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Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce, Room 2099B
14th Street and Pennsylvania Avenue NW
Washington, D.C. 20230

ATTN: RIN 0694-AG51

Subject: ACC comments on BIS "Additional Improvements and Harmonization of Export Clearance Provisions; Advanced Notice of Proposed Rulemaking;" Docket No. 150220163-5163-01

Dear Mr. Mooney:

The American Chemistry Council (ACC)[1] appreciates the opportunity to submit comments concerning the Department of Commerce, Bureau of Industry and Security (BIS) May 22, 2015 Advanced Notice of Proposed Rulemaking (ANPR) regarding "Additional Improvements and Harmonization of Export Clearance Provisions." ACC and its member companies greatly appreciate BIS's efforts to improve and streamline the Export Administration Regulations (EAR). ACC has concerns regarding the proposed suggestions for harmonizing the EAR and the International Traffic in Arms Regulations (ITAR). While the EAR and ITAR have similar purposes, the proposed suggestions for harmonization would be a significant resource and financial burden on industry and would ultimately create inconsistencies for exporters.

A. Require ECCNs on export control documents.

According to the ANPR, the changes proposed would amend 15 CFR Part 758, which deals with the Electronic Export Information (EEI) filing to the Automated Export System (AES). As Paragraph A states, the proposed regulation would require that export control documents list the Export Control Classification Number (ECCN) for all items on the Commerce Control List, other than those designated EAR99. As stated in the ANPR, it is not clear to ACC what the purpose would be served by including the ECCN on export documentation. Additionally, the specific change in Paragraph A is vague. The following questions need to be asked in order to clarify the detail of BIS's proposed change:

[1] The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is an $800 billion enterprise and a key element of the U.S. economy. It is one of the nation's largest exporters, accounting for ten cents out of every dollar in U.S. exports.

1. Is it the intention of BIS in Paragraph A to amend §758.1(b)(5) to eliminate the value threshold for commodities and mass market software, thus requiring EEI information be filed for all commodities and mass market software subject to the EAR, except as exempted by the Foreign Trade Regulations in 15 CFR Part 30?

2. Is it the intention of BIS to change the reporting of ECCN as specified in §758.1(g)(3) so that all ECCN are reported for No License Required (NLR) shipments, except EAR99? (The current wording exempts all EAR99 items plus those ECCN controlled only for AT.)

It is unclear what proposed benefit would be derived from either or both of these proposed changes compared to the added cost and complexity necessary to comply.

If the BIS proposal includes modification of 15 CFR §758.1(b)(5) to remove the $2,500 value threshold, then EEI would be required for **ALL** exports of commodities and mass market software subject to the EAR. The impact to multi-national corporations who export equipment, instrumentation and materials supporting Manufacturing and Research & Development would be very significant.

If the suggested changes to 15 CFR §758.1 were implemented the cost impact for one ACC member company alone is estimated to be "at least $50,000 annually" to determine ECCN and HTS classifications and prepare the necessary forms for EEI filing. Since many affected exports are various small quantities of materials and equipment to support consumer product R&D programs, these incremental costs would be incurred on a frequent basis, and are not simply one-time costs which might be expected for a repetitive export.

Furthermore, some exporters do not manufacture both EAR and ITAR materials and therefore only have IT systems setup to comply with one regulation. Modifications to in-house IT programs to harmonize the requirements and then produce the necessary information would impose significant amount of time, personnel, and financial resource constraints on companies. For example, one ACC member company spent approximately $100,000 to modify their IT system in order to classify customers and add the Ultimate Consignee classification to AES filing. Modifying IT systems to harmonize the EAR and ITAR would be significantly more expensive.

Modifying the regulations to require companies to report all ECCN, except EAR99, for low-value commodities exporting under a No Licensed Required (NLR) designation is burdensome for companies with a heavy volume of exports of equipment, instrumentation, and materials. For example: A company wishes to export a bearing or bearing system from a plant in the United States to another of its plants in Germany. A first tier review of the technical specifications of the bearing or bearing system rules out classification under ECCN 2A001 or 2A101. The remaining possibilities for ECCN classification are 2A991 and EAR99. If the proposed change from BIS removes the current exemption for reporting ECCN for classifications controlled for AT only, the exporter must perform an additional review to distinguish between 2A991 and EAR99 and report the ECCN if the bearing or bearing system is classified 2A991. Reporting License Code 33 and License Exemption Code NLR should be sufficient for EEI filing in this

case since those codes communicate control under AT only or lower. Reporting ECCN 2A991 in this case adds complexity and cost with no obvious benefit in terms of the control purposes of the regulations.

Part 758 of the EAR, as currently written, requires EEI filing and detailed information for goods exporting to Group E countries, goods exporting under license or license exception, or for those items formerly regulated under ITAR which have been moved over to the Commerce Control List (9x515 or "600 series"), regardless of value. These EEI filing requirements along with the other current filing requirements for exports of high-value commodities, exports to Validated End-Users, and exports to those on the Unverified List ensure effective export control, promote security in the U.S., and assure continued U.S. leadership in technology development. In addition, BIS already has access to all of this information via the EEI.

