls. Existing entries should be systematically reviewed, revised and enriched to be maximally useful to exporters. Some of these existing entries are now outdated, as the entities in question have changed their names and/or affiliations. And since many entries on the List have only a name to identify the entity, the public no longer has notice of the risky end-user once its name is changed.

BIS has stated that it cannot supply the Chinese names of entities on the List, because the Federal Register cannot accommodate their publication. To bypass this technical limitation, BIS should publish on its website, as guidance for exporters, an augmented version of the List including also the names of listed entities in their original alphabets. This vital information would allow industry to investigate properly potential customers for controlled goods.

BIS should also provide clear guidance to exporters on how to deal with entities related to those on the List. Some language regarding subordinates was included in the "Frequently Asked Questions Regarding the Entity List" on the BIS website, but the relevant section was recently removed. Many entities on the List have numerous subsidiaries and other related companies that constitute a diversion risk. BIS should explicitly state the extent to which license restrictions on listed entities extend to their relatives. All related entities so affected should be listed, as well.

In the interest of informing exporters more fully about diversion risk, BIS should include additional information about why entities are added to the list, and do so more clearly. BIS now describes, in Federal Register notices and accompanying press releases, the risk posed by each entity when it is added to the List. But the List itself only indirectly suggests the nature of the risk presented by each entity, by pointing to a section in Part 744 for license review policy. This indirect explanation would be further diluted in the case of the proposed Section 744.11, which contains a very broad basis for designation. The Japanese Ministry of Economy, Trade and Industry provides a useful model in this regard, by indicating WMD programs of concern directly on its warning list, for each entity. Such one-stop public education would allow industry to make efficient and informed decisions about prospective end-users, commodities and transactions.

BIS should also consider more systematic use of Section 744.20, which allows imposition of license requirements on entities sanctioned by the State Department. These sanctions are applied under various legal authorities against foreign individuals, private entities, and governments that engage in proliferation activities. All of these inherently risky end-users should be added to the Entity List after they are sanctioned, and should remain on the List even if the statutory term of the sanction has expired, unless the End-User Review Committee (ERC) determines that the entity is no longer a risk.

The Proposed Rule would establish a process by which a listed entity could request that it be removed from the List or that its listing be modified. It is not clear why BIS is seeking to formalize the procedure. But this change underscores the need for the ERC to conduct systematic reviews of entries on the List, to ensure that the entries are current and complete. These reviews should always be undertaken in conjunction with the intelligence community. Therefore, the proposed Section 744.16 should be changed to reflect the inclusion of the intelligence community in the review process. Also, private companies are often the recipients of information (such as suspicious purchase requests) suggesting that a particular entity is a risky end-user. BIS should afford the public an opportunity to supply such information to the ERC, which would aid the Committee's deliberations. It would therefore be prudent for BIS to allow a public comment period before the removal or modification of an Entity List entry at the request of the entity itself.

BIS has recently announced that it is planning a draft proposal that would introduce a standard format for all U.S. Government screening lists, with the objective of having a "more complete continuum of information … available for exporters to use in screening potential customers." Indeed, such a standard format could be a great help for industry. It could also benefit national security, by allowing smaller businesses to screen their transactions more efficiently and effectively. But this standard format would need to present complete information in a clear fashion. We look forward to working with BIS and other interagency partners on that forthcoming proposal, and hope that the suggestions herein will be helpful then, as well.

We are grateful for the opportunity to present our views.

Respectfully submitted,

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Wisconsin Project on Nuclear Arms Control

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Dear Mr. Rithmire:

Re: Comments on Proposed Rule: Authorization to Impose License Requirements forExports and Re-exports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States at [72 FR 31105 of June 5, 2007]
Regulatory Identification Number (RIN) 0694-AD82

We are pleased to comment upon this proposed rule.

We are in support of the underlying principles which created the original Enhanced Proliferation Control Initiative (EPCI), the U.S. end-use/end-user control. Under EPCI, Items listed as EAR99 In the EAR are subject to license requirements If the U.S. exporter knows or Is Informed that a license Is required for certain WMD and WMD-related activities (Sections 744.2, 744.3, 744.4, and 744.6). Sections 744.12, 744.13, and 744.14 focus on those transactions to specifically designated global terrorists, specifically designated terrorists, and foreign terrorist organizations. These end-use/end-user controls comport with those In three non-proliferation regimes (the Nuclear Suppliers Group, the Missile Technology Control Regime, and the Australia Group), as well as the catch-all control requirement In Operating Paragraph 3 of U.N. Security Council Resolution 1540 that requires all members of the U.N.

to have in place an effective export control regime as well as catch-all controls and other non-proliferation measures.

