Export Control Reform Update

Remarks
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For decades, the U.S. export control system supported national security objectives by keeping our most sophisticated technologies out of the hands of Cold War adversaries. Our efforts produced significant successes; in many cases, the United States was the sole producer of many of those technologies and could control their export with relative ease. In the case of foreign producers of such items, the United States was able to work with their governments to similarly control these sensitive technologies.

Today, we no longer face a monolithic adversary like the Soviet Union. Instead, we face terrorists seeking to build weapons of mass destruction, states striving to improve their missile capabilities, and illicit front-companies seeking items to support such activities. To further complicate things, countries don't always agree on the right approaches for addressing these threats.

In addition, the United States is not the only player on the court anymore. Today, cutting edge technologies are being developed at lightning speed in places all around the globe. To maintain competitiveness, many U.S. companies are partnering with foreign companies as they work to develop, produce, and sustain leading-edge military hardware and technology. And in many cases commercial technologies can be developed faster than military ones. Militaries are now using these commercial technologies, and the line between what is military and what is commercial has become blurred.

In the face of all these changes, our export control system failed to keep pace. By 2009, our munitions licensing system was processing over 80,000 license applications per year. The military forces of our allies faced unpredictable and, in some cases, quite lengthy delays in their efforts to obtain U.S. defense articles – even when they were working alongside U.S. forces in theatres of conflict.

U.S. exporters were experiencing the growing efforts of foreign competitors to replace or remove U.S. defense articles from their products. By doing so, foreign companies could avoid having to deal with our licensing system, or obtaining our permission if they wanted to re-export a product that contains a U.S. defense article – even something as small as a bolt. The developing trend of

avoiding the International Traffic in Arms Regulations, also referred to as going "ITAR-free", is quite troubling.

President Obama came into office strongly believing that we needed to improve the outdated export control system in order to strengthen U.S. national security and advance U.S. foreign policy interests. He also believed that we needed to create an efficient and predictable system using modern business practices and tools to help our exporters become more competitive now and in the future.

In August 2009, President Obama directed a task force to review the whole export control system and recommend how to modernize it in order to better address current threats, and today's rapidly changing technological and economic landscapes. The task force included representatives from the Departments of State, Defense, Commerce, Energy, Treasury, Justice, Homeland Security, and the Office of the Director of National Intelligence.

The task force completed its initial review of our export control system in early 2010, finding numerous deficiencies. In addition to the problems I mentioned previously, agencies had no unified computer system that let them communicate effectively with each other, let alone with U.S. exporters.

Licensing requirements were not only onerous, they were confusing, which delayed U.S. exporters and made them less competitive in overseas markets. The task force also found that this confusion could help those who might evade our controls. The task force also noted enforcement activities that were ineffective and wasteful, mostly due to poor communication among the various export enforcement entities.

To address these problems, the task force recommended reforms in four key areas:

- Licensing policies and procedures
- Control lists
- Information technology
- Export enforcement

Current Developments

President Obama directed agencies to implement the recommendations in three phases. In the first phase, we made core decisions on how to rebuild our lists, recalibrate and harmonize our definitions and regulations, update licensing procedures, create an Export Enforcement Coordination Center, and build a consolidated licensing database. Agencies are now in the second phase of work, which is the implementation of all of those decisions.

I am pleased to report that last week, a major milestone was reached when DDTC transitioned from DTRADE2 to the Department of Defense's secure export licensing database – called "USXports," which will help to make the export licensing review process a more seamless one.

A lot of what we have been doing in Phase 2 has involved revising the U.S. Munitions List (the USML) and the Commerce Control List (CCL). The purpose of this is to make sure that the items of greatest concern from a military perspective will remain on the USML, and be subject to the strictest licensing requirements, while items of less sensitivity will be moved to the CCL. I want to emphasize a key point: items moving to the CCL will remain controlled. They are not being "decontrolled." It is only under specific circumstances that items will be eligible for export under Commerce's more flexible licensing mechanisms. We are making tremendous progress in the effort to rewrite the USML categories. We have published thirteen revised USML categories in the Federal Register in proposed form for public comment. We recently concluded the public comment period for USML Category XV on spacecraft, and took comments from over 80 parties. Additionally, we will be publishing our proposed revisions for USML Category XI (electronics) this week.

As you know, we have already published several final revised categories. The first pair, Category VIII and Category XIX covering Aircraft and Engines respectively will take effect on October 15. We published final rules for Categories VI and VII – Vessels of War and Military Vehicles, as well as Categories XIII and XX – Auxiliary Military Equipment and Submersible Vessels, which will take effect on January 4th.

In addition to revising the control lists, we are updating our regulations to help streamline the licensing process. For example, the new definition of "specially designed" was published in April and will become effective on October 15th. Although one of the goals of the ECR initiative is to describe USML controls without using design intent criteria, certain sections in the revised categories nonetheless use the term "specially designed." It was, therefore, necessary for the Administration to define the term.

The specially designed definition has a two-paragraph structure, a broad "catch" that would control an item, and then a series of "yes/no" questions which may "release" the item from being specially designed. Paragraph (a) identifies which commodities and software are specially designed" and paragraph (b) identifies which parts, components, accessories, attachments, and software are excluded from specially designed. For USML sections containing the term "specially designed," a defense article is "caught" – it is "specially designed" – if any of the two elements of paragraph (a) applies and none of the elements of paragraph (b) applies.

Additionally, we published a proposed redefinition of "defense services" along with USML Category XV and are in the process of reviewing the public comments we received.

As you know, a proposed revision of the definition of defense service, pursuant to ECR, was first published on April 13, 2011. In that rule, the Department explained that the current definition is overly broad and captures certain forms of assistance or services that do not warrant ITAR control.

Rather than proceed to a final rule on the definition, the Department republished a second proposed rule, which incorporates certain changes stemming from the public comment review of the first proposal, but also includes in the definition the provision of certain assistance with regard to spacecraft.

A change to the proposed rule is that services based solely upon the use of public domain data would not constitute a defense services and would not require a license, TAA, or MLA to provide to a foreign person.

However, a new provision controls as a defense service the "integration" into defense articles whether or not ITAR-controlled "technical data" is provided to a foreign person during the provision of such services. The proposed definition defines “integration” and distinguishes it from “installation.”

The new rule specifies training for foreign "units or forces" will be considered a defense service only if the training involves the tactical employment of a defense article, regardless of whether technical data is involved.

Finally, we will be revising other parts of our regulations, including the definition of “public domain,” and creating new exemptions for replacement parts and incorporated articles.

Next Steps

In Phase 3, the Administration will work with Congress on legislation to conclude the reform initiative by creating a single export control agency and consolidate some of our enforcement units. We have much more work to do to complete our work in the second phase, so there are still a lot of decisions remaining about how to approach that effort.

In closing, I want to thank you for supporting the Administration’s Export Control Reform initiative. The inputs of the exporting community to this process have been invaluable. We look forward to working with you as we continue to bolster our national security, strengthen foreign policy goals, and protect and increase American jobs through export control reform. And I look forward to your questions.