

OFFSETS IN DEFENSE TRADE STANDARD OPERATING PROCEDURES

Background

In 1984, the U.S. Congress amended the Defense Production Act (DPA) to require the President to submit an annual report to Congress on the impact of offsets on the U.S. defense industrial base.¹ The Office of Management and Budget was the first agency appointed as the interagency coordinator for preparing the report for Congress. In 1992, Congress amended the DPA and directed that the Secretary of Commerce function as the President's Executive Agent in preparing the annual report to Congress.²

Section 723 of the DPA authorizes the Secretary of Commerce to develop and administer the regulations necessary to collect offset data from U.S. firms.³ The Secretary of Commerce has delegated this authority to the Bureau of Industry and Security (BIS). BIS published its offset reporting regulation in 1994.⁴ BIS amended its offset regulation in 2009.⁵

Offsets in defense trade encompass a range of industrial compensation arrangements required by foreign governments as a condition of the purchase of defense articles and services from a non-domestic source.

BIS collects data annually from U.S. firms involved in defense exports with associated offset agreements in order to assess the impact of offsets in defense trade.

Exports of defense articles and services can lower overhead costs for the Department of Defense; help sustain production facilities, workforce expertise, and the supplier base to support current and future U.S. defense requirements; promote interoperability of defense systems, subsystems

¹ See Pub. L. 98-265, April 17, 1984, 98 Stat. 149.

² See Pub. L. 102-558, Oct. 28, 1992, 106 Stat. 4198; see also Part IV of Exec. Order No. 12919, 59 Fed. Reg. 29,525 (June 3, 1994) and Exec. Order 13603, Fed. Reg. 16,651 (March 22, 2012).

³ Previously, the offset report was submitted pursuant to Sec. 309 of the Defense Production Act of 1950. However, as a result of the Defense Production Act Reauthorization of 2009, Pub. L. 111-67, which rewrote Title III of the Act and introduced a new Sec. 723 on offsets, the report is now submitted pursuant to Sec. 723. Section 723 is largely the same in content as the prior Sec. 309.

⁴ See 59 Fed. Reg. 61,796 (December 2, 1994) codified at 15 C.F.R. § 701.

⁵ See 74 Fed. Reg. 68,136 (December 23, 2009) codified at 15 C.F.R. § 701.

and components between the United States and friends and allies; and contribute positively to U.S. international account balances. However, offset agreements and associated offset transactions can negate some of the potential economic and industrial base benefits accrued through defense exports if the offset activity displaces work that would otherwise have been conducted in the United States.

Items offered as part of an offset transaction may require an export license from the relevant U.S. Government agency. For items that require an export license, such as items controlled for Missile Technology reasons, exporters are advised to consult with the Departments of Commerce, Defense, and State to obtain export control policy guidance prior to offering such items as part of an offset transaction.

U.S. Government Policy on Offsets in Defense Trade

The U.S. Government policy on offsets in defense trade states that the government considers offsets to be “economically inefficient and trade distorting,” and prohibits any agency of the U.S. Government from encouraging, entering directly into, or committing U.S. firms to any offset arrangement in connection with the sale of defense articles or services to foreign governments. U.S. defense contractors generally see offsets as a reality of the marketplace for companies competing for international defense sales. Several U.S. defense contractors have informed BIS that offsets are usually necessary in order to make defense sales – sales which can help support the U.S. industrial base.

Key Features of Offset Reporting Regulations

Mandatory Reporting: U.S. firms are required to report on an annual basis all contracts for the sale of defense articles or defense services (as defined in the Arms Export Control Act and International Traffic in Arms Regulations) to a foreign country or foreign firm for which the contract is subject to an offset agreement exceeding \$5,000,000 in value.

U.S. firms are also required to report all offset transactions completed in performance of existing offset commitments since January 1, 1993 for which offset credit of \$250,000 or more has been claimed from the foreign representative, and new offset agreements entered into since that time.

Noncompliance Penalties: Violation of the Defense Production Act may result in punishment by fine or imprisonment, or both. The maximum penalty provided by the Defense Production Act is a \$10,000 fine, or one year in prison, or both.

The Government may seek an injunction from a court of appropriate jurisdiction to prohibit the continuance of any violation of, or to enforce compliance with, the Defense Production Act and this regulation.

Reporting Requirements

Reporting period: The Department of Commerce publishes a notice in the Federal Register annually reminding the public that U.S. firms are required to report annually.

Reporting instructions: (1) U.S. firms must only report on offset agreements they have entered into with a foreign customer. U.S. firms must report offset transactions that they are directly responsible for reporting to the foreign customer, regardless of who performs the transaction (i.e., prime contractors must report for their subcontractors if the subcontractors are not a direct party to the offset agreement). (2) Reports must be submitted in hardcopy to the Offset Program Manager, U.S. Department of Commerce, Bureau of Industry and Security, Room 3876, 14th Street and Constitution Avenue, NW., Washington, DC 20230, and as an e-mail attachment to OffsetReport@bis.doc.gov. E-mail attachments must include the information in a computerized spreadsheet or database format. If unable to submit a report in computerized format, companies should contact the Offset Program Manager for guidance. All submissions must include a point of contact (name and telephone number) and must be submitted by a company official authorized to provide such information. (c) Reports must include the information described below. Any necessary comments or explanations relating to the information shall be footnoted and supplied on separate sheets attached to the reports.

U.S. firms must identify the six-digit North American Industry Classification System (NAICS) code(s) associated with the military export sale. Refer to U.S. Census Bureau's U.S. NAICS Manual for a listing of applicable NAICS codes (<http://www.census.gov/epcd/www/naics.html>).

U.S. firms must identify the following for each offset agreement:

- the foreign government agency or branch that is the signatory to the offset agreement
- the military export sale value
- offset agreement value
- offset agreement term in months
- offset agreement performance measures (e.g., best efforts, accomplishment of obligation, or other)
- offset agreement penalties for non-performance (e.g. liquidated damages, debarment from future contracts, added offset requirements, fees, commissions, bank credit guarantees, or other)

U.S. firms must identify the following for each offset transactions:

- an itemized list of offset transactions completed during the reporting period
- the name of foreign country of the foreign entity involved in the military export sale associated with the offset transaction
- a description of the military export sale associated with the offset transaction, as well as the date the offset agreement was signed (month and year)
- each category that describes the offset transaction as co-production, technology transfer, subcontracting, training, licensing of production, investment, purchasing, credit assistance or other
- the six-digit North American Industry Classification System (NAICS) code(s) associated with the offset transaction (<http://www.census.gov/epcd/www/naics.html>)
- the actual offset value.
- the offset credit value claimed by the offset performing entity, including any multipliers or intangible factors
- the offset transaction performance location (e.g., the name the country where each offset transaction was fulfilled, such as the purchasing country, the United States, or a third country)

Annual Report to Congress

The Department of Commerce is required to submit an annual report on U.S. defense offsets to Congress. The report includes an aggregated summary of the data reported by industry in accordance with the offsets regulation and the DPA. As provided by section 723 of the DPA, BIS will not publicly disclose the information it receives through offsets reporting unless the firm furnishing the information specifically authorizes public disclosure. The information collected is sorted and organized into an aggregate report of national offsets data, and therefore does not identify company specific information. Required information must be submitted to BIS no later than June 15, each year.

