

**Testimony by Matthew S. Borman
Acting Assistant Secretary for Export Administration
Bureau of Industry and Security
U. S. Department of Commerce**

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Export Compliance: Ensuring Safety, Increasing Efficiency

Mr. Chairman, distinguished members of the Committee, thank you for the opportunity to discuss the Department of Commerce's role in the export control compliance regime and the proposed legislation, H.R. 5828, *The Securing Exports Through Coordination and Technology Act*.

In the post-9/11 era, ensuring our dual-use export controls are effective and efficient is an increasingly challenging task. At the Bureau of Industry and Security (BIS), we strive to ensure that our controls address the varied and diffuse security threats and competitive challenges our nation faces. We continually evaluate and update our export licensing, compliance, and enforcement processes to support the continued technology leadership, economic power, and national security of the United States.

Licensing

As has been detailed in previous testimony and hearings, BIS has a robust program for controlling appropriate technologies, vetting export license applications, and informing U.S. companies of their obligations under the Export Administration Regulations (EAR). BIS carries out this robust program in cooperation with a number of other departments and agencies and U.S. industry. BIS cooperates closely with the Departments of State, Defense, and Energy, and the intelligence community in making policy, establishing jurisdiction and setting control levels for technology, and reviewing export license applications.

Over the past ten years, BIS has received between 10-20,000 license applications per year, with the highest amount over that period being Fiscal Year 2007 with a total of 19,296 applications received. Under Executive Order 12981, the Departments of State, Defense, and Energy can review all export license applications submitted to BIS. Defense and State review about 80% of all such license applications and Energy reviews about 34%. The average processing time for all BIS licenses in FY 2007 was 28 days.

In addition to the interagency review process, BIS further assesses prospective and retrospective compliance 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 in over 80 countries in FY 2007.

Outreach

In addition to the licensing process, BIS conducts other activities to assess and facilitate compliance with the EAR. One such activity is industry outreach. Informing U.S. companies, and their foreign partners, of the requirements under the EAR is critical to facilitating compliance. Industry cannot comply with regulations it does not understand or know exist. BIS typically conducts approximately 45 live seminars annually across the United States and in two to three countries abroad each year. BIS identifies attendees using licensing and export data and 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. BIS also participates in related outreach events organized by domestic and foreign industry as well as other agencies.

Export Data

Other compliance activity is based on data sharing arrangements with the Census Bureau (Census) for data in the Automated Export System (AES) and the Department of Homeland Security (DHS) for accessing data in the Automated Targeting System (ATS).

BIS uses AES data to verify compliance with the EAR. AES is the system for filing required data on exports from the United States and is the basis for U.S. foreign trade statistics. AES also helps detect and prevent the export of certain critical technology and commodities to unauthorized destinations or end users by targeting and identifying suspicious shipments prior to shipment. AES was implemented on July 3, 1995, to automate the manual process of filing the Shipper's Export Declaration (SED) and Outbound Carrier Manifests. AES is a joint, cooperative project supported by Census and DHS' Customs and Border Protection (CBP) and used by BIS and the Department of State's Directorate of Defense Trade Controls (DDTC). Since its inception, AES has served as an information gateway for Census, CBP, BIS and DDTC to improve the reporting of export trade information, customer service, compliance with and enforcement of export laws, and provide paperless reports of export information. BIS is continually working with Census and CBP to refine AES validations to further enhance export control administration.

For export transactions subject to BIS control, AES works as follows: Prior to export, exporters, with a few exceptions, are required to make AES filings electronically, providing approximately 36 different data elements, including the item, consignee, description of the item, country, quantity and value. AES performs edits and validations on this data, and exporters either receive error messages or an AES certification number upon a successful submission. For items subject to a licensing requirement, exporters must also identify the license number or license exception symbol and export control classification number (ECCN). For such items, relevant information regarding the export is transferred from BIS to CBP nightly every Tuesday through Saturday through a dedicated and secure line. Following the actual export of the item, CBP then notifies

BIS within 24 to 48 hours of the shipment under the relevant BIS individual license, which is input into BIS' licensing system. BIS also receives a separate AES file from Census that is reconciled with data in ECASS to validate whether exports shipped under a license or license exception are consistent with the respective authorizations. Those that are not reconciled are referred to BIS' Office of Export Enforcement for investigation.

Furthermore, BIS is working with Census and CBP to enhance AES validations. For example, on April 28, BIS established new fatal errors in AES when a license exception symbol is not accompanied by an ECCN. We expect that exporter compliance with this license exception requirement of the EAR will increase from approximately 85% in fiscal year 2007 to 97% in 2010. We are continuing to explore additional validations to AES (and any successor system) that could be implemented in a cost-effective manner to further improve compliance prior to shipments.

Enforcement

BIS also works closely with a number of agencies, including the Department of Justice and DHS, to enforce its dual-use export controls. BIS uses AES data to support BIS' investigative functions. BIS Special Agents and analysts routinely access AES data through ATS. ATS is a criteria-specific searchable database. ATS has proven to be a valuable tool for BIS and has generated both criminal and administrative investigations. It is also valuable in ongoing investigations to develop additional leads and/or identify associates of suspect companies.

