An Outline of the Principal U.S. Export Controls and Current Export Control Reforms

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[1] This document is intended to provide general guidance only. It should not be viewed as providing legal advice.

I. Introduction

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Nearly all items exported from the United States, including goods and technologies, are subject to one of the U.S. export control regimes. Those regimes prohibit the export of many types of items if the exporter does not first obtain a license from the U.S. government. An export license is typically required if an item has some military significance or could otherwise be used to harm the United States. Export controls can apply even if an export involves a commercial item with a benign intended use. Domestic transfers of some technologies to non-U.S. nationals working in the United States can also be prohibited without a government license.

Two particular export control regimes cover the vast majority of U.S. exports. They are the Export Administration Regulations ("EAR") and the International Traffic in Arms Regulations ("ITAR"). Over the years, exporters have faced significant hurdles in trying to comply with these regulations, particularly with respect to determining which set of regulations applies. These hurdles have caused U.S. companies to invest substantial resources in their compliance efforts and have increasingly lead to the inability to compete effectively with overseas suppliers. The U.S. government is now making significant efforts to reform the U.S. export control system to better protect national security while reducing unnecessary compliance burdens for U.S. industry.

For the most part, the ITAR restrict the export of items that have been specifically designed or modified for a military application. This, of course, covers items like weapons, but the ITAR also cover numerous items that may not appear to be military in nature. For example, a commercial electronic device might be modified such that it fits in a military application. Although the function of the device likely has not changed, there is at some level an unavoidable argument that the modification was specific to the given military application. As a result, the manufacturer would generally not be able to export the item or related technical information without a government license. In addition, any product into which such an item is incorporated would also become subject to the ITAR under the current rules. This has lead to many foreign manufacturers deliberately avoiding U.S. suppliers of ITAR-controlled parts.

The U.S. government's response has been to undertake a significant export control reform effort that primarily emphasizes amending the ITAR such that it controls those items that really are military in nature, while moving all other items currently under ITAR control to the EAR, which has more flexibility to license exports that are of lesser concern. The reform effort also includes plans to create a single licensing agency, enforcement agency, control list and information technology system. Much of those ambitions would require new legislation, but transitioning items from the ITAR to the EAR has been able to proceed under existing authority. That transition also addresses the central issue in most export control difficulties. Consequently, the bulk of the government's export control reform efforts have addressed the ITAR to EAR transition.

This outline provides a snapshot of the main ITAR and EAR provisions that determine when an export cannot proceed without a government license. It also provides an overview of the export control reform effort, what has been done and where it is going. The outline is a collaborative effort among several export control practitioners, and we hope you find it useful.

II. Export Administration Regulations ("EAR")

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A. Scope of the EAR

The EAR restrict more than just shipments from the United States to another country. The following identifies the main types of transactions subject to these regulations.

1. Exports from the United States and re-exports of goods, equipment, software and technology.[2]

   a. An "export" is an "actual shipment or transmission of items out of the United States." The EAR impose restrictions on actual movement of tangible items out of the United States as well as electronic transmissions of controlled technology and software out of the country.[3]

   b. A "reexport" is an "actual shipment or transmission … from one foreign country to another."[4]

   c. The "Deemed Export Rule" applies to exports and reexports. Generally speaking, sharing controlled technology with a non-U.S. national who is not a permanent resident in the country where the sharing occurs is deemed to be an export to the individual's home country.[5]

2. Exports from other countries of items made outside the United States that contain more than *de minimis* controlled U.S.-origin content.

   The *de minimis* rules provide that, if an item made outside the United States contains more than 10% or 25% controlled content (the applicable

[2] 15 C.F.R. §§ 734.2, 734.3.

[3] 15 C.F.R. § 734.2 (b)(1).

[4] 15 C.F.R. § 734.2 (b)(4).

[5] 15 C.F.R. § 734.2 (b)(2).

percentage depends on the destination), the item becomes subject to the EAR.[6]

In addition, foreign-made products of certain U.S. technologies can also become subject to the EAR.[7]

3. Several types of items are expressly excluded from the EAR's scope:

   a. Items that are subject to the jurisdiction of the State Department, Department of Energy or Nuclear Regulatory Commission.[8]

   b. Information defined as being publicly available.[9]

4. The U.S. Commerce Department's Bureau of Industry and Security administers the EAR.[10]

B. Circumstances under which the EAR require a license before an export or reexport may proceed

1. ECCN/destination: The applicable Commerce Control List ("CCL") classification of the good or technology or the Commerce embargo rules indicate whether the item involved is controlled for the intended destination.[11]

   a. The CCL is part of the EAR and consists of the following ten categories of types of items:

Category 0 –	Nuclear materials, facilities and equipment
Category 1 –	Special materials and related equipment, chemicals, "microorganisms" and "toxins"
Category 2 –	Systems, equipment and components
Category 3 –	Electronics
Category 4 –	Computers
Category 5 –	Part 1 – Telecommunications Part 2 – Information security
Category 6 –	Sensors and lasers
Category 7 –	Navigation and avionics

[6] 15 C.F.R. § 734.4, Part 734 Supp. 2.

[7] 15 C.F.R. § 736.2 (b)(3).

[8] 15 C.F.R. § 734.3 (b)(1).

[9] 15 C.F.R. § 734.3 (b)(3).

[10] www.bis.doc.gov.

[11] 15 C.F.R. § 738.2.

Category 8 – Marine
Category 9 – Aerospace and propulsion

b. Each of the ten CCL categories is divided further into Export Control Classification Numbers ("ECCN"), which are essentially alphanumeric codes associated with descriptions of various items.[12]

c. If an ECCN describes an item that will be exported, the notations in the "Reason for Control" subheading must then be studied. These notations make reference to the Commerce Country Chart, which an exporter must consult next unless the ECCN instructs otherwise.[13]

d. The Commerce Country Chart is a matrix listing the countries of the world in the left-hand column and reasons why exports might require a license in the top row.[14] If there is an "X" in the cell where the row for a given country and the column for an ECCN's reason for control meet, a license is required before items described by that ECCN can be exported to that country. Even if one reason for control noted in an ECCN does not apply to an intended destination, a license would be required if any other reason for control noted in the ECCN would apply.[15]

e. If an item is subject to the EAR but is not listed on the CCL, that item is referred to as "EAR99."[16]

f. EAR99 items can be exported and reexported under the EAR to any destination without a license provided the destination is not embargoed (such as Iran, Syria etc.) and the end-user and end-use prohibitions noted below do not apply.[17]

2. Prohibited end-use

a. The EAR identify a number of end-uses for which exports and reexports cannot be made without a license.[18] Examples include activities relating to:

[12] *See* http://www.bis.doc.gov/licensing/exportingbasics.htm.

[13] 15 C.F.R. § 738.4 (a).

[14] 15 C.F.R. § 738.3.

[15] 15 C.F.R. § 738.4 (a).

[16] 15 C.F.R. § 732.3 (b)(3).

[17] 15 C.F.R. § 736.2 (b).

[18] 15 C.F.R. Part 744.

i. Nuclear proliferation.[19]

ii. Development of chemical or biological weapons.[20]

iii. Military end-use in China.[21]

iv. Rocket systems.[22]

v. Foreign aircraft. [23]

3. Prohibited end-user: the end-user is on one of the U.S. government's prohibited lists

a. E.g., Denied Persons List, Unverified List, Entity List, Specially Designated Nationals List

b. The lists and a description of each are available at http://www.bis.doc.gov/complianceandenforcement/liststocheck.htm.

4. Embargoes: Part 746 of the EAR identifies the scope of the embargoes the United States implements through the EAR. The U.S. Treasury Department also administers embargoes through its Office of Foreign Assets Control ("OFAC"). OFAC's embargoes are typically broader than those under the EAR.[24]

C. **License Exceptions**

1. Even if a license is required, several license exceptions in the EAR might override that requirement.[25]

2. Examples of the types of exports that might be covered by an exception include:

[19] 15 C.F.R. § 744.2.

[20] 15 C.F.R. § 744.4.

[21] 15 C.F.R. § 744.21.

[22] 15 C.F.R. § 744.3.

[23] 15 C.F.R. § 744.7.

[24] *See, e.g.*, 31 C.F.R. Parts 515 (Cuba), 535 (Iran) and 538 (Sudan).

[25] 15 C.F.R. Part 740.

a. Exports for the repair or replacement of previously exported items.[26]

b. Exports for government programs.[27]

c. Exports of certain tools of trade.[28]

d. Exports of limited value.[29]

e. The U.S. government has also recently issued a new exception called "Strategic Trade Authorization" (or "STA"), which permits many restricted exports and reexports to countries that are of lesser concern provided certain agreements regarding use of items covered are in place.[30]

D. License Applications

1. If a transaction cannot proceed without a license, a license application must be submitted to BIS using its online system called SNAP-R. SNAP-R requires a free registration and certification for both the company making the application and the individual who will be administering the company's SNAP-R account.[31]

2. License applications can cover multiple items being sent to a given recipient and typically require identification of the end-user, end-use, ECCN, quantity and fair market value.[32]

3. Many license applications also require additional information specific to the type of application and may include end-user certificates, ultimate consignee statements or import certifications depending upon the reason why a license is required and the intended destination.[33]

[26] 15 C.F.R. § 740.10.

