FOIA/PA REQUEST
Case No: 2002-0162
Date Rec'd: 3-1-2002
Action Off: Brown
Related Case: 2002-0059

FIBER MATERIALS, INC.
... for materials ingenuity

5 Morin Street
Biddeford Industrial Park
Biddeford, Maine 04005-4497
Tel: 207-282-5911
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February 13, 2002

FOIA/Privacy Act Officer
U.S. Nuclear Regulatory Commission
Mail Stop T-6 D8
Washington, D.C. 20555-0001

Re: Freedom of Information Act Request

Dear Sir/Ma'am,

Please consider this correspondence a request for information under the Freedom of Information Act. Please provide any releasable portions of withheld documents as well as the name and address of the individual to whom an appeal should be addressed, if the NRC should deny this request.

Background

I recently conducted research, comparing the Export Control Classification Numbers (ECCNs) in the Commerce Control List (CCL) with the "Trigger List" items published in INFCIRC 254/Rev.5/Part 1. I did so based on NRC's response to my November 29, 2001 FOIA request, wherein I asked for the NRC's definition of the term "specially designed." On January 22, 2002, the NRC responded, indicating that they have no records indicating what interpretation is applied to the term "specially designed" (despite the fact that the term appears repeatedly in ECCNs within the CCL for which the NRC has licensing authority). I was steered toward several authorities which, unfortunately, did not define "specially designed" (see enclosure 1). However, they did exhibit as strong a pattern of use for the term "especially designed" as the CCL displays for the term "specially designed," convincing me that a comparison may be useful. During the course of my comparison, I noted the following:

> ECCNs 0A001, 0B001, 0B002, 0B004, 0B006, 0B009, 0C004, and 0C005 are clearly based on specific Trigger List items and they fall within the licensing jurisdiction of the Nuclear Regulatory Commission (NRC), per the CCL. Several of the ECCNs are transferred verbatim from the Trigger List to the CCL with the exception of the term "especially designed" (see ECCNs 0B001c.11, 0B001d., 0B001g.4, 0B001h.4, and 0B001j.1-5).

Based on my comparison, I theorized that Trigger List items were transferred to the CCL, during which the term "especially designed" was replaced by the term "specially designed." I requested confirmation of my theory through the NRC's website, where the public is invited to submit questions to the NRC. I received a response from an NRC employee, Suzanne Schuyler-Hayes, indicating that "***Any place where you see 'specially designed' or 'specially designed and prepared' consider it a typo, an error, or misprint. The correct language is 'especially designed or prepared'***" (see enclosure 2). Based on the significance of the issue and Ms. Schuyler-Hayes' summary response to my follow-up questions (see enclosure 2), I questioned the reliability of her explanation.

Request

Please provide me with any information you have which explains the relationship between the Trigger List and the CCL as described above and the relationship between the term "especially designed" in the Trigger List and the term "specially designed" in the CCL. I am primarily interested in the following: 1) any definition or official interpretation of the term "especially designed" of which NRC personnel have a record; 2) records indicating whether the NRC interprets the term "specially designed" found within ECCNs falling under NRC licensing jurisdiction exactly as it interprets the term "especially designed" in the Trigger List; 3) any definition, statement of understanding, or guidance provided to licensing officers by the NRC regarding the interpretation of the terms "specially designed" and "especially designed" for ECCNs falling under NRC licensing authority; 4) any correspondence or discussions NRC personnel have had with personnel from the U.S. Department of Commerce (DOC) and/or the Bureau of Export Administration (BXA) regarding any interpretation of the term, "specially designed" or "especially designed"; and 5) Any documents held by the NRC supporting the advice provided to me by Ms. Schuyler-Hayes.

Fee Waiver

I request waiver of all fees for this request. Disclosure of the requested information is in the public interest because it is likely to contribute significantly to the public's understanding of the operations or activities of the government, and is not primarily in the commercial interest of the company I represent, Fiber Materials, Inc.(FMI), for the reasons described below:

a. The interpretation of the term "specially designed" (or "especially designed" if it is equated with "specially designed") applied by U.S. export control authorities is a matter of public interest for three reasons: 1) it is presently being debated in at least one multilateral export control regime in which the United States participates (see enclosure 3); 2) it is used throughout the Commerce Control List and it is being interpreted in a "number of different ways by both the government and industry" resulting in "serious uncertainties as to the scope of controls" (see enclosure 4, p. 21) which may result in exporters unwittingly failing to apply for a license when one is required. (see enclosure 4, p. 24); and 3) confusion over the interpretation of the term is stalling the resolution of the enforcement action against FMI which the Department of Justice declared the public had a strong interest in resolving over a year ago (see enclosure 5). Public interest in the interpretation of the term "specially designed" was expressed in 1996 (see enclosure 6) and was officially recognized by the DOC Inspector General in 2001 as indicated by its report to Congress on the issue (see enclosure 4).

