STATEMENT

OF THE

BUSINESS ROUNDTABLE

ON

EXPORT CONTROLS:

A PLAN FOR COMPREHENSIVE REFORM

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INTRODUCTION

This paper presents the views of the Business Roundtable on the subject of export control reform. It begins by introducing eight general principles to guide the implementation of export control reform:

(1) Advancement of National Interest
(2) Effectiveness
(3) Transparency, Accountability, and Predictability
(4) Flexibility
(5) Efficiency
(6) Adequacy of Resources
(7) Equitable Enforcement
(8) Consultation with Private Industry

In the Parts that follow, it focuses on three distinct categories of export controls:

- **Dual-use controls**
- **Defense controls**
- **Sanctions**

Each Part contains a Background section that identifies the need for reform and proposes specific Legislative and Executive reform initiatives.

In the view of the Business Roundtable, all three export control regimes are, to varying degrees, poorly adapted to modern technological and international market realities and therefore fail to effectively advance U.S. national interests. The recommendations contained in this paper are designed to promote the effectiveness and efficiency of these three regimes.

I. PRINCIPLES FOR EXPORT CONTROL REFORM

1. Advancement of National Interest

Export controls should reflect a balanced conception of the national interest and an understanding that national and economic security are inextricably interlinked. Export control measures should therefore be tailored to achieve national security and/or foreign policy objectives in a manner that minimizes their negative impact on the industrial and technological base upon which U.S. economic competitiveness and military leadership depend.

2. Effectiveness

Export control measures should not be adopted unless they effectively advance U.S. policy objectives. Unilateral restrictions, especially on commodities and technologies that cannot be effectively controlled, often fail to meet this test and have the undesirable effect of needlessly penalizing U.S. businesses.

3. Transparency, Accountability, and Predictability

Agency rulemaking should be subject to standard public notice and comment procedures, regulations should be clear and coherent, and licensing criteria—including the names of blacklisted entities—should be accessible to U.S. exporters. To ensure accountability, agency action should be subject to administrative and judicial review.

4. Flexibility

In an environment of accelerating globalization and competitive technologies, export controls should be frequently reviewed and updated to ensure that finite government and corporate resources properly target the products, services, and technologies that warrant control.

5. Efficiency

Export licenses should be processed expeditiously, within defined time limits, and with a default toward decision.

6. Adequacy of Resources

Agencies should be adequately staffed, funded, and modernized to ensure efficient export control administration.

7. Equitable Enforcement

Agencies should explicitly consider relevant factors in connection with enforcement actions, including: the gravity of the violation, whether the exporter makes a voluntary disclosure, and whether the exporter maintains an internal compliance program.

8. Consultation With Private Industry

Agencies should consult with private industry in administering all export control regimes.

II. RECOMMENDATIONS FOR DUAL-USE CONTROL REFORM

A. BACKGROUND

The Export Administration Act (EAA) and the Export Administration Regulations (EAR) were originally adopted with the goal of promoting U.S. security interests during the Cold War era. In the intervening years, however, several key developments have rendered the Cold War template for dual-use control obsolete.

First, the information revolution and the accelerating process of economic globalization have dissolved traditional barriers to trade and produced a worldwide technological leveling. According to the Defense Science Board Task Force on Globalization and Security:

> From a long-term strategic standpoint, globalization's most significant manifestation is the irresistible leveling effect it is having on the international military-technological environment in which [the U.S.] must compete. Over time, all states—not just the U.S. and its allies—will share access to much of the technology underpinning the modern military. . . . [*T*]*he majority of militarily useful technology is or eventually will be available commercially and/or from non-U.S. defense companies.*

In effect, new developments in technology and international market conditions are rapidly eroding the ability of the United States to prevent our adversaries from acquiring goods and technologies with military applications.

Second, multilateral controls have lost their effectiveness. In this regard, the Defense Science Board states that:

> [M]ultilateral controls today are no longer a significant factor affecting access to highly sophisticated dual-use technology and they have been only marginally more successful in the conventional weapons area. . . . CoCom's success derived from its members facing a common threat[.] . . . [But t]he Cold War's end undermined this cooperative impetus, and the U.S. can no longer count on its allies . . . to follow America's lead.

