

## **CHAPTER 1**

# **Overview of Agency Jurisdiction**

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### **§ 1.01 In General**

In his January 2011 State of the Union Address, President Obama described the export regulatory structure as inefficient, noting that twelve different agencies “deal with exports.”<sup>1</sup> In fact, the number of agencies depends on how one defines the term “deal with exports.” Many government agencies provide advisory roles over exports but do not have jurisdiction to regulate exports. These agencies include, among others, the Defense Technology Security Administration, Export-Import Bank, International Trade Administration, and U.S.

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<sup>1</sup> President Barack Obama, Remarks by the President in State of Union Address (Jan. 25, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address> (last visited Aug. 23, 2013).

Agency for International Development.<sup>2</sup> Other agencies provide administrative functions involving exports, including Customs and Border Protection and the Postal Service. This Chapter covers only those sixteen government agencies with authority to regulate exports or administer procedures involving exports; those with solely advisory or policy-making roles are not discussed here.

Of the agencies authorized to administer U.S. export controls, some have broader jurisdictions than others. Those agencies with broad jurisdiction include the Department of Commerce (Commerce), Department of State (State), and Department of the Treasury (Treasury). Export controls on most items are governed by one of these three agencies. For certain category-specific items, jurisdiction falls under one of the more specialized agencies. With so many different agencies administering export controls, there is significant jurisdictional overlap.

Because there are so many agencies with overlapping jurisdiction, exporters have been lobbying for consolidation. Although many proposals for consolidation have come and gone over the years, the Obama Administration has undertaken an initiative that may make some progress in this regard.<sup>3</sup>

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<sup>2</sup> A list of agencies dealing with exports can be found on the Export.gov website: International Trade Administration, U.S. Census Bureau, Department of Energy, Export-Import Bank, Foreign Agricultural Service, Agency for International Development, Overseas Private Investment Corporation, Small Business Administration, Department of State, U.S. Trade and Development Agency, Office of Foreign Assets Control, and U.S. Trade Representative. See [http://export.gov/about/eg\\_main\\_016802.asp](http://export.gov/about/eg_main_016802.asp) (last visited Aug. 23, 2013).

<sup>3</sup> See § 1.05 *infra*.

## § 1.02 Export Controls on Persons and Entities

### [1]—Department of Commerce

The Department of Commerce's Bureau of Industry and Security (BIS) publishes three lists of persons and entities to whom special export restrictions apply: the Denied Persons List, the Unverified List, and the Entity List. The lists are differentiated by the extent to which they limit the ability of the named persons or entities, and all parties who wish to export to them, from engaging in export activity.

#### [a]—Denied Persons List

The most restrictive list is the Denied Persons List (DPL). The DPL identifies individuals and entities that do not have export privileges.<sup>1</sup> All export transactions conducted by the denied person, or by others exporting to the denied person, are prohibited.<sup>2</sup> Export transactions involving a person on the DPL violate the Export Administration Regulations (EAR).<sup>3</sup> When persons are added to, or removed from, the DPL, an official order appears in the Federal Register.<sup>4</sup> A record of recent updates (within the past ninety days) to the list appears on the Department of Commerce's Bureau of Industry and Security webpage.<sup>5</sup>

#### [b]—Unverified List

The Unverified List identifies persons whose prior transactions did not successfully complete a pre-license check (PLC)<sup>6</sup> or post-shipment verification (PSV)<sup>7</sup> conducted by BIS. Transactions with these persons raise a "red flag."<sup>8</sup> Names and relevant information about persons on the unverified list are available on the BIS website.

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<sup>1</sup> 15 C.F.R. § 764.3(a)(2).

<sup>2</sup> 15 C.F.R. § 764 Supp. No. 1(b) (Standard Terms of Orders Denying Export Privileges).

<sup>3</sup> 15 C.F.R. §§ 764.2(k), 764.3(a)(2).

<sup>4</sup> 15 C.F.R. § 764 Supp. No. 1(a).