b. Disclosure of the requested information will contribute to the public's understanding of the interpretation of the term "specially designed." We will provide the record of any official interpretation of the term "specially designed" (or "especially designed" if it is equated with "specially designed") to the court presiding over the enforcement action against FMI. This will help the court define the term by providing it the actual interpretation used by export licensing officials. This information will also help the court by indicating the meaning attributed by individuals in the export community, which may guide any "plain meaning" interpretation the

court might apply. Any action by the court to define the term "specially designed" will be dispositive to our case and therefor will likely be reported in national trade publications and read by the export community. The action is also likely to be reported in popular news media. Last year, the enforcement action against FMI was reported on the front page of one of Boston's largest newspapers. (see enclosure 7). Finally, once the court rules on the definition of the term "specially designed," it is likely that DOC or the NRC will publicly address the issue, either ratifying the court's definition or taking other action. Both the court's definition of the term and DOC's subsequent action will provide the public with the only answer it will have received since the public requested an official interpretation of the term and was rebuffed by BXA in 1996. (see enclosure 6)

c. Disclosure of the requested information is not primarily in the commercial interest of FMI. Public interest in ensuring that exporters are aware of the definition of key terms within the export control regulatory scheme is predominant for two reasons: 1) U.S. national security and foreign policy dictate U.S. export controls; and 2) The U.S. export control compliance system is largely self-regulated. FMI has no commercial interest in the information sought. However, we have a civic interest in knowing the prohibitions on lawful exports so that we can comply with relevant laws and so that we can defend against past and future allegations of violations.

If waiver is deemed inappropriate then I request NRC's rationale for its determination and I agree to pay up to $100 for production of these documents. Please contact me if production is expected to exceed this amount. Please forward records or correspondence to me at the following address instead of the Biddeford, Maine, address on my letterhead:

Materials International
Attn: David Starratt
289 Great Road
Suite 103
Acton, Massachusetts 01720

Thank you for your anticipated support. Please call me if you have any questions. I can be reached at (978)263-1028.

Sincerely,

David W. Starratt
General Counsel

NRC FORM 464 Part I (6-1998) | U.S. NUCLEAR REGULATORY COMMISSION | FOIA/PA 2002-0059 | RESPONSE NUMBER 1

RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) / PRIVACY ACT (PA) REQUEST

RESPONSE TYPE ☑ FINAL ☐ PARTIAL

REQUESTER: David W. Starratt

DATE: JAN 22 2002

PART I. -- INFORMATION RELEASED

- ☐ No additional agency records subject to the request have been located.
- ☐ Requested records are available through another public distribution program. See Comments section.
- ☐ APPENDICES — Agency records subject to the request that are identified in the listed appendices are already available for public inspection and copying at the NRC Public Document Room.
- ☐ APPENDICES — Agency records subject to the request that are identified in the listed appendices are being made available for public inspection and copying at the NRC Public Document Room.
- ☐ Enclosed is information on how you may obtain access to and the charges for copying records located at the NRC Public Document Room, 2120 L Street, NW, Washington, DC.
- ☐ APPENDICES — Agency records subject to the request are enclosed.
- ☐ Records subject to the request that contain information originated by or of interest to another Federal agency have been referred to that agency (see comments section) for a disclosure determination and direct response to you.
- ☐ We are continuing to process your request.
- ☐ See Comments.

PART I.A -- FEES

AMOUNT * $

* See comments for details

- ☐ You will be billed by NRC for the amount listed.
- ☐ You will receive a refund for the amount listed.
- ☑ None. Minimum fee threshold not met.
- ☐ Fees waived.

PART I.B -- INFORMATION NOT LOCATED OR WITHHELD FROM DISCLOSURE

- ☑ No agency records subject to the request have been located.
- ☐ Certain information in the requested records is being withheld from disclosure pursuant to the exemptions described in and for the reasons stated in Part II.
- ☑ This determination may be appealed within 30 days by writing to the FOIA/PA Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Clearly state on the envelope and in the letter that it is a "FOIA/PA Appeal."

PART I.C COMMENTS (Use attached Comments continuation page if required)

The NRC does not participate in the MTCR. The NRC staff suggests that you contact the Department of Commerce for information subject to your request at the following address:

Brenda Dolan
FOIA/PA Officer, Room 6020
Department of Commerce
14th Street and Constitution Avenue, NW
Washington, DC 20230
Telephone: (202) 482-4115

Additionally, information on the interpretation of the term "specially designed" can be found in Section 109 of the Atomic Energy Act; in Information Circular (INFCIRC) 209 which provides guidelines for the Zangger Committee; and in INFCIRC 254 which provides guidelines for the Nuclear Suppliers Group. The INFCIRCs are published by the IAEA.

SIGNATURE - FREEDOM OF INFORMATION ACT AND PRIVACY ACT OFFICER

Carol Ann Reeed Carol Ann Reed

From: Suzanne Schuyler-Hayes <SSH@nrc.gov>
To: starratt@mindspring.com <starratt@mindspring.com>
Date: Monday, February 11, 2002 1:09 PM
Subject: Re: Apparent Misprint in Export Control

Yes.

>>> "David Starratt" <starratt@mindspring.com> 02/11/02 12:12PM >>>
Thank you Suzanne for that clarification. It sounds like DOC writes and publishes the CCL and they made an error when they wrote "specially designed." They should have written "especially designed." Is that right?

I'm a bit of a novice in this area but my reading of ECCNs 0A001, 0B001, 0B002, 0B004, 0B005, 0B006, and 0B009 from the CCL is that the NRC has licensing jurisdiction over the export of those items. How do the NRC personnel with the responsibility for making licensing determinations or recommendations know how to interpret the term "especially designed"? I looked at Article III.2 of the Nuclear Nonproliferation Treaty and didn't find any assistance for your folks. Has the NRC addressed the issue or am I confused about the role of NRC personnel in the licensing process?

Thank you for your time and assistance in this matter.