The requirement to provide ECCN for all items on the CCL exceeds the requirements of ITAR, which does not require the USML category. Thus, this proposal creates an inconsistency that does not currently exist. Implementation of either or both of the potential proposed changes listed above does not appear to further the security interests of the United States. The implementation of these changes, as proposed, would place an extra burden of reporting on industry, clutter the landscape of export declaration information, and increase error rates in EEI reporting - potentially masking issues that warrant further investigation and diminishing the accuracy of export data, all for no obvious benefit.

B. Require identification of country of ultimate destination on export control documents.

It is ACC's understanding that at least one purpose of the proposal to include the country of ultimate destination on export control documents is to achieve consistency with the ITAR requirement in §123.9. However, the existing difference between the ITAR and the EAR is justified and should not be changed.

Most defense exports are either direct to the ultimate consignee or for incorporation within another foreign-made military item. Since all ITAR exports require a State Department license, defense exporters know the country of ultimate destination. This is not true for many dual-use exporters, who often sell to distributors. Additionally, if the distributor is located in a country for which no export license is required, this requirement will impose an additional burden on exporters to ascertain the county of ultimate destination.

As an example, a U.S. exporter ships items classified under 1C008 to a distributor in Canada. At the time of export, it is unlikely that the U.S. seller knows the identity or location of all the distributor's customers. Even the Canadian distributor may not know this at the time the shipment leaves the U.S. Multiple items may end up in different countries. In addition, many distributors are reluctant to identify their customers, for fear the U.S. exporter will sell directly to the customers.

Similar to the proposed ECCN requirement, this change will require time and money to change export systems and processes. The country of ultimate destination is usually already included in

shipping documents. Requiring exporters to use a two letter country code on export control documents would require many exporters to reprogram their IT systems. We believe that the existing Destination Control Statement (DCS)[2] and "know your customer" requirements are adequate to prevent diversion, assuming this is a goal of the proposal. As with the ECCN, the country of ultimate destination "as known to the USPPI at the time of export" (§30.6(a)(5) is available to BIS via the EEI filing.

C. Require license number or export authorization symbol on export control documents.

Similar to the reasons noted above in Section B requiring the license number or export authorization symbol on export control documents would require reprograming IT systems, which will take time and financial resources. ACC does not believe the cost to exporters to reprogram systems or otherwise change current export processes to provide information that justifies a change that does little to assist customers or prevent diversion that is already available to BIS.

D. Require AES filing for exports to Canada for items controlled for NS, MT, NP, and CB.

ACC and its member companies strongly oppose requiring AES filing for exports to Canada for items controlled for National Security (NS), Missile Technology (MT), Nuclear Nonproliferation (NP), and Chemical & Biological Weapons (CB). Given that Canada is one of our largest trading partners with quick road and rail deliveries, requiring AES filing for such exports would add an unnecessary administrative burden to exporters. Many exporters are able to use the Canadian exemption (15 CFR 30.36) for items not on the ITAR or EAR and therefore their Electronic Data Interchange (EDI) systems are not set up to notify their freight forwarder.

Similar to Paragraphs B and C, such a requirement would require exporters to reprogram IT systems in order to send information to freight forwarders and an added freight forwarder cost for each of these shipments.

E. Other suggestions for improving and harmonizing export clearance requirements.

In order to improve the current EAR export clearance requirements, ACC recommends BIS expand the general license authority for chemicals that are freely available outside of the Australia Group (AG). Products and technologies that are freely available outside control regimes should be eligible for a license exception to a limited and specific positive list of non-regime countries. Alternatively, BIS could re-instate Country Group CB3 for this same list of chemicals which fulfilled that same role until eliminated in 2005.

In ACC's view, all 1C350 chemicals are fungible, and marketplace circumstances mean that competitive advantage derives from prompt, reliable delivery and safe handling.

[2] Department of Commerce, Export Clearance Requirements §758.1, https://www.bis.doc.gov/index.php/forms-documents/doc_view/426-part-758-export-clearance-requirements

The Proposed License Exception CBX would apply to a list of trusted countries outside the AG regime. STA has the list of 6 countries for NS controls, so CBX would be similar to STA, but for a subset of freely-available CB controlled chemicals.

Proposed Solution: Revitalize EAR Chemicals & Biological Controls designations for "CB Column3"

BIS can use the existing structure of the EAR Commerce Control List found at Supplement No. 1 to Part 738 ("Country Chart") and the EAR Commerce Control List found at Supplement No. 1 to Part 774 ("CCL") to more efficaciously authorize the export of certain chemicals and chemical processing equipment to countries with, as the terms of the AG Guidelines for Transfers of Sensitive Chemical or Biological Items ("AG Guidelines") provide for, "consistently excellent non-proliferation credentials." [3]

This proposal requires two steps:

A. Step One - Create a Positive Country List

The first step is to identify countries that meet the AG Guidelines' standard of "consistently excellent non-proliferation credentials" ("CENPC List"). The U.S. has discretion under the AG Guidelines to apply expedited licensing measures to such countries. ACC proposes that BIS begin with the 125 countries it originally proposed as being suitable for Strategic Trade Authorization ("STA") for "transactions subject to national security controls of lesser sensitivity". ACC believes that beginning the development of the CENPC List in this manner is appropriate because BIS has already determined that these "destinations pose little risk of unauthorized uses" and that "U.S. national security and foreign policy justify authorizing transactions [to these countries] without the delay and expense of obtaining an export license."[4]

