Agilent Technologies, Inc.
8825 Stanford Blvd., Ste. 300
Columbia, MD 21045

719 531 4799 telephone
www.agilent.com

Agilent Technologies

Regulatory Policy Division
Room 2099B
U.S. Department of Commerce
14th Street and Pennsylvania Avenue NW
Washington, DC 20230

January 3, 2013

Re: BIS-2012-0044 (RIN 0694-AF37)

Dear Messrs. Mooney and Monjay:

On November 29, 2012, the Bureau of Industry and Security (BIS) published a Proposed Rule entitled "Revisions to the Export Administration Regulations (EAR) To Make the Commerce Control List (CCL) Clearer", which item appeared at 77 FR 71214.

Agilent appreciates the opportunity to comment on this proposed rule; this comment pertains solely to part (4) of this Proposed Rule, namely the Removal of Fourteen ECCNs Subject to the Exclusive Jurisdiction of the Nuclear Regulatory Commission. We would potentially be impacted by two of the proposed changes: 1) deletion of ECCN 0C004, because we are a vendor of deuterated (deuterium-containing) standards that are described/controlled by this ECCN; and 2) modification to the chapeau of ECCN 3A233, because we are a manufacturer of inductively coupled plasma mass spectrometers (ICP/MS) that are described/controlled by 3A233.a.

Agilent believes that, contrary to BIS's suggestions, removal of the 14 NRC ECCNs would not result in clarity but rather in complexity. Our reasoning is as follows:

1. **Removal of the 14 ECCN leaves exporters without valid ECCNs and no viable alternative is offered.** The Proposed Rule acknowledges that "there still is utility in including general cross reference to other agencies' rules". However, removal of these 14

ECCNs from the CCL effectively eliminates them, and the proposed replacement list in a revised §774.1 is little more a difficult-to-find and difficult-to-use footnote.

Consider the following scenario: A US Customs officer reviews a shipment for which the shipping documents indicate one of the 14 ECCNs. He/she sees the ECCN and, recognizing it as having the standard ECCN format, refers to the CCL only to find that the ECCN is not there. If he/she is knowledgeable about the EAR, then he/she might refer to §774.1, which points to NRC export controls in 10 CFR 110. However, 10 CFR 110 does not use the standard ECCN format, so the Customs officer still cannot directly relate the ECCN on the shipping document to the NRC export controls. At this point, the Customs officer must refer to an old version of the CCL or possibly to the EU control list. Agilent respectfully suggests that this scenario can hardly be construed as "clarification".

The above scenario is not merely hypothetical. As previously mentioned, Agilent sells (and exports) deuterated standards that are described by ECCN 0C004, which is one of the 14 ECCNs proposed for removal. It is Agilent's experience that deuterated standards as well as deuterated solvents are widely available in many countries, from which Agilent infers that there is non-negligible international commerce in deuterium. Agilent believes that there might similarly be non-negligible international commerce in "natural uranium" (0C001), for use as reference standards or other scientific purposes. (Agilent has no experience or expertise with which to assess to volume of commerce in the other 12 ECCNs.)

If the 14 NRC ECCNs were removed from the CCL, an exporter could confusingly choose to use no ECCN, to invent a non-standard ECCN, or to use the (now-questionably-documented) former CCL ECCN. But retention of the 14 NRC ECCNs on the CCL would ***provide a natural method for US exporters to use an ECCN that is automatically and instantaneously recognized by all parties*** *(exporter, importer, licensing officer, or enforcement officer)* ***worldwide***.

2. **Proposed language for some ECCNs is cumbersome, awkward and confusing.** An example of the added complexity of this proposal can be found in ECCN 3A233. Agilent

believes that the existing language, which refers to the NRC ECCN 0B002, clearly articulates the scope of control[1]:

> 3A233 Mass spectrometers, **other than those described in 0B002.g,** capable of measuring ions of 230 atomic mass units or greater and having a resolution of better than 2 parts in 230, and ion sources therefor.

By contrast, Agilent believes that the proposed language is cumbersome and awkward, requiring 40 words (including two defined terms) to describe an exclusion that the current language accomplishes in six words:

> 3A233 Mass spectrometers, **other than specially designed or prepared auxiliary systems, equipment, ‘‘parts’’ and ‘‘components’’ for isotope separation plants, made of or protected by UF6 resistant materials that are subject to the export licensing authority of the Nuclear Regulatory Commission (see 10 CFR part 110)**, capable of measuring ions of 230 atomic mass units or greater and having a resolution of better than 2 parts in 230, and ion sources therefor.