Offset Term Definitions

Offsets: Compensation practices required as a condition of purchase in either government-to-government or commercial sales of defense articles and/or defense services as defined by the Arms Export Control Act (22 U.S.C. § 2751, et seq.) and the International Traffic in Arms Regulations (22 C.F.R. §§ 120-130).

Offset Agreement: Any offset as defined under “offsets” that the U.S. firm agrees to in order to conclude a military export sales contract. This includes all offsets, whether they are “best effort” agreements or are subject to penalty clauses.

Offset Transaction: Any activity for which the U.S. firm claims credit for full or partial fulfillment of the offset agreement. Activities to implement offset agreements are categorized as coproduction, technology transfer, subcontracting, credit assistance, training, licensed production, investment, purchases and other.

Co-production: Transactions that are based upon government-to-government agreements authorizing the transfer of technology to permit foreign companies to manufacture all or part of U.S.-origin defense articles. Such transactions are based upon an agreement specifically referenced in Foreign Military Sales (FMS) Letters of Offer and Acceptance (LOA) and a government-to-government Memorandum of Understanding (MOU). Co-production is always classified as a direct offset.

Credit Assistance: Credit assistance includes direct loans, brokered loans, loan guarantees, assistance in achieving favorable payment terms, credit extensions, and lower interest rates. Credit assistance specifically excludes the use of “banked” offset credits (credits that exceed the requirement of the offset agreement and are permitted, by the terms of the agreement, to be applied to future offset obligations). Credit assistance is nearly always classified as an indirect offset transaction but can also be direct.

Credit Value of Offset Transactions: The U.S. dollar value credited for the offset transaction by application of a multiplier, any intangible factors, or other methods. The credit value may be greater than, equal to, or less than the actual value of the offset.

Investment: Investment arising from an offset agreement, often taking the form of capital dedicated to the establishment of a foreign entity unrelated to the defense sale or to expanding the U.S. firm’s subsidiary or joint venture in the foreign country. Investment can be either a direct or indirect offset.

Licensed Production: Overseas production of a U.S.-origin defense article based upon transfer of technical information under direct commercial arrangements between a U.S. manufacturer and a foreign government or producer. Licensed production is not pursuant to a co-production government-to-government MOU. In addition, licensed production almost always involves a part or component for a defense system, rather than a complete defense system. Licensed production transactions can be either direct or indirect offsets.

Multiplier: A factor applied to the actual value of certain offset transactions to calculate the credit value earned. Foreign purchasers use multipliers to provide firms with incentives to offer offsets that benefit targeted areas of economic growth. When a “positive” multiplier is applied to the price of a service or product offered as an offset, the defense firm receives a higher credit value toward fulfillment of an offset obligation than would be the case without application of a multiplier. Conversely, foreign purchasers apply “negative” multipliers to discourage certain types of transactions not thought to be in the best economic interest of the receiving entity.

Offset Transaction: Any activity for which the U.S. firm claims credit for full or partial fulfillment of the offset agreement. Activities to implement offset agreements are categorized as co-production, technology transfer, subcontracting, credit assistance, training, licensed production, investment, purchases, and other.

Purchases: Purchases involve the procurement of off-the-shelf items from the offset recipient. Purchases are indirect offset transactions.

Subcontracting: In the offset context, subcontracting is the overseas production of a part or component of a U.S.-origin defense article. The subcontract does not necessarily involve license of technical information. Instead, it is usually a direct commercial arrangement between the defense prime contractor and a foreign producer.

Technology Transfer: Transfer of technology that occurs as a result of an offset agreement and that may take the form of research and development conducted abroad, technical assistance provided to the subsidiary or joint venture of overseas investment, or other activities under direct commercial arrangement between the defense prime contractor and a foreign entity.

Training: Generally includes training related to the production or maintenance of the exported defense item. Training, which can be either direct or indirect offset, may be required in unrelated areas, such as computer training, foreign language skills, or engineering capabilities.

Technology Transfer: The technology transfer requirement was assigned 36 percent of the total offset obligation. Company B agreed to transfer all the necessary technology and know-how to firms in Nation A in order to repair and maintain the jet fighters. The government of Nation A deemed this capability to be vital to national security and, therefore, gave a multiplier of six. As a result, the transfer of technology actually worth \$30 million was given a credit value of \$180 million.