The Wassenaar Arrangement (WA) on Export Controls for Conventional Arms and Dual-Use Goods and Technologies as of 2003 has a catch-all control known as the Statement of Understanding (SOU) on the Control of Non-Listed Dual-Use items. According to the SOU, participating states are to take appropriate measures to require authorization for the transfer of non-listed dual-use items to destinations subject to a binding U.N. Security Council arms embargo, any relevant regional arms embargo either binding on a Participating State or to which a Participating State has voluntarily consented to adhere, if the non-listed item is intended or may be intended, entirely or in part for a military end-use. The U.S. government response to the WA conventional military catch-all morphed into Section 744.21, Restrictions on Certain Military End-Uses in the People's Republic of China, outside the parameters of the SOU as there is no binding arms embargo against China. (*Please see* our response to the China Rule at the BIS website.)

In short, we believe the proposed rule to expand the Entity List is seriously flawed and imprecise, offering a dubious process, which could more effectively be handled by existing mechanisms available under the Export Administration Regulations (EAR). Our concerns focus on specific, and in our opinion, fatal vagaries in key terms of the initiative and descriptions of the offensive conduct or activity which would result in a party being placed on Supplement 4 of Part 744 (the Entity List) and trigger a license requirement for export or re-export and/or restriction to license exceptions or modifications to certain license requirements.

While we are concerned for the national security and foreign policy interests of the United States, we believe the harm visited upon legitimate U.S. economic interests in a global economy warrant precise and transparent procedures to block or stop commerce upon merely anecdotal information without providing the exporter or the foreign entity a process to respond to secret allegations of potential conduct.

Vague Criteria for Revising the Entity List

The proposed rule provides the Bureau of Industry and Security (BIS) with the authority to add entities to the Supplement 4

of Part 744 (the Entity List) at will and without notice where BIS has "reasonable cause to believe, based on specific and articulable facts" that the entity "has been, are, or pose a significant risk of being or becoming involved in activities that are contrary to the national security or foreign policy interests of the United States and those acting on behalf of such entities may be added to the Entity List pursuant to this section." There are five new types of conduct - only some of them sounding in U.S. national security -- which can trigger application of this section. We will discuss our concerns with each type of conduct below. But first, we will review the basis upon which BIS, ostensibly in concert with the interagency partners, will list a party which is "supporting persons", "actions that could enhance the military capability…", or "enabling" certain activities inimical to a wide variety of U.S. national security, foreign policy or political interests.

Specific and Articulable Facts

It is not clear from the proposed rule whether the "specific and articulable facts" include intelligence reporting about an entity believed to be involved in such activities or are acting on behalf of such entities. The plain meaning of the words "specific" and "articulable" mean "definite" and "clear and distinct", respectively. (Random House, College Dictionary). What will be the source of these "facts"? What role will classified intelligence have in this review process?

If intelligence reporting is to be included in the description of the activities of the entity under review, will this intelligence be current (no more than two years old) and actionable? Clearly, it should be certified by the Director of National Intelligence and not be the product of weekend reservists clipping articles for DTSA, as was the case in the past. Based on years of experience as Chairman of the interagency Operating Committee, we witnessed the use of dated, inaccurate "intelligence" in the dual-use licensing process as a basis of denial. Generally, as OC Chairman I found the quality of intelligence reporting and analysis on prospective parties to a dual-use transaction decline during those years. Moreover, the focus of the lead intelligence agency in the dual-use licensing review process, at least since the early 1990's, had been on the proliferation of weapons of mass destruction. Changes in the global marketplace, which raised concerns that touched on national

security or foreign policy interests other than the proliferation of WMD and related materials, were ignored by the lead intelligence agency, which unilaterally refused to provide intelligence on such issues to the interagency process.

After September 11, 2001, the lead intelligence agency further narrowed its focus, because it believed certain industry sectors such as telecommunications in critical foreign markets had no importance to the proliferation of WMD. At the same time the Defense Intelligence Agency (DIA) the Defense Technology Security Administration (DTSA) stepped in to provide intelligence reports and analysis of questionable accuracy when compared with other information gathered from open and proprietary sources or from the parties themselves.