Rather than cooperating to multilateralize export controls, Western allies now fiercely compete against one another for business in markets around the world. In this highly competitive environment, unilateral U.S. controls are generally *ineffective* and serve only

to reward foreign competitors at the expense of U.S. companies. For this reason, the Defense Science Board emphasizes that "[c]linging to a failing policy of export controls has undesirable consequences beyond self-delusion."

Finally, the Department of Defense (DoD) now increasingly depends on the commercial technology sector to develop its next-generation military systems. According to the Defense Science Board, "[a]ny significant restriction on exports would likely slow corporate growth and limit the extent to which profits can be put back into research and development on next-generation technology. . . . If U.S. high-tech exports are restricted in any significant manner, it could well have a stifling effect on the U.S. military's rate of technological advancement." U.S. exports are therefore essential to *both* U.S. commercial technological advancement *and* U.S. military leadership.

While these modern developments are nothing short of revolutionary, dual-use controls remain fundamentally unchanged. The current dual-use control system is ineffective because it fails to keep pace with rapidly changing developments in technology and international market conditions. In many instances, the Control List includes items that are no longer controllable. Where dual-use controls continue to be appropriate, licensing administration needs to be streamlined and rationalized to minimize the burden imposed on U.S. businesses. The following recommendations are designed to address these concerns.

B. LEGISLATIVE REFORM

1. Classify unilateral controls as presumptively ineffective, and therefore inappropriate, unless the President issues a report explaining why such controls are needed.

Unilateral restrictions, especially on commodities and technologies that cannot be effectively controlled, generally fail to accomplish their objective and needlessly penalize U.S. businesses. Such controls should therefore be disfavored, unless the President issues a report to Congress explaining why the unilateral measure is necessary. The report should explain how such unilateral controls are likely to be effective, taking into account

such factors as: the foreign availability of the commodity, whether the commodity is widely available, whether the commodity's capability or performance can be effectively restricted, and what steps are being taken to multilateralize these controls.

2. Impose strict cost/benefit disciplines governing both new and existing dual-use controls that require the President to weigh the stated U.S. foreign policy and/or national security objectives against the associated costs to U.S. economic security. Items on the Control List should be reviewed regularly and should be decontrolled absent a renewed justification.

This discipline is intended to ensure that new and existing dual-use controls are based on a balanced assessment of the national interest and, where controls are necessary, that they are properly tailored to minimize any negative impact on the U.S. economy. The review mechanism is necessary to facilitate the Control List's continuous adaptation to rapidly changing developments in technology and international markets conditions.

3. Provide a broad license exemption covering the transfer of products, technologies, and services within and between a U.S. company and its controlled subsidiaries provided that those transfers are for internal use.

Dual-use controls need to reflect that the transfer of production inputs within a family of related companies with an integrated management structure and a common internal compliance program is qualitatively different from the sale of a final product to an unrelated end-user.

In today's networked world, companies are integrating their manufacturing and R&D functions across national boundaries at an accelerating rate. The exchange of proprietary emails and the use of intranets in performing engineering projects within a global business organization are fundamental to a company's competitiveness.

Yet dual-use export controls (with the narrow exception of encryption controls) fail to distinguish between access to proprietary commercial data by foreign national employees within a U.S. company and transfers of technology to unrelated end-users. In effect, access to proprietary data by a foreign national employee within a company—whether in

the United States or at an overseas subsidiary—subjects that company to burdensome licensing requirements which severely frustrate its ability to efficiently allocate and exploit intellectual resources.

This license exemption would alleviate the onerous burden imposed by the deemed export rule and, more generally, would free U.S. businesses to rationalize their global operations and compete more effectively.

4. Strengthen the foreign availability exemption and establish an exemption for widely available items.

The EAA must account for the fact that few goods, services, or technologies originate entirely in the United States. Controls on items that are available from foreign sources serve only to shift business away from U.S. companies in favor of foreign competitors without any countervailing benefit to U.S. national security or foreign policy interests. The EAA should therefore strengthen the foreign availability exemption for national security export controls.

Furthermore, while some dual-use items may still be produced exclusively in the United States, they are sold in the millions through a variety of sales channels, making worldwide access to those items largely uncontrollable. The exemption for widely available items is intended to limit dual-use controls to those items that can be effectively controlled.

