Testimony by Matthew S. Borman, Deputy Assistant Secretary of Commerce
Bureau of Industry and Security
U. S. Department of Commerce

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Beyond Control: Reforming Export Licensing Agencies for National Security and Economic Interests

Mr. Chairman, distinguished members of the Committee, thank you for the opportunity to discuss how we protect the national security and economic interests of the United States. In the post 9-11 era, we must be ever vigilant and we have been by continually updating our export licensing processes and refining how we at the Bureau of Industry and Security, promote the continued technology leadership, economic power, and national security of the United States.

A Changing Economic and Security Picture: Implications for our Export Control Regimes

Much of the architecture of our export control system was built during the Cold War when the world, while still dangerous, was in some ways a simpler place. The West confronted a clearly defined enemy, one which our allies shared, and we also held a significant technological advantage over our adversary. In the past, the United States was able to maintain its technological superiority over others, particularly our enemies, largely through a "denial" strategy where we prohibited the transfer or export of technology to other markets. The system of export controls that developed around this denial strategy was premised on the assumption that we had something others couldn't get – and the way to keep others from getting it was to deny U.S. firms the opportunity to sell it.

Dramatic changes in the economic landscape, however, challenge the underlying assumptions and foundations upon which our traditional denial strategy was based. As markets become increasingly integrated, production and supply chains for single goods now span the globe. Investment capital, technology, and intellectual talent are now more widely distributed. Moreover, many of the world's best and brightest have come to the United States, conducting research at our country's leading universities, research institutes, and technology firms. The consequence is that the fences we constructed in the past to preserve our technological superiority can no longer afford us the same level of protection.

It is not just changes in the economic landscape, however, which compels us to rethink our system of export controls. Today, we face more and varied national security risks from an increasing number of international actors – conventional challenges from nation-states, asymmetric and potentially catastrophic challenges from both nation-states and non-state actors, and the diffuse challenge of disruptive technologies that may enable adversaries of all kinds to

rapidly diminish our traditional overmatch advantages. And while our security is increasingly linked with others, we must still recognize that sometimes our allies, in addition to them being economic competitors, do not always share our security views.

These changes in both the political and economic landscape place tremendous pressure on our system of export controls which requires us to fine tune our strategies.

The Role of BIS in this Changing Global Landscape

The effective and efficient operation of the U.S. export control system is of the highest priority for BIS. The BIS Mission Statement succinctly encapsulates the role of BIS as a national security agency within the Department of Commerce. BIS' role is to

> Advance U.S. national security, foreign policy, and economic objectives by ensuring an effective export control and treaty compliance system and promoting continued U.S. strategic technology leadership.

The Bureau's paramount concern is the security of the United States, which includes its economic security, cyber security, and homeland security. Through administering U.S. dual-use export controls – that is, for products that have both civilian and military applications, BIS' focus is to stem the proliferation of weapons of mass destruction and the means of delivering them, to halt the spread of weapons and related technology to terrorists or countries of concern, and to further U.S. foreign policy objectives. The Bureau's mandate to protect U.S. national security includes not only supporting U.S. national defense, but also ensuring the health of the U.S. economy and the competitiveness of U.S. industry. Thus, BIS seeks to promote a strong U.S. defense industrial base, by ensuring that its regulations do not impose unreasonable burdens on innovation and commercial activity.

International cooperation and engagement is also critical to the Bureau's activities. Fulfilling the Bureau's mission of promoting security depends heavily upon international cooperation with our principal trading partners and other countries of strategic importance. BIS facilitates this international cooperation through ongoing multilateral dialogues in the context of the multilateral export control regimes (the Wassenaar Arrangement, Nuclear Suppliers Group, Australia Group, Missile Technology Controls Regime), and non-proliferation treaties such as the Chemical Weapons Convention. BIS also holds bilateral dialogues with countries that are major U.S. export markets such as the High Technology Cooperation Group with India and the High Technology Working Group with China.

The Bureau also has extensive cooperation with other departments and agencies and U.S. industry in carrying out its mission. BIS cooperates closely with the Departments of Energy, Defense, and State and the intelligence community in making policy, establishing jurisdiction and setting control levels for technology, and reviewing export license applications. BIS also works closely with a number of other agencies, principally the Departments of Homeland Security and Justice, in enforcing its dual-use export controls.

The Bureau carries out four major functions -- policy, licensing, outreach, and enforcement -- in administering the U.S. dual-use export control system. Policy is generally

established and revised through an interagency process, often chaired by the National Security Council, involving the Departments of Defense and State, with participation by other departments as warranted. Policy is implemented through the Export Administration Regulations (EAR) published by BIS. Regulatory revisions are typically cleared by the Departments of Defense and State and other departments as appropriate.