Sincerely,

Dave Starratt
-----Original Message-----
From: Suzanne Schuyler-Hayes <SSH@nrc.gov>
To: starratt@mindspring.com <starratt@mindspring.com>
Cc: WFISHER@bxa.doc.gov <WFISHER@bxa.doc.gov>
Date: Monday, February 11, 2002 8:31 AM
Subject: Re: Apparent Misprint in Export Control

The language "especially designed or prepared" comes directly from the Nuclear Non-proliferation Treaty, Article III.2. Any place where you see "specially designed" or "specially designed and prepared" consider it a typo, an error, or misprint. The correct language is "especially designed or prepared." The DOC is responsible for the CCL/ECCNs. We are a separate agency and our regulations are at 10 CFR Part 110. If you spot an error in 10 CFR Part 110, please let me know.

Suzanne Schuyller-Hayes, NRC

>>> David Starratt <starratt@mindspring.com> 02/08/02 11:42AM >>>
The following information was submitted by
David Starratt (starratt@mindspring.com) on Friday, February 8, 2002 at 11:42:40
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recipient_displayed_as: Public Affairs Location

comments: Dear Sir/Ma'am,

I am curently doing research, comparing the Export Commodity Control Number in the Commerce Control List (CCL) with the "Trigger List" published in INFCIRC 254/Rev.5/Part 1. During the course of my comparison, I noted two things:

1. ECCNs 0A001, 0B001, 0B002, 0B004, 0B006, 0B009 0C004, and 0C005 are based on specific trigger list items. Some of the ECCNs are transfered ver batim from the trigger list to the CCL with the exception of the term "especially designed." That term is converted to "specially designed" when the control appears on the CCL.

2. Trigger List item 2.2 addresses "Graphite having a purity level better than 5 parts per million boron...". However, the corresponding ECCN (0C005) addresses "Graphite, nuclear grade, having a purity level of less than 5 parts per million boron...". The "better than"/"less than" differential appeared to me to be an oversite and I'm pointing it out because I don't know whether the NRC caught it.

Please let me know whether ECCN 0C005 is defective. I would love to know that I helped to improve the CCL by catching a type-o. Please also provide me with any information you have explaining the cross-over between the Trigger List and the CCL and the relationship between "especially designed" in the Trigger List and "specially designed" in the CCL.

Thank you,

Dave Starratt
Fiber Materials Inc.
Suite 103
289 Great Road
Acton, MA 01720

(978)263-1028
Starratt@mindspring.com

organization: Fiber Materials Inc.

address1: Suite 103, 289 Great Road

city: Acton

state: MA

zip: 01720

country: U.S.

phone: (978)263-1028

SUBMIT2: Send Questions or Comments

MEMORANDUM

TO: Materials Processing Equipment Technical Advisory Committee

FROM: Charles F. Carter Jr., Chairman

DATE: December 20, 2001

SUBJECT: Minutes of Meeting Held on December 13, 2001

INTRODUCTIONS, AGENDA AND COMMENTS

Self-introductions were made. The Chairman asked if there were requests or changes to the agenda or comments from the public. There were none.

MINUTES OF THE JUNE 19, 2001 MEETING

The minutes were approved.

CHAIRMAN'S ANNUAL REPORT

The Chairman asked for comments on or corrections to the Chairman's Annual Report. There were none.

GENERAL COMMENTS ON BXA AND USG ACTIONS

There was discussion about the fact that the US is a leader in liberalizing the control parameters for computers, while at the same time being a leader for strict controls on machine tools. Other nations see this as action to protect a large U.S. industry. The U.S. justifies its action based on controllability and availability. This action is taken in spite of the critical nature of computers in weapons development and weapons application.

LICENSE DENIAL AND UNDERCUTING

The Nuclear Suppliers Group has a firm rule to prevent one nation from undercutting another when a license is denied. The problem is that some nations notify others when an "intent to deny" is issued. There is then a lengthy appeals process, and the license may or may not be denied. In the meantime, all nations are on hold with respect to accepting an order from the customer named in the license request. Unfortunately, the USG waits to notify until the appeals process is complete. By that time, a supplier in a cooperating NSG country may have picked up the order.

Action: George Loh will check on the status of a recently denied license with respect to notifying the other NSG members.

POST SHIPMENT VISIT

Gus Sundquist has worked diligently to formalize documentation when a post shipment visit is called for on a license. He stated at the meeting that the procedures should be approved by December 14.

UPDATE ON THE WASSENAAR ARRANGEMENT AND RELATED ISSUES

Tanya Mottley provided a review of actions in the Wassenaar Arrangement with emphasis on machine tools. The validity note is at the center of all actions on machine tools. Currently, all

member nations are charged to provide data on two important aspects of the control.

1. Participants will provide data on the accuracy of linear scales used by machine tool builders, and also on the number or lines on a rotary encoder used in conjunction with a ball screw.
2. Participants will provide data on the processing requirements and accuracy requirements for selected critical weapons component.

It was noted that the proposed prohibition on 5-axis machines is carried on even without regard to the fact that in some cases it may be an empty box (lathes), or that 5-axis may not be required for the manufacture of critical components.

Action: Committee members will submit ideas for the definition of 5-axis machines that are limited to special parameters making them suitable uniquely for the manufacture of named critical components.

SPECIALLY DESIGNED

Even though there is a mandate that the Expert Working Group address the issue of "specially designed," and some countries have proposed definitions, there is little motivation among participating countries in the WA to pursue this subject. Tanya Mottley gave a good overview of the status.

Action: Tanya Mottley will provide to the TAC Australian input on this subject. The TAC will review and comment. Also, it was suggested that the TAC could make specific proposals with respect to changes to only four or five items in Category 2. With limited and specific proposals the WA may be motivated to continue to move a step at a time.