5. Reform end-use and end-user controls, establishing that liability for violations should be limited to actions that have *materially contributed* to prohibited end-uses or end-users. These reforms should also define the criteria governing agency enforcement and the mitigating factors that bear upon the assessment of penalties.

Catch-all controls directed at particular end-uses and end-users, such as the Enhanced Proliferation Control Initiative (EPCI) in the Export Administration Regulations (EAR) need to be refocused to ensure that they target exports that actually impact national security rather than technical violations and *de minimis* transactions. This can be effectively accomplished by limiting liability to violations that *materially contribute* to

prohibited end-uses or end-users, and providing a specific exclusion from EPCI liability for *de minimis* transaction amounts.

Given the broad scope of EPCI liability for otherwise decontrolled commodities and the resulting potential for arbitrary and wasteful enforcement actions, the Bureau of Export Administration (BXA) at the Department of Commerce should be required to define all the criteria relevant to *both* the initiation of enforcement actions *and* the imposition of penalties.

Such factors should include, for example: (1) whether the exporter has an internal compliance program; (2) whether the exporter was negligent in creating or enforcing internal control measures; (3) whether the violation was caused by a third party beyond the exporter's effective control; (4) whether the violation was intentional or inadvertent; (5) the quantity and value of the items involved; (6) whether the exporter made a voluntary self-disclosure; (7) whether the transaction would have been authorized if the proper application had been made; (8) the degree of cooperation in an investigation; (9) whether the exporter cooperated in preventing the items from reaching an unauthorized person or destination; and (10) the gravity of the violation.

6. Amend the International Emergency Economic Powers Act (IEEPA) to include an explicit confidentiality provision for business proprietary information.

In recent years, the EAA's periodic expiration has led the President to order its continuation pursuant to IEEPA. This practice raises concerns for U.S. companies because, while the EAA provides explicit protections for confidential business information, IEEPA does not. Although a decision by the Eleventh Circuit Court of Appeals recently affirmed that such information is exempt from disclosure under the Freedom of Information Act (FOIA), we would urge the adoption of an explicit confidentiality provision in IEEPA to protect from public disclosure all information pertaining to export license applications and enforcement.

7. Eliminate the computer control requirements contained in the National Defense Authorization Act (NDAA).

The exponential growth of computing power and the availability of clustering and other technological trends make the NDAA's MTOPS-based control system obsolete and essentially unhelpful to U.S. national security interests. For precisely this reason, recent reports by the Department of Defense, the General Accounting Office, and the Defense Science Board have all concluded that the NDAA's system for controlling computer hardware exports is no longer viable. The EAA should repeal the NDAA's provisions relating to high performance computer exports in order to provide the President with the administrative authority necessary to implement the most appropriate types of controls.

8. Allocate the funds necessary to promote efficient license administration.

The Department of Commerce requires additional funding to further staff the Bureau of Export Administration and develop an accessible, electronic interface for dual-use licensing.

C. EXECUTIVE REFORM

1. Implement a regular review of the Control List to assess whether dual-use controls continue to be effective. Where a given control is ineffective, the commodity should be removed from the Control List.

As discussed above, rapidly changing developments in technology and international market conditions can render dual-use controls ineffective. Ineffective controls serve only to shift business away from U.S. companies in favor of foreign competitors without any countervailing benefit to U.S. national security. Accordingly, uncontrollable commodities should be removed from the Control List.

2. Create a broad license exemption covering the transfer of products, technologies, and services within and between a U.S. company and its controlled subsidiaries provided that those transfers are for internal use.

As discussed in Part II-B-3 above, dual-use controls should reflect that the transfer of production inputs within a family of related companies with an integrated management structure and a common internal compliance program is qualitatively different from the sale of a final product to an unrelated end-user. This recommendation is consistent with the new encryption control regulation, which provides a license exception for the intracorporate transfer of encryption products for a company's internal use. The exception would serve to alleviate the unnecessary burden imposed by the deemed export rule and, more generally, would free U.S. businesses to rationalize their global operations and compete more effectively.