<sup>5</sup> See Bureau of Industry and Security, <http://www.bis.doc.gov/dpl/recentchanges.asp> (last visited Aug. 23, 2013).

<sup>6</sup> The Office of Enforcement Analysis (OEA) within BIS often performs pre-license checks to verify the authenticity of a transaction.

<sup>7</sup> The OEA conducts post-shipment verifications to confirm compliance with U.S. export control laws and export licenses.

<sup>8</sup> 15 C.F.R. § 732 Supp. No. 3 (BIS's "Know Your Customer" Guidance and Red Flags). Some examples of "red flags" include a customer on the Denied Persons List, a purchaser reluctant to offer information about an item's end-use, or the buyer's line of business not matching the product's capabilities. BIS publishes "red flag" guidance on its website at <http://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern> (last visited Aug. 23, 2013).

**[c]—Entity List**

The Entity List identifies individuals and organizations that are subject to special licensing requirements in connection with exports, reexports, or in-country transfers of items covered under the EAR.<sup>9</sup> The entities included are those whose activities presently endanger, or likely will endanger, U.S. national security or U.S. foreign policy.<sup>10</sup> Updates and revisions to the Entity List, including the addition and removal of entities are made periodically as needed by the End-User Review Committee (ERC), composed of representatives of the Departments of Commerce, State, Defense, Energy, and where appropriate, the Treasury. The ERC is chaired by the Department of Commerce and makes decisions to add an entry to the Entity List by a majority vote and decisions to remove or modify an entry by unanimous vote.<sup>11</sup>

**[2]—Department of State****[a]—Nonproliferation**

The Department of State's Bureau of International Security and Nonproliferation is involved in imposing sanctions upon foreign individuals, entities, and governments that execute transactions leading to proliferation. These nonproliferation sanctions are authorized by legislative acts, such as the Chemical and Biological Weapons Control and Warfare Elimination Act,<sup>12</sup> and executive orders.<sup>13</sup> Official updates of nonproliferation sanctions can be found in the Federal Register.

**[b]—Arms Export Control Act Debarred List**

Those persons who have been convicted of violating, or have been found in violation of, the Arms Export Control Act (AECA)<sup>14</sup> are included on the AECA Debarred List. Persons on the list cannot export defense articles and defense services.<sup>15</sup> The period of time that

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<sup>9</sup> 15 C.F.R. § 744.1(c).

<sup>10</sup> 15 C.F.R. § 744.11(b). Five examples of activities that lead to placement on the Entity List are given in Title 15, Section 744.11(b)(1)-(5) of the Code of Federal Regulations, including supporting terrorists or other actions that could enhance the military capability of terrorism-supporting governments.

The license review policy for the entities on the Entity List is generally either "presumption of denial" or "case-by-case basis." 15 C.F.R. § 744 Supp. No. 4.

<sup>11</sup> 15 C.F.R. § 744 Supp. No. 5.

<sup>12</sup> Pub. L. No. 102-138, title V, 105 Stat. 722 (1991) (codified at 22 U.S.C. §§ 5601 *et seq.*); Pub. L. No. 102-182, title III, 105 Stat. 1245 (1991) (codified at 22 U.S.C. §§ 5601 *et seq.*).

<sup>13</sup> See, e.g., Exec. Order No. 13,382 that allows for the freezing of all funds of proliferators of weapons of mass destruction or related items. 70 Fed. Reg. 38,567 (June 28, 2005).

<sup>14</sup> Pub. L. No. 90-629, 82 Stat. 1320 (1968) (codified as amended at 22 U.S.C. §§ 2751 *et seq.*).

<sup>15</sup> 22 U.S.C. §§ 2751 *et seq.*; 22 C.F.R. § 127.7(a).

a person remains on the list may be indefinite, but in most cases, is no longer than three years.<sup>16</sup> However, until a Federal Register notice confirms that a person is removed from the AECA Debarred List, the prohibitions on the listed person remains.