CATEGORY 2 MATRIX GUIDE

The matrix guide is now on the BXA Web site. However, it is not easy for the casual observer to find. A suggestion to BXA is that the matrix should be more clearly related as an aid to the Category 2 listing.

LASER MEASUREMENT

Ron Miskell suggested that the TAC should revisit the terminology relating to laser measurement devices. These devices are found in the Wassenaar List under 2B.6.b.1.c.

NEXT MEETING

The date for the next meeting will be determined at a later date.

ADJOURNMENT

The meeting adjourned at 12:15 pm.

Open Meeting Minutes of 12/04/01 RPTAC

Jim Wyatt - Greeting and opening remarks. Introductions around the room.

Public comments by Don Weadon on foreign availability, regional stability controls, "specially designed," and customs trade symposium.

Harvey Monk – AES

5500 companies filing, 60-65% freight forwarders on behalf of U.S. principal party in interest; 80% of non-Canada transactions. Aug./Sept.: 230,000 paper documents; Laredo the top "paper port." Oct. introduction of AES PC Link, which links to AES for transmission only (other functions offline).

Mandatory submission: July program notice issued; report submitted to Congress; system secure and capable of handling load. Mandatory submission law for USML/CCL items into effect 3/31/02. Proposed draft of rule has received BXA and Customs comments – State still out. Next steps: State needs changes, so pre-submission notice to OMB required, then submit package. Process will take about 150 days and must be done before a final rule can be issued, so 3/31 date will not be met. Probably Fall '02 at the earliest.

(Spirited discussion of the mechanics of AES Direct followed: ability of parties to submit information independently for the same transaction, availability and accuracy of information, and possibility or impossibility of changing the system.)

Tanya Mottley – Wassenaar Arrangement

Noted that events of Sept. 11 had postponed meetings and delayed discussions.

U.S. priorities for this month's plenary (General Working Group):

1) Preventing acquisition of dual-use/conventional weapon items by terrorists (wording in initial elements, so no direct impact on exporters).

2) Catch-all controls on military end-users/uses in countries of concern.

(Discussion of multilateralism vs. national discretion. Dick Seppa commented that the regime was tougher on dual-use items than arms; Tanya said the imbalance will take time to address.)

3) Consultation procedure for denials on dual-use side ("no undercut" in other regimes) – information sharing on a bilateral basis – unlikely to be achieved this year.

With only items on sensitive list notified, less than half a dozen undercuts. Machine tool validity note: controls extended till end of May '02. Specially designed: no discussion since April; considering options: definition, statement of understanding, or guidance to licensing officers. Intangible transfers: statement of understanding two years ago – moving toward strengthening it.

When asked about proposals for the next round, Tanya said they receive proposals any time, but need recommended list changes by end of Dec. Majority of changes should be in Cat. 3.

Norm LaCroix – Encryption

Remarked that since Sept. 11, there had been public discussion about "back door access" to encryption, but BXA does not support this. Does not foresee significant changes in Wassenaar experts group – U.S. focus is on bringing EAR into line by removing 64-bit mass market limit and clarifying policy. Consumer grade short-range wireless clarified (exemplar language rather than parameters). Network and security management products' retail status clarified. Examples of "low-end" virtual private networking (VPN)

products to clarify what would be considered retail. No rollbacks, no broad sweeping decontrols.

Bill Root – IG Report and Response

Submitted Recommendations for CCL User Friendliness with 13 enclosures. Includes suggestions on the CCL Index; inclusion of C.A.S. numbers; 018 entry renumbering; revision of Supp. No. 2 to part 742 of the EAR and AT controls in general; cross-references from CCL to ITAR; format; regime language tracking; and license exceptions.

Matt Borman

Thanked Bill Root and RPTAC for all their work on the IG response, a "monumental task" that BXA will have to implement in stages.

Hillary Hess – Regulations Update

Published on Oct. 1: lifting of sanctions on India and Pakistan and removal of many Indian and Pakistani entities from the Entity List.

Multiple-category Wassenaar Arrangement changes pending signature by Assistant Secretary. Changes to Wassenaar Category 4 (Computers) pending at DOD. Changes to NSG and MTCR pending interagency review. AG changes being drafted – will include clarification of AT controls on chemicals. Rule on explosive detection devices (revised version) to be reviewed by RPTAC prior to interagency review.

Work Groups and TAC Matters

Dick Seppa – reported meeting held on EPCI controls with BXA's chief counsel.

Jim Wyatt – EE work group formed. Expressed concern over lack of RPTAC input into new membership guidelines.

Ben Flowe – FP comments.

The open session was adjourned.

ambiguous terms "specialized" and "specially designed" for military applications or for technically defined equipment in the CCL. Also, pointers from the CCL to the USML are unnecessarily confusing, and we found some outdated terminology being used in the CCL. Finally, there are some ways in which the CCL's structure can be modified to make it easier to navigate. We believe that BXA needs to convene a working group to address problems with the CCL, as well as work with State and the applicable congressional committees that are considering new legislation for dual-use exports to resolve the issues relevant to both the CCL and the USML.

Items appearing on both the CCL and the USML

Numerous ECCNs on the CCL also can be interpreted as being on the USML. For example, ECCN 1A984 is listed in the CCL as "chemical agents, including tear gas containing one percent or less of CS or CN[28]; smoke bombs; non-irritant smoke flares, canisters, grenades, and charges; and other pyrotechnic articles having dual military and commercial use." Similarly, Category XIV(a) of the USML covers "chemical agents, including but not limited to lung irritants, vesicants, lachrymators, tear gases (except tear gas formulations containing one percent or less of CN or CS), sternutators and irritant smoke, and nerve gases, and incapacitating agents." The only clear difference between the CCL and the USML in these two listings is that the CCL would cover tear gas containing one percent or less of CS or CN, whereas the USML would cover any tear gas containing over one percent. However, because of the USML's statement "including but not limited to" any of the items, with the exception of the tear gas, listed under ECCN 1A984 could also arguably fall under Category XIV(a) of the USML. Such confusion is not necessary, and BXA should work with State's Office of Defense Trade Controls (DTC) to remedy this problem which occurs with approximately 45 ECCNs on the CCL.

