Morton Sklar, Executive Director
Theresa Harris, Deputy Director
Monique Beadle, Refugee Project Director
Lynsay Gott, Equal Justice Works Fellow

May 22, 2008

Mr. Matthew S. Borman
Acting Assistant Secretary for Export Administration
U.S. Department of Commerce
Bureau of Industry and Security
Regulatory Policy Division
14th Street and Constitution Ave., N.W.
Room H-7205
Washington, D.C. 20230

RE: Request for Public Comments on Crime Control License Requirements in the Export Administration Regulations

Dear Mr. Borman:

In response to the U.S. Department of Commerce's Request for Public Comments on Crime Control License Requirements in the Export Administration Regulations, as set out in the Federal Register of March 19, 2008, the World Organization for Human Rights USA respectfully but emphatically suggests that major changes are required in many critical aspects of the current regulations and procedures, over and beyond the type of changes in the categories and descriptions of listed products that your notice mentions. These broader changes are necessary if the legal mandates of the Export Administration Act (EAA) and the accompanying statutory restrictions on the exportation of products and technologies that could be improperly used to contribute to major human rights abuses by the People's Republic of China (PRC) and other highly repressive regimes are to be properly and effectively monitored and enforced by the United States Government. Our research and experience indicate that many of the standards and restrictions currently in place are not being effectively enforced pursuant to Congressional mandates, due in large part to significant deficiencies in the general monitoring and enforcement procedures and standards applied by the Bureau of Industry and Security (BIS), as well as to insufficient clarity and breadth of coverage in the enforcement regulations themselves. On April 15, 2008 we filed a formal complaint letter with your agency alerting you to some key

2029 P Street, NW Suite 301 Washington, DC 20036
Tele: (202) 296-5702 Fax: (202) 296-5704 http://humanrightsusa.org info@humanrightsusa.org
World Organization for Human Rights USA is an independent, affiliated national member of
the International World Organization Against Torture and SOS Torture Networks.

monitoring and enforcement deficiencies in your EAA mechanisms and standards. A copy of this letter is attached.

As that April 15 complaint letter indicates, many of the restrictions and prohibitions set out in the statutory provisions enumerated in our complaint that limit export of products to China specifically, and to other foreign governments with established records of major human rights abuses more generally, are not being properly monitored and enforced by your agency. A key aspect of any amendment to your regulations that you consider must be further and more detailed clarification of the underlying policies and standards applicable to these transfers, so that U.S. companies will have a much clearer understanding of what their obligations are, and what types of exports should be subject to restrictions.

Consequently, while we strongly encourage BIS to update and substantially strengthen the EAA regulations, it is important to note that making minor updates and improvements in the regulations in and of itself will not address key elements of the core problem, which deals with more general needs associated with how compliance with the statutory purposes is being monitored and enforced on a systematic basis. The underlying purposes and goals of the EAA and accompanying human rights statutes can not be achieved without a stronger commitment on the part of the Department of Commerce to properly monitor and ensure compliance with these standards, and adoption of a clearer set of policies on what exports are prohibited and/or restricted. The deficiencies that presently exist are only partly attributable to problems with the regulations. In the absence of a strong commitment on the part of the Department to making certain that all products and technologies that are marketed to law enforcement agencies or that have crime control, monitoring and surveillance capabilities that lend themselves to human rights abuses will not be exported to repressive governments, improvements in the regulations will not be sufficiently effective. In short, a more substantial overhaul of BIS' procedures and standards related to export control of items that can significantly contribute to major human rights abuses is required, not simply an updating and expansion of the product listings in the regulations.

Specifically, in response to some of the questions posed in the March 19, 2008 Federal Register Notice, Human Rights USA recommends the following:

1. **Clearer Standards on Prohibitions Against Export of Products and Technologies Marketed and Sold to Law Enforcement Agencies, or That Are Likely to be Used for Monitoring and Surveillance Activities, Where U.S. Laws Prohibit or Restrict Such Transfers.**

A variety of U.S. laws and statutory provisions make clear that certain types of exports and uses of exported products are restricted and/or prohibited under U.S. law as a result of U.S. foreign policy interests, including the promotion of human rights throughout the world. BIS' regulations should set out and incorporate the requirements and prohibitions of each of these human rights statutory provisions in clear and unambiguous terms, and explain how they relate to the licensing procedures.

The licensing requirements on crime control products were instituted for the express purpose of promoting U.S. security interests and the observance of human rights around the world. 15 C.F.R. § 742.7. In repressive countries abroad, crime control and police equipment, and the misuse of law enforcement processes, too often are used to track dissidents, leading to such severe human rights abuses as arbitrary detention, torture and extra-judicial killings. The export licensing requirements and prohibitions on the exportation of crime control equipment are intended to ensure that American corporations are not complicit in the human rights abuses committed by foreign governments and their agents by providing the equipment that facilitates the identification and abuse of the victims. The requirements also symbolically reaffirm the importance the United States places on the observance of international human rights standards by foreign governments.