### [3]—Department of the Treasury

The Treasury's Office of Foreign Assets Control (OFAC) maintains the Specially Designated Nationals (SDN) List, a compilation of persons, entities, and companies with whom U.S. citizens are barred from engaging in all transactions. The List comprises persons who work directly, or indirectly, with certain countries, terrorists, and narcotics traffickers. Sanctions programs administered by OFAC include counter terrorism sanctions,<sup>17</sup> counter narcotics trafficking sanctions,<sup>18</sup> and the sanctions on Iran.<sup>19</sup>

The Obama Administration has sought to reduce the burden on exporters to check these multiple agency lists by publishing a consolidated screening list.<sup>20</sup> However, it is not without its limitations.<sup>21</sup>

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<sup>16</sup> 22 C.F.R. § 127.7(a).

<sup>17</sup> Exec. Order No. 13,224, 66 Fed. Reg. 47,079 (Sept. 23, 2001).

<sup>18</sup> Foreign Narcotics Kingpin Designation Act, Pub. L. No. 106-120, title 8, 113 Stat. 1606, 1626-36 (1999) (codified at 21 U.S.C. §§ 1901-1908, 8 U.S.C. § 1182(a)(2) (C)); Exec. Order No. 12,978, 60 Fed. Reg. 54,579 (Oct. 21, 1995).

<sup>19</sup> 31 C.F.R. § 560.

<sup>20</sup> See § 1.04[1] *infra* (discussing the consolidated screening list).

<sup>21</sup> See § 1.04[1] *infra*.

**§ 1.03 Export Controls on Items and Activities****[1]—Department of Commerce**

Within the Department of Commerce, the Bureau of Industry and Security (BIS) controls all export transactions not regulated by another agency.<sup>1</sup> Under the Export Administration Regulations (EAR), BIS maintains the Commerce Control List (CCL), which categorizes dual-use items (i.e., items with both commercial and military applications).<sup>2</sup> Under the EAR, dual-use items on the CCL are subject to varying levels of export restrictions, depending on the reason for control and the country to which the exporter intends to send the item.<sup>3</sup> Where an item falls under the jurisdiction of State, Treasury, Nuclear Regulatory Commission, Department of Energy, or the United States Patent and Trademark Office, the export regulations of that agency take precedence over the regulations imposed under the EAR.<sup>4</sup> Items governed by the EAR but not listed in the CCL are classified as EAR99.<sup>5</sup> EAR99 items do not themselves trigger export license requirements. However, EAR99 items may require export licenses when sent to particular end-users or embargoed countries.<sup>6</sup>

**[2]—Department of State**

The Department of State's Directorate of Defense Trade Controls (DDTC) administers defense-related export controls under the authority of the Arms Export Control Act. Controlled items are listed on the United States Munitions List (USML) within the International Traffic in Arms Regulations (ITAR).<sup>7</sup> The United States regulates these items in order to protect against the transfer of defense products, technologies, information, and services that may jeopardize U.S. interests and international security.<sup>8</sup> The regulations require that those dealing in

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<sup>1</sup> 15 C.F.R. § 734.3(a)-(b).

<sup>2</sup> There are ten categories (Nuclear Materials, Facilities, and Equipment and Miscellaneous; Materials, Chemicals, Microorganisms, and Toxins; Materials Processing; Electronics; Computers; Telecommunications and Information Security; Lasers and Sensors; Navigation and Avionics; Marine; and Propulsion Systems, Space Vehicles, and Related Equipment), five groups (Equipment, Assemblies, and Components; Test, Inspection, and Production Equipment; Materials; Software; and Technology), and three additional numbers involved in the classification scheme. See 15 C.F.R. § 738.2(a)-(d).

<sup>3</sup> 15 C.F.R. § 738.2(d)(2)(i)(A)-(B).

<sup>4</sup> 15 C.F.R. § 734.3(b).

<sup>5</sup> 15 C.F.R. § 734.3(c).

<sup>6</sup> For example, OFAC sanctions may apply to the transaction even though the item is classified as EAR99.