[27] 15 C.F.R. § 740.11.

[28] 15 C.F.R. § 740.9 (a)(2)(i).

[29] 15 C.F.R. § 740.3.

[30] 15 C.F.R. § 740.20.

[31] 15 C.F.R. § 748.7 (b).

[32] 15 C.F.R. Part 748, Supp. 1.

[33] 15 C.F.R. §§ 748.9, 748.10, 748.11 and Supp. 2.

E. **Antiboycott**

1. The antiboycott laws were adopted to prevent U.S. firms from participating in foreign boycotts that the United States does not sanction. The Arab League boycott of Israel is the principal foreign economic boycott that U.S. companies must avoid.[34]

2. U.S. companies operating in interstate or foreign commerce generally cannot enter agreements to:

   a. Refuse to do business with or in Israel or with blacklisted companies.

   b. Discriminate against other persons based on race, religion, sex, national origin or nationality.

   c. Furnish information about business relationships with or in Israel or with blacklisted companies.

   d. Furnish information about the race, religion, sex, or national origin of another person.

3. Companies are also subject to recordkeeping and reporting requirements regarding antiboycott requests received.[35]

4. The Treasury Department implements similar provisions through the Internal Revenue Code.[36]

F. **Recordkeeping**

1. The EAR imposes requirements regarding export-related documents a company must keep.[37]

2. Records to be retained include: export control documents, memoranda, notes, correspondence, contracts, invitations to bid, books of account, financial records, restrictive trade practice or boycott documents and reports and other records relating to covered transactions.

3. Records must be retained for five years from the latest of the export from the U.S., any known reexport, transshipment, or diversion of the item,

[34] 15 C.F.R. Part 760; http://www.bis.doc.gov/complianceandenforcement/antiboycottcompliance.htm.

[35] 15 C.F.R. Part 762

[36] *See* 26 U.S.C.A. § 999.

[37] 15 C.F.R. Part 762

any other termination of the transaction or the date the regulated person receives a boycott-related request or requirement.

G. **Export Clearance Requirements**

The EAR impose requirements to file an Automated Export System entry with U.S. Customs for exports requiring a license and to include a destination control statement on invoices for shipments of non-EAR99 items.[38]

H. **Penalties**

1. The possible penalties for violating the EAR are very steep. For civil violations, the monetary penalties can be $250,000 or twice the value of the transaction for each violation. In addition, a company can lose its export privileges and be subject to outside audits.[39]

2. For criminal violations the penalty can be $1 million or twice the benefit received from the transaction for each violation plus possible jail time of twenty years.[40]

III. International Traffic in Arms Regulations ("ITAR")

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A. Scope of the ITAR

1. Exports and temporary imports of hardware, technical data (including software) and services that are designed or modified for a military application are regulated under the International Traffic in Arms Regulations ("ITAR").[41] The items controlled are called "defense articles" or "defense services." Defense articles are listed on the U.S. Munitions List ("USML").[42]

2. The ITAR is administered by the U.S. State Department's Directorate of Defense Trade Controls ("DDTC")[43], in coordination with the Defense Technology Security Administration ("DTSA") and other offices within the Department of Defense.

[38] 15 C.F.R. §§ 758.1, 758.6.

[39] 50 U.S.C.A. § 1705 (b); 15 C.F.R. §§ 764.3 (a)(1), (2).

[40] 18 U.S.C.A. § 3571; 50 U.S.C.A. § 1705 (c); 15 C.F.R. § 764.3 (b).

[41] 22 C.F.R. Pts. 120-130.

[42] 22 C.F.R. § 121.1.

[43] www.pmddtc.state.gov.

3. The purpose of the regulations is to further the security objectives of the United States by "control[ling] the international trade in armaments" while supporting "valid requirements for effective and mutually beneficial defense relationships in order to maintain and foster the environment of international peace and security essential to social, economic, and political progress."[44]

4. Items may be designated "defense articles" (including technical data[45]) or "defense services" and subject to the ITAR if they are:

a. Specifically designed, developed, configured, adapted, or modified for a military application, and

i. Do not have predominant civil applications, and

ii. Do not have performance equivalent (defined by form, fit and function) to those of an article or service used for civil applications; or

b. Specifically designed, developed, configured, adapted, or modified for a military application, and have significant military or intelligence applicability such that control under the ITAR is necessary.

5. The intended use of an item after its export is not relevant in determining whether an item is on the USML. The determination as to whether an item is a defense article is made by DDTC with the concurrence of the Defense Department, and the agencies are afforded great discretion in making those determinations.[46]

B. License Requirements

1. Exports and Reexports

[44] 22 U.S.C. § 2751.

[45] Technical Data" includes (1) information that is required to design, develop, produce, manufacture, assemble, operate, repair, test, maintain, or modify a defense article (e.g., blueprints, drawings, photographs, plans, instructions and documentation); (2) classified information relating to defense articles and defense services; (3) information covered by an invention secrecy order; and (4) software directly related to defense articles. "Technical Data" does not include basic marketing information on function or purpose or general system descriptions of defense articles, information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities, or information in the public domain. 22 C.F.R. § 120.10.

[46] *See* 22 U.S.C. § 2778(h); *see also* United States v. Mak, 683 F.3d 1126, 1131 (9th Cir. 2012) ("The AECA provides that the State Department's designation of items as defense articles 'shall not be subject to judicial review.'")

Exports of defense articles and defense services to any country require authorization from DDTC either in the form of a license or license exemption.[47] This includes exports to the U.S. military or other U.S. persons outside the United States, disclosure of technical data to foreign persons[48] in the United States, and technical assistance provided to foreign persons in the United States.

2. Licenses

DDTC issues permanent and temporary licenses for the export of unclassified hardware (Forms DSP-5 and DSP-73), as well as licenses for classified exports (DSP-85) and temporary import (DSP-61).[49]

Defense services are authorized pursuant to Technical Assistance Agreements and Manufacturing License Agreements.[50] In addition to information regarding the item to be exported, any intermediate consignees, the end-user and end-use, license applicants are required to disclose payments, offers or agreements to pay "political contributions in an aggregate amount of $5,000 or more," or "fees or commissions in an aggregate amount of $100,000 or more" related to the license application.[51]

3. License Exemptions

Certain limited license exemptions are available for export and temporary imports of defense articles and defense services.[52] However, exports to certain proscribed countries are not eligible for those exemptions, and license applications for exports to those countries or nationals of those countries are subject to a policy of denial.[53]

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[47] 22 C.F.R. §§ 123.1, 124.1.

[48] "Foreign Person" means a person who is not a US citizen, lawful permanent resident (i.e., green card holder), or other protected person as defined by 8 U.S.C. § 1324b(a)(3); a foreign corporation, business association, partnership, trust, society or any other entity or group that is not incorporated or organized to do business in the United States; or an international organization, foreign government or any agency or subdivision of foreign governments (e.g. diplomatic missions). *Id*. § 120.16.

[49] *Id*. § 123.1.

[50] *Id*. § 124.1.

[51] This requirement applies to applications that relate to exports valued at $500,000 or more. *See id*. § 130.2.

[52] *See id*. §§ 123.4 (temporary imports), 123.16 (exports of defense articles), 124.2 (training and military service), 125.4 (technical data exports), 126.4 (U.S. Government Shipments), 126.5 (Canadian Exemption), 126.6 (Foreign Military Sales).

[53] 22 C.F.R. § 126.1. A list of proscribed countries is available at http://pmddtc.state.gov/embargoed_countries/index.html.

C. Brokering

1. Scope

   a. "Brokering" of defense articles is also subject to the ITAR.[54] "Brokering activities" include "financing, transportation, freight forwarding, or taking of any other action that facilitates the manufacture, export, or import or a Defense Article or Defense Service, irrespective of its origin."

   b. U.S. persons are subject to the ITAR brokering regulations when they engage in "brokering activities" related to U.S. - or foreign-origin defense articles, and whether the activities take place inside or outside the United States.[55] Foreign persons are subject to the ITAR brokering regulations when they engage in "brokering activities" related to U.S.-origin defense articles, including defense articles manufactured in foreign locations that incorporate U.S. components or are modified through the provision of U.S. defense services.[56]

2. Prior Approvals, Registration and Reporting

   a. Persons engaged in brokering activities are required to obtain prior written approval or provide prior notification to DDTC before engaging in brokering activities, unless an exemption applies.[57]

   b. Manufacturers, exporters and brokers of defense articles or defense services are required to register with DDTC on an annual basis.[58] Manufacturers of defense articles are required to register regardless of whether they export those articles.[59] Brokers are also required to file annual reports enumerating and describing their brokering activities by quantity, type, U.S. dollar value, and purchaser(s) and recipient(s), license(s) numbers for approved

[54] 22 C.F.R. Pt. 129.