In addition, the proposed revision is confusing and the scope of control is unclear. One interpretation is that the exclusion pertains to “…systems, equipment, “parts” and “components”…that are subject to the export licensing authority of the NRC”. A second interpretation is that the exclusion pertains to “UF6 resistant materials that are subject to the export licensing authority of the NRC”. That is, it is unclear whether, upon referring

[1] Except that, in a vivid demonstration of the point that BIS is making regarding maintenance of the CCL, 0B002 contains a formatting error: Paragraphs 0B002.e.1 and 0B002.e.2 should be 0B002.f.1 and 0B002.f.2, respectively; and paragraph 0B002.f and subparagraphs f.1 and f.2 should be 0B002.g and subparagraphs g.1 and g.2, respectively.

to the NRC control list, an exporter is looking for an entry for mass spectrometers or for an entry for UF6 resistant materials.

The complexity of this language could potentially also create a burden for US companies in the event that foreign export control authorities were to request clarification on whether the scope of US ECCN 3A233 is equivalent to the scope of their national ECCN 3A233.

3. **Alignment with EU control list remains a worthwhile goal.** BIS explains that the reason for including the NRC ECCNs in the CCL was, in part, "to better align the CCL with the European Union's control lists that are primarily based on the multilateral control regimes." Exporting is by definition an international activity, and for that reason Agilent believes that alignment to the EU control list (which is the *de facto* international standard) remains a worthwhile goal. Agilent also observes that the Proposed Rule does not seek to explain why this goal is no longer worthwhile.

4. **Removal of these ECCNs could set an undesirable precedent.** Many countries worldwide are members of the multilateral control regimes and several other non-member countries voluntarily comply with the guidelines of those regimes. To the best of Agilent's knowledge, all of these other countries use a single control list, even when multiple agencies have export authority for different ECCNs within those single lists. US action to split what had hitherto been a single control list into multiple lists could establish a precedent for other countries to do likewise. Agilent believes that such an outcome, if it were to occur, would increase the complexity of global export compliance and therefore be undesirable.

5. **Does not prevent cross-references from becoming out of date; might not reduce maintenance.** The proposed rule states BIS's concern that "by including references to other agencies' controls in specific ECCNs, there is the potential that such ECCN references will become out of date…" Agilent acknowledges that this potential exists and equally acknowledges that, to the extent that it does exist, it poses a challenge for

maintenance of the CCL[2]. Nevertheless, Agilent believes that proposed rule does not simplify the situation but rather aggravates it: In the existing CCL, the NRC ECCNs are clearly partitioned from the BIS ECCNs, but the proposed rule would blur the distinction, in some cases by adding Heading Notes (e.g., 3A225) and in other cases modifying the chapeau itself (e.g., 3A233). ***It appears that both of these approaches incorporate more tightly into the CCL the NRC control language that BIS wishes to remove.*** The probable outcome of this proposal is that BIS's maintenance responsibility would increase rather than decrease.

6. **Timely maintenance of the NRC ECCNs might not be needed.** Agilent respectfully suggests that the existing structure of the CCL provides clear and adequate notice to exporters that certain items are subject to the export licensing jurisdiction of the NRC. Agilent further respectfully suggests that BIS's obligation stops at this point: exporters are duly and properly informed and it is their responsibility to consult the applicable NRC regulations. Under this interpretation, Agilent believes that timely maintenance of the 14 NRC ECCNs in the CCL is not required.

7. **Contrary to the "single control list" goal of export control reform.** Among the Administration's stated goals for Export Control Reform is a Single Control List. Agilent acknowledges that in this context "Single Control List" has been understood to refer to ITAR/EAR, but this does not alter the fact that removing the 14 NRC ECCNs from the CCL would be contrary to this goal.

To summarize, Agilent urges BIS to retain the 14 NRC ECCNs as-is on the CCL because *even if they are not completely up-to-date, retaining the NRC ECCNs on the CCL*

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[2] In fact, Agilent questions whether this potential exists in actual practice. We believe that the underlying philosophy of the Nuclear Trigger List is such that changes would occur only infrequently and, indeed, in the current proposed rule BIS offers no examples of actual changes to the NRC ECCNs (BIS cites 76 FR 55278, but that proposed rule would have clarified the circumstances in which an export license is required; it would not have modified the ECCNs themselves).

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nevertheless provides a formal structure that is critical to commercial transactions: ***they provide a natural method for US exporters to use an ECCN that is automatically and instantaneously recognized by all parties*** *(exporter, importer, licensing officer, or enforcement officer)* ***worldwide****.*

The foregoing being said, in the spirit of progress, we offer a possible viable compromise: Retain the 14 ECCN chapeaux within the CCL but delete the various subparagraphs of those ECCNs, and for "List of Items Controlled" indicate "refer to NRC at 10 CFR 110". Simultaneously (so as to preclude the scenario described in item 1, above), undertake joint BIS/NRC action to update the NRC control list to use the standard ECCN format.

If you wish any clarification or would like to discuss any of the above comments, please contact me at jonathan_wise@agilent.com or 719-531-4799.

Sincerely yours,

Jonathan Wise
Global Trade Compliance
Agilent Technologies