

RECORD OF COMMENTS: EFFECTS OF FOREIGN POLICY-BASED EXPORT CONTROLS

Published in the Federal Register: September 8, 2008 ([73 FR 52006](#))

Comments due October 8, 2008

| COMMENT # | SOURCE | SIGNER(S) OF LETTER | DATE | NUMBER OF PAGES |
|------------------|--|--------------------------------|-----------------|----------------------------|
| 1. | Industry Coalition on Technology Transfer | Eric L. Hirschhorn | October 6, 2008 | 2 |
| 2. | Wisconsin Project on Nuclear Arms Control | Arthur Shulman | October 8, 2008 | 5 |
| 3. | Sun Microsytems | Hans Lumers | October 8, 2008 | 4 |

Hearing-impaired persons who will attend the meetings and require the services of a sign language interpreter should contact the Regional Office at least ten (10) working days before the scheduled date of the meetings.

Records generated from these meetings may be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meetings. Persons interested in the work of this advisory committee are advised to go to the Commission's Web site, <http://www.usccr.gov>, or to contact the Eastern Regional Office at the above e-mail or street address.

The meetings will be conducted pursuant to the provisions of the rules and regulations of the Commission and FACA.

Dated in Washington, DC, September 3, 2008.

Christopher Byrnes,

Chief, Regional Programs Coordination Unit.

[FR Doc. E8-20742 Filed 9-5-08; 8:45 am]

BILLING CODE 6335-01-P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Docket No. 0808181107-81109-01]

Effects of Foreign Policy-Based Export Controls

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Request for comments on foreign policy-based export controls.

SUMMARY: The Bureau of Industry and Security (BIS) is reviewing the foreign policy-based export controls in the Export Administration Regulations (EAR) to determine whether they should be modified, rescinded or extended. To help make these determinations, BIS is seeking comments on how existing foreign policy-based export controls have affected exporters and the general public. Additionally, BIS is particularly interested in comments regarding the Entity List (Supplement No. 4 to part 744 of the EAR), including on its usefulness and format, as well as on the specific entities listed and the licensing policies and requirements assigned to each.

DATES: Comments must be received by October 8, 2008.

ADDRESSES: Written comments may be sent by e-mail to publiccomments@bis.doc.gov. Include "FPBEC" in the subject line of the message. Written comments (three copies) may be submitted by mail or

hand delivery to Jeffery Lynch, Regulatory Policy Division, Bureau of Industry and Security, Department of Commerce, 14th Street & Pennsylvania Avenue, NW., Room 2705, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: For general questions regarding foreign policy-based export controls, Joan Roberts, Foreign Policy Division, Office of Nonproliferation and Treaty Compliance, Bureau of Industry and Security, telephone: (202) 482-4252, and for questions specific to the Entity List, Karen Nies-Vogel, Office of the Assistant Secretary for Export Administration, Bureau of Industry and Security, telephone: (202) 482-3811. Copies of the current Annual Foreign Policy Report to the Congress are available at <http://www.bis.doc.gov/PoliciesAndRegulations/08ForPolControls/index.htm> and copies may also be requested by calling the Office of Nonproliferation and Treaty Compliance at the number listed above.

SUPPLEMENTARY INFORMATION: Foreign policy-based controls in the Export Administration Regulations (EAR) are implemented pursuant to section 6 of the Export Administration Act of 1979, as amended. The current foreign policy-based export controls maintained by the Bureau of Industry and Security (BIS) are set forth in the EAR, including in parts 742 (CCL Based Controls), 744 (End-User and End-Use Based Controls) and 746 (Embargoes and Special Country Controls). These controls apply to a range of countries, items, activities and persons, including: Certain general purpose microprocessors for "military end-uses" and "military end-users" (§ 744.17); significant items (SI): Hot section technology for the development, production, or overhaul of commercial aircraft engines, components, and systems (§ 742.14); encryption items (§§ 742.15 and 744.9); crime control and detection commodities (§ 742.7); specially designed implements of torture (§ 742.11); certain firearms included within the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (§ 742.17); regional stability items (§ 742.6); equipment and related technical data used in the design, development, production, or use of certain rocket systems and unmanned air vehicles (§§ 742.5 and 744.3); chemical precursors and biological agents, associated equipment, technical data, and software related to the production of chemical and biological agents (§§ 742.2 and 744.4) and various