3. Provide a broad, comprehensive license for the transfer of production inputs within and between unrelated entities with a formal customer-supplier relationship where all parties are already subject to U.S. jurisdiction.

In order to compete effectively in the global marketplace, U.S. companies often need to outsource certain aspects of their manufacturing operations. This license provision is intended to reduce transaction costs for businesses that maintain formal customer-supplier relationships. To ensure that these transactions are effectively controlled under U.S. law, the license would extend only to unrelated suppliers that are already subject to U.S. jurisdiction.

4. Modernize BXA procedures to conform to the competitive requirements of the global business model.

The following measures are intended to make dual-use control administration more efficient and less burdensome to exporters.

a) Develop procedures to make a complete, authoritative blacklist of end users available to U.S. exporters and forwarding agents without compromising intelligence sources and methods.

b) Permit voluntary, one-time end user reviews so that exporters can export to an end user, free of EPCI concerns, until the government notifies otherwise.

c) Require BXA to explain the reasons for any licensing delays or denials in writing.

d) Automate the export classification process and make all ECCN determinations electronically accessible to exporters.

e) Revitalize multilateral cooperation with our NATO and non-NATO allies by working toward harmonized ECCNs and licensing standards.

5. Implement flexible reforms that eliminate unnecessary impediments to electronic commerce.

Electronic commerce has become an important element in global sales and supply chain integration and is fundamental to U.S. global competitiveness. But as the speed and automation of electronic commerce has increased, dual-use controls have failed to make adequate accommodations. EPCI controls, for example, were instituted at a time when order entry and shipment were executed manually. In today's automated electronic business environment, export screening standards and requirements need to better reflect the reality that many commercial transactions are executed instantaneously via the internet.

6. Reward industry compliance efforts by treating compliance programs as a mitigating factor in civil enforcement actions and agreeing to maintain as confidential a company's identity in cases of voluntary self-disclosure.

In order to be effective, export controls depend on exporters' voluntary compliance. These recommendations are designed to ensure that BXA provides the appropriate incentive structure to U.S. businesses.

7. Reform BXA's EPCI liability standards by adding a materiality requirement and providing an exclusion for transactions of *de minimis* value. Establish criteria both for initiating enforcement actions and defining circumstances that should mitigate the assessment of penalties, including, for example: (1) whether the exporter has an internal compliance program; (2) whether the exporter was negligent in creating or enforcing internal control measures; (3) whether the violation was caused by a third party beyond the exporter's effective control; (4) whether the violation was intentional or inadvertent; (5) the quantity and value of the items involved; (6) whether the exporter made a voluntary self-disclosure; (7) whether the transaction would have been authorized if the proper application had been made; (8) the degree of cooperation with any investigation; (9) whether the exporter

cooperated in preventing the items from reaching an unauthorized person or destination; and (10) the gravity of the violation.

As discussed in Part II-B-5 above, these end-use and end-user controls should target only those exports that actually impact national security rather than *de minimis* and technical violations. This can be effectively accomplished by limiting liability to violations that *materially contribute* to prohibited end-uses or end-users. The ten criteria identified above are intended to promote transparency and equitable enforcement under EPCI.

8. Adopt equitable standards governing forwarding agent liability.

The EAR should reflect that forwarding agents acting in support of U.S. exports are qualitatively different from exporters generally. Forwarding agents should be explicitly exempt from liability for export control violations where they lack knowledge of the exporter's violation. This exemption is particularly equitable in light of the fact that the U.S. Postal Service enjoys blanket immunity for all of its export-related activities.

9. Create and task the President's Technology Export Council (PTEC) to advise the President on both the effectiveness and functioning of dual-use export controls.

We welcome President Bush's initiative, announced during the campaign, to establish the President's Technology Export Council (PTEC) to solicit industry input on issues relating to the effectiveness and functioning of U.S. export controls. In the dual-use context, the PTEC can provide the President and senior Commerce officials with useful information relating to EAR administration as well as key trends and issues pertaining to the export of high tech commodities.