[55] *See id*. § 129.2(b). U.S persons that are engaged in brokering activities limited exclusively to U.S. domestic sales or transfers are not subject, but even one activity related to a foreign sale or transfer will subject a U.S person to the regulations. *See id*.

[56] *See id*. § 129.2(b).

[57] *See id*. § 129.6.

[58] *Id*. § 122.1.

[59] *Id*.

activities and any exemptions utilized for other covered activities.[60]

D. Violations

Violations of the ITAR are subject to fines and penalties, including fines of up to $1,000,000 for each violation and imprisonment for up to 20 years.[61] Penalties can be imposed both on companies as well as individuals in their personal capacities. DDTC has entered into several significant settlement agreements during the last several years.[62]

IV. Export Control Reform Effort

A. Purpose, Approach and Benefits

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1. The Issue

While there is general agreement between the U.S. government and industry that the United States needs a robust export control system that prevents its adversaries from obtaining sensitive equipment and technologies, there is also agreement that the existing system creates unnecessary burdens for industry and hinders the ability of the U.S. military to cooperate with its closest allies.[63] U.S. companies in the aerospace industry have noted for many years the erosion of their market share due to "ITAR-free" products offered by their foreign competitors.[64] Infrared detection equipment manufacturers have also noted that proposed ITAR controls on certain items could result in "a significant reduction, if not the complete elimination of manufacturing

[60] *See id.* § 129.9.

[61] *See id.* § 127.1(a)(4).

[62] *See*, http://www.pmddtc.state.gov/compliance/consent_agreements.html

[63] *See*, *e.g.*, Remarks as Delivered by Secretary of Defense Robert M. Gates, Business Executives for National Security (Export Control Reform), Ronald Reagan Building and International Trade Center, Washington DC, April 20, 2010; Marion C. Blakey, President & CEO, Aerospace Industries Association of America, Statement for the Record, House Committee on Foreign Affairs, Export Controls, Arms Sales, and Reforms: Balancing U.S. Interests, Part II, February 7, 2012; National Association of Manufacturers, *The NAM Blueprint for a 21st Century Export Control Regime*, available at http://www.nam.org/Issues/Trade-Regulation/Export-Controls.aspx?q=Export+Controls&p=3.

[64] *See*, *e.g.*, P. de Selding, *U.S., Thales at Odds Over Request for ITAR-free Satellite Design Information*, Space News (Jan. 6, 2012), available at http://www.spacenews.com/policy/120106-thales-request-itar-free-sat-info.html (describing DDTC investigation beginning in 2008 of "ITAR-free" satellites offered by Thales Alenia Space).

and design facilities in the United States."[65] In April 2010, then-Secretary of Defense Robert Gates described the weakening of U.S. "bilateral relationships, credibility, and ultimately American security" caused by the current export control regime.

2. The Proposal

To address these issues, President Obama has proposed to streamline U.S. export controls by building "higher walls around the export of our most sensitive items while allowing the export of less critical ones under less restrictive conditions."[66] To that end, the proposed reforms include a transformation to a Single Control List; Single Primary Enforcement Coordination Agency, Single Information Technology (IT) System, and Single Licensing Agency (the "Four Singularities").[67]

3. Authority Needed

Some of these changes would require Congress to enact authorizing legislation. However, the Administration can accomplish and has been working toward many of its proposed reforms, and make significant improvements to export control processes, through its own action. Examples include amendment of the regulation on encryption products, creation of a "Strategic Trade Authorization" license exception to allow for exports of national security controlled items to certain countries, issuance of proposed rules amending the ITAR and EAR and revising the definition of "specially designed," and establishment of the Export Enforcement Coordination Center for enhanced information sharing and coordination between law enforcement and intelligence officials regarding possible violations of U.S. export controls laws.[68]

B. Status Snapshot

Author: Jahna Hartwig, Williams Mullen PC

1. The most significant efforts to date have been the proposed revisions to the lists of controlled items in both the ITAR and EAR. The State and Commerce Departments have published proposed rules relating to

[65] R. Tiron, T. Capaccio, *Infrared Export Limits Pentagon Wants Opposed by Industry*, Bloomberg Businessweek (Aug. 29, 2012), available at http://www.businessweek.com/news/2012-08-29/infrared-export-limits-pentagon-wants-opposed-by-industry?goback=%2Egde_1657217_member_159229690

[66] The White House, Video Remarks by The President to the Department of Commerce Annual Export Controls Update Conference (Aug. 30, 2010), available at www.aia-aerospace.org/assets/wh_videoremarks_08302010.pdf.

[67] The White House, Fact Sheet on the President's Export Control Reform Initiative (Apr. 20, 2010), available at http://www.whitehouse.gov/the-press-office/fact-sheet-presidents-export-control-reform-initiative.

[68] *See* President's Export Control Reform Initiative, available at http://export.gov/ECR/.

controls on Explosives and Energetic Materials,[69] Vessels,[70] Submarines,[71] Military Vehicles,[72] Aircraft,[73] Military Training Equipment,[74] Protective Personnel Equipment and Shelters,[75] Auxiliary Military Equipment,[76] and Gas Turbine Engines.[77] These proposed rules are addressed in more detail below.

2. Congressional involvement is required to complete the list changes. Section 38(f) of the Arms Export Control Act (AECA) states that the "President may not remove any item from the Munitions List until 30 days after the date on which the President has provided notice of the proposed removal to the Committee on International Relations of the House of Representatives and to the Committee on Foreign Relations of the Senate . . . ."[78]

3. While there is no legal bar to proceeding with the removal of items after the 30 day period has expired, past Administrations have traditionally honored Congressional requests to hold the process pending Congressional approval. This may be due, in part, to the fact that Congress could subsequently pass legislation to place items on the U.S. Munitions List, as it did with certain satellites and equipment in 1999. Commercial communications satellites, other civilian satellites and associated commercial equipment are controlled as defense articles pursuant to the 1999 National Defense Authorization Act. Removal of those items from the U.S. Munitions List therefore would require legislation.

4. In a July 2012 speech, the Commerce Department's Under Secretary for Industry and Security noted that "export control reform is far from complete," and that, "should the President be reelected, we hope to consider these items as second-term initiatives."[79]

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[69] *See* 77 Fed. Reg. 25,932 (May 2, 2012); 77 Fed. Reg. 25,944 (May 2, 2012).

[70] *See* 76 Fed. Reg. 80,282 (Dec. 23, 2011); 76 Fed. Reg. 80,302 (Dec. 23, 2011).

[71] *See* 76 Fed. Reg. 80,291 (Dec. 23, 2011); 76 Fed. Reg. 80,305 (Dec. 23, 2011).

[72] *See* 76 Fed. Reg. 76,085 (Dec. 6, 2011); 76 Fed. Reg. 76,100 (Dec. 6, 2011).

[73] *See* 76 Fed. Reg. 68,675 (Nov. 7, 2011); 76 Fed. Reg. 68,694 (Nov. 7, 2011)

[74] *See* 77 Fed. Reg. 33,688 (June 7, 2012); 77 Fed. Reg. 35,317 (June 13, 2012).

[75] *See* 77 Fed. Reg. 33,698 (June 7, 2012); 77 Fed. Reg. 35,310 (June 13, 2012).

[76] *See* 77 Fed. Reg. 29,564 (May 18, 2012); 77 Fed. Reg. 29,575 (May 18, 2012).

[77] *See* 76 Fed. Reg. 76,072 (Dec. 6, 2011); 76 Fed. Reg. 76,097 (Dec. 6, 2011).

[78] 22 U.S.C. § 2778(f).

[79] Remarks of Eric L. Hirschhorn, Under Secretary for Industry and Security, U.S. Department of Commerce Bureau of Industry and Security Update 2012 Conference (July 17, 2012), available at http://www.bis.doc.gov/news/2012/hirschhorn_update_2012.htm.