chemicals included in those controlled pursuant to the Chemical Weapons Convention (§ 742.18); nuclear propulsion (§ 744.5); aircraft and vessels (§ 744.7); communication intercepting devices (software and technology) (§ 742.13); embargoed countries (part 746); countries designated as supporters of acts of international terrorism (§§ 742.8, 742.9, 742.10, 742.19, 746.2, 746.4, 746.7, and 746.9); certain entities in Russia (§ 744.10); individual terrorists and terrorist organizations (§§ 744.12, 744.13 and 744.14); certain persons designated by Executive Order 13315 ("Blocking Property of the Former Iraqi Regime, Its Senior Officials and Their Family Members") (§ 744.18); and certain sanctioned entities (§ 744.20). Attention is also given in this context to the controls on nuclear-related commodities and technology (§§ 742.3 and 744.2), which are, in part, implemented under section 309(c) of the Nuclear Non-Proliferation Act.

Under the provisions of section 6 of the Export Administration Act of 1979, as amended (50 U.S.C. app. 2401-2420 (2000)) (EAA), export controls maintained for foreign policy purposes require annual extension. Section 6 of the EAA requires a report to Congress when foreign policy-based export controls are extended. The EAA expired on August 20, 2001. Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp., p. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of July 23, 2008, 73 FR 43603 (July 25, 2008), continues the EAR and, to the extent permitted by law, the provisions of the EAA, in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701-1706 (2000)). The Department of Commerce, insofar as appropriate, is following the provisions of section 6 by reviewing its foreign policy-based export controls, requesting public comments on such controls, and preparing a report to be submitted to Congress.

In January 2008, the Secretary of Commerce, on the recommendation of the Secretary of State, extended for one year all foreign policy-based export controls then in effect.

To assure maximum public participation in the review process, comments are solicited on the extension or revision of the existing foreign policy-based export controls for another year. Among the criteria considered in determining whether to continue or revise U.S. foreign policy-based export controls are the following:

1. The likelihood that such controls will achieve the intended foreign policy purpose, in light of other factors,

including the availability from other countries of the goods, software or technology proposed for such controls;

2. Whether the foreign policy objective of such controls can be achieved through negotiations or other alternative means;

3. The compatibility of the controls with the foreign policy objectives of the United States and with overall United States policy toward the country subject to the controls;

4. Whether the reaction of other countries to the extension of such controls is not likely to render the controls ineffective in achieving the intended foreign policy objective or be counterproductive to United States foreign policy interests;

5. The comparative benefits to U.S. foreign policy objectives versus the effect of the controls on the export performance of the United States, the competitive position of the United States in the international economy, the international reputation of the United States as a supplier of goods and technology; and

6. The ability of the United States to enforce the controls effectively.

BIS is particularly interested in receiving comments on the economic impact of proliferation controls. BIS is also interested in industry information relating to the following:

1. Information on the effect of foreign policy-based export controls on sales of U.S. products to third countries (i.e., those countries not targeted by sanctions), including the views of foreign purchasers or prospective customers regarding U.S. foreign policy-based export controls.

2. Information on controls maintained by U.S. trade partners. For example, to what extent do they have similar controls on goods and technology on a worldwide basis or to specific destinations?

3. Information on licensing policies or practices by our foreign trade partners that are similar to U.S. foreign policy-based export controls, including license review criteria, use of conditions, requirements for pre- and post-shipment verifications (preferably supported by examples of approvals, denials and foreign regulations).

4. Suggestions for revisions to foreign policy-based export controls that would bring them more into line with multilateral practice.

5. Comments or suggestions as to actions that would make multilateral controls more effective.

6. Information that illustrates the effect of foreign policy-based export controls on trade or acquisitions by intended targets of the controls.

7. Data or other information on the effect of foreign policy-based export controls on overall trade at the level of individual industrial sectors.

8. Suggestions as to how to measure the effect of foreign policy-based export controls on trade.

9. Information on the use of foreign policy-based export controls on targeted countries, entities, or individuals.

BIS is also interested in comments relating generally to the extension or revision of existing foreign policy-based export controls.