Confusion over the terms "specialized" and "specially designed"

There has long been a debate about the use of the terms "specialized" and "specially designed" for military applications or for technically defined equipment in certain ECCNs. For example, ECCN 2B018, one of many ECCNs that contain these terms, covers "*specialized* machinery, equipment, gear, and *specially designed* parts and accessories therefor, including but not limited to the following, that are *specially designed* for the examination, manufacture, testing, and checking of arms, appliances, machines, and implements of war . . . [emphasis added]." Because the terms are ambiguous, they are being interpreted in a number of different ways by both the government and industry. These informal interpretations have resulted in serious uncertainties as to the scope of controls.

[28] CS is orthochlorobenzalmalononitrile and CN is chloroacetophenone.

The terms "specialized" and "specially designed" should not be used as substitutes for complete technical descriptions of what is being controlled. We recognize that the use of these terms stems from their use by the Wassenaar Arrangement and other multilateral regimes, and that BXA is well aware of this problem. In fact, BXA staff are currently participating in an expert group, sponsored by the Wassenaar Arrangement, to address the problem. To avoid further confusion, it is preferable to address this problem multilaterally because the CCL effectively mirrors the Wassenaar Arrangement dual-use list. Therefore, we encourage BXA's efforts to resolve this problem in conjunction with the multilateral regimes.

Confusing pointers

The CCL closely mimics the structure of the European Union and Wassenaar Arrangement dual-use lists, even using the same numbering scheme. However, some items on the European Union and Wassenaar Arrangement lists are subject to State's jurisdiction in this country. Therefore, certain ECCNs (or parts of ECCNs) on the CCL "point" to State as having the licensing jurisdiction for the item(s). Specifically, the entries state that "These items are subject to the export licensing authority of the U.S. Department of State, Office of Defense Trade Controls. See 22 CFR part 121."

However, the pointers are confusing for two reasons. First, they do not provide exporters with any specific information, such as the USML category in which the item(s) fall. So, exporters are potentially faced with reviewing the entire USML to find the appropriate category for their item. This information could easily be included in the pointers. Second, in some cases, even after scouring the entire USML, exporters cannot find any reference to their item. Two examples of this problem are ECCNs 9B115 and 9B116. The only possible category in which these items might fall on the USML is Category XXI, Miscellaneous Articles, which is characterized as "Any article not specifically enumerated in the other categories of the U.S. Munitions List which has substantial military applicability and which has been specially designed or modified for military purposes." Exporters can often be left guessing whether this is in fact the correct category for their item. The CCL should not only "point" to the USML, but it should provide an exporter with the specific category within the USML so as to avoid confusion.

Term on the CCL is outdated

The CCL describes some ECCNs as being on the International Munitions List. For example, ECCN 1C018 is titled "Commercial charges and devices containing energetic materials on the International Munitions List." However, the International Munitions List was eliminated when its creator, COCOM, was dissolved in March 1994. The successor list to the International Munitions List is the Wassenaar Arrangement Munitions List, which is what the CCL should be referencing. The CCL should be updated to reflect this change.

List navigation issues

Several structural and reference changes could be made to make the CCL easier to use. For example, several users cited the two-column format of the CCL as being hard to use. We found this to be particularly true when the CCL is viewed in an electronic format, such as over the Internet. Because of the narrow columns, a user has to do much scrolling up and down to read an entry, which is confusing. Also, users suggested that emphasizing words such as "and," "or," and "all" in the ECCN entries would help exporters determine exactly what is intended to be controlled. Changing the CCL to a one-column format and emphasizing certain key words would help exporters more easily navigate the entries.

Many users told us that having a consolidated index of items on the CCL and USML would greatly help in navigating the two lists and understanding which agency has jurisdiction for a particular item. It would serve as a single source for exporters to consult to determine which list they should review to determine whether they need to apply for an export license. In addition, the exercise of creating such an index would likely help ameliorate many of the overlapping jurisdiction and confusing pointer problems discussed above.

Another helpful change would be to cross-reference between the CCL and the applicable Schedule B or Harmonized Tariff Schedule of the United States codes.[29] The National Customs Brokers and Forwarders Association of America told us that referencing the CCL against the applicable Schedule B or Harmonized Tariff Schedule codes would be very helpful to its members. The association pointed out that most people responsible for the shipping of items for export (and those who must determine whether an item is a licensable export) do not have the technical knowledge required to make the fine distinctions necessary to determine which ECCN an item might fall under. However, because all shippers, freight forwarders, and customs brokers are very familiar with the Schedule B or Harmonized Tariff Schedule codes, it would be helpful to start with these codes and work back to the CCL. As an example, if an exporter is shipping an item with a Harmonized Tariff Schedule code of 1234.67.8901, there could be reference next to this code telling the exporter to check ECCN 1C350. We recognize that this approach was tried nearly 40 years ago, and that problems arose because items can often be categorized as being in more than one Schedule B or Harmonized Tariff Schedule code. However, given the time that has elapsed and the changes to the CCL in the meantime, it is certainly appropriate to reconsider whether such a cross-referencing system might help make today's CCL more user-friendly.