<sup>7</sup> 22 C.F.R. pts. 120-130.

<sup>8</sup> 22 U.S.C. §§ 2778-2780; 22 C.F.R. pts. 120-130.

controlled items register with the DDTC and file for an export license through its D-Trade system.

In addition to weapons-related items, the ITAR controls exports of spacecraft and space-related items. These items fall under Categories IV and XV of the USML. Satellite launches are subject to additional restrictions when the launch takes place in a non-NATO country or in a country that is not a major non-NATO ally.<sup>9</sup> The launch is also subject to additional restrictions when carried out by individuals from one of these countries.<sup>10</sup> In these situations, the manufacturer must file a Technology Transfer Control Plan issued from the Department of Defense.<sup>11</sup> The ITAR requires that The Department of Defense's Defense Technology Security Administration (DTSA) monitor all conditions of the satellite launch, including the design, transportation, and maintenance of the satellite to prevent the technology from being shared with the launch-site country.<sup>12</sup>

### **[3]—Department of the Treasury**

The Department of the Treasury's OFAC specializes in safeguarding national security through ensuring that financial transactions do not imperil U.S. security interests. OFAC issues economic and trade sanctions aimed at foreign countries, terrorists, those who deal in weapons of mass destruction, and others who threaten U.S. national security, policy, or the national economy. It administers some, but not all, virtually total embargoes and a few more selective controls. These sanctions are promulgated pursuant to the Trading With the Enemy Act (TWEA)<sup>13</sup> and the International Emergency Economic Powers Act (IEEPA).<sup>14</sup> However, IEEPA largely supersedes the TWEA in most areas. The current embargo of Cuba is grandfathered under TWEA. Most other OFAC embargoes, including those of Iran and Sudan, and selective controls, such as those of rough diamonds unless validated by a Kimberley Process Certificate, are authorized by IEEPA.

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<sup>9</sup> Pub. L. No. 105-261, div. A, title XIV, § 1514(b), 112 Stat. 2176 (1998) (codified at 22 U.S.C. § 2778). A list of major non-NATO allies is given in 22 C.F.R. § 120.32.

<sup>10</sup> 22 U.S.C. § 2778, Proliferation and Export Controls note, § 1514(a)(2)-(4).

<sup>11</sup> 22 U.S.C. § 2778, Proliferation and Export Controls note, § 1514(a)(1).

<sup>12</sup> 22 C.F.R. § 124.15.

<sup>13</sup> Act of Oct. 6, 1917, ch. 106, 40 Stat. 411 (1917) (codified at 50 U.S.C. App. §§ 1-44).

<sup>14</sup> Pub. L. No. 95-223, title II, 91 Stat. 1626 (1977) (codified at 50 U.S.C. §§ 1701-1707).

#### [4]—Nuclear Regulatory Commission

Pursuant to the Atomic Energy Act of 1954,<sup>15</sup> the Nuclear Regulatory Commission's (NRC) Office of International Programs regulates the export of nuclear commodities. These items include the following:

Facilities:<sup>16</sup>

- Nuclear reactors;
- Uranium enrichment facilities;
- Spent fuel reprocessing plants;
- Uranium and conversion plants;
- Heavy water or deuterium production plants;
- Nuclear fuel fabrication plants;
- Lithium isotope separation facilities; and
- Equipment, component parts, and assemblies designed for exclusive use in any such facilities.

Materials:<sup>17</sup>

- Special nuclear material;
- Source material;
- By-product material;
- Deuterium; and
- Nuclear grade graphite for nuclear end use.

The NRC issues general and specific export licenses for these commodities unless they fall into an exception.<sup>18</sup> A general export license allows for the export of certain forms of nuclear material in limited quantities.<sup>19</sup> For export of nuclear materials to restricted countries,<sup>20</sup> the general licenses are more limited.<sup>21</sup> The NRC requires that exporters provide greater details on applications for general export licenses for the following materials:

- By-product material;<sup>22</sup>
- Deuterium;<sup>23</sup>
- Reactor components;<sup>24</sup>

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<sup>15</sup> 42 U.S.C. §§ 2011 *et seq.*

<sup>16</sup> 10 C.F.R. § 110.8.