Entity List

The Entity List (Supplement No. 4 to Part 744 of the EAR) provides notice to the public that certain exports and reexports to parties identified on the Entity List require a license from BIS and that availability of License Exceptions in such transactions is limited. In connection with the annual review of all foreign policy-based export controls, BIS is particularly interested in public comments regarding the Entity List, including but not limited to those specific to the entities on the List and the licensing policies and requirements assigned to each of them, and on the Entity List's utility and suggestions for ways it might be improved through changes in format, organization or otherwise.

Parties submitting comments are asked to be as specific as possible. All comments received before the close of the comment period will be considered by BIS in reviewing the controls and developing the report to Congress and/or in implementing changes to the Entity List.

BIS will not accept public comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. BIS will return such comments and materials to the persons submitting the comments and will not consider them in the development of a response. All information relating to the notice will be a matter of public record and will be available for public inspection and copying. In the interest of accuracy and completeness, BIS requires written comments. Oral comments must be followed by written memoranda, which will also be a matter of public record and will be available for public review and copying.

The Office of Administration, Bureau of Industry and Security, U.S. Department of Commerce, displays these public comments on BIS's Freedom of Information Act (FOIA) Web site at <http://www.bis.doc.gov/foia>. This office does not maintain a separate

public inspection facility. If you have technical difficulties accessing this Web site, please call BIS's Office of Administration at (202) 482-0637 for assistance.

Dated: August 29, 2008.

Christopher R. Wall,

Assistant Secretary for Export Administration.

[FR Doc. E8-20672 Filed 9-5-08; 8:45 am]

BILLING CODE 3510-33-P

DEPARTMENT OF COMMERCE

International Trade Administration

A-570-892

Carbazole Violet Pigment 23 from the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on carbazole violet pigment 23 (CVP 23) from the People's Republic of China (PRC). The period of review (POR) is December 1, 2006, through November 30, 2007. We preliminarily determine that 11 companies have failed to cooperate by not acting to the best of their ability to comply with our requests for information and, as a result, should be assigned a rate based on adverse facts available (AFA). We are also rescinding this administrative review with respect to three companies. If these preliminary results are adopted in our final results of this review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries of subject merchandise during the POR.

Interested parties are invited to comment on these preliminary results. We will issue the final results no later than 120 days from the date of publication of this notice.

EFFECTIVE DATE: September 8, 2008.

FOR FURTHER INFORMATION CONTACT: Deborah Scott or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482-2657 or (202) 482-0649, respectively.

SUPPLEMENTARY INFORMATION:

ICOTT INDUSTRY COALITION ON TECHNOLOGY TRANSFER

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

October 6, 2008

Via E-Mail

Mr. Jeffrey Lynch
Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce
14th Street and Pennsylvania Avenue, NW, Room 2705
Washington DC 20230

Re: Effects of Foreign Policy-Based Export Controls, 73 Fed. Reg. 52006
(Sept. 8, 2008)

Dear Mr. Lynch:

The Industry Coalition on Technology Transfer (ICOTT) is pleased to respond to the Department's request for comments on the renewal of foreign policy-based export controls.

In large measure these controls are unilateral in character. Therein lies their ineffectiveness. While there can be instances where unilateral controls are justified, they are rarer than the broad array of such United States controls would indicate. From the standpoint of effectiveness, unilateral controls are like damming half a river. The builder may take pride in the majesty of the dam but there is every bit as much water downstream as before the first shovelful of earth was turned. For this reason, unilateral controls should be invoked—or continued—only where the resulting injury to American workers and businesses can be justified when balanced against the symbolic character of the restrictions. By and large, this balance weighs in favor of removing unilateral United States foreign policy controls.

Another argument frequently advanced in support of unilateral controls is that their imposition is necessary while the United States seeks multilateral support. The historical record of this tactic has been mixed at best. At a minimum, controls imposed unilaterally under this rationale should be of limited duration unless sufficient multilateral control is achieved.

We assume that the principal goal of foreign policy controls is to prevent target countries from gaining access to the controlled goods and technology. Foreign policy controls, like other unilateral controls, are unlikely to achieve such goals for the reasons noted above.

We urge that any controls that do not meet the foregoing criteria be removed.