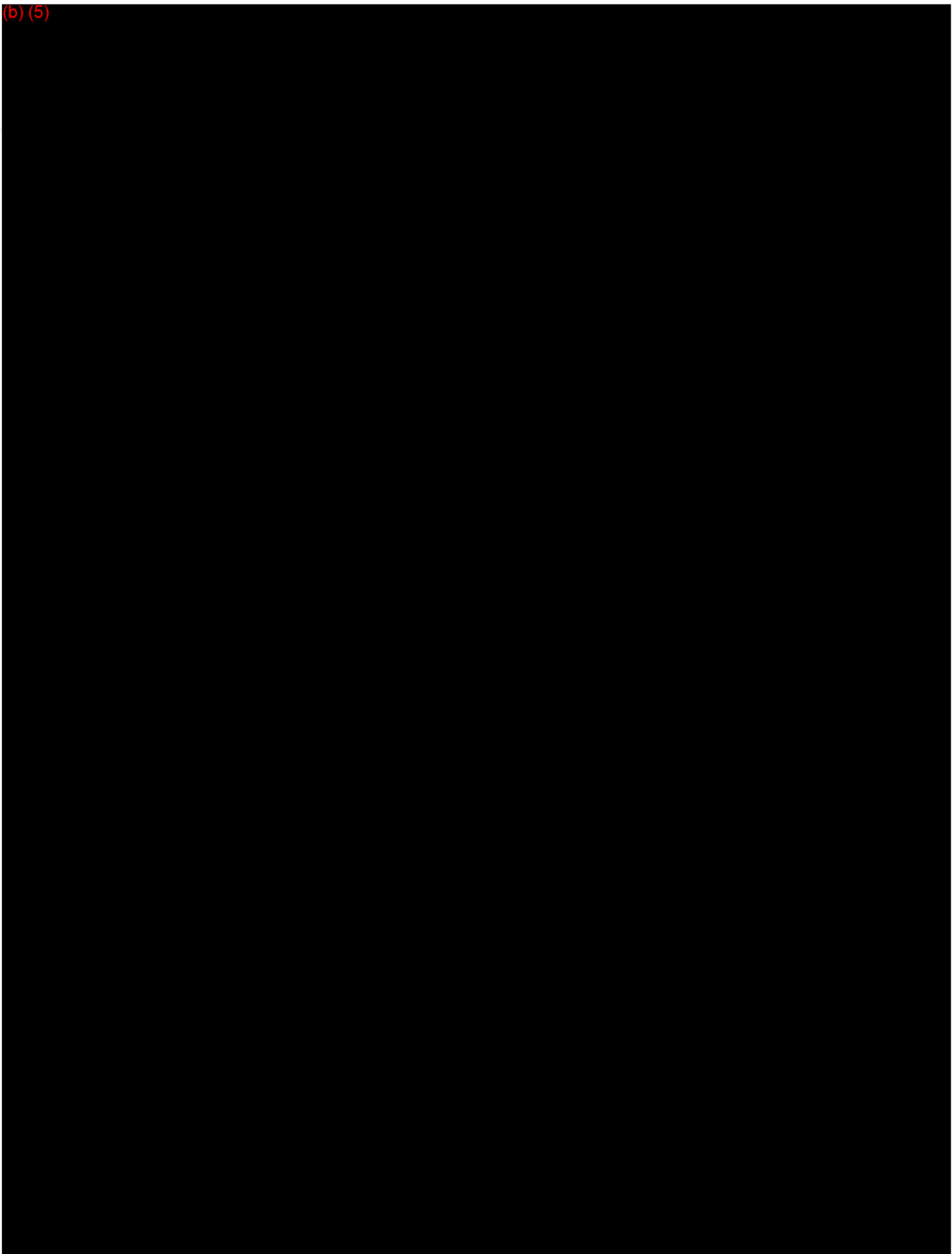
Licensed Production: Firms from Nation A manufactured some components of the KS-340 jet fighters, totaling \$240 million, which accounted for 48 percent of the offset obligation. There was no multiplier associated with this activity.

Technology Transfer: Company B provided submarine technology to firms from Nation A, which accounted for seven percent of the offset obligation, or \$35 million. There was no multiplier associated with this activity.

Other: An offset transaction other than co-production, credit assistance, licensed production, investment, purchases, subcontracting, technology transfer, or training.

Direct Offset: An offset transaction directly related to the article(s) or service(s) exported or to be exported pursuant to the military export sales agreement.

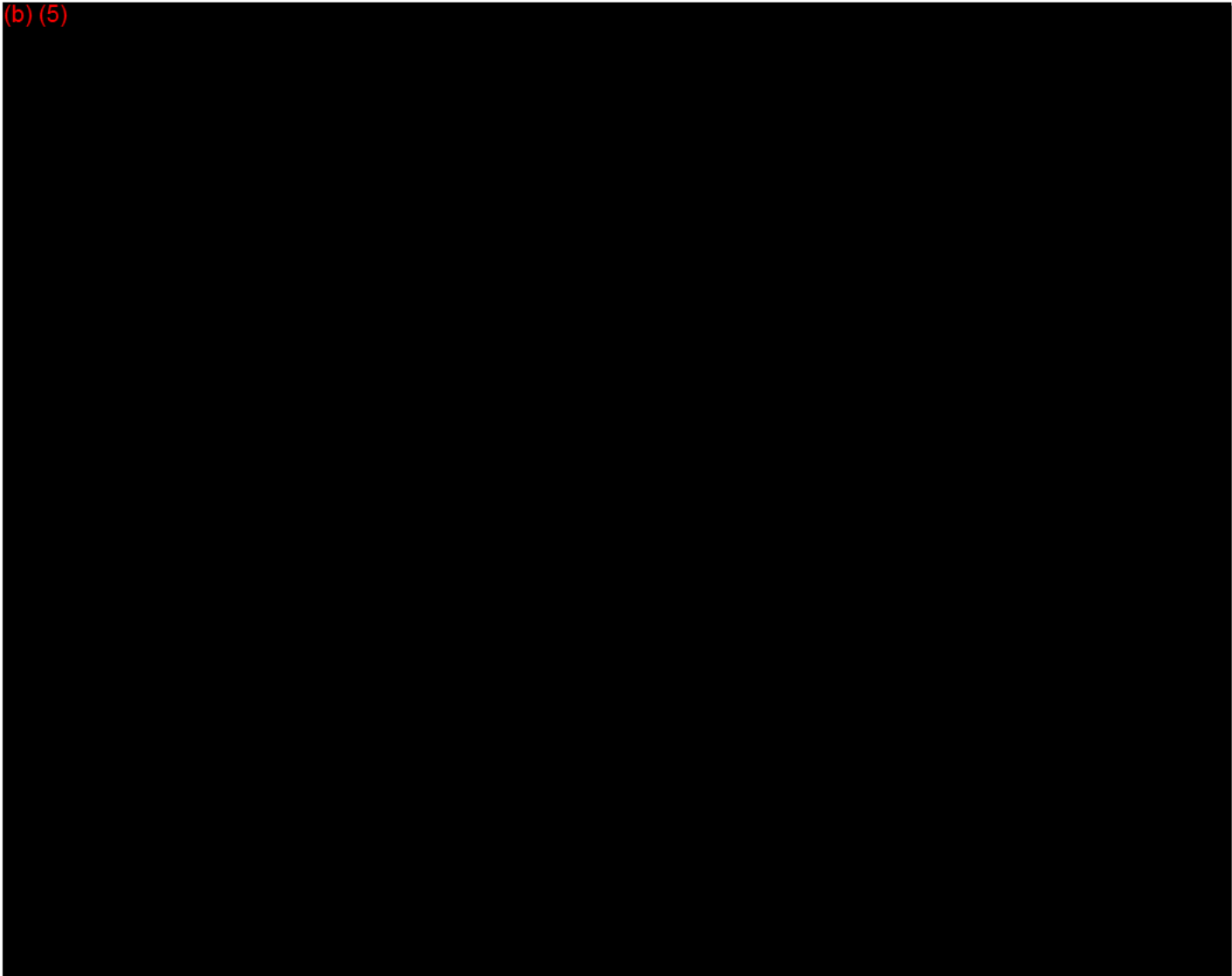
Indirect Offset: An offset transaction unrelated to the article(s) or service(s) exported or to be exported pursuant to the military export sales agreement.