To list an entity on the Entity List carries serious economic and diplomatic consequences. For that reason alone, the "specific and articulable facts", including intelligence reporting and analysis, should be current and accurate. Moreover, both the U.S. exporting community and the entity in question should be immediately informed that it is under review before the review is completed in order to give all affected parties the opportunity to state their position and provide additional information about the activities of concern before BIS and interagency reviewers conclude that the entity should be placed upon the List. Moreover, there should be a transparent and rational process which allows the interested parties and the entity in question to not only oppose its inclusion on the list, but also to have itself removed from the list in a transparent and timely fashion. Failure to have provided for such a process in this new list not only creates a "black hole" -- where mere allegation means perpetual damnation -- but it also raises serious issues under the national treatment provisions of the WTO Treaty in light of the foreign policy and political aspects of its operation, as discussed below.

The Five New Types of Conduct Triggering Listing Are Vague and Overly Broad

Proposed Section 744.11(b) describes several types of conduct which can result in a party being placed on the Entity List and trigger a license requirement for export and re-exports. Each of these five types of conduct raises concerns because of the lack of specificity concerning the activity, which would

trigger review and possible listing.

In Section 744.11(b)(1),what does "supporting persons engaged in acts of terror" mean? Will BIS provide guidance as to what is meant by "supporting persons"? What types of exports or re-exports are these restrictions intended to capture? What is an "act of terror" if there is still no internationally agreed definition of what is "terrorism"? We already understand from international responses, including that of the United States, that one person's freedom fighter is another person's terrorist.

Section 772.11(b)(2)

Section 772.11(b)(2) as currently written is not clear whether the "actions that could enhance the military capability of, or the ability to support terrorism of governments that have been designed by the Department of State…" applies only to those governments, which State has designated as supporters of international terrorism. Or does the first clause of this item addresses actions described in new Section 744.21, part of the new China Rule? It would appear that this item should be more clearly written to have the Department of State specify the foreign government in question and tie in the conduct that enhances the military capability of that government designated as supporting international terrorism. This would avoid confusion in the exporting community, avoid capricious interagency behavior, and prevent commercial mischief.

Section 744.11(b)(3)

The scope of Section 744.11(b)(3) as currently written is breathtaking in its reach from what was initially proposed in the China Rule. The only provision in Part 744 of the EAR that restricts transactions that enhance the military capability of a foreign country is focused on China. No other country is designated for similar treatment under Part 744.

This item should be eliminated for several reasons.

First, since there is no other country identified in the EAR where a licensing requirement is required if the proposed transaction could make either a direct and significant contribution or material contribution to enhanced capability of the People's Republic of China. This should not be the

back-door maneuver BIS is seeking to use to penalize activities or conduct comparable to those wisely removed from the final China Rule. When first proposed in 2006, the "China conventional military catch-all" rule (Revisions and Clarification of Export and Reexport Controls for the People's Republic of China (PRC); New Authorization Validated End-User [71 FR 38313 of July 6, 2006] as it was *then* known) contained a new Section 744.6 entitled "Restrictions on Certain Activities of U.S. Persons". That provision sought to extend the coverage of the EAR to those entities which "support" an export, re-export, or transfer of an item requiring a license if for a Chinese military end-use. "Support" meant "any action, including financing, transportation and freight forwarding by which a person facilitates an export, re-export, or transfer without being the actual exporter or re-exporter." During the lengthy comment period on the China rule, industry and the exporting community seriously criticized this provision. The proposed Section 744.6 received particularly strong criticism from various quarters including banks, the legal community and financial institutions, especially on account of its overly broad scope and lack of any provision for contract sanctity.

When the final China Rule was published in June 2007, BIS excised that nettlesome section without comment. One wonders why this proposed Entity List expansion seeks to resurrect this wide range of activities related to aspects of any given export or re-export transaction, including financing and "enabling" (not defined), when the final China rule eliminated an identical provision?