INDUSTRY COALITION ON TECHNOLOGY TRANSFER

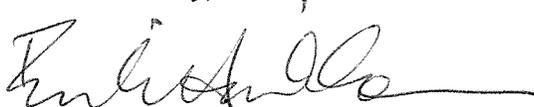
Mr. Jeffrey Lynch
October 6, 2008
Page 2

In addition to noting the general ineffectiveness of unilateral controls, we recommend that where such controls are imposed for anti-terrorism reasons, License Exception RPL be available for emergency services, including one-for-one replacement of parts, rendered to commercial aircraft that are located in, owned by, or registered in sanctioned countries. Were an aircraft to crash because maintenance was unavailable due to United States export controls, the adverse publicity for our country would far outweigh any benefit derived from the controls themselves. Moreover, even absent a safety problem, the unavailability of scheduled aircraft could inconvenience nationals of many countries that are not sanctioned by the United States and be costly to affected airports and other international airlines (i.e., not of sanctioned countries) providing connecting flights.

The notice also seeks comment on the Entity List. One egregious shortcoming about that list has been obviated—at least for now—by the recent transfer of certain sanctioned parties from General Order No. 3 (part of supplement 2 to part 736 of the EAR), where they were hidden from most exporters, to the list, which is somewhat better known to the exporting community. 73 Fed. Reg. 54499 (Sept. 22, 2008). Regrettably, the open-ended character of the criteria for listing set out in § 744.11(b), especially paragraph (5), along with the lack of a time period for acting upon requests for removal from the List under § 744.16, raises significant due process issues and should be reconsidered.

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 the U.S. Government's export control activities.

Sincerely,



Eric L. Hirschhorn
Executive Secretary

October 8, 2008

Mr. Jeffrey Lynch
Regulatory Policy Division
Bureau of Industry and Security
U.S. Department of Commerce
14th Street and Pennsylvania Avenue, NW
Room 2705
Washington, DC 20230

RE: Comments on Foreign Policy-Based Export Controls

Dear Mr. Lynch,

The Wisconsin Project on Nuclear Arms Control is pleased to submit the following in response to the September 8, 2008 request by the U.S. Department of Commerce, Bureau of Industry and Security (BIS) for comments on foreign policy-based export controls (73 Fed. Reg. 52006). 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 commitment by BIS to improve the efficiency and transparency of dual-use export controls while safeguarding U.S. national security and economic competitiveness. The Project also welcomes the willingness by BIS to engage with all stakeholders to review comprehensively its administration of these controls. But in conducting these reviews and launching initiatives to increase efficiency, BIS should exercise great care when considering reduction or elimination of controls on entire categories of items, end-users or transactions. Just as changes in controls may have unintended consequences for the competitiveness of American businesses, so, too, such changes may prove detrimental to national and international security. This inherent risk is especially high with respect to proliferation controls.

The Entity List

The Project is pleased to respond to the request for comments by BIS on the Entity List. Located in Supplement No. 4 to Part 744 of the U.S. Export Administration Regulations (EAR), the List identifies export-restricted foreign parties, so designated for a variety of reasons, including proliferation concerns. As BIS intends to focus increasingly on entities rather than countries, the Entity List is its primary tool for informing exporters about dangerous parties in transactions.

BIS is now adding to the List entities linked to activities that are contrary to the national security or foreign policy interests of the United States. This is a flexible new 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. BIS should use the 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. At the same time, BIS should also consider more systematic use of Section 744.20, which specifically allows imposition of license requirements on entities sanctioned by the State Department. These sanctions are applied against foreign entities and governments that engage in proliferation activities. All of these entities should be added to the Entity List after they are sanctioned by State, and should remain on the List even if the statutory term of the original sanction has expired, unless a determination is made that the entity is no longer a risk.

Improving the List

Despite its growing importance, there has been little effort to maintain the utility of the Entity List as an accurate, current and required front-line screening tool for exporters. BIS has recently indicated that this will soon change. The Wisconsin Project looks forward to helping improve the List and its related procedures. Below are specific suggestions for doing so. Several of these suggestions are illustrated in the Project's annotations of the China section of the List, available on the Project's website at www.wisconsinproject.org. These annotations also include specific additions and revisions to current entries, for consideration by BIS as it reviews the List.