III. RECOMMENDATIONS FOR DEFENSE CONTROL REFORM

A. BACKGROUND

The Arms Export Control Act (AECA) and the International Traffic in Arms Regulations (ITAR) were originally adopted in a Cold War security context that has since been witness to what the Defense Science Board terms a "Military Affairs Revolution." U.S. defense controls do not adequately account for several modern international developments, including the accelerating process globalization, technological leveling, and the decline of effective multilateral controls. According to the Defense Science Board, "the majority of militarily useful technology is or eventually will be available commercially and/or from non-U.S. defense companies." These revolutionary developments present difficult new challenges to the implementation of effective defense controls that can slow our adversaries' access to military capabilities.

Current U.S. defense controls are especially ineffective to the extent they ignore the essential relationship between U.S. defense exports and U.S. national security. In modern times, DoD relies increasingly on the U.S. commercial sector for sourcing, but it is no longer a large enough customer to keep the commercial sector vibrant. Consequently, the Defense Science Board warns that "[i]f U.S. high-tech exports are restricted in any significant manner, it could well have a stifling effect on the U.S. military's rate of technological advancement." Because of U.S. military dependency on defense exports, the reduction of transaction costs associated with defense control licensing and administration becomes not just an issue of corporate competitiveness, but also a question of national security.

The recommendations that follow are designed to update U.S. defense controls so as to maximize their effectiveness and minimize the administrative costs that they impose on U.S. defense exporters.

B. LEGISLATIVE REFORM

1. Reform the congressional notification process by (a) eliminating notification requirements for exports to NATO allies, Japan, Australia, and New Zealand; (b) permitting pre-contractual notifications where companies have received verified equipment orders; and (c) revising current notification thresholds for Major Defense Equipment (MDE) and defense articles and services sold under contract to adjust for inflation.

The congressional notification process imposes a substantial administrative burden on U.S. munitions exporters. Where current notification requirements are unnecessary to safeguard national security, they should be relaxed. In this regard, congressional notification procedures for munitions sales to our NATO allies, Japan, Australia, and New Zealand are no longer necessary. U.S. security interests can be adequately addressed by a post-shipment reporting procedure.

The current requirement that exporters must conclude a sales contract before initiating the time-consuming congressional notification procedure generates unnecessary delays (if not lost sales) for U.S. exporters. We recommend that Congress relax this requirement by permitting exporters to trigger the notification process upon receipt of a verified equipment order.

Finally, the current notification thresholds for both MDE and defense articles and services sold under contract need to be increased from current levels to adjust for inflation accrued since their adoption. The ITAR should also establish a mechanism to annually revise these notification thresholds to adjust for future inflation.

2. Establish a license exception for reexports and retransfers of U.S.-origin components incorporated into foreign defense articles where the U.S.-origin components are of *de minimis* value and do not involve a "critical technology."

It is unnecessary to impose reexport or retransfer licensing requirements where U.S. producers supply only low-tech components of *de minimis* value (such as hardware piece parts) for incorporation into foreign defense articles. These controls do not substantially

advance national security and, quite the opposite, threaten to erode the special influence that the United States enjoys as a global supplier of military components and parts.

3. Provide for administrative and judicial review of commodity jurisdiction determinations.

The Office of Defense Trade Control (ODTC) at the Department of State is responsible for deciding, in the first instance, whether a given commodity is a defense article or service subject to the ITAR, or a dual-use commodity subject to the EAR. Although the commodity jurisdiction determination represents a critical, threshold step under the U.S. export control framework, it is exempt from judicial review under current law. In order to promote accountability in decisionmaking, the AECA should be amended to provide for both administrative and judicial review of all commodity jurisdiction determinations. In order to promote institutional expertise, we recommend that all judicial appeals be made to the U.S. Court of Appeals for the D.C. Circuit and that special safeguards be developed to protect classified information in the context of these proceedings.

4. Return jurisdiction over satellite exports to the Department of Commerce.

The recent legislation returning commercial communications satellites to the State Department's Munitions List from the Commerce Department's Control List was aimed at restricting the flow of satellite technology to China. But as the Defense Science Board has observed, "export control tightening meant to deny single states such as China access to certain technology can do unintended damage to vitally important U.S. business relationships elsewhere." While the goal of denying satellite technology to China is an important one, the decision to place commercial communications satellites under the Munitions List is inflicting significant collateral damage on our national and economic security. Under current ITAR regulations, commercial satellite items are subject to "special export controls" that frustrate demand for U.S. satellite technologies *everywhere* and jeopardize the promise of future industrial collaboration and integration with our military allies, especially those in Europe. Indeed, the Defense Science Board predicts that "European satellite and rocket builders, which currently depend on U.S. companies to assure their supply chain, will logically look elsewhere for suppliers if the cost of

doing business with the U.S. remains unacceptably high." In light of these considerations, we believe that U.S. national and economic security interests can be better served by regulating commercial communications satellites under the EAR regime.