BIS frequently revises the EAR to adapt to changes in technology, markets, threats, and country policy. In fiscal year 2007, for example, BIS published 23 revisions to the EAR. These revisions adjusted control levels for certain technologies, revised export and reexport controls for the People's Republic of China, and imposed new foreign policy controls on North Korea. One of the ways BIS ensures that the dual-use export control system is efficient and effective is by frequent revisions to the EAR to ensure the controls are focused on the current challenges.

Executive Order 12981, as amended, governs the interagency license review process, which is thorough and comprehensive. After a company submits its license application, a BIS licensing officer reviews the application. The Departments of Defense, Energy, State, and other departments as warranted, review and make recommendations to BIS. Applications also undergo a review by the intelligence community. Under Executive Order 12981, applications that reviewing departments disagree on are "escalated" to the Operating Committee (OC). The OC is an interagency panel of senior career experts. Further escalations go first to the Advisory Committee on Export Control Policy (ACEP), which is at the Assistant Secretary level. If further escalation is needed, a disputed application goes then to the Export Administration Review Board (EARB) (cabinet level), and could ultimately go to the President. Escalations above the ACEP are extremely rare and there have been none during this Administration.

Over the past ten years, BIS has received between 10-20,000 license applications per year, with a high of 19,296 applications in fiscal year (FY) 2007. The average processing time for all BIS licenses in FY 2007 was 28 days.

Reviewing departments disagree on only a small fraction of license applications. In FY 2007, 0.8 percent of all cases received by BIS were escalated to the OC and only .13 percent were further escalated to the ACEP. The OC's case average processing time in the first half of FY 2008 was 14 days, the processing time set forth in Executive Order 12981. Applications at the ACEP are generally resolved with only one meeting, which takes place once a month. The dispute resolution process is therefore working as intended.

One of the ways BIS assesses the effectiveness of the licensing process is through end-use checks. When performed prior to approval (pre-license check), the check provides feedback on the reviewing agencies' initial recommendation to approve a particular transaction. When performed after an item is delivered, the results of a post-shipment verification provide direct feedback on the effectiveness of the license review process. BIS conducted over 850 end-use checks worldwide in FY 2007.

Keeping U.S. industry informed of its obligations under the EAR is another critical part of ensuring that the dual-use export control system is efficient and effective. BIS typically conducts approximately 45 live seminars annually across the United States and in two to three countries abroad each year. BIS evaluates the effectiveness of these seminars through detailed evaluation forms from participants. Moreover, BIS has recently established an on-line training

room on its website for individualized, cost-effective outreach to individuals and small and medium sized enterprises in the United States and around the world. The on-line training room has already received over 10,000 hits from interested internet users. BIS also offers webinars and other on-line materials and tutorials to aid in its outreach efforts and participates in related outreach events organized by other agencies and entities.

The major activities of BIS' enforcement program include investigating criminal and administrative violations and imposing civil sanctions for violations of the EAR, IEEPA, the Chemical Weapons Convention Implementation Act (CWCIA), and related statutes and regulations. Consistent with the President's national security priorities, BIS prioritizes its enforcement activities on cases relating to the proliferation of weapons of mass destruction, terrorism, and military diversion. In FY 2007, BIS Special Agents made 23 arrests, and assisted in obtaining 16 convictions and $25.3 million in criminal fines. Administratively, 65 cases were settled through Final Orders totaling $5.8 million in fines.

A significant challenge for BIS is the long-standing lapse of the Export Administration Act of 1979, as amended (EAA). This lapse hinders the ability of BIS to employ up-to-date authorities to enforce the dual-use export control system. While in lapse, the EAA cannot be updated and thus the enforcement authorities of BIS's Special Agents' have not kept pace with an ever changing criminal landscape.

BIS's Special Agents need updated tools to combat proliferation in an era of globalization. For example, BIS's agents are currently unable to work directly with their foreign law enforcement counterparts. In addition, they do not have the authority to conduct undercover operations—or even make a simple arrest – *in the United States* without undergoing a cumbersome bureaucratic process. While effective cooperation between U.S. law enforcement agencies has enabled our agents to overcome some of these hurdles, they need updated enforcement authorities to enhance our national security by enabling domestic and international investigations and enforcement actions to proceed more quickly, efficiently, and effectively.

S. 2000, the "Export Enforcement Act of 2007," sponsored by Senator Christopher Dodd, would reauthorize the EAA and enhance the enforcement authorities of BIS's Special Agents. We support prompt enactment of this bill, which is similar to the Department's proposal, and would address one of the most significant challenges BIS faces in administering the dual-use export control system.

