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TRANSATLANTIC ROUNDTABLE ON INDUSTRY AND TRADE

*Implications of the Obama Administration's  
Export Control Initiative on Transatlantic Trade*

**Remarks by the Honorable Eric Hirschhorn**  
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For all the years I've been involved in export controls, I don't think I ever expected to see this many people, short of the Commerce Department's annual conference, in one room who share that interest. It is a pleasure to be here and to talk with you about both my goals as under secretary, since I'm a new arrival at the Commerce Department, and also as much as I'm able to share with you about the interagency White House-led export control initiative that began late last summer and is continuing apace.

During my tenure as under secretary, however long it may be, and that's in the hands of the United States Senate, there are three things that I would like to accomplish, putting aside the question of export control reform, which is proceeding on a parallel track. One of them is very closely related to export control reform. It is what I call Efficiency, a licensing system that is less complicated, relatively user-friendly – it will never be completely user-friendly – and that appropriately earns and deserves the respect of those who are regulated by it.

The second is Education. While in private practice, I would received a phone call from a perspective client who would say, "I've been exporting this device for 15 years and I was at a conference last week and someone told me I might need an export license for it. Can you tell me anything about it?" I suspect that those of you who have been involved in due diligence in the acquisition of small and medium-sized businesses have been through the same sort of drill. So one thing that I would like to do more of is to get the word out. The Bureau does a lot of it already, both through its seminar programs and through the visits and the availability of export enforcement agents where we have field offices. The larger companies, who work very hard at compliance, are entitled to a level playing field, which means making sure that competitors and suppliers are well aware of the rules.

And finally, there is Enforcement. It's a dirty word but it cannot be ignored. The enforcement efforts of the department, while they are good, can be sharper and more focused on people who show disregard for the system rather than those who just make honest mistakes. This change will not happen overnight, but it a goal I would like to achieve during my time at the Commerce Department.

Regarding export control reform, I will tell you as much as I can, although much is still in flux. A number of decisions have been made, but many more remain to be made as to all three phases of the effort. It was announced last August. The President directed the National Security staff and the National Economic Council to conduct a broad-based interagency review. An interagency task force was established and it's been meeting almost daily. It submitted a basic report in February but it has continued to meet every single day and the people on it are consumed by the amount of work, the amount of detail, the number of questions that have to be addressed.

There is general agreement not only in this room but within the government that our current system itself is a national security risk in the sense that it's too complicated, has too many redundancies, and tries to protect way too much. The result is that it encourages customers outside the United States to seek foreign suppliers and it encourages U.S. companies to move their R&D and other operations offshore. I don't think anyone would see that as healthy for the U.S. industrial base.

The review is based on the following guiding principles. First, the control should focus on the smallest set of technologies possible, those that are capable of being used to pose a significant national security threat to the United States. Second, control should be coordinated fully with the multilateral regimes of which the United States is a member to the maximum extent possible. Third, unilateral control

should only be applied where they are required by law - you'd be surprised how many are required by law - essential to furthering the foreign policy goals of the United States or necessary for defense or intelligence reasons. There should be clarity for government and industry about what is controlled and there should be a system for updating what is controlled. It's been called indexing in the past. That term seems to be passé these days but it's the same concept that many of us have talked about for longer than I care to remember. The licensing system should be transparent, predictable, and timely. I think it's better than it used to be, both at the Commerce Department and at the Department of State, but it's still not what it ought to be. And finally, implementation and enforcement capability should be enhanced.

We also need to take into account the cyber security. The Department of Homeland Security has taken a very different approach to what should or should not be controlled. They have worked very hard to get protective technology out, not just to Europe but anywhere it can be used to protect computers and IT systems. So, that has to be taken into account in whatever controls are going to be imposed by the United States government. The review is very broad-based. It's looking at a lot of the past studies and there is no shortage of them, between the National Academies of Science and various think-tanks, universities and scholars, not to mention many industry reports. There is a lot to chew on. I sometimes say that if Rip Van Winkle had been in the export control business, he wouldn't have been surprised at all when he woke up after 20 years and looked around him. Many of the issues are the same ones we've been dealing with since I was at Commerce in the early 1980s.

But we may really have a chance to gain some ground this time around. It's an extraordinary lineup of interests. Two important cabinet secretaries – Secretary of Commerce Gary Locke and Secretary of Defense Robert Gates – have taken a very strong personal interest in this project. Secretary of State Hillary Clinton, aided by Under Secretary [for Arms Control and International Security] Ellen Tauscher, is also very involved and that is unusual. The involvement of the White House and the National Security staff is not something we have seen that often in the past, so that's another piece of the lineup. Finally, there are some very important committees, members, and staff in the Congress that are engaged and very interested in seeing how much we can accomplish.

Where are we at this point? The administration has determined that there are really four components that need fundamental reform: control lists, licensing policy and practices, enforcement, and the information technology infrastructure. Again, many of the details have not been specified so I'm going to give you what I can. The plan is to separate the effort into three phases, although they are not sequential – they're going on at the same time at this point.

Phase one is the starting point. We've established a tentative language for what the control tiers would be in a combined list. We're at the point of experimenting with specific items that are now controlled and testing them against these tentative tiers to see where they fall. If they fall the same way they have in the past, we'll know we have to go back and start over, not the whole exercise but the exercise of drafting the tiers. In phase two, there will be work on what the licensing policies will be for these tiers. And it's sort of an "iterative" – I don't like the word but it's probably the right one to use here – in terms of okay, if we put these into this tier, what licensing policy will fit that? It's easier to think about than it is to actually do, I will say that. People are finding it hard work and it's really testing whether this approach can succeed.