5. Allocate the funds necessary to provide ODTC with more senior-level staff positions.

Several of our members have experienced that ODTC is understaffed at senior levels due to budgetary constraints at the State Department. This creates a serious bottleneck in the licensing review process and should be rectified through additional budgetary appropriations.

C. EXECUTIVE REFORM

1. Implement a modern electronic license review system that is interoperable between the Departments of State, Defense, Commerce, and Treasury.

On January 16, 2001, the Department of Defense opened its U.S. Export Systems Interagency Program Management Office (USXPORTS IPMO) with the goal of designing, developing, and deploying a modern electronic export license review system that will be interoperable between the Departments of State, Defense, and Commerce. Its stated objective is to "modernize the export control process by ensuring easy and timely electronic access to pertinent export data, while protecting national security interests and industry proprietary data." Significantly, this program is fully funded for $30 million over three years.

We are optimistic that the IPMO will deliver on its promise to streamline licensing review procedures across all agencies by the end of 2003. In order for this effort to succeed, however, we would urge that: (1) U.S. industry assume a prominent and formal role in the process; (2) the Administration provide the necessary oversight to facilitate greater interagency cooperation and harmonization; and (3) U.S. Customs be explicitly included in the process.

2. Promote transnational defense collaboration and industrial integration by implementing the Defense Trade Security Initiative (DTSI) proposals announced by the State Department in May 2000.

The DTSI initiatives represent an important first step in reforming the ITAR. Those initiatives aim at increasing our mutual security by enhancing defense capabilities, promoting interoperability and cooperation with our allies, and removing other unnecessary barriers to U.S. defense trade.

In implementing the DTSI initiatives, we urge the Administration to give top priority to modernizing and streamlining ODTC licensing procedures to reduce burdensome transaction costs for U.S. exporters. Pursuant to DTSI, the ITAR should facilitate the use of comprehensive licenses covering major programs and projects, multiple destination licenses, and destination-based exemptions.

3. Moving beyond DTSI, conduct a fresh, comprehensive reassessment of the ITAR—in consultation with U.S. industry—with the objective of developing an effective system to protect critical military technologies from unwanted transfer while supporting U.S. industrial competitiveness worldwide.

The Administration should collaborate with U.S. industry and senior officials at the Departments of State and Defense to develop more effective and efficient alternatives to the current licensing system. The following recommendations are intended to help rationalize ITAR administration:

a) Direct U.S. intelligence agencies to develop and maintain—in concert with U.S. industry—an interagency database that catalogs all widely available military technologies and identifies those countries and end-users of munitions that qualify for a national security exemption.

b) Create a new license exemption, analogous to EAR 99, for the export of widely available munitions to countries and end-users that do not present national security concerns.

c) Consider the feasibility of a process-based licensing system that focuses on companies' internal compliance programs for entire categories of defense articles and services, particularly those involving non-critical technologies.

4. Undertake a biannual review of the U.S. Munitions List (USML) focusing on the underlying character and value of the article in question.

The Departments of State and Defense waste scarce administrative resources regulating the export of articles that are not inherently military. For example, many components and parts "specially designed or modified for military use" are simply miscellaneous hardware piece parts such as bolts, brackets, bushings and connectors. It makes little sense to classify such ordinary, low-tech items as munitions given the substantial costs involved for both industry and government and the marginal benefit of such controls for U.S. national security.

5. Require that all license applications, commodity jurisdiction determinations (CJs), advisory opinions, and other formal guidance are processed in a timely fashion according to prescribed deadlines. Unclassified CJs and other formal guidance should be published, subject to appropriate safeguards that protect companies' proprietary information.

