UNITED STATES DEPARTMENT OF COMMERCE
Under Secretary for Industry and Security
Washington, D.C. 20230

December 27, 2005

The Honorable Edward J. Markey
House of Representatives
Washington, D.C. 20510

Dear Representative Markey:

I am writing to follow up on Secretary Gutierrez's response to your letter regarding recent developments in the U.S.-India relationship. In particular, you referred to recent revisions to the Export Administration Regulations (EAR) and the President's agreement to cooperate with India on civil nuclear activities.

As noted in the Secretary's letter dated November 4, 2005, the recent revisions to the EAR were the result of India's completion of its actions in the U.S.-India Next Steps in Strategic Partnership. While the enclosed document describes those actions, several are particularly worth noting. First, India committed to ensure that U.S.-origin items are not diverted into prohibited activities, such as nuclear weapons research and development. This commitment includes an agreement that enables U.S. officials to conduct end-use checks more frequently and efficiently in India. Second, India enacted a comprehensive export control law. Third, India agreed to adhere to the Nuclear Suppliers Group and the Missile Technology Control Regime.

In addition, India will take a number of critical steps as part of the civil nuclear cooperation. These steps include separating its civilian and military nuclear facilities and placing its civilian facilities under international safeguards.

These actions will help bring India into the international nonproliferation mainstream while helping India to meet its growing energy needs in a clean and efficient manner.

I have recently returned from a trip to India for the U.S.-India High Technology Cooperation Group, which I co-chair with Indian Foreign Minister Shyam Saran. During my discussions, senior Government of India officials continue to express their strong commitment to undertaking the necessary steps that will make the emerging global partnership envisioned by President Bush and Prime Minister Singh a reality.

If I can be of further assistance, please contact me or Scott Kamins, Director of Congressional and Public Affairs for the Bureau of Industry and Security, at (202) 482-0097.

Sincerely yours,

David H. McCormick

Enclosure

December 2005

U.S. Department of Commerce Response to Specific Questions Raised by Representative Edward Markey

Completion of the Next Steps in Strategic Partnership (NSSP)

On July 18, 2005, President George W. Bush and Indian Prime Minister Manmohan Singh announced the completion of the NSSP with India. The proposed cooperation outlined in the NSSP has progressed through a series of reciprocal steps that built on one another, including steps related to creating the appropriate environment for successful high technology commerce.

On August 30, 2005, a rule was published in the *Federal Register* to implement certain steps resulting from the completion of the NSSP, namely, the removal of license requirements for exports and reexports of items controlled unilaterally by the United States for nuclear nonproliferation reasons to India and the removal of six Indian entities – three Department of Atomic Energy (DAE) facilities and three Indian Space Research Organization (ISRO) facilities – from the Department of Commerce's Entity List (See Supplement No. 1 to Part 744 of the Export Administration Regulations (EAR)). These entities were removed because India has taken a number of significant actions, including committing not to use U.S.- origin items in nuclear weapons or ballistic missile programs, allowing U.S. government officials to verify that U.S.-origin items are being properly used, enacting a comprehensive export control law, and adhering to the Nuclear Suppliers Group and the Missile Technology Control Regime guidelines and control lists. The ISRO facilities are involved in commercial satellite work and the DAE facilities are under International Atomic Energy Agency safeguards.

The regulation was published after a detailed review by the Departments of Commerce, State, Energy, and Defense. All departments agreed that this regulation would further the nonproliferation and foreign policy goals of the United States consistent with statutory nonproliferation requirements. Since this regulation involves a military or foreign affairs function of the United States (See 5 U.S.C. 553(a) (1)), the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable. Though this was published as a final rule, the public still has the ability to provide comments, as was noted in the *Federal Register* Notice.

The EAR continues to require an export license when an exporter knows or has reason to know that any item will be used in activities related to nuclear, chemical, or biological weapons, or rocket system/unmanned air vehicles in India, even if the export is intended for an end user not on the Department of Commerce's Entity List.

Department of Commerce Unilateral Nuclear Controls

The Department of Commerce controls two types of items that have nuclear and non-nuclear applications: those that are multilaterally controlled and are identified in the Nuclear Suppliers Group (NSG) Dual Use Annex, and those that are controlled unilaterally by the United States. Items that are uniquely nuclear, such as reactors, gas centrifuges, and related components, are identified on the NSG Trigger List and are licensed for export by the Nuclear Regulatory Commission (NRC). The NSG Dual Use Annex is published by the International Atomic Energy Agency (IAEA) in Information Circular (INFCIRC 254/ Rev.5/Part2). These items are identified on the Commerce Control List (CCL) by Export Control Classification Numbers (ECCN) where the reason for control is NP1.

The NSG Dual Use Annex covers a broad spectrum of equipment and technology, including items such as accurate machine tools, high-strength aluminum, and mass spectrometers. All Commerce-controlled NSG dual-use items require a license for export to any end user in India.