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[29]The Harmonized Tariff Schedule of the United States provides the applicable tariff rates and statistical categories for all merchandise imported into the United States. It is based on the international Harmonized Tariff System, the global classification system that is used to describe most world trade in goods. The Harmonized Tariff Schedule of the United States is administered by the U.S. International Trade Commission. Schedule B codes, also based on the international Harmonized Tariff System, are used to classify products being exported from the United States. The Census Bureau's Office of Foreign Trade Statistics administers the Schedule B codes.

Conclusions

There are several reasons for the problems associated with using the CCL. First, the current annual reviews of the CCL are insufficient to address the types of problems discussed above. While BXA officials try to ensure that the list is current and does not contain errors, the emphasis during the annual reviews is to ensure that any changes, mostly due to changes made by the multilateral regimes, are accurately reflected in the CCL. As a result, the CCL does not receive a thorough "scrub" every year to address many of the problems identified during our review. The last time the underlying structure of the list was addressed was in 1996, when BXA published the first comprehensive rewrite of the Export Administration Regulations in over 40 years. Second, comparative reviews of the CCL and USML are infrequent at best. In fact, no one at BXA or DTC could remember when the two lists had last been reviewed in tandem. Finally, some of the problems exporters have with using both the CCL and USML are simply due to the different structures of the two lists, as described earlier. Because of this fact, it is difficult for users to navigate between the two lists and determine which agency has licensing jurisdiction.

To encourage greater compliance with the CCL, BXA should endeavor to make the list as user-friendly as possible. To its credit, BXA has taken some steps in recent years to make the CCL easier to use. For example, it was very helpful to multinational exporters when BXA, in 1996 as part of its rewrite of the Export Administration Regulations, adopted virtually the same numbering system for the CCL as is used by the European Union and the Wassenaar Arrangement. Now, multinational exporters can more easily find their item on the CCL, as well as on the European Union or Wassenaar Arrangement lists, to determine what controls may be applicable. However, based on the numerous examples enumerated above, there is still much room for improvement in the user-friendliness of the CCL. Because the CCL can be confusing for exporters, exporters may make errors in determining whether their item is covered by the CCL. As a result, they may not apply for a license when one is required.

To address the concerns we have identified, we recommend that BXA convene a working group of interested constituents (small and large exporters, trade associations, and U.S. government agency representatives), under the auspices of the Regulations and Procedures Technical Advisory Committee, to improve the user-friendliness of the CCL. In addition, BXA should work with State to (1) eliminate the current overlap of items and make sure that it is very clear on which list an item falls, and (2) create a user-friendly consolidated index of the items on the CCL and USML. To ensure that this happens, we recommend that BXA also work with the applicable congressional committees, that are considering new legislation for dual-use exports, to ensure that any new Export Administration Act or similar legislation includes a requirement that the agencies eliminate the overlap and create such an index for both the CCL and the USML.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 93-10193-DPW
	)	
WALTER L. LACHMAN, ET AL.,	)	
	)	
DEFENDANTS.	)	

GOVERNMENT'S OPPOSITION TO DEFENDANTS' JUNE 2001 DISCOVERY REQUEST

The government opposes the defendants' June 2001 Discovery Request for the reasons stated in the government's previous post-verdict submissions, including: Government's Response to Defendants' Supplemental Memorandum and Exhibits and to the Memorandum of the Industry Coalition on Technology Transfer as Amicus Curiae in Support of Defendants' Motion for Judgment of Acquittal or New Trial, dated November 6, 1995; Government's Response to Defendants' Supplemental Evidentiary Submission Concerning the Phrase, Specially Designed, and to Defendants' Sealed Memorandum in Support of Their Motion for Judgment of Acquittal or New Trial, dated April 17, 1996; Government's Response to Defendants' Additional Memorandum and Exhibits in Support of Their Motion for Judgment of Acquittal and New Trial, dated August 22, 1997; Government's Response to Defendants' Supplemental Motion for Discovery in Aid of Their Post-Verdict Motions, dated December 17, 1997; Government's Opposition to Defendants' Third Joint Motion for Discovery in Aid of Their Post-Verdict Motions, dated February 19, 1999; and the

Government's Final Brief, dated June 19, 2000.

The defendants' latest filing adds nothing material to the trial record or the post-verdict submissions, including disclosures made by the government. The documents filed with the defendants' Offer of Proof are not only cumulative but irrelevant to any issue in this case, which involved an export in 1988. The government therefore should not be required to take additional time to collect documents underlying those filed with the Offer of Proof. The defendants' other discovery requests are similarly cumulative and irrelevant. The Wassenauer Arrangement did not even exist in 1988. Since the defendants have argued that the Court should interpret "specially designed" based exclusively on the written COCOM record, see Defendants' Joint Memorandum of September 2000 at 12[1], the record of Wassenauer discussions is irrelevant. As for the tapes of the Wassenauer meetings at which controls for Hot Isostatic Presses were discussed, the government immediately sought those tapes after the Court issued its August 28, 2000 order, but was informed that the tapes no longer exist. A State Department official was informed by Wassenauer officials in Vienna that the tapes from the meeting in question were not available as they are continually being recycled.

In conclusion, the government respectfully submits that the

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[1]As argued in the Government's Response to Defendants' Joint Memorandum of September 2000, the government does not agree that the written COCOM record should be the only source of interpretation, but even that record does not support defendants' arguments.

post-verdict motions in this case should be decided without further delay. The jury returned its verdict more than six years ago. The government as a party to this case and the public in general have a strong interest in seeing this case resolved. The government therefore respectfully requests a ruling without the need for further filings.