<sup>17</sup> 10 C.F.R. § 110.9.

<sup>18</sup> See 10 C.F.R. § 110.1(b)(1)-(6).

<sup>19</sup> 10 C.F.R. §§ 110.19-24.

<sup>20</sup> See 10 C.F.R. § 110.29.

<sup>21</sup> The list of restricted destinations includes: Afghanistan, Andorra, Angola, Burma (Myanmar), Djibouti, India, Israel, Oman, and Pakistan. Restrictions on nuclear exports to these destinations are contained in 10 C.F.R. § 20(f), § 110.21(b), §§ 110.22(b) and (d), § 110.23(a)(3), §§ 110.24(a) and (b), and § 110.41(a)(9).

<sup>22</sup> 10 C.F.R. § 110.23.

<sup>23</sup> 10 C.F.R. § 110.24.

- Source material;<sup>25</sup> and
- Special nuclear material.<sup>26</sup>

When a general license does not apply, the NRC may issue a specific license.<sup>27</sup> The specific license requires the exporter to provide detailed information on the nature of the proposed transaction.<sup>28</sup>

### [5]—Department of Energy

Exports of natural gas and liquefied natural gas must be authorized by the Department of Energy's (DOE) Office of Natural Gas Regulatory Activities (ONGRA), in accordance with Section 3 of the Natural Gas Act of 1938.<sup>29</sup> ONGRA may issue a blanket authorization<sup>30</sup> or a long-term authorization to exporters.<sup>31</sup> A blanket authorization enables the export for two years on the exporter's behalf or on behalf of a third party. A long-term authorization is required when the exporter's contract is for a term longer than two years.

Exporters of electrical energy must obtain a license from the Office of Policy, Siting and Analysis within the DOE's Office of Electricity Delivery and Energy Reliability. For electrical transmission lines that cross the U.S. border, a presidential permit is required. For export of electrical energy overseas, the DOE reviews license applications for compliance with two criteria. First, the DOE ensures that, in accordance with the Federal Power Act,<sup>32</sup> the export of electrical energy does not have an adverse effect on the U.S. supply of electrical energy. Second, the DOE must ensure that the export authorization request complies with the National Environmental Policy Act.<sup>33</sup>

The DOE monitors unclassified assistance of foreign atomic energy activities.<sup>34</sup> The Secretary of the DOE specifies the requirements for general and specific authorizations.<sup>35</sup> Generally authorized activities include, but are not limited to, attending meetings held by educational or scientific institutions, providing information or assistance to prevent a radiological emergency that endangers the public, and participation in

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<sup>24</sup> 10 C.F.R. § 110.26.

<sup>25</sup> 10 C.F.R. § 110.22.

<sup>26</sup> 10 C.F.R. § 110.21.

<sup>27</sup> 10 C.F.R. § 110.19.

<sup>28</sup> 10 C.F.R. § 110.32.

<sup>29</sup> 15 U.S.C. § 717(b).

<sup>30</sup> 15 U.S.C. § 717(b) (as amended by Section 201 of the Energy Policy Act of 1992); 10 C.F.R. pt. 590.

<sup>31</sup> 15 U.S.C. § 717(b); 10 C.F.R. pt. 590.

<sup>32</sup> 16 U.S.C. §§ 791 *et seq.*

<sup>33</sup> Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321 *et seq.*).

