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June 29, 2015

Mr. Eric L. Hirschhorn, Under Secretary for Industry and Security  
Mr. Kevin J. Wolf, Assistant Secretary for Export Administration  
Bureau of Industry and Security  
US Department of Commerce

Re: RIN0694-AG51 (The advanced notice of proposed rulemaking (ANPR) titled  
"Additional Improvements and Harmonization of Export Clearance Provisions"  
in 80 FR 29554 dated May 22, 2015)

Dear Mr. Hirschhorn and Mr. Wolf:

Thank you so much for your continued supports to us, Center for Information on Security Trade Control (CISTEC), and Japanese industries.

We would refer to your 80 FR 29554 of May 22, 2015 in which you requested comments for how export clearance requirements under the EAR can be improved. We understand through the document that you made the request under your consideration to harmonize export clearance provisions between the ITAR and the EAR, and thereby to reduce the burden on U.S. exporters. On this occasion, we are pleased to submit to you our comments as stated below. We are submitting this because this subject, especially your proposed measures of the paragraphs A and C in the FR, is quite relevant even to us non-U.S. re-exporters. We are sure that our comments made from re-exporters' perspective will support your decision making.

Also, taking this opportunity, we would like to re-make our ultimate requests on the US reexport control, which we have been making for a very long time.

## **1. Our Comments on the BIS's proposals in the above-mentioned Federal Register**

### **1.1 Our Conclusion**

Regarding the BIS's proposals A and C quoted below and the addition of the examples of the export control documents published in the above-captioned Federal

Register, we fully agree and would like to ask BIS to stipulate these as the final rules in the EAR as soon as possible.

QUOTE

A. Require ECCNs on export control documents.

The ECCN for all 9x515 and "600 series" items is currently required to be identified on the export control documents, along with the destination control statement. BIS is considering requiring that the ECCN be identified for all items on the Commerce Control List. This would not include items that are designated EAR99.

UNQUOTE

QUOTE

C. Require license number or export authorization symbol on export control documents. BIS is also considering requiring that the license number or export authorization symbol be identified on export control documents. This proposed revision would require that the license number, license exception code, or no license required designation be entered on the export control documents.

UNQUOTE

QUOTE

Export control documents in paragraphs (A) through (C) include the commercial invoice and contractual documentation.

UNQUOTE

Note: The current EAR §758.5(b) stipulates only Electronic Export Information (EEI) filing, bill of lading or air waybill as the examples of export control documents.

## **1.2. Our Reasons**

If BIS would stipulate the above-mentioned A and C and addition of the examples of the export control documents as the final rules in the EAR, we reexporters/non-US companies could easily and surely know the ECCN, license exception code, or no license required designation, etc., which are indispensable for our non-US companies/reexporters to sufficiently comply with the EAR's re-export control regulations. Therefore, the above-quoted BIS's proposals A and C and addition of the examples have substantially reflected the following continued requests (1) to (5).

(1) Our requests in Section 2.1 in our attached letter to Mr. Mancuso, Under

Secretary for Industry and Security, US Department of Commerce, at that time, dated November 7, 2007, which we submitted and explained to him when our delegation team, including me, visited BIS (Attachment 1)

- (2) Our request in Section 4.2 in our attached letter to Mr. Wall, Assistant Secretary of Export Administration, BIS, US Department of Commerce, at that time, dated February 19, 2009, which we submitted to him as our public comment in response to 74FR413 of January 5, 2009 (Attachment 2)
- (3) Our oral request to Mr. Wolf when our delegation team visited BIS in Nov. 2011
- (4) Our oral request to Mr. Wolf in the Q&A session in the US Export Control seminar in Tokyo, Japan, on February 19, 2015
- (5) Section VI (Export-Related Regulations) of "RECOMMENDATIONS BY THE GOVERNMENT OF JAPAN TO THE GOVERNMENT OF THE UNITED STATES REGARDING REGULATORY REFORM AND COMPETITION POLICY" dated October 15, 2008, which has been published on the following website of Ministry of Foreign Affairs of Japan  
<http://www.mofa.go.jp/region/n-america/us/economy/report0810.pdf>

More specific reasons of our conclusion are as follows, as stated in our above-mentioned attached letter dated November 7, 2007.