Respectfully submitted,

JAMES B. FARMER
United States Attorney

By: _____
JAMES D. HERBERT
DESPENA F. BILLINGS
Assistant U.S. Attorneys

Dated: July 18, 2001

CERTIFICATE OF SERVICE

Suffolk, ss. Boston, Massachusetts
July 18, 2001

I, James D. Herbert, Assistant U.S. Attorney, do hereby certify that I have served a copy of the foregoing to the following counsel of record by first class mail:

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app. 2412(c)) makes the Administrative Procedure Act (5 U.S.C. 556) evidence standard ("reliable, probative, and substantial") applicable. BXA does not believe that any different EAR standard is needed.

Three commenters called for detailed provisions on how much evidence is needed to support a summary decision under § 766.8.

BXA did not adopt this suggestion. BXA concludes that the use of the standard "there is no genuine issue as to any material fact" is proper and sufficient.

Another commenter stated that § 766.24(b) should be revised to define the "imminent violation" criterion for issuance of a temporary denial order as requiring a showing of imminence both in nearness of time and in likelihood of occurrence. BXA did not adopt this suggestion. BXA retains its longstanding definition from the existing EAR, consistent with the legislative history of the 1985 amendments to the EAA, that either time or probability imminence will support the issuance or renewal of a temporary denial order.

This interim rule adopts many improvements in drafting clarity and precision that were suggested in the comments, along with numerous others that BXA developed. This interim rule revises § 766.7 to make default procedures available in antiboycott proceedings. There were no public comments suggesting this change, but it makes the procedures for imposing administrative sanctions and other measures in antiboycott cases more consistent with other proceedings under the EAR. Finally, BXA decided to remove from this interim rule one provision that appeared in the proposed rule even though no comments on it were received. This interim rule eliminates a provision from § 766.18 of the proposed rule that would have barred reference in a settlement order to a finding of a violation, as the content of such an order is consensual. This deletion makes this interim rule consistent with the existing EAR.

Part 768—Foreign Availability

Part 768 reflects the provisions described in part 791A of the existing EAR. It implements section 5(h) of the Export Administration Act (EAA) and contains procedures and criteria relating to determinations of foreign availability for national security controlled items. It is substantively unchanged from the existing part 791A. This revised version contains several technical changes, such as use of the term "claimant" instead of "applicant," intended to make part 768 easier to read and understand.

Only three commenters mentioned this part in their submissions, possibly because the **Federal Register** notice soliciting comments had stated that BXA did not intend to make any significant changes in this part.

One commenter questioned why Cuba is included in the definition of "controlled countries" for foreign availability purposes under § 768.1(d) and not for general purposes by inclusion in Country Group D:1, as described in Supplement No. 1 to part 740. Cuba is a "controlled country" pursuant to determination made by BXA under section 5(b) of the EAA. (See Export Administration Annual Report 1994, at II–8.) Country Group D:1 does not include countries subject to broad based embargoes, such as Cuba and North Korea, even though they are controlled countries. This interim rule adds a clarifying notation stating that since virtually all exports to Cuba and North Korea currently are subject to an embargo, the foreign availability procedures do not apply to these two controlled countries. A similar notation is included in Supplement No. 1 to part 740.

Another commenter suggested that § 768.7(d) be revised to clearly reflect the provision of section 5(f)(3) of the EAA that "the Secretary shall accept the representations of applicants * * * supported by reasonable evidence, unless contradicted by reliable evidence * * *". BXA did not make any revisions because § 768.7 paragraphs (c), (d)(1), (d)(2), and (d)(3) of this interim Rule already implement this provision.

One comment suggested that the provision in § 768.7(f)((1)(i)(C) for submitting foreign availability determinations to COCOM or a successor regime was unnecessary and should be deleted. When COCOM ceased functioning on March 31, 1994, the United States and other member countries agreed to maintain the control lists that were in place at that time until a successor regime was in place. A change has been made in this interim rule to reflect BXA's intention to conduct any necessary consultations with former member countries.

Another commenter questioned why foreign availability procedures do not apply to foreign policy controlled items. Foreign availability is always taken into account whenever foreign policy controls are imposed, expanded, or extended. Because the purposes of foreign policy controls vary, strict procedures for conducting assessments have not been deemed to be warranted. Finally, one commenter suggested that part 768 be revised to reflect the expanded role of the Strategic Industries and Economic Security Office's Economic Analysis Division in considering unfair impact, effectiveness of controls, and foreign availability, and to discuss how exporters may contribute to this work and analysis. BXA will consider such an addition to the EAR in future revisions.

Part 770—Interpretations

Part 770 contains certain interpretations concerning commodities, software, technology, and *de minimis* exceptions for chemical mixtures. These are designed to clarify the scope of the controls. BXA intends to add interpretations to this part over time to aid you in interpreting the EAR. Since the publication of the proposed rule, BXA has issued certain interpretations on the application of the *de minimis* exclusion for certain mixtures of chemicals. Those interpretations are added to part 770 in this interim rule.

Some commenters suggested that the part numbers of this chapter and others will overlap with the part numbers of different chapters in earlier versions of the EAR and therefore BXA should use both odd and even numbers for the parts of this interim rule. BXA does not believe that using only even numbers for the parts of this interim rule will cause confusion. BXA further believes that is it useful to retain only even numbers in this interim rule so as to leave room for future parts that cannot now be anticipated.