For example, ATS/AES data were instrumental in a BIS investigation that led to the identification of a major diverter of U.S.-origin aircraft parts to Iran. Upon receiving information about a suspect foreign company, an ATS search identified numerous U.S. companies exporting to the suspect overseas company. When the U.S. companies were interviewed, BIS learned that the overseas company had previously been in business under a different name that had been on the BIS Denied Parties List; the company had changed its name and continued to violate the Iranian Transaction Regulations and the BIS Denial Order. BIS advised the unwitting U.S. companies to not conduct business with this overseas firm, thus preventing future violations, and the new alias was added to the BIS Denied Parties List.

In another example, a BIS Field Office Special Agent identified a U.S. company exporting a milling and cutting machine destined for China without a BIS license. As many milling machines require export licenses, the item was detained and subsequently determined to require an export license. The ensuing investigation uncovered additional violations.

H.R. 5828

The above examples demonstrate the utility that AES provides with regard to BIS' compliance and enforcement efforts. BIS welcomes the broad goals of H.R. 5828 to further enhance the reliability and effectiveness of information in AES. However, given the complexities of the EAR and law enforcement needs, there are limitations to the types of validations that can be programmed into AES. In fact, some recent experience with creating new requirements in AES

demonstrates that making changes to the system as proposed by H.R. 5828 will require significant resources for implementation, both initially and on an on-going basis.

BIS looks forward to working with the Subcommittee on making this bill as productive and fruitful as possible. With this background, BIS provides detailed comments to the proposed manager's amendment to H.R. 5828. While Census' testimony for the record pertains to the licensing, outreach, and data sharing elements of H.R. 5828, the following BIS comments focus on the export control provisions in the bill:

- Section 3, amending 13 U.S.C. § 305 (a). Because certain requirements in § 305(c) permit the filing of data when a transaction may violate the restrictions of the EAR (i.e., a compliance alert or other warning, not a fatal error), the language in § 305(a) needs to be amended for consistency purposes.
- Section 3, amending 13 U.S.C. § 305 (b). BIS publishes many revisions to the EAR annually. Requiring Commerce to make changes to AES to reflect EAR revisions could add significant time and cost to the rulemaking process. BIS would have to coordinate with Census and CBP in advance of any rulemaking to determine the feasibility of inputting new requirements into AES. In addition, any change to AES will have cost implications. While BIS routinely reviews EAR revisions to determine how best to implement and enforce them, including through AES, mandating such action could adversely impact national security when rules require immediate publication or if the Department does not have resources to incorporate EAR changes into AES.
- Section 3, amending 13 U.S.C. §§ 305 (c)(1) and (c)(3)(A). There is not a one-to-one correlation between Harmonized Tariff System (HTS) and ECCN codes. In fact, HTS codes routinely are associated with multiple ECCNs and ECCNs are routinely associated with multiple HTS codes. While HTS codes could provide exporters with limited assistance in classifying an item on the Commerce Control List, using AES to electronically alert filers of a potential link under (c)(1) would be confusing and potentially lead to a large number of false positives. Issuing compliance alerts under (c)(3)(A) would be even more problematic as they could inhibit exporters from proceeding with a transaction, thereby impeding legitimate trade. Moreover, BIS uses AES compliance alerts for enforcement purposes, and this provision could unnecessarily target legitimate trade and waste BIS resources.
- Section 3, amending 13 U.S.C. § 305 (c)(2). Implementing screens for parties on the Entity List would be very complicated and time-consuming. Supplement No. 4 to Part 744 of the EAR identifies both specific entities and subordinate entities that can include any entities, institutes, or centers associated with those entities, but not explicitly identified. In addition, there is no standard list of items for which an exporter must seek a license. For some entities, a license is required for all items subject to the EAR; for others, a license is required only for specific ECCNs or computer tiers. Programming and keeping such disparate lists up to date in AES to ensure that appropriate transactions receive a fatal error would be virtually impossible.

When effectively used, AES can minimize the number of technical reporting errors (e.g., keystrokes) and allow BIS to focus its compliance and especially its enforcement resources on issues of national security concern. The major activities of BIS' enforcement program include investigating criminal and administrative violations and imposing civil sanctions for violations of the EAR, the International Emergency Economic Powers Act (IEEPA), as amended by the International Emergency Economic Powers Enhancement Act (IEEPEA), 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.

Export Administration Act

A significant challenge for BIS, especially with respect to its enforcement activities, 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 Special Agents have not kept pace with an ever changing criminal landscape.

Although BIS enforcement efforts would benefit from an improved AES system, it is vital that BIS Special Agents acquire updated enforcement authorities to combat proliferation in an era of globalization. For example, BIS' 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.

The Administration has been working with Congress since 2001 to renew the EAA in order to strengthen the dual-use export control system. With the EAA in lapse, dual-use export controls have been kept in place by annual Executive Orders invoking IEEPA.

When the IEEPA is invoked, its penalties are applied to dual-use export control violations. Though those penalties have been increased by the enactment of the IEEPEA, they are not as strong as those proposed by the Export Enforcement Act (S. 2000). Additionally, as a result of this unique structure for the continuation of export controls, prosecutors are sometimes reluctant to bring criminal indictments for export control violations given the complex web of authorities for current export control regulations.

S. 2000, the "Export Enforcement Act of 2007," sponsored by Senator Christopher Dodd, would reauthorize the EAA and enhance the enforcement authorities of BIS Special Agents. We support prompt enactment of this bill by the Senate, which is similar to the Administration's

proposal, and would address one of the most significant challenges BIS faces in administering the dual-use export control system.

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. Enactment of S. 2000 is essential to being able to enforce the EAR. In addition, H.R. 5828, as revised per Department of Commerce comments, will be another important tool needed to meet these threats.