Second, we believe that this item fails to take into consideration the reality that foreign governments have existing bilateral arrangements and defense cooperation agreements with other countries concerning conventional transfers and related activities such as service, repair, development or production. Except for those destinations subject to full or partial arms embargoes by actions taken by the U.S. Security Council, there is no international restriction on conventional arms transfers at this time. For example, the U.S. Government has imposed a unilateral embargo and trade sanctions on the Government of Iran. But there is yet no international conventional weapons embargo or sanction against Iran and therefore it is not illegal under international law to engage in the trade of conventional weapons with Iran. Although the U.S. Government is strongly opposed to trade with Iran and has sanctioned foreign

companies under the Iran Nonproliferation Act of 2000, those companies are unable to learn specifically what activities have caused them to be sanctioned under that statute. We believe it important for the Department of State to engage with those foreign governments which are behind the trade in conventional weapons with governments of concern, and not have BIS drive foreign policy concerning certain destinations through promulgation of export control regulations and penalize those entities involved in the trade that are engaged in legitimate programs in full compliance with their domestic laws and regulations, particularly those of our allies.

Currently, the U.S. Government has no overarching China trade policy, yet seeks to cobble a trade policy directed to China through bits and pieces of export control and trade-related regulations not cut from full cloth. This approach creates unpredictability for U.S. exporters In terms of compliance and in their ability to remain globally competitive, especially In the highly-charred US-Sino market.

We also believe it important for the U.S. Government to change its position on the development of an International Arms Trade Treaty. It is a sad fact that the U.S. Government was the only U.N. member state that voted against the draft International Arms Trade Treaty when the issue was voted on in the U.N. General Assembly last December (The final vote was 153 countries voting in favor, the U.S. voting against, and 23 member states abstaining.) It is both hypocritical and dysfunctional that the U.S. Government seeks to penalize those involved in legitimate conventional weapons activities while choosing not to use its influence to work within the U.N. framework in drafting a meaningful arms trade treaty that recognizes internationally recognized human rights and the obligation to restrict the arms trade to avoid the black trade and illicit trafficking to include non-state actors.

Section 744.11(b)(4) Conflict with the Unverified List

Section 744.11(b)(4) appears to conflict with the publication of the Unverified List, which identifies those companies and countries in which BIS could not conduct a pre-license check (PLC), or post-shipment verification (PSV). BIS published a notice on June 14, 2002, advising U.S. exporters of the Identities of eleven foreign companies for which no PLC or PSV could be undertken. In that notice, U.S. exporters were informed that identification on the Unverified List did not

trigger a license requirement, but in accordance with long-standing "red flag" guidance, advised U.S. exporters to perform *enhanced due diligence* before exporting any items to such identified entities.

The newly proposed section (b)(4) triggers not only listing *but also* a license requirement to export or re-export to such entities for "deliberately failing or refusing to comply with an end-use check conducted by or on behalf of BIS or the Directorate of Defense Trade Controls of the Department of State, by denying access, by refusing to provide Information about parties to a transaction, or by providing information about such parties that…cannot be verified or authenticated." There have been increasing numbers of license conditions requiring a PLC and/or PSV, including those routinely imposed on sequential licenses to well-know ultimate consignees with no record of non-compliance that result in the backup of shipments of items because pending license applications are not processed until and unless a prior visitation requirement is completed. These on-site visitations are done pursuant to specific agreements with the foreign governments where the ultimate consignee is located and require representatives of both the U.S. government and the foreign government to do the on-site together.

These on-site visits are generally not done in a timely manner, because there is insufficient, and, in some cases, inappropriately trained staff in U.S. embassies abroad. Moreover, there is no rationalization for when and with what frequency the interagency licensing reviewers, along with the Office of Export Enforcement, will impose such on-site visitation requirements on a licensee.

Although the U.S. Congress appears to be pushing BIS for on-site inspections for many if not all licensed transactions, it is illogical to impose these on-site visitation requirements all licensed transactions. A better approach would be for BIS to work with the technical advisory committees to develop a risk transaction matrix that would identify specific criteria which calls for the imposition of such on-site visitation requirements as opposed to routine reporting requirements or other measures to assure compliance with license terms.

Another reason for this item to be reconsidered is that there are limited resources in the U.S. government. In the critical China market, there is only one OEE representative In the U.S. Embassy in Beijing charged in part with doing on-site

visitations for all of China. When this individual is not available, no on-site visitations are completed, the backlog grows, with the cooperaating and willing-to-comply Chinese ultimate consignee eagerly awaiting receipt of the item to continue its production requirements.

We recommend that certain elements of this proposed rule be withdrawn and reconsidered before imposing additional burdens on U.S. exporters, their ultimate consignees, and other entities, foreign and domestic, involved in such transactions.