- (i) In order for our non-US companies/reexporters to sufficiently comply with the EAR's re-export control regulations, it is indispensable for them to be able to know the EAR classification information (i.e. Whether the items are EAR99 or ECCN item?; In case of a ECCN item, what is the specific ECCN of the item?) as to the items exported from the US exporters. However, there are many cases where US companies are reluctant to provide the non-US importers with the EAR classification information and also reluctant to describe such information on the export control documents mainly because the EAR does not oblige US exporters to do so.
- (ii) Under the EAR §748.3, anyone can ask BIS about the classification and receive the BIS's reply. Due to this BIS's assistance, the stipulation of BIS's proposals A and C in the EAR would not cause a heavy burden on the US exporters. On the contrary, non-stipulation of the BIS's proposals A and C in the EAR would substantially force the non-US importers to spend much time in confirming BIS's classification judgment, which would be a heavy burden on non-US importers because non-US importers do not have sufficient information on the items provided by the US exporters. Considering US exporters have much more information on their own

items to be exported than the non US importers, we believe it fair to stipulate the BIS's proposals A and C as the final rules in the EAR and thereby to have the US exporters confirm BIS's judgment under the EAR §748.3 in difficult cases without shifting back to non-US importers.

## 2. Our ultimate request

Taking this opportunity, we would like to remind you that it is our ultimate request that the BIS exempt countries including Japan that are members of international export control treaties/regimes and are implementing robust controls consistent with international standards and norms from re-export controls. We have been requesting this repeatedly in the past as stated in (1) to (4) below. We know that you responded to our request at each time, but would be pleased if you could again consider our request, which is quite reasonable, we believe.

- (1) Our above-mentioned letter to Mr. Mancuso. (Attachment 1)
- (2) Our above-mentioned letter to Mr. Wall (Attachment 2)
- (3) Our oral request to Mr. Wolf when our delegation team visited BIS in Nov. 2011
- (4) The above-mentioned Section VI of "RECOMMENDATIONS BY THE GOVERNMENT OF JAPAN TO THE GOVERNMENT OF THE UNITED STATES REGARDING REGULATORY REFORM AND COMPETITION POLICY" dated October 15, 2008

Thank you again for your assistance and cooperation.

Sincerely,



Tsutomu Oshida  
Executive Managing Director  
Center for Information  
on Security Trade Control (CISTEC)

### Attachment 1:

CISTEC's letter to Mr. Mancuso, Under Secretary for Industry and Security,  
US Department of Commerce, at that time, dated November 7, 2007

### Attachment 2:

CISTEC's letter to Mr. Wall, Assistant Secretary of Export Administration, BIS,  
US Department of Commerce, at that time, dated February 19, 2009



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November 7, 2007

Mr. Mario Mancuso  
Under Secretary for Industry and Security  
U.S. Department of Commerce

**CISTEC's Requests to BIS on the U.S. Reexport Control**

Dear Mr. Mancuso:

Thank you for your acceptance of the CISTEC delegation's meeting with you and the other BIS's senior management officials on November 15, 2007.

Concerning the above-captioned matters, first of all, we would like to express our gratitude to the U.S.'s understanding of Japanese concerns regarding the operation of the reexport control system and the U.S.'s efforts to settle the issues. These U.S.'s understanding and efforts are stated in the "THIRD REPORT TO THE LEADERS ON THE U.S.-JAPAN REGULATORY REFORM AND COMPETITION POLICY INITIATIVE" dated June 8, 2004 and the "SIXTH REPORT" on the same dated June 6, 2007, which were jointly written and published by both the U.S. government and Japanese government.

We would be very grateful if BIS would accept CISTEC's following requests and thereby further enhance the U.S. entire reexport control systems.

**1. Our ultimate request**

We would like to ask BIS to exempt countries which are members of all of export control treaties/multilateral regimes and also have established appropriate export control laws/systems (e.g. Japan) from U.S. re-export control.

Alternatively, it would be also appreciated if BIS would create a new license exception for reexports from countries which meet the above-mentioned criteria in the EAR (Export Administration Regulations), as requested in "Recommendations for Modernizing Export Controls on Dual Use Items" dated March 6, 2007 of the "Coalition for Security and Competitiveness" formed by the U.S. leading industrial associations, such as NAM, AeA, and so on.



