

October 8, 2008

Mr. Jeffrey Lynch  
Regulatory Policy Division  
Bureau of Industry and Security  
U.S. Department of Commerce  
14<sup>th</sup> 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](http://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