BIS could modify the STA list by adding or removing particular countries that may or may not meet the same AG Guidelines in the following fashion:

1) Remove any of the 32 countries currently subject to CB Column 3 controls, the most relevant CB controls for this exercise - e.g., Bahrain, Georgia, Jordan, Kazakhstan, Qatar, Saudi Arabia, and Taiwan;
2) Remove any countries designated as controlled for National Security purposes and so listed under Country Group D:1 at Supplement No. 1 to Part 740 of the EAR - e.g., Cambodia and Laos;
3) Remove any countries not a party to the Chemical Weapons Conventions (CWC) or the Biological Weapons Conventions (BWC) – Andorra, Chad, Comoros, Djibouti, Guinea, Kiribati, Marshall Islands, Mauritania, Micronesia, Namibia, Nauru, Samoa and Tuvalu;
4) Add Cyprus to the draft CENPC List because it is a current AG Partner and signatory to both the CWC and the BWC.

[3] Australia Group Guideline No 2 available at http://www.australiagroup.net/en/guidelines.html.
[4] Export Control Modernization: Strategic Trade Authorization License Exception, 75 Fed. Reg. 76654 (proposed December 9, 2010).

The result is a draft CENPC List of 104 countries, all of whom are participants in the AG, the CWC and/or the BWC, not under current CB Column 3 restriction, and determined by BIS to pose little risk of unauthorized uses. Authorizing license exception qualified exports to these destinations ***for items with wide global availability outside the AG*** is clearly consistent with the AG guidelines. Again, AG Guideline No. 2 explicitly states that "it is a matter for the Government's discretion to determine whether and to what extent to apply expedited licensing measures in the case of transfers to destinations to destinations it judges possess consistent excellent non-proliferation credentials."

B. Step Two – Create a Widely-Available Chemical and Chemical Equipment List

The second step is to create a list of widely-available chemicals and chemical equipment that would qualify for a lesser level of control than currently captured under CB2, that of CB3. This would require revising the CCL to utilize the EAR Chemicals and Biological Controls on the Country Chart (CB Column 3) designations that were removed from various ECCNs.

In 2005, BIS revised the EAR to expand controls on chemicals to make the EAR licensing requirements "consistent with the AG guidelines."[5] In doing so, BIS kept the CB Column List designations in the Country Charts for many countries that would not meet this standard, but removed the specific CB Column 3 designation from relevant ECCNs. In effect, BIS did not fully exercise its authority to determine which countries could qualify for an expedited form of licensing and simply required Individual Validated Licenses for all AG-controlled chemicals exported to non-AG countries. The expanded controls since 2005 have made it more difficult for the U.S. chemical and chemical equipment industries to compete in the global market. The controls also create a significant and unnecessary administrative, license-processing burden for BIS, U.S. businesses and the global customer base. U.S. businesses and trade associations would respond positively to a BIS Federal Register Request for Information or Notice of Inquiry to assist BIS in creating the appropriate list of widely available chemicals and chemical equipment

ACC is therefore requesting to amend the CCL to indicate CB Column 3 rather than CB Column 2 as a reason for control of the final list of ECCNs. Concurrently, BIS would amend the Country Chart to include a CB Column 3 mark for every country ***not*** found to have consistently excellent non-proliferation credentials – i.e., those countries excluded from the CENPC List. Thus, chemicals and processing equipment that are widely available outside of the AG Partner States would fall from CB Column 2 to CB Column 3 and could be exported without license to the CENPC countries because of their significantly lesser proliferation and re-export risk.

If BIS were to settle on a list of countries and ECCNs for chemicals and processing equipment widely available outside for the AG Partner States, then implementing a revised Column 3 to control exports outside the CENPC List of countries would be a dramatic step towards the type of export control the Administration seeks.

[5] Expansion of the Country Scope of the License Requirements that Apply to Chemical/Biological (CB) Equipment and Related Technology; Amendments to CB-Related End-User/End-Use and U.S. Person Controls, 70 Fed Reg 19688 (April 14, 2005)

Conclusion

ACC greatly appreciates BIS' efforts to improve and harmonize the export clearance requirements and the opportunity to provide comments on the proposals to do so. While the proposals in the ANPR are a good start, we believe the current proposals would ultimately be counterproductive create additional burdens and discrepancies between the various export clearance requirements. As a suggestion, ACC recommends BIS pursue the two-step process suggested above to reform the CB3 level of export control for chemicals and chemical equipment that are widely available outside the Australia Group when exported to destinations that pose a lesser risk of unauthorized uses or transfers.

We look forward to working with you on this issue, and we would welcome the opportunity to discuss alternative approaches. Should you have any questions or require any additional information, please feel free to contact me (alexa_burr@americanchemistry.com or 202-249-6425).

Sincerely,

Alexa Burr
Manager, Regulatory & Technical Affairs

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