These measures are aimed at promoting efficiency and transparency in defense export control administration. The publication of ODTC actions should serve as an important tool in aiding exporters in their compliance efforts.

6. Codify all standards relevant to ODTC enforcement policies and identify what factors—such as the gravity of the violation, the degree of a company's cooperation, and its internal compliance program—should guide its enforcement decisions and mitigate the imposition of penalties.

Current ITAR regulations fail to delineate enforcement standards in cases not involving voluntary disclosures and provide little guidance regarding the assessment of penalties. This recommendation is intended to promote transparency, accountability, and equitable enforcement.

7. Adopt equitable standards governing forwarding agent liability.

The ITAR should reflect that forwarding agents acting in support of U.S. exports are qualitatively different from exporters generally. Forwarding agents should be explicitly exempt from liability for export control violations where they lack knowledge of the

exporter's violation. This exemption is particularly equitable in light of the fact that the U.S. Postal Service enjoys blanket immunity for all of its export-related activities.

8. Create and task the Presidential Technology Export Council (PTEC) to formalize U.S. business collaboration with the State Department and DoD in implementing ITAR reforms.

We strongly support President Bush's goal, announced during the campaign, to establish the President's Technology Export Council (PTEC) to solicit industry input on issues relating to the effectiveness and functioning of U.S. export controls. We expect that the PTEC will provide the President and senior agency officials with important feedback relating to defense control administration and reform.

IV. RECOMMENDATIONS FOR SANCTIONS REFORM

A. BACKGROUND

Sanctions-based trade controls—including trade embargoes, export restrictions, and secondary boycotts—are often considered as a foreign policy tool to accomplish a number of goals, including: expressing condemnation, punishing objectionable behavior, isolating a target country or entity, and forcing a change in leadership or form of government. Many sanctions are directed by Congress through specific legislation while others are imposed by the President pursuant to general statutory authority such as the International Emergency Economic Powers Act (IEEPA). While the foreign policy objectives underlying such sanctions may be laudable, the current trade control regime for implementing U.S. sanctions undermines their effectiveness.

In the modern global economy—characterized by fierce competition, technological leveling, and weak multilateral controls—unilateral sanctions cannot be effective unless the United States is a monopoly supplier of a good or service for the targeted country or entity. In the post-Cold War era, however, this is rarely ever the case. Consequently, U.S. unilateral trade sanctions generally have the effect of shifting business away from American companies in favor of foreign competitors. According to a recent economic study, unilateral trade sanctions in 1995 caused the United States to lose between $15 and $19 billion in export revenues and between 200,000 and 260,00 American jobs. Other immeasurable costs of sanctions include the loss of U.S. prestige and the loss of goodwill by U.S. businesses in foreign markets.

In order to effectively serve the national interest, Congress and the President need to adequately consider the totality of costs and benefits associated with any proposed sanctions program. Moreover, where sanctions programs continue to be appropriate, reform measures are urgently needed to provide greater transparency, efficiency, and accountability in the OFAC licensing process. For precisely this reason, the Judicial Review Commission on Foreign Asset Control has recommended that OFAC "attach the highest priority to establishing new licensing procedures which are more responsive to the legitimate needs of the U.S. business community." The following recommendations are intended to address these various concerns.

B. LEGISLATIVE REFORM

1. Create a new procedural framework governing the adoption of future sanctions legislation to ensure that any such measures are based on a complete and balanced assessment of the national interest.

Before passing legislation to impose economic sanctions, Congress should issue a report articulating its specific foreign policy objectives and weighing the associated costs and benefits to U.S. national and economic security. In determining a program's benefits, Congress should consider the likelihood that a sanction—especially a unilateral sanction—will advance the stated foreign policy objectives more effectively than a policy of engagement. Similarly, in determining a program's costs, Congress should be required to measure the projected impact on U.S. national and economic security, including the quantity of lost exports and U.S. jobs, as well as possible damage to U.S. relations with other states. In the event that sanctions are deemed appropriate, such measures should be narrowly tailored to minimize the collateral damage to U.S. economic security.

2. Create a biannual review mechanism for all future and existing sanctions programs to reassess their effectiveness and measure their cost to U.S. economic security.