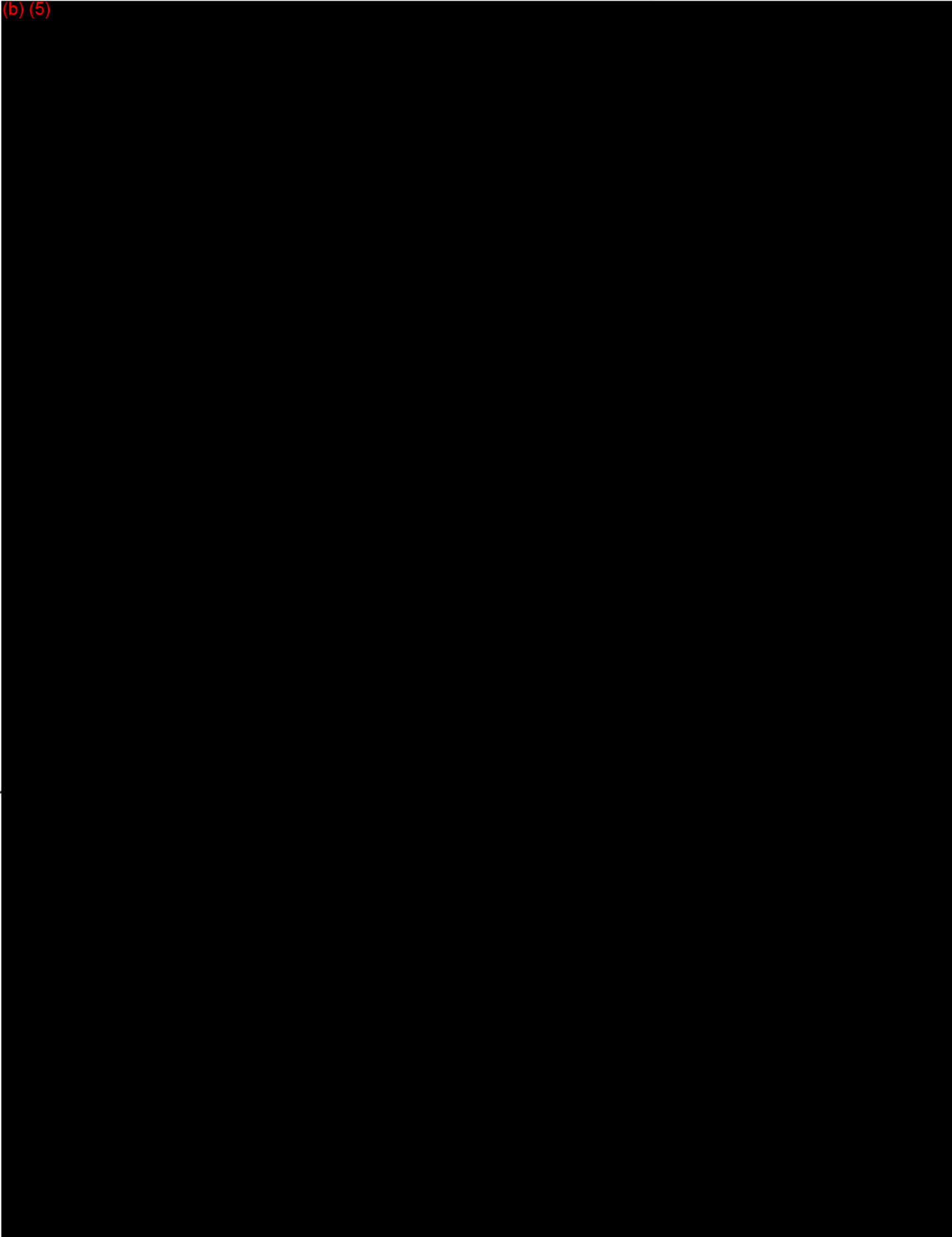
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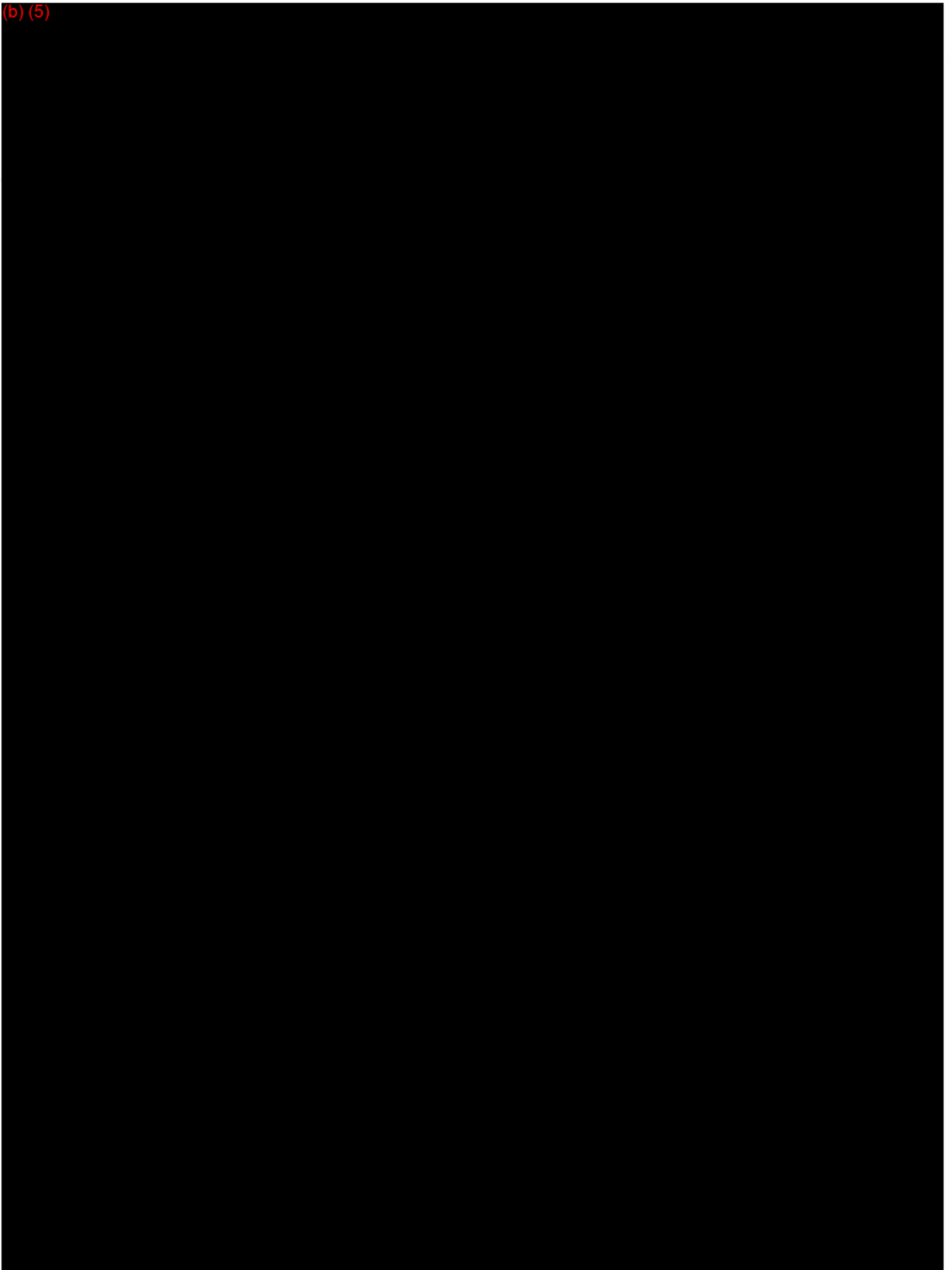