Items controlled unilaterally for nuclear nonproliferation reasons are items the United States and its nonproliferation partners agreed did not warrant multilateral control. The following is a complete list of items controlled unilaterally for nuclear reasons on the CCL:

- Depleted uranium (ECCN 1A290)[1]
- Certain graphite not controlled by ECCN 1C107 or the NRC (ECCN 1C298)
- Generators and other equipment specially designed, prepared, or intended for use with nuclear plants (ECCN 2A290)
- Equipment, except items controlled by 2A290, related to nuclear material handling and processing and to nuclear reactors (ECCN 2A291)
- Piping, fittings and valves made of, or lined with, stainless steel or other alloy steel containing 10% or more nickel and/or chromium (ECCN 2A292)
- Pumps designed to move molten metals by electromagnetic forces (ECCN 2A293)
- "Numerically controlled" machine tools not controlled by 2B001 or 2B201 (ECCN 2B290)
- "Software" specially designed for the "development," "production," or "use" of equipment controlled by 2A290, 2A291, 2A292, 2A293 or 2B290 (ECCN 2D290)
- "Technology" according to the General Technology Note for the "use" of equipment controlled by 2A290, 2A291, 2A292, 2A293 or 2B290 (ECCN 2E290)
- Oscilloscopes (ECCN 3A292)
- "Technology" according to the General Technology Note for the "development," "production," or "use" of equipment controlled by 3A292 (ECCN 3E292)

Unilaterally-controlled nuclear items have applications in nuclear power generation and are controlled to hinder unsafeguarded nuclear power activities. However, many of these items, such

[1] This ECCN applies to depleted uranium not controlled on the U.S. Munitions List or under the jurisdiction of the U.S. Nuclear Regulatory Commission (NRC). In addition, the ECCN only applies to shipments of more than 1000 kilograms used for shielding for X-ray units, radiographic exposure or teletherapy devices, radioactive thermoelectric generators, or packaging for the transportation of radioactive materials

as oscilloscopes, pipes and valves, graphite, and lower accuracy machine tools, have predominant uses outside of the nuclear area. In the past, the Department of Commerce, with the concurrence of the Departments of State, Energy and Defense, approved the vast majority of all license applications for the export of these items to India. The August 2005 regulation did not change current license requirements for the export of these items to unsafeguarded nuclear facilities in India or other end users identified on the Entity List. In addition, a license is still required for the export of these items if intended for use in a prohibited nuclear weapons activity, or other proscribed chemical, biological, or rocket system/unmanned air vehicle end-use, as defined in Part 744 of the EAR.

Many, if not all, of the items controlled for unilateral nuclear concerns, are available from sources outside of the United States with no export license requirements. Accordingly, the U.S. unilateral controls did not prevent India from obtaining these items. Rather, the net result of these controls has been to place U.S. industry at a disadvantage when attempting to market these items to legitimate end users in India. These unilateral controls will, however, remain in place for the other non-NPT signatories as well as the terrorist supporting states.

India's Safeguarded Facilities

The August 30, 2005 rule removed three DAE nuclear power related entities, Tarapur (TAPS 1 & 2), Rajasthan (RAPS 1& 2), and Kudankulam (1 & 2) from the Entity List. TAPS 1 & 2 and RAPS 1 & 2 are under IAEA safeguards. Kudankulam 1 & 2 is under construction, and the Government of India and the IAEA have agreed that this facility will be subject to IAEA safeguards upon completion. Since 1998, when these facilities were put on the Entity List, there has been limited licensing interest in these facilities.

Critical items for nuclear reactors are controlled on the NSG Dual Use Annex or Trigger List. Accordingly, the most sensitive items would still require a license to any destination in India. Additionally, with our new end-use visit capabilities (since October 2004, BIS has conducted over 65 end use checks on government and civilian facilities), the chance of the safeguarded facilities procuring items for the non-safeguarded facilities is greatly diminished.

The removal of these plants from the Entity List is consistent with our NSG or other legal obligations. Further, the removal of these plants from the Entity List, combined with the potential increase in trade of otherwise non-controlled items, provides additional incentive for India to put other facilities under IAEA safeguards.

Domestic Legal Changes

The removal of the Indian entities and the change in licensing requirement for unilaterally controlled nuclear items on the CCL is consistent with our domestic legal obligations. The supply of Trigger List items would require changes to NSG practice as well as domestic legislation, including the Atomic Energy Act. The Administration is committed to working closely with Congress to address the requirements of the Atomic Energy Act. *NSG Commitments*

As noted above, the removal of the Indian entities and the change in licensing requirements for unilaterally controlled nuclear items on the CCL is not contrary to our NSG obligations. Further, regarding U.S.-India civil nuclear cooperation, the U.S. government is consulting with our NSG partners on how best to work with India to stem nuclear proliferation and promote the use of nuclear power in a safe and environmentally sound method.

IAEA Director General Mohamed El-Baradei has welcomed this initiative to embark on full civil nuclear energy cooperation with India and to work to enhance nuclear nonproliferation and security. Moreover, many NSG partners have welcomed this initiative, including the United Kingdom, France, and Russia. This Presidential initiative was presented to all of the NSG members at the October 19, 2005 Consultative Group meeting. Further work will be necessary in order to gain full acceptance in the NSG. The United States and India will need to engage these and other countries on this initiative in order to respond to their concerns and secure their support.

Benefits of U.S. - India Civil Nuclear Cooperation

The first step in the civil-nuclear initiative is for India to separate its civilian and military nuclear facilities and programs. Once it has done so, India is required to file a declaration with the IAEA regarding its civilian facilities, place them under IAEA safeguards, and adhere to an Additional Protocol with respect to them. With this initiative, India's nuclear technology and materials are safer from the hands of terrorists, and the United States can be assured that we are not aiding India's military nuclear program in any form. Our initiative only allows India access to technology that will help increase its domestic energy production to meet its rapidly increasing demand.

In addition, this initiative will encourage India's participation in strengthening the international nonproliferation effort. Entering into a mutually beneficial civil-nuclear initiative will allow our two countries to partner more effectively in addressing issues of global concern. This includes the acquisition of nuclear enrichment and reprocessing technology by countries that may use this technology for military purposes or allow it to be transferred to rogue entities. India's commitment to the global nonproliferation effort is particularly evident by the September vote at the IAEA meeting to refer Iran to the United Nations Security Council.