- **General principle.** The exporter should have *effective* notice of each entity on the List. That is, the exporter should be able to rely on the List in identifying conclusively each entity listed, and in determining whether a party to a potential transaction is in fact a listed entity. At present, this is not always the case. Accordingly, each entry on the List should clearly describe a designated entity of concern, using all available accurate information.
- **Names and aliases.** The primary name provided should clearly identify the entity, and all known aliases and addresses should be included. Currently, it is not always clear what entity is actually designated in a particular entry. For example, the List contains an entry for "First Department, China Academy of Launch Vehicle Technology, (CALT)". Although the plain reading of the text suggests that only the First Department of CALT is listed (and the rest of CALT is presumably unaffected), BIS has indicated in filings that all of CALT is in fact listed. The entry for "Karachi CBW Research Institute, University of Karachi's Husein Ebrahim Jamal Research Institute of Chemistry (HEJRIC)" is similarly unclear in identifying which entity is listed. Such confusion could have serious ramifications for decisions by exporters and for the success of export enforcement cases. Greater care should be taken with grammar and punctuation in naming entities on the List. The focus should be on describing fully the entity of concern, rather than transcribing information from sources.

- **Multiple locations.** Each entry should make clear that all of the entity's addresses and locations are included in the designation, even if not all are specifically listed. If an entity needs to be listed in multiple entries to reflect locations in different countries, the entries should clearly cross-reference each other.
- **Information about corporate parents.** Information that identifies an entity's corporate parent should be included consistently to help identify the entity (for numbered institutes, for example).
- **Avoiding duplication.** As the List grows, special care should be taken to avoid listing the same entity repeatedly under different names (as currently appears to be the case with two adjacent entries under Malaysia referencing "Vast Solution").
- **Subordinates.** Until recently (2007), BIS provided guidance on the treatment of subordinate entities in its online "Entity List FAQs". There, BIS stated that "if subordinates for a listed entity are not specifically named on the list, ALL subordinates of that entity are considered listed..." This important guidance has been removed from the FAQs without any explanation. Thus, there is no guidance at this time on the issue. To minimize the risk of diversion and circumvention of controls, BIS should adopt the policy that all entities majority-owned or controlled in fact by a listed entity are considered listed and subject to the same licensing requirement. BIS should facilitate industry compliance by providing corresponding guidance, and by including in each entry on the List a note (such as "with all subsidiaries and subunits") and the names and addresses of all such known subordinates.
- **Listings by type.** The entries for India's Department of Atomic Energy and Pakistan's Atomic Energy Commission include categories of subsidiaries identified by type only. Such listings are not effective for screening. These entries should also list fully, by name, all entities falling in each category.
- **Reasons for listing.** In the interest of informing exporters more fully about diversion risk, BIS should include additional information about why entities are added to the List. 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. This indirect explanation is further diluted for entities listed pursuant to the new Section 744.11, which contains a very broad basis for designation. The triggering section is now included in the License Requirement column for some entities and in the License Review Policy column for others. BIS should fulfill requests from industry and follow the example of other governments by indicating WMD programs and other reasons for concern directly and explicitly on the List, for each entity. These additions would allow exporters to make better decisions about prospective end-users, commodities and transactions.

- ***Names in original alphabets.*** BIS has stated that the names of listed entities in their original alphabets cannot be included on the official Entity List because the Federal Register cannot accommodate their publication. BIS should publish on its website, as guidance for exporters, an augmented version of the List including these names. Making this information available is as important for protecting national security as the guidance on transshipments to Iran recently published by BIS – indeed, much of the effort in researching and supplying the original alphabet names for entities on the List would serve the goal of inhibiting proliferation to Iran’s WMD programs. The Project has already carried out and published this research for the China section of the List. And the forthcoming annual Entity List reviews (see below) will, by necessity, involve research on each entity by foreign language specialists. This will minimize any added cost to BIS of publishing on its website the entity names in their original alphabets.
- ***Standard format.*** BIS has previously 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 benefit, in part by allowing smaller businesses to screen their transactions more efficiently and effectively. The Office of Foreign Assets Control (OFAC) at the U.S. Department of the Treasury has developed a comprehensive and user-friendly data format for its designation lists. The OFAC model could be used in developing the government-wide screening list standard format.