## 2. Our requests as transitional measures

### 2.1. US exporters' legal obligation to provide ECCN

As a transitional measure, we would like to ask BIS to stipulate as soon as possible in the EAR the US exporters' legal obligation to provide the importers with the classification information (e.g. ECCN), as requested by "RECOMMENDATIONS BY THE GOVERNMENT OF JAPAN TO THE GOVERNMENT OF THE U.S. REGARDING REGULATORY REFORM AND COMPETITION POLICY" dated October 24, 2003 and December 5, 2006.

The reasons are as follows:

- (i) Although "Best Practice for Transit, Transshipment, and Reexport of Dual Use Items subject to the EAR" published by BIS on November 23, 2003 requests exporters to provide the ECCN to the end users and the ultimate consignees, this guideline stipulates that it creates no legal obligation to comply with such best practices.
- (ii) In order for our non-US companies to sufficiently comply with the re-export control regulations by the EAR, it is indispensable for them to receive the EAR classification information (i.e. Whether the items are EAR99 or ECCN item?; In case of a ECCN item, what is the specific ECCN of the item?) as to the items exported from the US exporters. However, there are many cases where US companies are reluctant to provide the non-US importers with the EAR classification information mainly because the EAR does not oblige US exporters to do so.
- (iii) Under the EAR § 748.3, anyone can ask BIS about the classification and receive the BIS's reply. Due to this BIS's assistance, the stipulation of the above-stated US exporters' legal responsibilities would not cause a heavy burden on the US exporters. On the contrary, non-stipulation of the above-stated US exporters' legal responsibilities would substantially force the non-US importers to spend much time in confirming BIS's classification judgment, which would be a heavy burden on non-US importers because non-US importers do not have sufficient information on the items provided by the US exporters. Considering US exporters have much more information on their own items to be exported than the non-US importers, we believe it fair to stipulate the above-stated US exporters' legal responsibilities and thereby to have the US exporters confirm BIS's judgment under the EAR § 748.3 in difficult cases without shifting the task to non-US importers.



## 2.2. U.S. Industries' Recommendations

The above-mentioned "Recommendations for Modernizing Export Controls on Dual Use Items" dated March 6, 2007 of the "Coalition for Security and Competitiveness" make recommendations on various EAR issues in addition to its above-stated recommendations on a new license exception. We think these recommendations on the EAR are also important and reasonable and thus would like to ask BIS to accept them as much as possible.

## 3. Background of the CISTEC's requests above

### 3.1 Our Japanese companies' efforts and burdens for complying with the EAR

Japanese companies spend a long time and large cost in complying with the EAR (e.g. education and training to the employees, including making the internal EAR textbooks or manuals in Japanese language). According to the results of the questionnaire survey to major companies, in general, the cost for coping with the EAR is 10% to 30% of the entire export control cost.

### 3.2 Avoidance of the purchase or adoption of US origin items due to the EAR reexport control

We non-US companies are sometimes substantially forced to avoid the purchase or adoption of US origin items and replace them with non-US origin items, even at the stage of the design (i.e. "design out"), for the purpose of reducing the time and human cost to be caused by coping with the EAR and avoiding the risk of the violation of the EAR.

(Note):

Although CISTEC tried to precisely estimate the value amount of the above-mentioned avoidance and replacement of US origin items by Japanese industries, it was practically very difficult to do so.

Therefore, instead of showing the value amount, we would like to show the actual examples of Japanese industries in the attachment.

### 3.3 Loss of the business chances due to the EAR reexport control

Furthermore, there are some cases where we non-US companies are substantially forced to give up the reexport businesses which are involved with the items subject to the EAR in order to reduce the time and human cost and avoid the risk of the violation of the EAR.





3.4 CISTEC and JMC's efforts for enhancing the Japanese industries' awareness of the EAR

- (i) CISTEC and JMC (Japan Machinery Center for Trade and Investment) publish the following useful EAR guidebooks.
  - "Beginner's Guide for the US Reexport Control" (published by CISTEC)
  - "Q&A/Case Study on the US Export and Reexport Control" (published by CISTEC)
  - "Explanation of EAR Violation Cases" (published by CISTEC)
  - "Guidance for Experienced Export Control Personnel on the US Reexport Control" (published by JMC)
- (ii) CISTEC also holds various seminars and training courses on the EAR for Japanese companies, the lecturers of which are EAR experts of Japanese companies and a U.S. lawyer.

Thank you for your understanding and assistance.