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OCC Clearance #2

Joanna Gordon

From: Wolfberg, Elias <EWolfberg@doc.gov>
Sent: Monday, November 26, 2012 3:33 PM
To: Joanna Gordon

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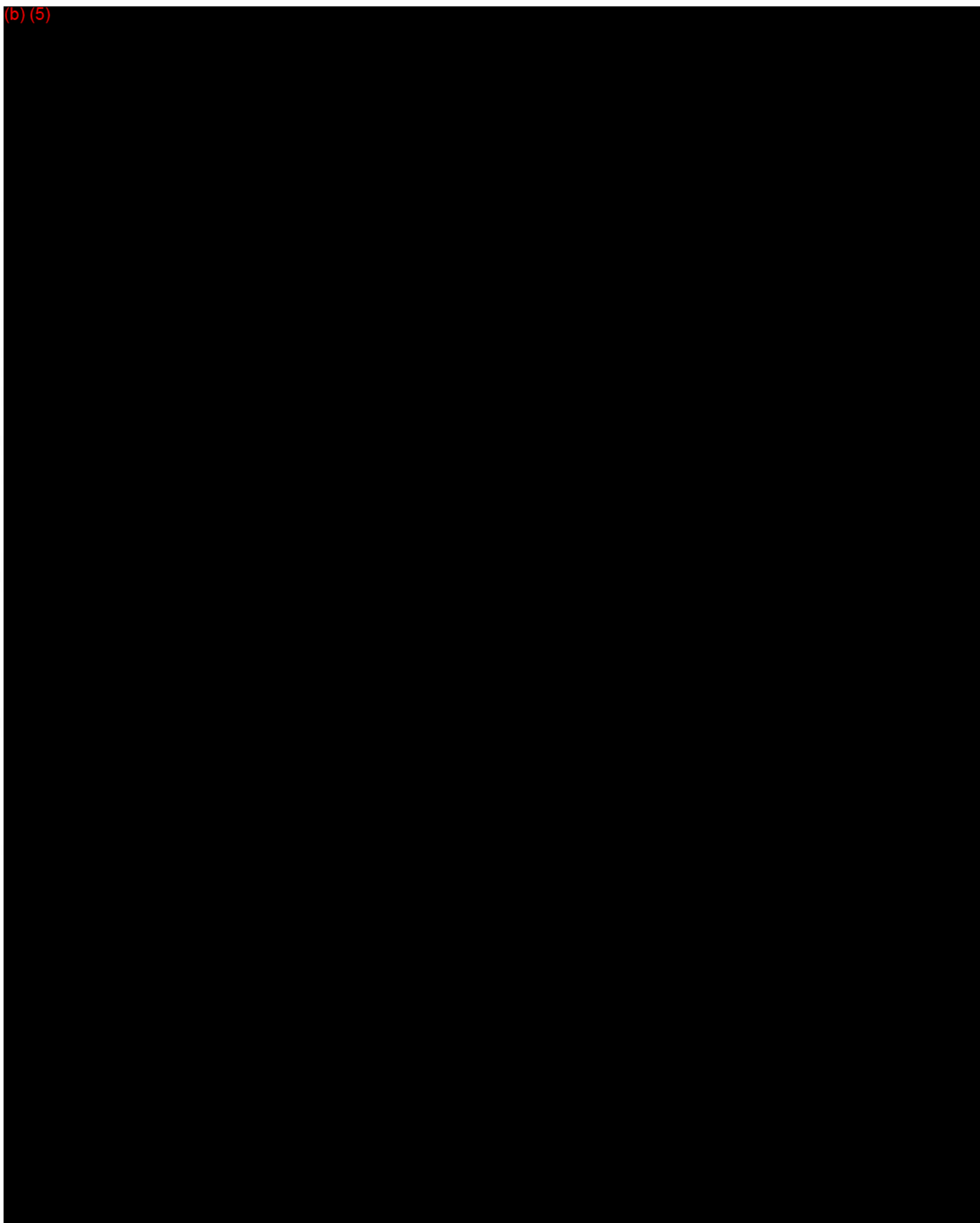
OCC Clearance