BIS Initiatives to Address the Dynamic Nature of the Geopolitical System

While BIS strives for efficiency and accuracy in administering U.S. dual-use export controls, the Bureau is constantly reviewing, revising, and updating its policies to make the process more effective. These efforts are focused by the dual-use export control reform directive issued by the President on January 22, 2008 and the report of the Secretary's Deemed Export Advisory Committee (DEAC) issued in December 2007. In addition, to address the Government Accountability Office January 2007 report, BIS has established a new Performance Goal in the FY 2009 President's budget request. Collectively, these efforts will further BIS's ability to effectively operate, with our interagency partners, our dual-use export control system.

U.S. Export Control Reform Directives

This past January, the President announced a series of U.S. export control reform directives to ensure that dual-use export control policies and practices support the National Security Strategy while facilitating U.S. economic and technological leadership. To further these objectives, the President directed that certain steps be taken to enhance the focus of the dual-use export control system in three main areas.

First, the directives focus the dual-use export control system on foreign end-users of U.S. high technology products in order to adapt to the changing threat environment and the globalization of technology and markets. Export control policy focused on foreign end-users will permit the facilitation of U.S. high-tech exports to "trusted customers," while preventing those foreign parties acting contrary to U.S. national security and foreign policy interests to receive sensitive technologies. The expanded Entity List, the Validated End-User (VEU) Program, and the Intracompany Transfer License Exception are among the initiatives that focus on specific foreign end-users.

Second, because technological and economic competitiveness are vital to the long- term national security of the United States, the directive stresses that the U.S. export control system must constantly reassess to ensure that the appropriate items are controlled. To achieve this goal, among other initiatives, the Bureau has begun a systematic review and update of the Commerce Control List (CCL). BIS has already completed the first phase of this effort with the publication of website guidance and clarifications to certain Commerce Control List entries. BIS continues to work on the second and third phases of this review by developing proposed changes to unilateral and multilateral controls over the next several months.

Third, the directive requires heightened transparency in BIS' administration of the dual-use export control system. To achieve this, BIS intends to publish advisory opinions and other additional relevant information to assist exporters in complying with the regulatory requirements.

Deemed Export Advisory Committee Report

The report of the Secretary's Deemed Export Advisory Committee (DEAC) provides specific focus on the challenge of foreign national's access to controlled dual-use technology in the United States. The report points out that technological talent is increasingly ubiquitous. Many of the world's best and brightest come to the United States to study or conduct research at our universities; many others are developing cutting edge technologies at our country's leading companies. The challenge is how to protect U.S. security interests while maintaining our research institutions and companies as the destinations of choice for talented foreign students and professionals. The DEAC recently concluded that current policy is not equipped to handle today's information economy, changes in the nature of the post-Cold War threat to national security, the increased globalization of technology development and manufacturing, and the heightened development of cutting-edge technologies abroad. The committee therefore endorsed a revised approach to deemed exports and presented BIS with a number of specific reform proposals.

BIS has carefully considered the recommendations made by the DEAC and taken up many of them. For example, BIS will soon formally establish an Emerging Technology and Research Advisory Committee to undertake reviews of emerging technologies and ensure that the CCL remains up-to-date in this regard. BIS is also in the process of developing the review criteria when authorizing deemed exports to foreign nationals. Additionally, BIS will consider factors raised in the DEAC report as it is conducting its comprehensive review of the CCL.

Additional Effectiveness Measure

BIS now has an additional tool to further measure the effectiveness of the dual-use export control system. Its new performance goal, to "Maintain and Strengthen an Adaptable and Effective U.S. Export Control and Treaty Compliance System**,"** will measure the percentage of shipped transactions in compliance with the licensing requirements of the Export Administration Regulations (EAR). This measure evaluates how effective the dual-use export control system is in ensuring that items subject to a BIS licensing requirement are exported in compliance with the EAR. BIS will measure exporter compliance with the EAR by reviewing, on an annual basis, the entire compilation of export transactions subject to a license requirement (*i.e.,* licensed and license exception shipments) and determining what percentage are in compliance with the EAR following any BIS intervention as necessary. BIS interventions will comprise actions taken to mitigate or resolve non-compliance findings (*i.e.,* counseling, outreach, warning letters, and enforcement referral).

Conclusion

The United States faces unprecedented security challenges from threats of terrorism to proliferation of weapons of mass destruction and advanced conventional weapons to instability in a number of regions in the world. The United States also faces unprecedented economic challenges from the increasing worldwide diffusion of high technology and global markets. The United States must, therefore, ensure that the dual-use export control system is properly

equipped to meet those challenges. BIS is continually evaluating and revising the dual-use export control system to effectively meet those challenges.