Sincerely yours,

*Tsutomu Oshida*

Tsutomu Oshida  
Executive Managing Director  
Center for Information  
on Security Trade Control (CISTEC)



Japanese industries' actual examples of avoidance or replacement  
of U.S. origin items due to the U.S. reexport control

[Example 1]:

- The entire non-U.S. origin items exported from Japan:
  - Plasma cleaning equipment (\$125,000 - \$165,000 per each)
- U.S. origin item which was avoided and replaced with non-U.S. origin items for the incorporation into the above-mentioned non-U.S. origin plasma cleaning equipment :
  - U.S. origin pressure transducer (ECCN: 2B230) (\$1,700 per each)
    - This was replaced with Liechtenstein origin one.
- Reasons of the avoidance/replacement:
  - The pressure transducers themselves sometimes need to be exported to the customers from Japan for the maintenance of the plasma cleaning equipment. However, as for the U.S. origin pressure transducer (ECCN: 2B230), although APR (EAR740.16(j)) is applicable in case of the reexport from Japan to designated countries, the reasons for control are NP Column 1 and AT Column1 and also the license exceptions LVS, GBS or CIV are not applicable (N/A) at all under the Commerce Control List of the EAR. Therefore, there are various possible cases where none of license exceptions are applicable and thus the reexport would require license.

[Example 2]:

- The entire non-U.S. origin items exported from Japan:
  - Routers (\$42,000 per each)
- U.S. origin item which was eliminated from the above-mentioned non-U.S. origin routers:
  - U.S. origin encryption software (ECCN: 4D003) (\$25 per each)
- Reasons of the elimination/avoidance:
  - Although it was indispensable to precisely confirm the license exception status of the above-mentioned U.S. origin encryption software (ECCN: 4D003) for complying with the EAR, it was practically difficult to do so.

[Example 3]:

- The entire non-U.S. origin items exported from Japan:
  - Solar batteries for artificial satellites
- U.S. origin item which was avoided and replaced with non-U.S. origin items for the incorporation into the above-mentioned non-U.S. origin solar batteries
  - U.S. origin cover glass
    - This was replaced with U.K. origin one.
- Reasons of the avoidance/replacement:
  - For reducing the burdens of the confirmation of ECCN of the U.S. origin cover glass and also decreasing the time and human cost for coping with the EAR.



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February 19, 2009

The U.S. Department of Commerce  
Bureau of Industry and Security

Attention: Mr. Christopher R. Wall, Assistant Secretary of Export Administration

Dear Mr. Wall,

Subject: Parts and Components Inquiry

We the Center for Information on Security Trade Control (CISTEC), a non-profit organization in Japan, are very pleased to submit herewith our comments in response to your parts and components inquiry made in the Federal Register 74 FR 413 dated January 5, 2009. Over the past years, as you may be aware, CISTEC has been constantly sending a delegation to BIS to exchange views mainly on the issue of extraterritorial application of the U.S. export control regulations. We would therefore take this as the right opportunity to present our views once again, with live data this time, for your due perusal.

To respond to your request, we conducted a quick survey making a questionnaire based on your inquiries. We sent it to our 352 member companies and received answers from 116 respondents, who are all leading companies in Japan operating businesses worldwide. The responses shown here do represent the majority opinions of Japanese industry. The answers, together with the questionnaire, are all translated into English, graphed out and attached to this letter for your reference and analysis.

The individual facts, comments and opinions collected here are direct voices of your "CUSTOMERS," and, therefore, we sincerely hope that you take those into serious consideration when you review your policies.

But before going into the details attached, please read the key points we summed up as below:

1. When actually required in the past to elect either non-U.S. or U.S.-origin items;
  - (1) 17% of the respondents answered that they straightaway elected non-US items disregarding the classification of the U.S.-origin items because they thought it's more efficient and cost effective. (Question 1-a-3)

- (2) 13% of the respondents answered that, in order to avoid any legal risks, they elected non-US items even if they knew that the U.S.-items were non-controlled. (Question 1-a-4)

Please refer to the answers to Questions 1-a-5 and 2(c), which are a collection of lost businesses to America.

## 2. When required in the future to elect either non-U.S. or U.S.-origin items;

- (1) 90% of the respondents answered that they would elect non-U.S. items in case the U.S.-origin items were controlled and required a license. (Question 1-b-1)
- (2) 50% of the respondents answered that they would straightaway elect non-U.S. items disregarding the classification of the U.S.-origin items because they think it's more efficient and cost effective. (Question 1-b-3)

The above results imply a trend that the stricter the U.S. export control regulations become, the more non-U.S. exporters elect non-U.S. parts and components for their products.