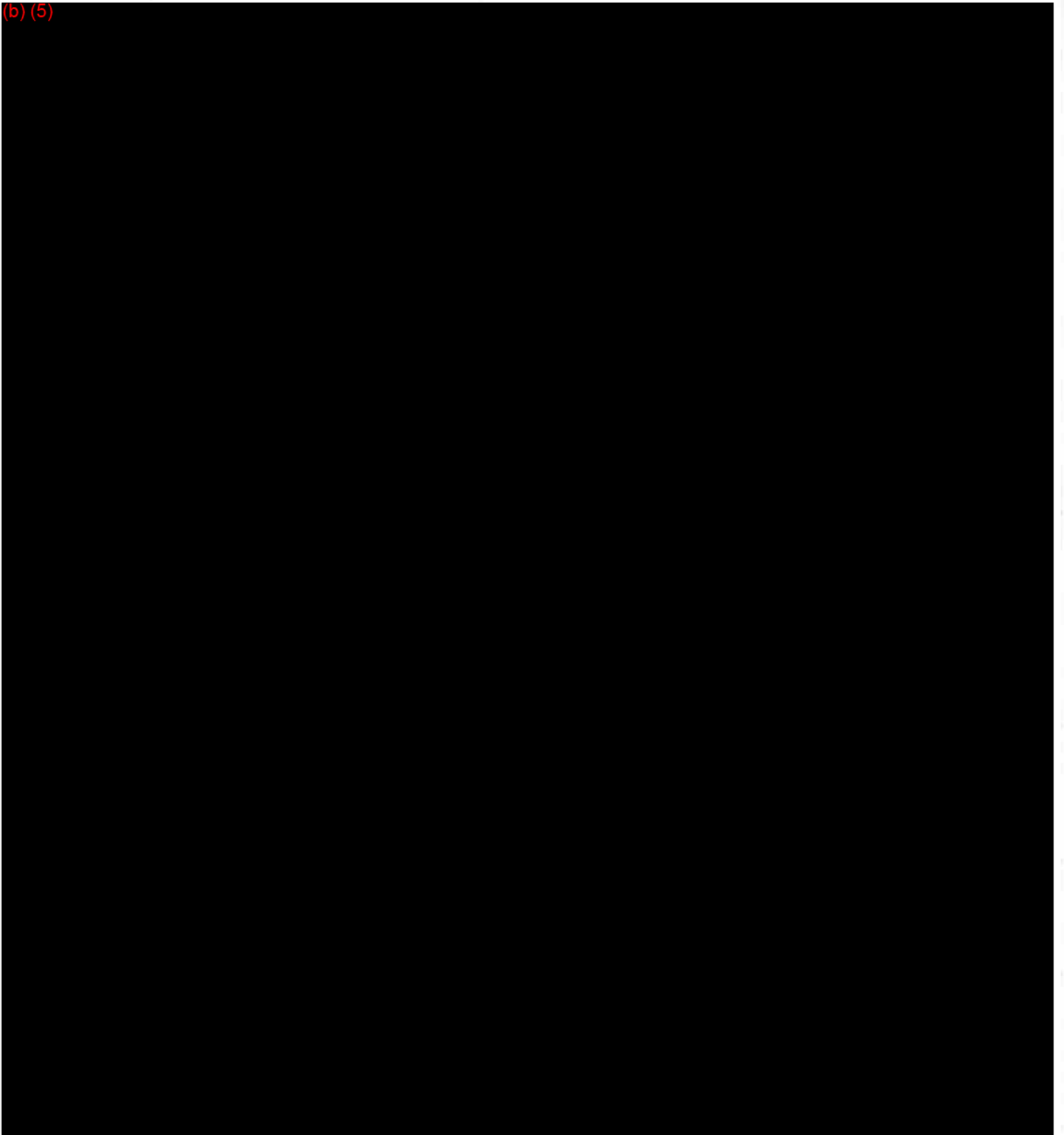
Mark Crace

From: Wolfberg, Elias <EWolfberg@doc.gov>
Sent: Monday, November 05, 2012 11:34 AM
To: Mark Crace
Cc: Michael Vaccaro; PINCUS, ROGER

(b) (5)







WEINBERG
COLLEGE OF
ARTS & SCIENCES

Department of Political Science

John A. and Marjorie Weisberg
College of Arts and Sciences

NOV 15 2011

Freedom of Information Officer
Bureau of Industry and Security, Room 6622
U.S. Department of Commerce
Washington, DC 20230

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), I hereby request selected information from the BIS Offsets Database for the years 1993 to 2010, and any other years for which this data are available.

This information would cover both transactions and agreements for each year in the database and would include for agreements: year, country, (total) export value, (total) offset value. For transactions: year, country, (total) actual value, (total) credit value, and the (total) value for each transaction type (i.e. direct, indirect, or unspecified) and transaction category (i.e. co-production, credit assistance, etc).

I understand that BIS aggregates the offset-related information it collects from defense contractors, to the extent that the activities of individual companies cannot be determined. I request information on total values for each country and year in the database (for example, the value of all co-production transactions with Australia in 1994) rather than at the firm or individual transaction level. This is a robust level of aggregation and would not place an undue burden on BIS employees. This will not result in the release of any "secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort" (Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983)).

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information.

In order to help to determine my status to assess fees, you should know that I am affiliated with an educational institution, and this request is made for a scholarly purpose and not for commercial use. Therefore, I request a waiver of all fees for this request.

If you have any questions regarding this request, please contact me at (b) (6)

(b) (6) I look forward to receiving your response within the twenty day statutory time period. Thank you for your consideration of this request.

Sincerely,



Jonathan Caverley
Assistant Professor of Political Science



UNITED STATES DEPARTMENT OF COMMERCE
Bureau of Industry and Security
Washington, D.C. 20230
March 18, 2011

Mr. Jonathan Caverley
Assistant Professor of Political Science
Weinberg College of Arts & Science
Northwestern University
Scott Hall 601 University Place
Evanston, IL 60208

Subject: Freedom Of Information Act (FOIA) BIS 11-023

Dear Mr. Caverley,

This is in response to your February 18, 2011 FOIA request for "selected information from the BIS Offsets Database for the years 1993 to 2010, and any other years for which this data are available."

BIS has completed its search for documents responsive to your request and is unable to provide the exact information requested from the offsets database due to the confidentiality provisions of Section 705(d) of the Defense Production Act of 1950, and BIS' Offset Reporting Regulation. See 15 C.F.R. §701 (2010). This information is being withheld under FOIA Exemption (b)(3) which exempts from disclosure information prohibited from disclosure by another statute if that statute "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. §552(b)(3)(A)(ii) (2000).

The statutory provision that specifically exempts this information from disclosure by establishing particular criteria for withholding is Section 12(c) of the Export Administration Act of 1979, as amended (the "Act").¹ Section 12(c)(1) states, in pertinent part, that "information obtained for the purpose of, consideration of, or concerning, license applications under this Act shall be withheld from public disclosure unless the release of such information is determined by the Secretary to be in the national interest." This Section does not merely authorize maintaining the confidentiality of information obtained under the Act, but requires such information not be disclosed unless its release is determined to be in the national interest. In the absence of a national interest determination authorizing release of information responsive to your request and consistent with the criteria of Section 12(c), any such information cannot be released.

Section 705(d) of the Defense Production Act of 1950, states that "Information obtained under this section which the President deems confidential...shall not be published or disclosed unless the President determines that the withholding thereof is contrary to the interest of the national

¹ Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 C.F.R., 2001 Comp 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 13, 2009 (74 Fed. Reg. 41, 325 (Aug. 14, 2009)), has continued the Regulation in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701-1706 (2000)) ("IEEPA").



defense." Pursuant to Executive Order 12919, the President has delegated the authority for compiling information on offsets in defense trade and submitting a report to Congress to the Department of Commerce, which has been further delegated to BIS Strategic Industries & Economic Security (SIES). BIS, in Section 701.5 of the Offset Reporting Regulation, further clarifies that "offset information submitted by U.S. industry in support of the annual report to Congress shall not be released publicly, except for aggregated data use in the annual report to Congress, without the permission of the companies." However, certain aggregated data is available in the 15 annual reports to Congress by BIS which can be located at www.bis.doc.gov/news/indexnewsarchives.html. Because the full text of the first six reports is not available on the BIS website, BIS has provided the 2003 report enclosed with this letter and will provide reports for years 1996, 1997, 1998, 1999, and 2000 electronically.