Sanctions laws should remain in effect where they continue to advance the national interest, not because of inertia. To ensure the effectiveness of trade sanctions, these measures should automatically sunset within a two-year period absent an explicit determination by the President—in consultation with Congress and the affected U.S. industries—that the sanctions measures effectively advance U.S. foreign policy objectives and that the resulting costs to U.S. economic security are justified.

3. Require OFAC to act on license applications within a defined statutory time period and, in the event of a denial, to explain its reasons in writing.

OFAC currently lacks strict standards governing the disposition of license applications. These recommendations are designed to inject greater efficiency, transparency, and accountability into the licensing process.

4. Promote OFAC accountability through meaningful administrative and judicial review.

All OFAC decisions—including licensing decisions and civil enforcement actions—should be reviewable by an ALJ within the Treasury Department, where OFAC would bear the burden of proof, and all ALJ decisions should be appealable to the U.S. Court of Appeals for the D.C. Circuit. Where necessary, special safeguards should be developed to protect classified and sensitive law enforcement information in the context of these proceedings.

5. Establish an advisory committee under FACA to facilitate a dialogue between the Administration and the U.S. business community affected by sanctions laws.

U.S. industry has an important role to play in helping the Administration assess the economic costs associated with U.S. sanctions policies. Although these costs may be justified in a given case, a realistic measurement of costs is essential in determining whether, on balance, a sanctions program serves the national interest.

6. Allocate additional funds necessary to implement these recommendations and ensure OFAC's efficient administration

The Treasury Department requires additional funding to further staff the Office of Foreign Asset Control and streamline its licensing administration.

C. EXECUTIVE REFORM

1. Redesign, in consultation with U.S. industry, the regulatory architecture for sanctions programs by creating a single, master set of regulations that can be selectively tailored to meet the particular objectives of different programs.

This measure, aimed at making sanctions regulations more uniform and accessible, can facilitate the adoption of workable compliance models for U.S. businesses and help clarify OFAC definitions and standards such as, for example, the definition of "U.S. persons" and the varying scope of permissible conduct by U.S. persons and their affiliates.

2. Undertake periodic reviews of sanctions regulations to reassess their effectiveness and ensure that they are properly tailored to implement legislative and executive objectives.

As discussed in Part IV-B-1 above, sanctions measures should be narrowly tailored to minimize collateral damage to U.S. economic welfare. OFAC regulations should, for example, accommodate the global business model by eliminating unnecessary barriers to electronic commerce.

3. For all future Executive Orders imposing sanctions, publish, within a limited period of time, proposed regulations for public notice and comment. Where exigent circumstances warrant the immediate adoption of such regulations, OFAC should adhere to notice and comment procedures for interim regulations.

The promulgation of sanctions regulations will benefit from public participation and industry input. These recommendations are intended to ensure the timely adoption of sanctions regulations while making allowances for interim regulations where appropriate. Failure to follow standard APA guidelines should be the exception rather than the norm.

4. Adopt license review procedures that require all license applications to be processed within a specified timetable and, where licenses are denied, require a written explanation for the denial.

These measures are intended to promote the principles efficiency, transparency, and accountability in the context of the OFAC licensing process.

5. Direct OFAC to publish its regulatory interpretations, advisory opinions, and other general guidance, as well as sanitized versions of its licensing and civil enforcement decisions, on its website.

These measures are aimed at promoting transparency and predictability in trade sanction administration and should serve as an important tool in aiding exporters in their compliance efforts.

6. Adopt equitable standards governing forwarding agent liability.

OFAC sanctions regulations should reflect that forwarding agents acting in support of U.S. exports are qualitatively different from exporters generally. Forwarding agents

should be explicitly exempt from liability for sanctions violations where they lack knowledge of the exporter's violation. This exemption is particularly equitable in light of the fact that the U.S. Postal Service enjoys blanket immunity for all of its export-related activities.

7. Promulgate regulations codifying OFAC standards for civil enforcement actions.

To promote transparency and to ensure greater equity in sanctions enforcement, OFAC should memorialize the circumstances where it will issue warning letters, identify what mitigating factors—such as the gravity of the violation, a company's voluntary self-disclosure, and its internal compliance program—may affect an enforcement decision, and define what conduct falls within a "safe harbor" from civil liability.