Ultimately, we hope to transition the two control lists – the U.S. Munitions List and the Commerce Control List – into mirrored structures. After we've figured out what goes in what tier and what the licensing policies are, we will be merging them in phase three into a single control list. Phase three will have – as we have planned it and as Secretary Gates laid it out on April 20<sup>th</sup> – what we call four singularities: A single control list instead of the two we have today. A single licensing agency which would combine the licensing functions of the Bureau of Industry and Security at the Commerce Department, the Defense Trade Controls Directorate at State, the goods portion of [Office of Foreign Assets Control] OFAC's licensing, and some portion of the Defense Technology Security Administration's licensing role. This is where it is today. How many people, which functions, what will be where is not yet completely determined.

A single enforcement coordination agency, where now have criminal enforcement in several different agencies and administrative enforcement in several different agencies. The expectation is that all of the administrative enforcement for export controls and embargoes will be in the single licensing agency, wherever it's located – and that has not yet been made public or even determined in a final way. Criminal enforcement will be in a separate agency, probably an existing agency, and the same way that the State and Treasury departments operate today: their administrative enforcement is conducted in-house but if they have criminal enforcement, it is handled outside of their agencies. It's worked pretty well for them and we think it would probably work if it were broadened somewhat.

Phases one and two mostly can be accomplished by executive order or agency determination. They don't require legislation for the most part. It doesn't mean we're not going to be consulting closely with the Congress, but it's a different level of involvement by the Congress. Phase three, which is the final phase, the phase that requires agency reorganization, transfers of budget, personnel, etc., of course, will require legislation and a very heavy involvement by the Congress. We are hopeful of getting the legislation this year. It's pretty far into the second session of the 111th Congress and it's not clear we're will succeed, but it's certainly our intention to try and get legislation this year if we can.

There is one caveat I need to give you and I don't think it's going to be a surprise to anybody in this room. Creating a single licensing agency and a single enforcement coordination agency is not suddenly going to make the rough waters calm. It's a field in which appropriately, the policy tensions are substantial. The interest of exporters, of national security, of foreign policy will always be there and there is no expectation on anyone's part in this exercise that those policy tensions are going to disappear. We're hoping to manage them better. We're hoping to eliminate the non-policy problems, which overlap, and uncertainty about jurisdiction and taking too long to get licenses issued or determinations made. But the fundamental policy issues are never going to go away and they shouldn't. These are transactions. These are projects that raise a lot of questions in national security, in foreign policy, and in industrial and export policy and it's appropriate that they not go away.

Obviously, for those of you who are students of the Congress, there are going to be congressional jurisdictional issues as well. I will not go into those any further. I think they are self-evident.

As far as the charter of this group is concerned, obviously, our relationship with Europe is one of the most critical aspects of this country's national security. We value it highly. We couldn't survive without it. We need a system that will manage that relationship as well as our other relationships around the world. We all face diverse threats from state actors, transnational groups, and individual actors; and the old bipolar system under which the existing export control system was constructed is gone.

The U.S. export control system seeks to be based – and largely is based – on clarity, transparency, and a devotion to the rule of law. These are values that we share with our European allies. We are hoping to make the system more true to those values by the time we're finished.

Many U.S. export controls, as you know, stem from multilateral export control regimes and our participation in them – the Wassenaar Arrangement, the Australia Group, the Nuclear Suppliers Group, and the Missile Technology Control Regime. These lists are harmonized and obviously, any reform that we undertake has to take full account of the items. It's probably a majority of the items we control that are on one or more of these lists and it's going to involve working very closely with the other members of these multilateral groups, many of whom are represented in this room. I can assure you that the United States is absolutely committed to fulfilling its international obligations and has no intention of undercutting, undermining, or acting unilaterally with respect to anything that's controlled by these groups. We will work very closely with them and we believe that it's not inconsistent with the reform efforts that we're trying to make.

As Secretary Gates mentioned on April 20th, when he spoke before the Business Executives for National Security, we, and the State Department, review tens of thousands of license applications every year for export to EU and NATO destinations. Well over 95 percent of those are approved. That tells you something. In addition, many parts and components of major pieces of defense equipment, combat vehicles, fighter planes, require their own export licenses even down to a bolt, a screw, a latch, a hinge. That's one of the things we're taking aim at in this effort.

There is, I believe, a real commitment by all the agencies to try and get this underbrush under control. It takes far too much time for those of you in industry. It takes far too much time for those of us in government to deal with these kinds of applications and we are very hopeful that by the end of the process, we will have at least reduced very substantially the licensing burden that's associated with especially some of the pretty garden variety parts and components. Obviously, there are some components that are important that will remain under control, perhaps even to Europe. We are hoping that fewer licenses will be required across the board, and I am confident that we will accomplish that, if we get nothing else.

A single list with a single agency should help us concentrate on the relatively few technologies that are really important to our national defense and it should help us speed the provision of equipment to allies like those represented in this room and our partners who have fought alongside us in coalition operations. Minimizing export licenses to the EU and NATO will ensure working closely with the governments of those countries because if we're going to take down the wall from our coast that protects against improper exports and re-exports, it has to reappear somewhere else. We will expect to work closely with companies and governments to ensure that there are adequate controls against improper re-exports of the items that will no longer require licensing or that will travel under license exceptions.

That is as much as I'm in a position to talk about at this point about the export control reforms. I'm very hopeful about them. I think that, looking at my own three decades of involvement in the export control system; this is the best chance I have ever seen for making things better. The beauty of it, in a sense, is that there's been so little progress in that time that if we accomplish only a relatively modest portion of our rather large goal, it will be a great victory and it will be a better system than we have today. So with that, I thank you.