C. Key Speeches

Authors: Curtis M. Dombek and Neil Ray, Sheppard Mullin Richter & Hampton LLP

1. Remarks as delivered by Secretary of Defense Robert M. Gates

   April 20, 2010, Export Control Reform, Washington DC, Available at: http://www.defense.gov/speeches/speech.aspx?speechid=1453

2. The Administration's Export Control Reform Plans Remarks by General Jones, National Security Advisor

   June 30, 2010, Available at: http://www.aia-aerospace.org/assets/speech_jones_06302010.pdf

3. Video Remarks by the President to the Department of Commerce Annual Export Controls Update Conference

   August 31, 2010, Annual Exports Control Update, Washington DC, Available at: http://www.whitehouse.gov/the-press-office/2010/08/30/video-remarks-president-department-commerce-annual-export-controls-updat

4. Remarks by Eric L. Hirschhorn, Under Secretary of Commerce for Industry and Security

   July 17, 2012, 2012 Update Conference, Washington DC, Available at: http://www.bis.doc.gov/news/2012/hirschhorn_update_2012.htm

5. Remarks by Kevin J. Wolf, Assistant Secretary of Commerce for Export Administration

   July 17, 2012, 2012 Update Conference, Washington DC, Available at: http://www.bis.doc.gov/news/2012/wolf_update_2012.htm

6. Remarks by Andrew J. Shapiro, Assistant Secretary of State for Political-Military Affairs

   July 17, 2012, 2012 Update Conference, Washington DC, Available at: http://www.state.gov/t/pm/rls/rm/195155.htm

D. Changes in Effect

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1. New ECCN Series, OY521[80]

   a. April 13, 2012: BIS publishes final rule which amends the EAR by establishing a new ECCN series, 0Y521, on the CCL and makes corresponding changes to the EAR.

   b. The ECCN 0Y521 series will be used for items that warrant control on the CCL but are not yet identified in an existing ECCN. This new temporary holding classification is equivalent to USML Category XXI (Miscellaneous Articles), but with a limitation that while an item is temporarily classified under ECCN 0Y521, the U.S. Government works to adopt a control through the relevant multilateral regime(s); to determine an appropriate longer-term control over the item; or determines that the item does not warrant control on the CCL.

   c. Items will be added to the 0Y521 ECCNs by the Department of Commerce, with the concurrence of the Departments of Defense and State, when it identifies an item that should be controlled because it provides a significant military or intelligence advantage to the United States or because foreign policy reasons justify such control.

2. Establishment of E2C2 and ITU

   a. March 7, 2012: The White House announces the official opening of the Export Enforcement Coordination Center (E2C2) and the Information Triage Unit (ITU).

   b. Export Enforcement Coordination Center (E2C2): Established by the President under Executive Order 13558, the E2C2 is responsible for enhanced information sharing and coordination between law enforcement and intelligence officials regarding possible violations of U.S. export controls laws.

      The E2C2 is administered by the Department of Homeland Security (DHS) with a leadership team comprised of officials from DHS, the Federal Bureau of Investigation, and the Department of Commerce. The opening of the E2C2 builds on the increased criminal penalties for export control violations and the provision of Commerce's permanent law enforcement authorities implemented in partnership with Congress in the Comprehensive Iran Sanctions, Accountability, and Divestment Act

[80] 77 Fed. Reg. 22,191 (April 13, 2012).

(CISADA), further strengthening the enforcement of U.S. export controls.

c. Information Triage Unit (ITU): The ITU is responsible for assembling and disseminating relevant information, including intelligence, from which to base informed decisions on proposed exports requiring a U.S. Government license. This multi-agency screening will coordinate the reviews of separate stove-piped processes across the government to ensure that all departments and agencies have a full dataset, consistent with national security, from which to make decisions on license applications. The ITU is housed at the Department of Commerce.

d. In support of the E2C2 and the ITU, the Director of National Intelligence designated the Office of the National Counterintelligence Executive as the entity responsible for coordinating export control issues involving the Intelligence Community.

3. Strategic Trade License Exception[81]

a. June 16, 2011: BIS publishes a final rule which amends the EAR by adding new Strategic Trade License Exception.

b. STA permits the export of a defined set of items on the Commerce Control List – certain dual-use items and less significant munitions items, predominantly parts and components – to Allies and certain other friendly countries that pose little risk of diversion without a specific license.

c. To be eligible, exporters would have to provide notification to BIS of the transaction and a destination control statement notifying the foreign consignee of the terms of the exception's safeguard requirements, and they must obtain from the foreign consignee a statement acknowledging its understanding and willingness to comply with the requirements of the license exception.

d. STA is available in various degrees to 44 countries. To a group of 36 countries made up of NATO partners and members of at least three multilateral nonproliferation control regimes, dual-use items controlled for national security (NS), chemical or biological weapons, nuclear non-proliferation, regional stability, crime control, or significant items (hot section jet technology) are eligible for an STA. This would include almost all items on the CCL that are not controlled for statutory reasons. An additional eight countries would be eligible for exports, reexports, or transfers controlled for NS-only and are not designated as STA-excluded.

[81] 77 Fed. Reg. 35,276 (June 16, 2011).

e. Dual-use items controlled for missile technology (MT), chemical weapons (CW), short supply (SS), or surreptitiously listening (SL) would not be eligible for export under STA. Certain implements of execution and torture, pathogens and toxins, software and technology for "hotsections" of aero gas-turbine engines, and encryption have also been excluded from the STA.

f. The exception is only relevant to exports, reexports, and transfers for which a license is required under the EAR. Thus, if the EAR do not impose an obligation to apply for and receive a license before exporting, reexporting, or transferring an item subject to the EAR, STA is not relevant to the transaction. The exception does not alter any of the General Prohibitions in the EAR against unlicensed exports, reexports, or transfers to proscribed end users, end uses, or destinations.

4. Consolidation of Screening Lists

December 9, 2010 – Consolidation of export screening lists of the Departments of Commerce, State and the Treasury into one spreadsheet as an aide to industry in conducting electronic screens of potential parties to regulated transactions.[82]

5. Harmonization of Criminal Penalties

July 1, 2010 – CISADA harmonizes the criminal penalty provisions of the United Nations Participation Act of 1945, the Arms Export Control Act, and the Trading with the Enemy Act: now under each law, criminal fines of up to $1 million may be assessed, and individuals may be imprisoned for up to 20 years.

E. Pending Rule Changes

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1. Transition from the U.S. Munitions List to the Commerce Control List

a. Overview

Currently, under the International Traffic in Arms Regulations (ITAR), DDTC has primary responsibility for controlling exports of items with military applications that are identified on the USML. Pursuant to the Export Administration Regulations (EAR), BIS administers the CCL, which identifies and classifies numerous commercial and dual-use items that are also subject to export controls. Since the announcement of the Export Control Reform Initiative, DDTC and BIS, in conjunction with

[82] http://export.gov/ecr/eg_main_023148.asp.

the U.S. Department of Defense, have been working to revise the USML and CCL so that they can be merged into a single "positive" list.

The first step in this process has involved an evaluation of all items on the current USML and CCL according to objective, technical parameters. This is being done through the so-called "bright line" process to determine which items should be controlled as dual-use goods and which should be controlled as munitions. As this review continues, the agencies have been gradually issuing proposals to move certain items that do not perform an inherently military function or otherwise provide a critical military or intelligence advantage from the USML to a newly created "Commerce Munitions List" within the CCL.

Proposed revisions to the USML categories below have been published in the Federal Register since 2011 (citations provided above) although no final rules on these category revisions have been published:

- Category V (Explosives and Energetic Materials, Propellants, Incendiary Agents and Their Constituents);
- Category VI (vessels of war and naval equipment);
- Category VII (tanks and military vehicles);
- Category VIII (aircraft and associated equipment);
- Category X (protective personnel equipment and shelters)
- Category XIII (auxiliary military equipment);
- A new Category XIX (gas turbine engines) carved out of Category VIII, and
- Category XX (submersible vessels and oceanic equipment).

According to these proposals, items moved to the Commerce Munitions List on the CCL will be designated with a new "600 series" export control classification number (ECCN). With certain exceptions, a license would be required to export or re-export the "600 series" items to all countries except Canada. The proposals would also create a new paragraph "y" for certain "600 series" items that will require a license for export to the People's Republic of China (PRC) for certain military end uses. In addition, a general policy of denial of export licenses will apply to all "600 series" items that are destined for export to a country subject to a U.S. arms embargo.

The proposed rules have further detailed how parts, components, and accessories and attachments will be handled. Specifically-identified parts, components, and accessories and attachments will be listed in the "600 series" next to the end item to which they are most directly related. Generic parts, components, and accessories and attachments will be classified under a new paragraph "x" of an item description if, for example, they were "specially designed" for the relevant item.

b. Category V – Explosives and Energetic Materials, Propellants, Incendiary Agents and Their Constituents **(DDTC Rule)**

1. One major change proposed to this category involves removal of broad catchalls with the listing of specific materials that warrant ITAR control caught by current catchalls. For example, paragraph (a)(35) as currently written broadly controls, ''Any other explosive not elsewhere identified in this category specifically designed, modified, adapted, or configured (e.g., formulated) for military application.'' This catchall is being removed.