Certain commenters urged BXA to add interpretations of certain issues; and BXA will review those recommendations for inclusion in the future.

Commenters also asked BXA to include an interpretation of the phrase "specially designed." BXA is not responding to this recommendation due to pending criminal enforcement action and for other reasons.

This part contains certain interpretations regarding the *de minimis* content of certain chemical mixtures. These reflect amendments to the EAR adopted after the publication of the proposed rule.

Part 772—Definitions

This part defines terms as used in the EAR.

In response to comments, this interim rule combines the definitions part from the proposed rule with the multilaterally-agreed definitions found on the Commerce Control List that are found in Supplement No. 3 to § 799A.1 of the existing EAR. These definitions may be distinguished from other definitions by the fact that they appear in quotation marks.

ection!

JUDGE MARIA LOPEZ

The Boston Herald
9/8/00

offender sentence sparks cry for ouster

ANISZLO

anch recall judge who 12-year-old boy to a terrifying sexual assault.

The case unleashed a torrent of outrage on Beacon Hill — including a blast from Gov. Paul Cellucci. "This is a complete and utter outrage," said House Minority Leader Francis Marini (R-Hanson).

Marini and other House lawmakers plan to file a "bill of address" against Judge Maria Lopez next week. The rarely used constitutional device, if approved by both the House and Senate, would empower Cellucci to request Governor's Council

Turn to Page 4

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STAFF PHOTO BY JIM MAHONEY

o bashes a homer yesterday, sparking an 11-6 come-from-behind win against need more firepower tonight as Roger Clemens and the Yankees come to re on the Red Sox, Pages 106-116.

Convicted execs still raking in defense $$

By ANDREA ESTES

More than five years after a Boston jury convicted two high-tech executives for selling India the know-how it needed to build medium-range nuclear missiles, the men remain free and are earning millions of dollars from new government contracts.

Walter Lachman, 67, of Concord and Maurice Subilia Jr., 53, of Kennebunkport, Maine, were found guilty in United States District Court on March 31, 1995.

But federal Judge Douglas P. Woodlock still hasn't jailed them. "We're very disappointed that sentencing has not occurred," Amanda DeBusk, the U.S. Commerce Department's assistant secretary for export enforcement, said yesterday.

"This is very important and very serious. We're very hopeful

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Execs who sold nuke info still free

From Page 1

the judge will move forward and proceed to sentence these folks," she said.

Until the judge enters paperwork finalizing their conviction, their companies — Fiber Materials Inc. of Biddeford, Maine, and Materials International of Acton — continue to benefit from taxpayer-financed government contracts.

Since their indictment, the companies, which specialize in guided missile and spacecraft parts, have been awarded 29 contracts worth $22 million, according to records of the Federal Procurement Data Center. Many of the contracts are entirely new; others are renewals of existing ones.

In FY99, for example, Fiber Materials Inc. had contracts with the Army, the Navy, the General Services Administration and the National Aeronautics and Space Administration, according to records.

One expert said he was surprised the convicted contractors were still getting government work.

"It shows you can break the law by selling to a known nuclear entity and get away with it," said Jordan Richie, an analyst for the Risk Report, a newsletter that tracks the spread of nuclear weapons.

The men, who remain free on a $50,000 bond, face up to 10 years in prison and $5 million in fines. Judge Woodlock has neither sentenced the men, who were found guilty of violating export rules intended to stop the spread of nuclear weapons, nor ruled on a motion for a new trial filed within days of the conviction back in 1995.

A hearing was held last week, but the judge gave no indication that a decision was imminent.

Woodlock said he couldn't comment while the case is pending.

The motion for a new trial was filed by Harvard law professor Alan Dershowitz, hired after the trial along with well-known criminal defense lawyers Harvey Silverglate and Andrew Good.

Prosecutors James Herbert and Despena Billings declined comment on the case.

But at trial they argued that Lachman and Subilia sidestepped Commerce Department rules barring the sale of certain equipment to India.

The jury agreed that in 1988 the men sent a control panel for a "hot isostatic press" to India's Defense Research and Development Laboratory, which was building a medium-range missile called Agni.

The press produces fibers called carbon-carbon that, when applied to missiles, make them fly faster and strike more accurately because they can withstand the heat of atmospheric re-entry.

The companies needed an export license, but didn't get one, the jury found.

In a sentencing memorandum filed nearly five years ago, Billings and Herbert called the men's crime "egregious" and urged Woodlock to sentence the defendants harshly.

Under federal sentencing guidelines, the memorandum says, Lachman faces between five years, three months and six-and-a-half years years; Subilia, between six-and-a-half years and eight years and one month.

Silverglate called the case "something out of a Dickens novel," and insisted that new information will clear his clients.

Because of the wording of the regulations, Silverglate said, Lachman didn't believe he needed a license.

A classified document that became public in a German court after the trial showed that U.S. government officials also believed the regulations didn't cover the type of equipment Lachman sold.

The unearthing of the document, Silverglate said, touched off years of litigation.

"You can't imagine how complicated these filings were," he said. "This set of regulations is an abomination unto the Lord. It's not like nothing has been done (for all these years)."

Briefs and affidavits have been filed back and forth. After their indictment in 1993, the companies were briefly barred from doing business with the government.

But according to an FMI lawyer, the government agreed to continue awarding contracts until the case was resolved. Then, if the judge upholds the conviction, the companies would likely lose their government work.

"Back in 1994, there was an agreement entered into for FMI to continue doing government contract work while the case was pending," said Jennifer Beedy, the company's general counsel. "The parties believed one way or another it would be resolved quickly."