As we have noted, there is need for clarify and preciseness in key terms used in descriptions of the types of conduct which can trigger listing and a license requirement.

Broader initiatives, such as a conventional weapons policy, need to be coordinated and formulated internationally, and a strategically coordinated China policy needs to have input from government, academia, and industry, instead of a rushed, scatter-shot approach through regulatory tweaks here and there that give the appearance of "taking action" but in reality only render the U.S. control system and U.S. exporters vulnerable to commercial mischief by competitors and represent yet another step away from multilateralism at WA.

To fail to address these fatal deficiencies of the proposed rule threatens the competitiveness of U.S. industry, disruptions to existing contractual relationships, commercial mischief, and will trigger a further "designing out" initiative in the global market of items subject to unpredictable and fickle U.S. export controls.

We look forward to assisting you and the Under Secretary's Technical Advisory Commmittees in these efforts, and thank you for the opportunity to comment on this proposed regulation.

Very truly yours,

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August 3, 2007

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Attn: Mike Rithmire

RIN 0694-AD82

Re: Proposed Rule: Authorization to Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States (72 Fed. Reg. 31005, June 5, 2007)

Dear Mr. Rithmire:

The Industry Coalition on Technology Transfer ("ICOTT") appreciates the opportunity to comment on the above-referenced proposed rule (the "Proposed Rule"), which would expand the scope of reasons for which BIS may add parties to the Entity List (Supplement No. 4 to part 744 of the Export Administration Regulations.). Specifically, the Proposed Rule would authorize BIS to add entities (and those acting on their behalf) to the Entity List where BIS has "reasonable cause to believe, based on specific and articulable facts" that the entities "have been, are, or pose a significant risk of being or becoming involved in activities that are contrary to the national security or foreign policy interests of the United States."

ICOTT and its member associations recognize the importance of protecting the national security and foreign policy interests of the United States and support reasonable and effective export controls. The many companies represented by ICOTT's member associations are on the frontline of the U.S. export control process and devote considerable time, effort and expense to assure that export transactions comply with applicable export regulations. It is from this vantage point that we comment on the Proposed Rule.

At the outset, ICOTT applauds the overall regulatory approach of the Proposed Rule, which seeks to address emerging threats to U.S. national security or foreign policy interests by identifying, targeting and listing individual entities that require further scrutiny, rather than

establishing new controls (e.g., country controls) of a broader nature. This targeted, entity-based approach is better suited to the global nature of many of the national security and other threats facing the United States than are broader, country-based controls. Additionally, this approach has the potential to employ more efficiently the limited export enforcement and compliance resources of the government and the private sector by focusing such resources on entities for which there may be a basis for enhanced concern. Adding new entities to the existing Entity List should cause relatively minimal disruption to private sector compliance programs that already screen transactions against that list. In this regard, the approach of the Proposed Rule is superior to that of other recent proposals, including the recently announced controls on certain exports to China, which require very substantial revisions to the export screening and compliance programs of numerous exporters and re-exporters. ICOTT urges BIS to give serious consideration to replacing such broader-based controls with targeted entity-based controls in areas in which these more focused controls would be more appropriate and effective and less burdensome to the private sector.

While ICOTT generally supports the entity-based approach reflected in the Proposed Rule, we do have a number of serious concerns about the proposal and the exceedingly broad authority that it would grant to BIS. We urge BIS to address these concerns in any final rule.

The Proposed Rule would grant BIS extremely broad authority to add new entities to the Entity List and to tailor license requirements and the availability of license exceptions for such entities. The five types of conduct listed in the Proposed Rule as bases for listing on the Entity List are worded very broadly. For example, "conduct that poses a risk of violating the EAR" can be a basis for listing. Additionally, the Proposed Rule makes clear that these listed examples are only "illustrative" of the types of conduct that could be a basis for listing. Further, the Proposed Rule would permit BIS to list entities on the basis of conduct or concerns that do not involve items or activities that are subject to the EAR.