End-User Review Committee Procedures

BIS chairs the interagency End-User Review Committee (ERC), which is responsible for adding, removing and modifying entries on the Entity List. BIS has recently published Procedures for End-User Review Committee Entity List Decisions (Supplement No. 5 to Part 744 of the EAR), as well as a formal procedure that would allow a listed entity to request removal or modification of a List entry (Section 744.16 of the EAR). Below are some suggested revisions to these procedures, mostly to ensure that the ERC has all of the information necessary for its decisions.

- BIS should ensure that sufficient, quality intelligence information and analysis are available for all ERC decisions. Such information should be sourced from throughout the U.S. intelligence community. The ERC currently includes representatives of the Departments of Commerce, State, Defense, Energy and sometimes Treasury. The composition of the ERC should be changed to explicitly include the intelligence community (including its components outside the current ERC agencies).
- BIS should also enable industry and other members of the public to provide input into the ERC decisionmaking process. This would supply the ERC with access to valuable open source intelligence - about suspicious transaction requests, risky entities, and even simply additional or corrected identifying information - that is in the hands of industry and other private parties. Such external information is especially important when a listed entity requests removal from the List and supplies supporting documentation. The public should

have an opportunity to comment on such a request and to supply additional information relevant to the decision.

- The new procedures provide for an annual review of the Entity List by the ERC. BIS expects that the first review will be completed no later than August 21, 2009. These reviews hold great promise for updating the List and making it effective. Here, too, public input is key to ensuring proper depth and breadth of information available for ERC decisions regarding the List. During each annual review cycle, public comments should be solicited while the ERC is carrying out research and analysis. The Project's work on annotating the List is an example of the kind of information the ERC could receive. Once tentative decisions are made as a result of the review, they should be published on an interim basis to allow additional public review and comment. To ensure balanced and regular examinations of each listed entity, each entry on the List should be reviewed fully every year. And any review triggered by a request from a listed entity for removal or modification should be comprehensive, beyond simply addressing the information in the request itself.
- Supplement No. 5 specifies that any ERC member agency may propose a change to the Entity List, and that the ERC will vote on each proposal within 30 days after the ERC Chairman first circulates it to all member agencies (unless a postponement is agreed). To ensure efficiency and predictability, Supplement No. 5 should also specify that the ERC Chairman must circulate each such proposal within 10 days of receiving it.

We are grateful for the opportunity to present these comments.

Respectfully submitted,

Arthur Shulman
General Counsel
Wisconsin Project on Nuclear Arms Control



Sun Microsystems, Inc.
Mailstop UMPK10-144
10 Network Circle, Menlo Park, CA 94025
Fax (650) 786-2232

October 7, 2008

Mr. Jeffrey Lynch
Regulatory Policy Division,
Bureau of Industry and Security
Department of Commerce, Room 2705
14 St. and Pennsylvania Ave. NW
Washington, DC 02030

Re: Effects of Foreign-Policy-Based Export Controls (Docket
0808181107-81109-01), Federal Register, September 8, 2008, Volume 73,
No. 174.

Dear Mr. Lynch,

Sun Microsystems, the world's leader in networked systems, again welcomes the opportunity to comment on foreign policy-based export controls administered by the Bureau of Industry and Security. Sun recognizes the necessity of such controls, but wishes to point out weaknesses in their general application, as well as particular issues with direct impact on Sun's ability to conduct global business operations.

As a general matter, export controls, including those imposed for foreign policy purposes, should meet three criteria:

- **Controls should support a defined objective.** Export controls should not be considered ends in themselves, but should be imposed with defined objectives. Only if the objective is defined can success be measured.
- **Controls should work.** If the objective of controls is to deprive the target country of a technology or commodity, issues like foreign availability and controllability must be regularly evaluated.
- **Controls must be consistent, predictable and flexible.** The specific execution of controls must be framed in a way to avoid unnecessary damage and to assist businesses in implementing them.



Foreign policy-based controls in particular have been historically weak in the application of these principles, and require diligence to ensure that their execution meets intended objectives and that their impacts do not change over time in unintended ways.

In this year's comments on Foreign Policy-based controls, Sun would like to point out two areas where we believe that in their present form they have produced unnecessary and unintended competitive damage to U.S. companies without a commensurate policy or control benefit.

Residual Controls on Cryptographic Software that is "Publicly Available"

Information that is in the public domain or that is generally available to the public is not subject to EAR (or other) US jurisdiction and control. However, this is not true in the case of software containing encryption.