Michael Vaccaro, Acting Director of the Office of Strategic Industries & Economic Security, is the denying authority. You have the right to appeal the decision to withhold this document. 15 C.F.R. §4.10 (2010). An appeal must be received within 30 calendar days of the date of this letter by the Assistant General Counsel for Administration, U.S. Department of Commerce, Office of General Counsel, Room 5898-C, 14th Street and Constitution Avenue, NW, Washington, DC 20230. Your appeal may also be sent by e-mail to FOIAAppeals@doc.gov or by facsimile (fax) to (202) 482-2552. The appeal must include a copy of the original request, this denial, and a statement of the reason why withheld records should be made available. The submission is not complete without the required attachments. Submitted material, such as the appeal letter, the envelope, the e-mail subject line, and the fax cover sheet, should be clearly marked "Freedom of Information Act Appeal." The office only monitors incoming submissions during normal business hours, which are Monday through Friday, 8:30 a.m. to 5 p.m. Eastern Standard Time. FOIA appeals received after normal business hours, including e-mails and faxes, will be deemed received on the next business day.

If you have questions regarding this request, please contact Mark Crace at (202) 482-8093 or via e-mail at mark.crace@bis.doc.gov.

Sincerely,



Gay Shrum
Chief Financial Officer and
Director of Administration

Enclosure



April 13, 2011

Assistant General Counsel for Administration
U.S. Department of Commerce, Office of General Counsel
Room 5898-C
14th Street and Constitution Avenue, NW
Washington, DC 20230.

Dear Sir or Madam:

This letter constitutes an administrative appeal under the Freedom of Information Act, 5. U.S.C. Sec. 552(a)(6). I am writing to appeal the determination by the Department of Commerce's Bureau of Industry and Security (BIS) with regard to my FOIA request filed on Feb 18, 2011, BIS-11-023, for aggregate data by country of defense industrial offsets found in BIS Offset Data and annually reported to Congress. By a letter of March 18, 2011 the BIS withheld these records under exemption (b)(3) of the FOIA. Copies of the original request and the denial are enclosed. I appeal the determination on several grounds.

First, release of this data is in the public interest. Note that my request seeks information on United States relations with other countries, and does not ask for firm-specific information. Given our relations via the arms trade with many countries in the news these days, disclosure of the level of subsidization by the America taxpayer of these transactions appears quite clearly in the public interest.

Second, Section 701.5 of the Offset Reporting Regulation states that "offset information submitted by U.S industry in support of the annual report to Congress shall not be released publicly, except for aggregated data use in the annual report to Congress, without the permission of the companies." Please note that this statute makes no national interest argument. Indeed, the phrase "permission of the companies" implies that this statute is designed to reflect the concerns of these private firms. The statutes cited in the denying letter cover company-level information, which I do not request; the information I requested is not covered by statute and should not be withheld. For example, the December 2008 report to Congress states that ten U.S. defense contractors reported 43 defense export sales contracts during Calendar Year (CY) 2007 with 18 countries valued at \$6.74 billion. These contracts included a reported 290 direct and 297 indirect discrete offset transactions. Asking for the data at the country-year level sheds little light on firm activities, and thus their authorization to release this data is not required.

Third, the information is within BIS's Office of Strategic Industries & Economic Security (SIES) release authority. The denying letter cites Executive Order 12919, which delegates to the Department of Commerce compiling information on offsets in defense trade and submitting a

report to Congress. This authority has been further delegated to BIS and on to SIES. The annual report routinely states the value of offset transaction for the "top ten" countries. The decision to not release data for the eleventh country, twelfth, etc. is an editorial one with no substantive justification. Releasing the same data for other countries fits precisely "aggregated data used in the annual report to Congress" and thus meets the letter and intent of the law.

Fourth, the intent of the law, in addition to the burden of the public interest, should presuppose release of this data. After all, the law directs that "the information provided by U.S. firms will be aggregated and used to determine the impact of offset transactions on the defense preparedness, industrial competitiveness, employment, and trade of the United States. Summary reports will be submitted annually to the Congress pursuant Section 309 of the Defense Production Act of 1950, as amended." Additionally, the Defense Offsets Disclosure Act of 1999, Pub. L. No. 106-113, Div. B, §1247 (1999) established a national commission requiring the President to submit a report to Congress addressing all aspects of the use of offsets in international defense trade within a year of its establishment. This report has not come to pass. Releasing the country-level aggregated data would appear to be a step in the right direction given the intent of Congress apparent in this law.

Elsewhere, Section 723(a)(1)(B and C) of the Defense Production Act Reauthorization of 2009 requires that the report must contain "a summary of offset arrangements concluded during the reporting period" as well as "a summary and analysis of any bilateral and multilateral negotiations relating to the use of offsets completed during the reporting period." It appears clear that the intent of the law is for the data I requested, among other information, to be released to the public.

Finally, I also note that none of the statutes cited in the denying letter are covered in Department of Justice's October 2010 memo "Statutes Found to Qualify Under Exemption 3 of the FOIA."

As previously noted, I do not request firm level data, and therefore firm authorization to release information that is aggregated and publicly released in a report to Congress seems to go well beyond the letter and intent of the statute. If the BIS response to the appeal determines that disclosure of this information "must be authorized in writing by an official of the firm competent to make such an authorization," in addition to pursuing this appeal further I will request that the BIS contact authorized representatives of each company to release the information. The contents of this correspondence with these firms would appear to be in the public interest (as well as substantively important for my own research) and thus I will request copies under FOIA.

I have cc'ed Northwestern University's Office of General Counsel, the members of which have provided invaluable assistance and have offered to help in any further discussions to resolve this appeal amicably and beyond. Additionally, I have already contacted the Office of Government Information Services who has also offered to do likewise.

Having discussed the matter with several FOIA staff members in the Department of Commerce, I also want to point out that the BIS claim to have partially complied to this request is incorrect. All the documents provided to me were already available on the BIS web site or in

Northwestern's Government Documents Library.

Thank you for your consideration of this appeal. Please do not hesitate to contact me with any further questions at (b) (6)

Sincerely,



Jonathan Caverley
Assistant Professor of Political Science



December 9, 2008

ACTION MEMORANDUM

TO: Christopher R. Wall
Assistant Secretary for Export Administration

FROM: Michael Vaccaro
Acting Director, Office of Strategic Industries & Economic Security

SUBJECT: 13th Annual Report to Congress on Offsets in Defense Trade

Action Requested

- Forward to the Under Secretary for approval EA's 13th annual report to Congress on Offsets in Defense Trade. The report has been cleared by the members of the Interagency Working Group on Offsets (IAWG), the Office of the Chief Counsel for Industry and Security (OCC/IS), the Office of Management and Budget (OMB), and by Deputy Assistant Secretary Borman.