2. Examples of materials added because of deletion of catchalls are as follows:

- tetrazines (BTAT (Bis(2,2,2-trinitroethyl)-3,6-diaminotetrazine);
- LAX–112 (3,6-diamino- 1,2,4,5-tetrazine- 1,4dioxide);
- PNO (Poly(3-nitrato oxetane); 4,5 diazidomethyl-2-methyl-1,2,3-triazole (iso- DAMTR));
- TEPB (Tris (ethoxyphenyl) bismuth)(CAS 90591–48–3); and
- TEX (4,10-Dinitro-2,6,8,12-tetraoxa-4,10-diazaisowurtzitane).

3. Those materials currently captured in the catchalls that do not warrant control on the USML are to be controlled on the CCL. Examples of such materials to be removed from various catchalls and controlled on the CCL are spherical aluminum powder and hydrazine and its derivatives.

4. Another major change proposed to this category involves addressing U.S. obligations to multinational regimes. There is a limited catchall (a)(32) that is being changed from 8700 meters

per second to 8000 meters per second to match the criteria from the Nuclear Suppliers Group. The proposed revision would read as follows (see paragraph (a)(38)): ''Explosives, not otherwise enumerated in this paragraph or on the CCL in ECCN 1C608, with a detonation velocity exceeding 8,000m/s at maximum density or a detonation pressure exceeding 34 Gpa (340 kbar).'' Additional hydrazine materials are specified by the Missile Technology Control Regime (MTCR) and these entries were added.

5. Additionally, some materials are to be added that are significant to the military but have little commercial application. For example, DNAN (2,4 Dinitroanisole), a military explosive currently covered by the catchall in (a)(35), will be controlled in paragraph (a)(11).

c. Category V – Explosives and Energetic Materials, Propellants, Incendiary Agents and Their Constituents **(BIS Rule)**

1. In conjunction with a proposed rule from DDTC, BIS published a proposed rule that described how energetic materials and related articles that the President determines no longer warrant control under Category V would be controlled under the Commerce Control List (CCL) in new Export Control Classification Numbers (ECCNs) 1B608, 1C608, 1D608, and 1E608.

2. If implemented, this proposed rule would also control under ECCN 1C111 some of the aluminum powder and hydrazine and derivatives thereof that are now controlled under Category V of the USML.

3. This proposed rule also would control equipment for the ''production'' of explosives and solid propellants, currently controlled under ECCN 1B018.a, and related ''software,'' currently controlled under ECCN 1D018, under new ECCNs 1B608 and 1D608, respectively.

4. In addition, this proposed rule would control commercial charges and devices containing energetic materials, which are currently controlled under ECCN 1C018, under new ECCN 1C608.

d. Category VI – Vessels (**DDTC Rule**)

1. The changes described in BIS's proposed rule and the State Department's proposed amendment to Category VI of the USML were based on a review of Category VI by the Defense

Department, which worked with the Departments of State and Commerce in preparing the proposed amendments.

2. The review was focused on identifying the types of articles that are now controlled by USML Category VI that are either: (i) Inherently military and otherwise warrant control on the USML, or (ii) if they are a type common to civil applications, possess parameters or characteristics that provide a critical military or intelligence advantage to the United States, and are almost exclusively available from the United States.

3. If an article satisfies either or both of those criteria, the article remains on the USML. If an article does not satisfy either criterion, but is nonetheless a type of article that is, as a result of differences in form and fit, ''specially designed'' for military applications, then it is identified in one of the new ECCNs in BIS's proposed rule.

4. Finally, if an article does not satisfy either of the two criteria and is not found to be ''specially designed'' for military applications, the article is not affected by this rule because such items already are not on the USML.

5. The proposed revision narrows the types of surface vessels of war and special naval equipment controlled on the USML to only those that warrant control under the stringent requirements of the Arms Export Control Act. It will remove from control of the USML harbor entrance detection devices formerly controlled under Category VI(d) and will no longer include submarines, which will be controlled in Category XX.

6. This proposed rule also revises § 121.15 to more clearly define ''surface vessels of war and special naval equipment'' for purposes of the revised USML Category VI.

e. Category VI – Vessels (**BIS Rule**)

1. BIS's proposed rule would create five new 600 series ECCNs in CCL Category 8—8A609, 8B609, 8C609, 8D609, and 8E609—that would control articles the President determines no longer warrant control under USML Category VI.

2. Paragraph .a of ECCN 8A609 would control surface vessels of war that are ''specially designed'' for military use, but not enumerated in the USML or elsewhere on the CCL.

3. This proposed rule does not add gas turbine engines for military vessels of war to the proposed new ECCN 8A609. Instead, the Administration issued a separate proposed rule describing the U.S. Government's controls on gas turbine engines and related items for military aircraft, ships, and vehicles that no longer warrant control under the USML or an existing 018 ECCN on the CCL.

4. Similarly, this proposed rule does not address military submersible vessels of war, submarines, and related articles that no longer warrant control under the USML.

5. ECCN 8B609.a would control test, inspection, and production ''equipment'' ''specially designed'' for the ''development'' or ''production'' of surface vessels of war and related commodities enumerated in ECCN 8A609 (except for items in 8A609.y) or in USML Category VI. Paragraphs .b through .x and paragraphs .y.1 through .y.98 would be reserved for possible future use.

6. ECCN 8C609.a would control materials ''specially designed'' for the ''development'' or ''production'' of surface vessels of war and related commodities enumerated in ECCN 8A609 that are not specified elsewhere on the CCL, such as in Category 1, or on the USML. Paragraphs .b through .x of ECCN 8C609 would be reserved for possible future use. USML subcategory XIII(f) would continue to control structural materials 'specifically designed, developed, configured, modified, or adapted for defense articles,'' such as warships and vessels of war controlled by USML subcategory VI(a).

7. The State Department plans to publish a proposed rule that would make USML Category XIII(f) a more positive list of controlled structural materials. Commerce will publish a corresponding proposed rule under which ECCN 8C609 would control any materials ''specially designed'' for USML Category VI or ECCN 8A609 that would no longer be controlled by the revised XIII(f).

8. ECCN 8D609.a would control ''software'' ''required'' for the ''development,'' ''production,'' operation, or maintenance of commodities enumerated in 8A609, 8B609, or 8C609. Paragraphs .b through .x of ECCN 8D609 would be reserved for possible future use. ECCN 8D609.y would control specific ''software'' ''specially designed'' for the ''development,'' ''production,'' operation, or maintenance of commodities enumerated in ECCN 8A609.y, 8B609.y, or 8C609.y.

9. ECCN 8E609.a would control ‘‘technology’’ ‘‘required’’ for the ‘‘development,’’ “production,’’ operation, installation, maintenance, repair, or overhaul of items enumerated in ECCN 8A609, 8B609, 8C609, or 8D609, except for items enumerated in 8A609.y, 8B609.y, 8C609.y, or 8D609.y. Paragraphs .b through .x of ECCN 8E609 would be reserved for possible future use. ECCN 8E609.y would control specific ‘‘technology’’ ‘‘required’’ for the ‘‘development,’’ ‘‘production,’’ operation, installation, maintenance, repair, or overhaul of items enumerated in ECCN 8A609.y, 8B609.y, 8C609.y, or 8D609.y.

10. In addition, ECCNs 8A609, 8B609, 8C609, 8D609, and 8E609 would each contain a special paragraph designated ‘‘.y.99.’’ Paragraph .y.99 would control any item that meets all of following criteria:

- The item is not listed on the CCL;
- The item was previously determined to be subject to the EAR in an applicable commodity jurisdiction determination issued by the U.S. Department of State; and
- The item would otherwise be controlled under one of these Category 8, 600 series, ECCNs because, for example, the item was ‘‘specially designed’’ for a military use.

11. Items in these .y.99 paragraphs would be subject to antiterrorism controls.

f. Category XX – Submersible Vessels (**DDTC Rule**)

1. The proposed revision accounts for the movement of submarines from Category VI and consolidates the controls that will apply to all submersible vessels in a single category. In addition, naval nuclear propulsion power plants for submersible vessels controlled under Category XX, formerly controlled under Category VI(e), will now be controlled under Category XX(b). This proposed rule also creates § 121.14 to more clearly define ‘‘submersible vessels and related articles.’’ Finally, this revision makes conforming edits to §§ 123.20, 124.2, and 125.1 (nuclear related controls).

2. This proposed rule controls only those parts, components, accessories, and attachments that are specifically designed for a

defense article controlled in this category. All other parts, components, accessories, and attachments will become subject to the new 600 series controls in Category 8 of the CCL.

g. Category XX – Submersible Vessels (**BIS Rule**)

1. The proposed rule describes how submersible vessels, oceanographic equipment and related articles that the President determines no longer warrant control under Category VI or Category XX of the USML would be controlled under the CCL in new ECCNs 8A620, 8B620, 8D620, and 8E620.

2. In addition, this proposed rule would control closed and semi-closed circuit (rebreathing) apparatus, engines and propulsion systems for submersible vessels, and submarine and torpedo nets, which are currently controlled under ECCN 8A018, under new ECCN 8A620.