Encryption is unique in that items in that are generally available to the public remain subject to the EAR, meaning that they retain controls to some destinations. Specifically, notification requirements and controls remain on embargoed destinations.

These controls are a legacy of encryption's pre-1997 history as a munitions item. At that time, steps were taken to prevent public release of cryptographic code on the grounds of their unique sensitivity. However, these conditions no longer hold, not only because of the great increase in the amount of encryption software available commercially, but also because of the large amount made publicly accessible subject to minimal controls since 1996.

The disruptive effect of these controls is greatly disproportionate to any national security value that they may now provide. Companies now actively pursue an "open source" strategy, in which they intentionally make their software publicly accessible via open source licenses. This is done so that their products may be quickly accepted by developer and other target groups. To the extent that cryptographic functions are an intrinsic feature of their products (e.g., operating systems), even residual controls on these open source uncontrollable products have disproportionate and significant competitive effects.



In practice, such competitive effects involve the impacts of export screening requirements, particularly involving electronic downloads and free distribution of CD's at trade shows and other marketing events. While embargoed destination and name/entity screening for electronic downloads is now typically accomplished via automated systems, the volume of downloads coupled with the large number of names (now over 26,000) on consolidated US embargoed entities lists, generates massive numbers of false matches or "positives" that must be resolved manually. Sun, for example, must typically resolve 30,000 or more such false positives each month.

In addition to the full time staff needed to do this, this activity causes unnecessary delays in an increasing proportion of online transactions, threatening the viability of such software distribution as a business model and negatively impacting business strategy built on wide and swift adoption of open source software.

Another tangible impact of these residual controls is on the distribution of open source software containing cryptography on CD's at trade shows and other events. The fact that US EAR controls apply means that some standard of due-diligence (including screening) must be implemented before such software may be freely distributed.

Both because non-US open source products are not subject to these controls, and because free, mass market software cannot be controlled in fact, this claim of jurisdiction and the controls that it requires serve no purpose as they do not in practice deprive potential adversaries of use of the software. In order to bring controls on cryptographic software and technology in line with other controls, Sun strongly urges that they be removed from EAR jurisdiction.

Inclusion of Entities Without Addresses or Other Reference Data on Embargoed Entities Lists

Screening parties to export transactions under EAR jurisdiction has become the backbone of company export internal control programs. Typically, such screening is accomplished via automated means, using software or services provided by multiple private vendors.

In practice, automated export screening presents a range of both conceptual and practical issues. For example, entity/name data may originate from multiple, non-English character sets (e.g., Mandarin Chinese, Cyrillic, etc.) for which multiple transliterations are in common use. Names may be in differing orders, be abbreviated differently, or exhibit other factors that greatly complicate automated matching processes.



On top of this complexity, sanctioned and embargoed entities used by US exporters as reference data originate for multiple US agencies, and are in different formats. While there has been a recent recognition that formatting must be made consistent, this is just the tip of the iceberg in terms of making entity data usable in company screening processes.

An increasingly serious issue in automated name screening is the common inclusion of names without any other associated reference data. Such data may include country, address or other information, and is critical for the resolution of "false positives."

Many names found on the US sanctioned list, especially those originating from the Treasury Department's Specially Designated Nationals List, appear very commonly in their respective countries. Such individuals are often listed without address or other data necessary to distinguish them from legitimate customers.

The combined US embargoed/sanctioned lists contain nearly 3000 names without addresses or other geographic identifiers. This makes elimination of "false positives" involving them in practice impossible - they must be considered as sanctioned entities, although most are not.

Agencies contributing to lists of sanctioned and embargoed entities should, except in very exceptional circumstances, eliminate names when further identifying data is not available. New names should not be added unless such identifying information can be developed.

As the US continues to place increasing emphasis on end-use and end-user controls, it is important to consider how they affect companies' ability to execute their internal control programs in the global business environment, and the impact that marginal or unfocused measures may have in a rapidly evolving marketplace. Sun wishes to point out that the objectives of export control will be more fully achieved if US companies are allowed to use their scarce resources to address issues that are useful and truly significant.

Sun recognizes the important role of foreign policy-based controls, and is grateful for this opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Hans Luemers", written over a horizontal line.

Hans Luemers,
Senior Director,
International Trade Services,
Sun Microsystems