In view of its broad reach and language, the Proposed Rule is likely to cause considerable confusion for exporters unless BIS makes certain changes in the proposal and provides, in the regulation and elsewhere, clearer and narrower limits on the reach of the rule as well as further specific information about how the rule will be applied. We set out a number of specific issues and concerns below:

1. **The Listing Process.** It is important that BIS provide more information on the process that will be employed in determining whether to add entities to the Entity List. For instance, what process will BIS employ in determining whether non-EAR-related activities would provide a basis for adding entities to the Entity List? Who will determine the national security and foreign policy interests of the United States in this context? How will other agencies be consulted in these regards? At what levels will these consultations take place? Who within BIS will make these determinations, particularly with respect to non-EAR-related activities? What checks will be in place—particularly given the open-ended nature of the potential reasons for listing—to assure that lower-level BIS officials will not apply their own notions as to the national security or foreign policy interests of the United States?

Although we appreciate that some of the specific information that would form the basis for determinations under the Proposed Rule could involve confidential sources and methods, we do believe that exporters and others should have more detail on the overall outlines of the listing process. Among other things, a more complete description of the listing process would be vital to those seeking *removal* from the Entity List, particularly in the case of persons listed on the basis of inaccurate or incomplete information. Given the broad outlines of the Proposed Rule and its potential to use EAR requirements to address concerns about non-EAR items and activities, it is also critical that listing decisions be made in a coordinated manner and at an appropriately senior level.

2. **The Illustrative Examples.** We further believe that it is crucial to provide significantly more guidance on the types of conduct that may provide a basis for adding a party to the Entity List. For example, the fifth listed example – "engaging in conduct that poses a risk of violating the EAR ..." – is exceedingly broad, and should be replaced in the rule with more specific illustrations of the conduct of concern to BIS. There are a wide range of activities that pose a risk of violating the EAR, and many of these are minor. BIS must spell out in more detail, those types of EAR violation risks that cause it concern. If this example is retained, some form of materiality standard should be added, and further illustrations should be provided. An example might be "engaging in conduct that poses a substantial risk of imminent and serious violation of the EAR . . . ."

3. **Removal Process.** As noted, the Proposed Rule would provide very broad bases for listing a party on the Entity List, including conduct that does not relate to the EAR and conduct that poses foreign policy risks. In view of these far-reaching criteria, it is important that senior-level officials have a greater role in the removal process. In this regard, we strongly recommend that persons seeking removal have the express right to appeal to a senior Department official any denial of their removal request by the interagency end user review committee.

4. **End Use Checks.** The Proposed Rule lists "deliberately failing or refusing to comply with an end use check conducted by or on behalf of BIS" or other agencies as a basis for listing. We are aware of instances of parties who have not been notified that they have been deemed to fail end use checks—either because they hadn't failed such checks or because the checks never even had been attempted. Accordingly, it is important that the Proposed Rule, as applied, include steps to ensure that such parties are not added to the Entity List in these circumstances.

5. **VEU Coordination.** BIS should take appropriate steps to coordinate any expanded Entity List with its new Verified End User process. For example, it should consider making the VEU process available to all entities that are not included on the Entity List, or should establish presumptions that a party not included on the list should be eligible, in the absence of other specific and articulable facts, for VEU status.

6. **Contract Sanctity.** The Proposed Rule should include a contract sanctity exception. Absent extraordinary circumstances, parties should be able to complete transactions that were entered into before the date that BIS determined that there were specific and articulable facts that required the listing of a party on the Entity List.

7. **Identification of Listed Parties.** Listed entities and, insofar as possible, their business locations, should be identified clearly. Moreover, the rule should make clear that only listed entities—and not, for example, unlisted affiliates, subsidiaries, or sister entities—are covered. This applies not only to companies but to institutes and universities.

8. **Clarity of Coverage.** Proposed § 744.11(b) should include "744.20" in its list of EAR provisions. Otherwise there is the danger of duplication between parties listed pursuant to § 744.20 and those listed under § 744.11. More broadly, each provision of Part 744 that relates to the Entity List should contain at least a cross reference to Supplement 4, and each entry on the Entity List should specify the provision of Part 744 that supplies the basis for listing the entity in question.

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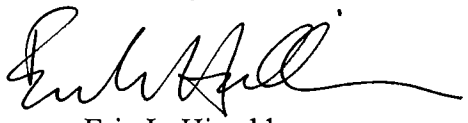
Founded in 1983, ICOTT is a group of major trade associations whose hundreds of individual member firms export controlled goods and technology from the United States. ICOTT's principal purposes are to advise U.S. Government officials of industry concerns about export controls, and to inform ICOTT's member trade associations (and in turn their member firms) about U.S. Government export control activities.

Sincerely,



Eric L. Hirschhorn
Executive Secretary