3. BIS also would establish a new, unilateral control on submersibles ‘‘specially designed’’ for cargo transport that are not currently subject to USML or CCL controls.

h. Category VII – Military Vehicles (**DDTC Rule**)

1. The Administration’s review was focused on identifying the types of articles that are now controlled by USML Category VII that either (i) are inherently military and otherwise warrant control on the USML, or (ii) if of a type common to civil vehicles, possess parameters or characteristics that provide a critical military or intelligence advantage to the United States and that are almost exclusively available from the United States.

2. For articles that satisfy one or both of those criteria, the review resulted in the article’s remaining on the USML. An article that did not satisfy either standard but was nonetheless a type of article that is, as a result of differences in form and fit, ‘‘specially designed’’ for military applications, would be identified in the new ECCNs proposed in the BIS notice.

3. The proposed revision narrows the types of ground vehicles controlled on the USML to only those that warrant control under the stringent requirements of the Arms Export Control Act. Changes include the removal of most unarmored and unarmed military vehicles, trucks, trailers, and trains (unless ‘‘specially designed’’ as firing platforms for weapons above .50 caliber), and armored vehicles (either unarmed or with inoperable weapons)

manufactured before 1956. Also, this revision removes gas turbine engines designed for ground vehicles from inclusion in this category.

i. Category VII – Military Vehicles (**BIS Rule**)

1. This rule proposes a new version of ECCN 0A606. The heading would be revised from ‘‘Ground Vehicles, ‘Parts’ and ‘Components’ as follows’’ to ‘‘Ground vehicles and related commodities, as follows (See List of Items Controlled)’’ to reflect the fact that some of the items listed in the entry are accessories, attachments, forgings, castings and other unfinished products that are not, as defined, ‘‘parts’’ or ‘‘components’’ of the ground vehicles that would be classified under proposed ECCN 0A606.

2. The EAR Country Chart Column designators in the License Requirements section would apply national security (NS column 2), regional stability (RS column 2) to 0A606.b, certain unarmed all-wheel drive off-road vehicles derived from civilian vehicles that provide ballistic protection to level III (National Institute of Justice standard 0108.01, September 1985) or better and parts and components that provide such protection. All other paragraphs of this ECCN, except paragraph .y, would be subject to the NS column 1 and RS column 1 reason for control, and the entire ECCN would be subject to the anti-terrorism reason for control. Applying NS column 2 and RS column 2 reasons for control to the armored off-road vehicles in 0A606.b would allow armored SUVs that are used for personal protection to be exported to most NATO member countries along with Australia, Japan and New Zealand without a license.

3. The proposed new ECCN 0A606 would include deep water fording kits ‘‘specially designed’’ for ground vehicles controlled by 0A606.a or USML Category VII, and self-launching bridge components not enumerated in USML Category VII(g) ‘‘specially designed’’ for deployment by ground vehicles enumerated in USML Category VII or 0A606.

4. The proposed new ECCN would not include in paragraph .y blackout lights because the subject of appropriate controls over blackout lights is a topic under consideration by the Wassenaar Arrangements on Export Controls for Conventional Arms and Dual-Use Goods.

j. Category VIII – Military Aircraft (**DDTC Rule**)

1. Changes include moving similar articles currently controlled in multiple categories into a single category or subcategory (e.g., inertial navigations systems for aircraft formerly controlled under Category VIII(e) will likely be moved to controls either in Category XII or the CCL in future proposed rules.

2. The proposed rule also revises § 121.3 to more clearly define ''aircraft'' for purposes of the revised USML Category VIII: to mean:

- [D]evelopmental, production, or inventory aircraft that:
    - Are U.S.-origin aircraft that bear an original military designation of A, B, E, F, K, M, P, R or S;
    - Are foreign-origin aircraft ''specially designed'' to provide functions equivalent to those of the aircraft listed in (a)(1) of this section;
    - Are armed or are ''specially designed'' to be used as a platform to deliver munitions or otherwise destroy targets (e.g., firing lasers, launching rockets, firing missiles, dropping bombs, or strafing);
    - Are strategic airlift aircraft capable of airlifting payloads over 35,000 lbs to ranges over 2,000 nm without being refueled in-flight into short or unimproved airfields;
    - Are capable of being refueled inflight; or
    - Incorporate any ''mission systems'' controlled under this subchapter.

3. ''Mission systems'' are defined as ''systems'' (see § 121.8(g) of this subchapter) that are defense articles that perform specific military functions beyond airworthiness, such as by providing

military communication, radar, active missile counter measures, target designation, surveillance, or sensor capabilities.

4. "Specially designed" parts and components are defined to cover only stealth aircraft or named features like folding wing, with other covered parts and components being of the specific named types listed in the new rule (bomb racks, etc.).

k. Category VIII – Military Aircraft (**BIS Rule**)

1. Certain military aircraft and related articles the President determines no longer warrant control in USML Category VIII would be controlled under proposed new ECCNs 9A610, 9B610, 9C610, 9D610, and 9E610.

2. ECCN 9B610.a would consist of test, inspection, and production equipment specially designed for the development or production of aircraft and related commodities and articles controlled by ECCN 9A610 or USML Category VIII. ECCN 9B610.b would consist of environmental test facilities designed or modified for military aircraft and related commodities. New ECCN paragraphs also implement WAML Category 18, which applies to production equipment and components for items on the WAML generally, with respect to production equipment for military aircraft, and environmental test facilities for such aircraft and related commodities.

3. ECCN 9B610.c would implement a Missile Technology Control Regime control on production facilities specially designed for certain ECCN 9C610 would consist of types of Unmanned Aerial Vehicles or drones.

4. ECCN 9C610 would consist of materials specially designed for aircraft and related commodities controlled by ECCN 9A610 that are not specified elsewhere on the CCL, such as in CCL Category 1, or on the USML. USML subcategory XIII(f) would continue to control structural materials ''specifically designed, developed, configured, modified, or adapted for defense articles,'' such as aircraft controlled by USML subcategory VIII(a).

5. ECCN 9D610 would consist of software specially designed for commodities in 9A610, 9B610, or 9C610. ECCN 9D610 would also contain a ''Note to License Exceptions Section'' referring readers to the proposed Supplement No. 4 to part 740, which would limit the use of License Exceptions GOV and STA for

ECCN 9D610 software for the production or development of 15 types of parts and components.

6. ECCN 9E610 would consist of technology that is required commodities in 9A610, 9B610, 9C610, or software 9D610. ECCN 9E610 would also contain a ‘‘Note to License Exceptions Section’’ referring to proposed Supplement No. 4 to part 740, which would limit the use of License Exceptions GOV and STA for ECCN 9E610 technology (other than ‘‘build-to-print technology’’) for the production of 15 types of ECCN 9A610.x parts and components.

l. Category IX – Military Training Equipment (**DDTC Rule**)

The title of the category is changed to indicate that it covers training equipment only. Paragraph (a) lists all the types of training equipment covered in the category. Paragraph (b) is also revised to more specifically describe the items (simulators) controlled therein. Radar target generators are to be controlled in Category XI(a). Infrared scene generators are to be controlled in Category XII(c). Tooling and production equipment, currently controlled in paragraph (c), are to be covered on the CCL.

m. Category IX – Military Training Equipment (**BIS Rule**)

1. This proposed rule describes how articles the President determines no longer warrant control under Category IX (Military Training Equipment and Training) of the United States Munitions List (USML) would be controlled under the Commerce Control List (CCL) in new Export Control Classification Numbers (ECCNs) 0A614, 0B614, 0D614, and 0E614.

2. Proposed ECCN 0A614 would impose national security (NS Column 1), regional stability (RS Column 1), and anti-terrorism controls on military training ‘‘equipment’’ not controlled by the USML and on most ‘‘parts,’’ ‘‘components,’’ and ‘‘accessories and attachments’’ ‘‘specially designed’’ for such military training ‘‘equipment.’’

3. Proposed ECCN 0B614 would impose national security (NS Column 1), regional stability (RS Column 1), and anti-terrorism controls on test, inspection and production equipment, and on ‘‘parts,’’ ‘‘components,’’ and ‘‘accessories and attachments’’ therefor, that are ‘‘specially designed’’ for the ‘‘production’’ of commodities controlled by ECCN 0A614 or USML Category IX.

4. Proposed ECCN 0D614 would impose national security, (NS Column 1), regional stability (RS Column 1), and anti-terrorism (AT Column 1) controls on ‘‘software’’ ‘‘specially designed’’ for the ‘‘development,’’ ‘‘production,’’ operation or maintenance of commodities controlled by ECCNs 0A614 or 0B614 (except the .y paragraphs of these ECCNs).