## 3. The free opinions received as responses to Question 6-f can be summarized as below.

- (1) The U.S. Government should abandon the extraterritorial application of its export control regulations since it's a violation of the international law and moreover imposes dual burden on non-U.S. exporters.
- (2) Or otherwise it should be rearranged and be maintained within the framework of the international export control systems so that its unilateral aspect can be eliminated.
- (3) If, however, the U.S. Government still insists on keeping the extraterritorial application as it is now, it must at least take the following steps immediately.
  - a) The member nations of the multilateral export control regimes should be excluded from the countries subject to the control because those countries, including Japan, are considered implementing national export controls no less strictly than the U.S.
  - b) It must be made mandatory for U.S. exporters to inform relevant ECCNs to their foreign importers.
  - c) Useful guidance must be published and face-to-face consultation service must be provided, both in our language.
  - d) The complicated regulations of the EAR must be simplified and streamlined so that everybody can understand them without difficulties. Moreover, the present multi-agency regulatory system, where different sets of regulations are intertwined, must be reformed into one single set of regulations that should be administered under one single authority.



#### 4. Conclusion

On the basis of the attached comments from Japanese companies, we would like to make the following requests to your BIS, as we did in our official letter dated September 7, 2007 to Mr. Mario Mancuso, the then Under Secretary for Industry and Security, U.S. Department of Commerce.

##### 4.1 Our ultimate requests

First of all, we must respectfully stress that the current extraterritorial way of applying the U.S. export control regulations is seriously influencing your own economy in disproportionate to contributing to national security. We believe BIS should make 'good foreign exporters', who are your customers and never a threat for national security, to easily and properly choose and purchase US-origin items.

Therefore, we would like to request BIS to exempt countries which are members of all of export control treaties/multilateral regimes and also have established appropriate export control laws/systems (e.g. Japan) from U.S. re-export control, as requested in "RECOMMENDATIONS BY THE GOVERNMENT OF JAPAN TO THE GOVERNMENT OF THE UNITED STATES REGARDING REGULATORY REFORM AND COMPETITION POLICY" dated October 15, 2008.

Alternatively, it would be also appreciated if BIS would create a new and much broader license exception for reexports from countries which meet the above-mentioned criteria in the EAR (US Export Administration Regulations), as requested in "Recommendations for Modernizing Export Controls on Dual Use Items" dated March 6, 2007 of the "Coalition for Security and Competitiveness" formed by the U.S. leading industrial associations, such as NAM, AeA, and so on.

##### 4.2. Our requests as a transitional measure

As a transitional measure, we would like to request BIS to stipulate as soon as possible in the EAR the US exporters' legal obligation to provide the importers with the export control classification information (e.g. ECCN), as requested in the above-mentioned "RECOMMENDATIONS BY THE GOVERNMENT OF JAPAN TO THE GOVERNMENT OF THE UNITED STATES REGARDING REGULATORY REFORM AND COMPETITION POLICY" dated October 15, 2008.

In this regard, we must point to the fact that many of the respondents indicate that a good percentage of U.S. companies are even unable to classify their products themselves or reluctant to provide the classification information to the importers mainly due to the lack of the above-mentioned legal obligation, and that it is causing considerable amounts of extra time and money to each company in Japan. This is one of the main reasons of Japanese companies' avoidance of the purchase or adoption of US origin items.



It is our strong desire that our comments presented here be a good help for your policy review.

Sincerely,

*Tsutomu Oshida*

Tsutomu Oshida  
Executive Managing Director, CISTEC

Attachments:

- Exhibit 1: The questionnaire
- Exhibit 2: Survey results for Category No.1 to No.6
- Exhibit 3: Comments in response to questionnaire Category No.1 (a-5)
- Exhibit 4: Comments in response to questionnaire Category No.1 (a-6)
- Exhibit 5: Comments in response to questionnaire Category No.2 (c)
- Exhibit 6: Comments in response to questionnaire Category No.4 (a-2) and (b-2)
- Exhibit 7: Comments in response to questionnaire Category No.5 (b)
- Exhibit 8: Comments in response to questionnaire Category No.6 (f)