Providing clear guidance on the various human rights statutory provisions subject to BIS enforcement procedures includes placing greater emphasis on the likely end-user of a product, instead of focusing exclusively on the nature of the product being transferred. It needs to be understood that any transfers to law enforcement entities and/or those that are used for law enforcement purposes, by definition suggests the likelihood of human rights abuse in highly repressive regimes. Due to the rapid pace of technological advancement, any list of prohibited technologies faces the possibility of becoming quickly outdated as newer technologies emerge. However, if BIS enforces the EAA and associated human rights statutes with a proper concern for the underlying purposes for which these statutory provisions were adapted, and with clear standards that restrict or prohibit all types of transfers likely to lead to human rights violations, manufacturers will be unable to justify the export and marketing of their products to law enforcement agencies heavily linked to major human rights abuses, as they are currently doing.

2. **Clarification That Dual-Use Characteristics of a Product Do Not Insulate It from Export Restrictions and Controls Where Improper and Prohibited Use is Likely, or the Potential for Such Misuse Exists**

Under the current regulatory system, U.S. manufacturers are exporting unlicensed products and technologies to repressive countries, and marketing them expressly for crime control purposes linked to human rights abuses, claiming the exportation is exempt from trade restrictions and associated licensing requirements because the products have “dual use” characteristics, and therefore can be treated as civilian sales of generic goods not subject to restrictions, despite the ways in which they end up being marketed and used. BIS must make clear that dual or multiple use characteristics do not insulate proposed transfers from review and licensing requirements where a high potential exists for uses related to law enforcement and to the violation of human rights by the recipient foreign government or its agents.

For example, at a recent security trade show in the People’s Republic of China (PRC), Cisco Systems, Inc. aggressively marketed its “policenet” technology as a way to facilitate the tracking and identification of Internet users. This technology allows the police to access an individual’s records from various localities, including that individual’s family history, political behavior, Internet use, photographs and fingerprints. In addition, it allows the police to read the individual’s private emails. This technology’s obvious susceptibility to misuse leading to human rights abuses makes it necessary for the CCL to clearly require

export licenses for this type of dual use technology. Exempting dual use technologies from licensing requirements, or simply permitting companies to self-designate the nature of exports, and to self-police compliance with the applicable statutes, would severely impair the effectiveness of the regulations and the fulfillment of the regulations' goals of promoting the observance of human rights. Such an exemption would ignore the realities of the present situation, that corporations are expressly marketing and selling their dual use technology for prohibited law enforcement and human rights abuse purposes.

Companies can not be allowed to make these determinations on their own, with no monitoring and supervision by BIS, since the profit motive temptation to treat products as exempt from controls because of their "generic" or "dual use" nature is simply too great. BIS must require all transfers to be reported and made public, and there must be an effective independent mechanism to assess the judgments being made as to the appropriate nature of the exports taking place. Clearly, too many U.S. companies have been taking advantage of BIS' currently lax policies and standards by simply treating their exports as exempt and not seeking the required licenses. That deficiency must be addressed in the regulation amendments.

The Validated End-User program currently in force with respect to dual use military exports to the PRC provides a possible template for reducing any increased economic costs to American corporations as a result of tighter controls on the export of dual use technology. Under such a program, U.S. exporters could sell dual use products to customers in repressive countries without obtaining a license after the prospective buyer has been validated by the Department of Commerce as a legitimate civilian purchaser, and the Department has certified that selling to the buyer would not increase the likelihood of human rights violations.

3. **Broadened and More Specific Product Categories Subject to Licensing Requirements.**

In addition to the broader policy guidance amendments to the regulations that we are proposing, some updates and improvements in the product category listings also are required. BIS must prohibit the exportation of electronic products and technologies that are currently being widely used by repressive governments to identify and arbitrarily and unjustly arrest and criminally prosecute journalists, human rights advocates and democracy advocates for simply exercising their free press, speech and association rights through use of the Internet and other electronic means. The current regulations are drastically outdated. Recent technological developments, including biometric devices, integrated security systems and firearms training software are far more likely to lead to human rights abuses when placed in the hands of repressive governments than are the products presently listed on the CCL. The EAA regulations must be updated to incorporate these technological innovations.

The updated and expanded prohibitions should include broader descriptions of specific categories of prohibited exports, not simply a list of particular products. Prohibiting products rather than categories of technology invites corporations to seek out loopholes and continue exporting products that violate the EAA though they do not appear on the CCL. In addition, the updated categories must prohibit the transfer not only of equipment

and technology linked to use of the Internet, but other forms of monitoring and surveillance equipment that is being or can be used by the recipient repressive governments and their agents to restrict freedom of the press, speech and association, or to crack down on other human rights.

Conclusion

Human Rights USA strongly urges BIS to take a much broader approach to its consideration of amendments to its regulations and standards on export control, and to adopt more comprehensive changes to its regulations to more fully bring its enforcement standards and activities, and its monitoring and enforcement procedures, more into line with a number of Congressional statutes mandating human rights observance in the way that U.S. companies handle their product exportation decisions.

Sincerely,

Morton Sklar
Executive Director

Theresa Harris
Deputy Director

Cynthia Andrus
Legal Intern, George Washington University Law School