5. Proposed ECCN 0E614 would impose national security (NS Column 1), regional stability (RS Column 1), and anti-terrorism (AT Column 1) controls on ‘‘technology’’ ‘‘required’’ for the ‘‘development,’’ ‘‘production,’’ operation, installation, maintenance, repair, or overhaul of commodities controlled by 0A614 or 0B614, or software controlled by 0D614 (except the .y paragraphs of these ECCNs).

6. Proposed new ECCNs 0A614, 0B614, 0D614 and 0E614 also would contain a paragraph ‘‘.y.99’’ that would control any item that meets all of the following criteria:

   - The item is not listed on the CCL;
   - The item was previously determined to be subject to the EAR in an applicable commodity jurisdiction determination issued by the U.S. Department of State; and
   - The item would otherwise be controlled under one of these 0x614 ECCNs because, for example, the item was ‘‘specially designed’’ for a military use.

n. Category X – Protective Personal Equipment and Shelters (**DDTC Rule**)

1. Anti-gravity suits, pressure suits, and atmosphere diving suits, currently controlled in paragraphs (a)(3), (a)(4), and (a)(5), respectively, would become subject to the EAR. Paragraph (a)(7) would control certain protective goggles, spectacles, and visors with an optical density of 3 or greater.

2. Permanent and transportable shelters, currently controlled in paragraph (b), as well as equipment for the production of articles covered in this category (current paragraph (c)), would be controlled on the CCL.

3. Paragraph (d), which controls parts and components, is limited in scope to include only ceramic or composite body armor plates, laser protective lenses for the articles enumerated in (a)(7), and classified hardware.

4. As with the revision of other categories, the USML will not control all generic, non-specific parts, components, accessories, and attachments that are in any way specifically designed or modified for a defense article, regardless of their significance to maintaining a military advantage for the United States. These items will become subject to the new 600 series controls in Category 1 of the CCL.

o. Category X – Protective Personal Equipment and Shelters (**BIS Rule**)

1. This proposed rule describes how articles the President determines no longer warrant export control under Category X would be controlled under the CCL in new ECCNs 1A613, 1B613, 1D613, and 1E613. In conjunction with establishing these new ECCNs, this proposed rule would control military helmets (currently controlled under ECCNs 0A018 and 0A988) under new ECCN 1A613 and amend ECCN 1A005 for body armor. This proposed rule also would remove machetes from ECCN 0A988.

2. Proposed ECCN 1A613 would impose national security (NS Column 1), regional stability (RS Column 1), and antiterrorism (AT Column 1) controls on commodities herein. Paragraph .a of ECCN 1A613 would control armored plate ‘‘specially designed’’ for military use and not controlled by the USML. Paragraph .b would control shelters ‘‘specially designed’’ to provide ballistic protection or protect against nuclear, biological, or chemical contamination. Paragraph .c would control military helmets providing protection less than NIJ level IV (currently classified under ECCN 0A018.d) and helmet shells providing protection less than NIJ level IV. Paragraph .d would control soft body armor and protective garments manufactured to military standards or specifications that provide ballistic protection equal to or less than NIJ level III (NIJ 0101.06, July 2008) as well as hard body armor plate that provides NIJ level III protection.

3. This proposed rule would revise the List of Items Controlled section in ECCN 1A005 to more positively identify soft body armor and hard body armor plates that are controlled under this ECCN.

p. Category XIII – Auxiliary Military Equipment (**DDTC Rule**)

1. This proposed rule revises USML Category XIII, re-titled "Materials and Miscellaneous Articles."

2. Paragraph (a) is removed and placed in reserve; the articles currently controlled there (i.e., cameras and specialized processing equipment) are to be controlled in revised Category XII or the CCL. Photointerpretation, stereoscopic plotting, and photogrammetry equipment ''specially designed'' for military use will be controlled under ECCN 0A617.e. Paragraph (c) is removed and placed in reserve; the articles currently controlled there (i.e., self-contained diving and underwater breathing apparatus) are to be controlled in ECCN 8A620.f.

3. Paragraphs (d), (e), (g), and (h) are reorganized and expanded to better describe the articles controlled therein. Paragraph (f) is re-designated to cover articles that are classified. The articles in the current paragraph (f) (i.e., structural materials) are to be controlled in proposed CCL ECCN 0C617 and in revised USML Categories VII, VIII, and XIII. Paragraph (i) is re-designated to control signature reduction software, with embrittling agents (currently controlled in paragraph (i)) moving to the CCL under ECCN 0A617.f.

4. Articles common to the Missile Technology Control Regime (MTCR) Annex and the USML are to be identified on the USML with the parenthetical ''(MT)'' at the end of each section containing such articles. A future proposed rule will address the sections in the ITAR that include MTCR definitions.

q. Category XIII – Auxiliary Military Equipment (**BIS Rule**)

1. Auxiliary and miscellaneous military equipment and related articles the President determines no longer warrant control under Category XIII (Auxiliary Military Equipment) of the United States Munitions List (USML) would be controlled under the Commerce Control List (CCL) in new Export Control Classification Numbers (ECCNs) 0A617, 0B617, 0C617, 0D617, and 0E617 as part of the proposed new ''600 series'' of ECCNs.

2. ECCN 0A617.a would control construction equipment ''specially designed'' for military use, including such equipment ''specially designed'' for transport in aircraft controlled by USML Category VIII(a) or proposed ECCN 9A610.a and ''parts,''''components''

and ‘‘accessories and attachments’’ ‘‘specially designed’’ therefor, including crew protection kits used as protective cabs.

3. ECCN 0A617.b would control concealment and deception equipment ‘‘specially designed’’ for military application that are not controlled in USML Category XIII(g), as well as ‘‘parts,’’ ‘‘components,’’ ‘‘accessories and attachments’’ specially designed therefor.

4. ECCN 0A617.c would control ferries, bridges (other than those described in ECCN 0A606 or USML Category VII), and pontoons if the ferries, bridges or pontoons are ‘‘specially designed’’ for military use, also identified in WAML Category 17.m.

5. ECCN 0A617.d would control test models ‘‘specially designed’’ for the ‘development’’ of defense articles controlled by the USML or commodities controlled in the ‘‘600 series.

6. ECCN 0A617.e. would control photointerpretation, stereoscopic plotting and photogrammetry equipment that would not be controlled by USML Category XIII(a) or elsewhere in the USML, as well as ‘‘parts,’’ ‘‘components,’’ ‘‘accessories and attachments’’ ‘‘specially designed’’ therefor. ECCN 0A617.f would control ‘‘metal embrittlement agents’’, currently controlled by USML Category XIII(i) but not within the scope of the revised Category XIII the State Department has proposed.

7. ECCN 0B617.a would control test, inspection, and production ‘‘equipment’’ not controlled by USML Category XIII(k) ‘‘specially designed’’ for the production’’ or ‘‘development’’ of commodities controlled by ECCN 0A617 or USML Category XIII.

8. ECCN 0C617.a would control materials, coatings and treatments for signature suppression, ‘‘specially designed’’ for military use and that are not controlled by the USML or ECCNs 1C001 or 1C101.

9. ECCN 0D617.a would control ‘‘software’’ ‘‘specially designed’’ for the ‘‘development,’’ ‘‘production,’’ operation, installation, maintenance, repair, overhaul or refurbishing of commodities controlled by ECCN 0A617, ‘‘equipment’’ controlled by ECCN 0B617, or materials controlled by ECCN 0C617.

10. ECCN 0E617.a would control ‘‘technology’’ ‘‘required’’ for the ‘‘development,’’ ‘‘production,’’ operation, installation,

maintenance, repair, overhaul or refurbishing of commodities controlled by ECCN 0A617, ‘‘equipment’’ controlled by ECCN 0B617, materials controlled by ECCN 0C617, or ‘‘software’’ controlled by ECCN 0D617.

r. Category XIX – Gas Turbine Engines (**DDTC Rule**)

This proposed rule establishes USML Category XIX to cover gas turbine engines and associated equipment currently covered in Categories VI, VII, and VIII. The USML identifies engine subcategories in all three of these categories, but there has been confusion concerning the controls in Category VI (which currently lists only ‘‘naval nuclear propulsion plants,’’ leading exporters to question whether other types of propulsion systems are controlled as ‘‘components’’ in Category VI(f)), Category VII (which controls both diesel and gas turbine engines under the same general term ‘‘engines’’ in Category VII(f)), and Category VIII (which controls ‘‘military aircraft engines’’ but not reciprocating engines). The intent of this change is to make clear that gas turbine engines for surface vessels, vehicles, and aircraft that meet certain objective parameters are controlled on the USML.

s. Category XIX – Gas Turbine Engines (**BIS Rule**)

1. This proposed rule describes how military gas turbine engines and related articles that the President determines no longer warrant control under Category VI, VII, or VIII of USML would be controlled under the CCL in new ECCNs 9A619, 9B619, 9C619, 9D619 and 9E619. In addition, this proposed rule would control military trainer aircraft turbo prop engines and related items, which are currently controlled under ECCN 9A018.a.2 or .a.3, 9D018 or 9E018, under new ECCN 9A619, 9D619 or 9E619.