Background

- In April 2008, Acting Assistant Secretary Borman approved SIES's action plan to restructure this annual report to Congress and to enhance data utilized in drafting the report. In particular, the action plan consisted of:
 1. Streamlining the report to eliminate redundant discussions;
 2. Incorporating data published by other U.S. Government agencies on U.S. international trade and defense spending into the report; and
 3. Initiating a rulemaking to amend BIS's offset reporting regulation to enhance the data collected from industry.
- The 13th annual report has been streamlined to presents the offset data collected from U.S. defense contractors in a clearer manner. The report also incorporates data published by the Department of Defense, the Census Bureau, and the Bureau of Economic Analysis. The new format has been well received by members of the IAWG.
- Industry has expressed a specific concern to SIES and the IAWG that the report has been used in the past by foreign governments during offset negotiations as leverage to demand higher offsets in offset agreements (citing offset agreement percentages obtained by other foreign governments and reported in the BIS report as examples). It is evident based my experience as a participant in the Department of Defense's Declaration of Principles/Market Access Working Group meetings that foreign officials are very familiar with the report.



- The 13th annual report includes two new *For Official Use Only* annexes that present country-specific offset activity data for 2007 and for the 1993-2007 period for Congress's information which would be redacted from the public version of the report. The data contained in the new annexes is much more detailed than the country-specific data published in previous reports and will be extremely useful in supporting the LAWG's discussions with foreign governments on limiting the adverse effects of offsets in defense procurements. The public version of the draft report will include aggregate, worldwide data on reported offset agreements and offset transactions.
- The 13th annual report also eliminates an annex that listed offset transactions by Standard Industrial Classification codes. We have eliminated this annex due to concerns with the methodology used in the past by SIES to self-classify offset transactions. We plan to address this issue in the rulemaking to update the offset reporting regulation to require industry to classify offset transactions by North American Industry Classification codes. We are currently finalizing the draft of the proposed rule.
- This report has been cleared by the Departments of Defense, State, Labor, the Office of the United States Trade Representative, OMB, and OCC/IS:

Recommendation

Forward the report to the Under Secretary for final clearance.

Approve  Disapprove _____ Let's Discuss _____

Date 12/10/08



December 9, 2008

ACTION MEMORANDUM

TO: Mario Mancuso
Under Secretary for Industry and Security

THROUGH: Daniel O. Hill, Deputy Under Secretary for Industry and Security *DOH*

FROM: Christopher R. Wall *CRW*
Assistant Secretary for Export Administration

SUBJECT: 13th Annual Report to Congress on *Offsets in Defense Trade*

Actions Requested

- Approve the attached report and sign the attached letters to the Chairmen and Ranking Members of the House Committee on Financial Services and the Senate Committee on Banking, Housing, and Urban Affairs.

Background

- Export Administration's Office of Strategic Industries and Economic Security has completed the 13th annual report to Congress on *Offsets in Defense Trade*. This report presents data on offset agreements and offset transactions from 1993 through 2007.
- During 1993-2007, U.S. companies reported entering into 625 offset agreements with 44 countries related to export sales totaling \$91.0 billion. These offset agreements were valued at \$65.5 billion and equaled 71.9 percent of the export contract value. For 1993-2007, U.S. companies reported 9,249 offset transactions in 48 countries. The actual value of the offset transactions from 1993 to 2007 was \$45.7 billion.
- The 13th annual report includes an annex prepared by the Interagency Offset Working Group (IaWG) highlighting consultations in 2008 with foreign nations on limiting the adverse effects of offsets in defense procurement. The IaWG is chaired by the Department of Defense with participation from Export Administration, the Departments of Defense, Labor, and State, and the Office of the United States Trade Representative.



- The 13th annual report includes two new *For Official Use Only* annexes that present country-specific offset activity data for 2007 and for the 1993-2007 period for Congress' information which will be redacted from the public version of the report. The data contained in the new annexes is much more detailed than the country-specific data published in previous reports and will be extremely useful in supporting the IaWG's discussions with foreign governments. The public version of the report will include aggregate, worldwide data on reported offset agreements and offset transactions.
- I have cleared this report as has BIS's Office of the Chief Counsel and the Office of Congressional and Public Affairs. We have also coordinated the report with the Office of Management and Budget, the Departments of Defense, Labor, and State, and the Office of the United States Trade Representative.
- Michael Vaccaro of SIES and William Houston also briefed Neal Orringer of the Senate Banking Committee and Scott Morris of the House Financial Services Committee on the draft report on December 23. Neither staffer expressed concern with the new format or in marking Annexes A and B as *For Official Use Only*.

Recommendation

- I recommend that you approve the attached report and sign the transmittal letters to Congress.

Approve _____ Disapprove _____ Discuss _____

Date _____

WebCIMs: 20793
 Drafted by: R. DeMarines (SIES), x3755
 Approved by: E. Longnecker, x5537
 M. Vaccaro, x8232
 M. Borman, x5491
 Cleared by: R. Woodard (OCC/IS), x5301
 W. Houston (OCPA), x6002

LIST OF FOIA EXEMPTIONS

(b)(1) – exempts from disclosure classified national security information

(b)(2) – exempts from disclosure records related solely to the internal personnel rules and practices of an agency.

(b)(3) – exempts from disclosure information prohibited from disclosure by another statute. An example of such a statute is section 12(c) of the Export Administration Act which protects information concerning export license applications.

(b)(4) – exempts from disclosure (1) trade secrets and (2) information which is (a) commercial or financial, (b) obtained from a person and (c) privileged or confidential. This exemption applies only to information submitted from outside the government. Information which has been voluntarily submitted is confidential if it constitutes information which the submitter would not customarily make available to the public. Information which has been compelled to be submitted is confidential if disclosure is likely to: 1) impair the government's ability to obtain necessary information in the future or 2) cause substantial harm to the competitive position of the person from whom the information was obtained.

(b)(5) – exempts from disclosure internal Federal government documents which are both pre-decisional and deliberative. In addition, the attorney work-product privilege and the attorney-client privilege have been incorporated into exemption (b)(5).

(b)(6) – exempts from disclosure information about individuals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, so long as that invasion is not outweighed by a public interest in disclosure.

(b)(7) – exempts from disclosure records or information compiled for law enforcement purposes (administration, civil, or criminal.) and meet one of the following sub parts:

(b)(7)(A) - exempts information where disclosure “could reasonably be expected to interfere with enforcement proceedings.”

(b)(7)(B) - exempts information that the disclosure “would deprive a person of a right to a fair trial or an impartial adjudication.”

(b)(7)(C) - exempts information that the disclosure of which “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”

(b)(7)(D) - exempts information that “could reasonably be expected to disclose the identity of a confidential source, including a state, local, or foreign agency or authority or any private institution which furnished information on a confidential basis.”

(b)(7)(E) - exempts information that “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.”

(b)(7)(F) - exempts information that “could reasonably be expected to endanger the life or physical safety of any individual.”