2. Paragraphs .a through .d of ECCN 9A619 would control, respectively: (i) Gas turbine engines ‘‘specially designed’’ for military use that would not be controlled under proposed USML Category XIX; (ii) digital engine controls (e.g. Full Authority Digital Engine Controls (FADEC) and Digital Electronic Engine Controls (DEEC)) ‘‘specially designed’’ for gas turbine engines in ECCN 9A619; (iii) hot section components and related cooled components ‘‘specially designed’’ for gas turbine engines in ECCN 9A619; and (iv) engine monitoring systems for gas turbine engines and components in ECCN 9A619.

2. Transition Rule

Classification changes proposed under the Export Control Reform Initiative present challenges for companies from a business and compliance perspective. The latest transition plans issued by DDTC[83] and BIS[84] are designed to address these challenges and provide for an orderly transition to the new classification system. Specifically, these transition plans seek to minimize disruptions to existing export licenses (including agreements) by establishing a number of ground rules.

a. Transition Rules for ITAR Licenses, License Applications and License Amendments

1. Once each proposed transfer of an item from the USML to the CCL becomes final, the affected item will be subject to the EAR. Under the transition plan announced by DDTC, licenses issued and agreements (i.e., Technical Assistance Agreements, Manufacturing License Agreements and Distribution Agreements) previously approved by DDTC will remain valid until they expire or are returned or amended, or for a period of two years from the effective date, whichever occurs first. Any limitation, proviso or other requirement imposed on such DDTC licenses and agreements will remain in effect until such time.

2. License applications for items transitioning to the CCL that DDTC receives prior to the effective date of a proposed change to an applicable part of the USML will be adjudicated up until the effective date of the proposed change, unless the applicant requests that the application be Returned Without Action.

3. License applications and amendment requests that DDTC receives within 45 days after the final rule's publication but before the effective date will be adjudicated when the applicant provides a written statement certifying that the export or temporary import will be completed within 45 days after the effective date. The validity period for such licenses and amended licenses will be limited to 45 days after the effective date.

4. Agreements and amendments to agreements that DDTC receives after the final rule's publication, but before the effective date, will be Returned Without Action if they contain both USML and CCL items. Further, such agreements must be terminated if all items subject to the agreement are transitioning to the CCL.

[83] 77 Fed. Reg. 37,346 (June 21, 2012).

[84] 77 Fed. Reg. 37,524 (June 21, 2012).

5. Non-U.S. consignees or end users with items that have transitioned from DDTC to BIS jurisdiction must comply with the EAR for subsequent re-exports or transfers.

b. ITAR Registration

1. Under the ITAR, manufacturers, exporters and brokers are required to register with DDTC if their activities involve USML defense articles or defense services. In its proposed transition plan, DDTC reminds registered manufacturers, exporters, temporary importers, defense service providers and brokers (registrants) that they are required to notify DDTC in writing whenever they are no longer in the business of manufacturing, exporting or brokering USML defense articles or defense services, including as a result of their products being transferred from the USML to the CCL.

2. Registrants who determine that all of their activities will be subject to BIS jurisdiction must nevertheless maintain registration with DDTC until the applicable transition date. Registrants who determine they will no longer be required to register with DDTC as a result of a transfer of their product to the CCL, and who have registration renewal dates that occur after publication of the final rule implementing the transfer but before its effective date, may request to have their registration expiration date extended to the effective date of transition. Such registrants will not be charged a registration fee. Registrants that avail themselves of the opportunity to continue using previously issued DDTC authorizations and agreements for items that have transitioned to the CCL must maintain current registration with DDTC, which includes payment of registration fees.

c. Broadening of EAR License Exceptions Consistent With ITAR Exemptions

1. In the course of its analysis of the proposed changes to the USML and CCL, BIS discovered that exemptions under the ITAR for some items were broader than license exceptions under the EAR. Accordingly, BIS's proposed transition rule seeks to harmonize the provisions of several EAR license exceptions with several ITAR exemptions (but does not apply to the scope of license exceptions available for items controlled for Missile Technology). The proposed EAR license exception changes are detailed and complex. Below are a few sample highlights:

- License Exception TMP would allow the temporary export of a specified item to a U.S. subsidiary, affiliate or facility abroad in any country (except a terrorism supporting country) without an export license. It would also allow a shipment originating in Canada or Mexico that incidentally transits the United States en route to a delivery point in the same country without an export license;

- License Exception RPL would allow the export of replacement parts for defense articles on the Commerce Munitions List, which were lawfully exported, without an export license;

- License Exception GOV would allow, in specified circumstances, the export, reexport and transfer without an export license of "600 series" items consigned to nongovernmental end users (e.g., U.S. government contractors) acting on behalf of the U.S. government;

- License Exception TSU would allow training information related to a defense article on the Commerce Munitions List, which was lawfully exported, to be exported to the same recipient without an export license; and

- License Exception STA would specify that the use of this exception for "600 series" items is available only when all non-U.S. parties to the transaction (e.g., the purchaser, intermediate consignees, ultimate consignees, and end users) have previously received U.S. items under a license issued by DDTC or BIS. For purchasers, intermediate consignees, ultimate consignees and end users that have not been so vetted, a license would be required even for STA-eligible items.

d. Lengthening BIS License Validity Period

In its transition plan, BIS proposes to extend the validity period of its export licenses from two years to four years (consistent with the validity period of DDTC export licenses). Exporters may also request an extended validity period beyond four years. Grounds for requesting an extension include having agreements previously approved by DDTC for a longer period of time.

e. Notifications

Under BIS's proposed transition plan, the EAR will now include provisions requiring BIS to provide a certification to Congress prior to the approval of exports of major defense equipment (i.e., any item of significant military equipment having a nonrecurring research and development cost of more than $50 million or a total production cost of more than $200 million). Exporters of major defense equipment that meet this dollar threshold will need to notify BIS of such transactions for all exports except those made under License Exception GOV.

f. De Minimis Rule for "600 Series" Content Items

This aspect of BIS's proposed transition plan has particular significance for companies that manufacture items overseas which incorporate U.S. origin items. For "600 series" content items, BIS has proposed a de minimis level of 0 percent for countries subject to U.S. arms embargoes, which reflects the ITAR's "see through rule," and 25 percent for all other countries. In addition, foreign-produced items that (i) meet any of the "600 series" ECCN classifications and (ii) are direct products of either U.S-origin "600 series" technology or a plant that is a direct product of U.S.-origin "600 series" technology would be subject to the EAR

g. PRC Military End Use

BIS's proposed transition plan confirms an earlier proposal whereby "600 series" items, including "y" items described in a "600 series" ECCN, may not be exported, re-exported, or transferred to the PRC without a BIS license.

h. Automated Export System Threshold Changes

Currently, exporters enter information for both ITAR- and BIS-controlled transactions into the Automated Export System (AES). Many exports worth less than $2,500 are exempted from the requirement to enter information on the transaction into AES. The proposed transition plans remove the low-value exemption for "600 series" items for all destinations, including Canada, and requires AES filings for all "600 series" items, regardless of value. In addition, the proposed rule requires AES filings for all exports under License Exception STA, regardless of value.

3. Single Control List: Definition of "Specially Designed"[85]

a. Concurrently with their transition plans, DDTC and BIS have also proposed a single definition of the term ''specially designed'' that will apply to the USML, the proposed ''600 series'' and the rest of the CCL. As discussed above, an overarching goal of the Export Control Reform Initiative is to simplify the export control system.

b. To that end, DDTC and BIS have been looking into creating a "positive" list that would control items according to objective technical parameters instead of the current "design-intent" approach. But as DDTC and BIS have acknowledged, completely eliminating design-intent based controls as part of a transition to a positive list is simply not feasible. For instance, the term "specially designed'' is used widely throughout the CCL, as well as in the control lists of multilateral regimes to which the United States is a signatory. Consequently, through the new rules, DDTC and BIS have proposed a new, single definition of "specially designed" to apply throughout the EAR and the ITAR.

c. DDTC and BIS have coordinated their efforts to arrive at a unified definition through a so-called "catch and release" methodology. That is, the definition first attempts to "catch" a fairly broad swath of items that, as a result of "development," (i) have properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions described in the relevant USML or CCL category, (ii) are required for a USML or CCL listed item to function as designed or (iii) are used with a USML or CCL listed item to enhance its usefulness or effectiveness. It then exempts or "releases" certain items if they, for example, (i) are enumerated elsewhere in the USML or CCL, (ii) are parts that are commonly used in multiple types of commodities not enumerated in the USML or CCL (e.g., screws) or (iii) were or are developed for civil applications.

[85] 77 Fed. Reg. 36,409 (June 19, 2012).