<sup>34</sup> 10 C.F.R. § 810.6 as authorized by Section 57b of the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.*

<sup>35</sup> 10 C.F.R. § 810.1.

government-sponsored or government-approved exchange programs.<sup>36</sup> A generally authorized activity does not require approval or review by the Secretary of the DOE.<sup>37</sup> A specific authorization is required of any persons engaged in producing special nuclear material in certain countries,<sup>38</sup> providing sensitive nuclear technology to any foreign country, and giving assistance or training to any foreign country in nuclear reactor or nuclear production-related projects.<sup>39</sup> For a specific authorization, the applicant must file an application with the DOE, for approval by the Secretary of the DOE.<sup>40</sup>

On June 12, 2013, the DOE proposed an amendment to the DOE Acquisition Regulation to require all of its contractors to comply with all export control laws, regulations, and directives effective at the time of the contract award. DOE contracting officers will be required to include a clause that certifies specific compliances with export control laws, including obtaining licenses and approvals, timely notifications, and other necessary performance requirements in order to ensure compliance by the contractor.<sup>41</sup>

#### [6]—Department of the Interior

Wildlife, living or dead, may be subject to export regulation by the Department of the Interior's U.S. Fish and Wildlife Service. These regulations are based on the Convention on International Trade in Endangered Species (CITES), of which the United States is a signatory. CITES applies to the international export of specified plants and animals.<sup>42</sup>

The Endangered Species Act<sup>43</sup> (ESA) executes the agreements set forth in CITES. The purpose of the ESA is to protect plants and animals from extinction. The ESA and CITES may also apply in special circumstances to antiques that comprise in part of animal products. In addition, the Migratory Bird Treaty Act<sup>44</sup> (MBTA) restricts export of live birds, bird nests, and other bird products without a license. The U.S. Fish and Wildlife Service administers export licenses covered by the MBTA.

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<sup>36</sup> 10 C.F.R. § 810.7.

<sup>37</sup> 10 C.F.R. § 810.3.

<sup>38</sup> The list of countries can be found in 10 C.F.R. § 810.8(a).

<sup>39</sup> 10 C.F.R. § 810.8(a).

<sup>40</sup> 10 C.F.R. § 810.10.

<sup>41</sup> 78 Fed. Reg. 35,195 (June 21, 2013). DOE reopened the comment period and extended the deadline to end August 13, 2013. 78 Fed. Reg. 45,168 (July 26, 2013).

<sup>42</sup> Species included in CITES are listed in the three Appendices to the Convention. Convention on International Trade in Endangered Species of Wild Fauna and Flora (Mar. 3, 1973), 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243, ELR Stat. 40336.

<sup>43</sup> 7 U.S.C. § 136; 16 U.S.C. §§ 1531 *et seq.*

<sup>44</sup> Act of July 13, 1918, ch. 128, 40 Stat. 755 (1918) (codified at 16 U.S.C. §§ 703-712).

Certain restrictions also apply to marine mammals under the Marine Mammals Protection Act,<sup>45</sup> timber exports under CITES, and exotic birds under the Wild Bird Conservation Act.<sup>46</sup>

### **[7]—Food and Drug Administration**

The Food and Drug Administration (FDA) regulates pursuant to the Federal Food, Drug, and Cosmetic Act (FDCA).<sup>47</sup> The FDCA gives guidance as to when export of unapproved, adulterated, or misbranded items may be allowed.<sup>48</sup> Certain drugs may be exported overseas even when not approved for U.S. sale.<sup>49</sup> Foreign governments sometimes require export certificates from U.S. exporters. In many instances, foreign importers of these products seek assurance that these items meet certain U.S. standards. Examples of export certificates include the Certificate of Free Sale, indicating a food product, dietary supplement, or cosmetic may be legally marketed in the United States, and the Certificate of Exportability, signifying that a human drug or device that cannot be marketed in the United States may be legally exported overseas.

### **[8]—Patent and Trademark Office**

The Commissioner for Patents within the Department of Commerce requires a license for filing a patent application in a foreign country if the invention was made in the United States and a U.S. application for the invention has not yet been filed or is less than six months old. Obtaining such foreign filing license relieves the patent applicant from the licensing requirements of other agencies' controls, such as State's ITAR, Commerce's EAR, or DOE's Assistance to Foreign Atomic Energy Activities. However, if no Patent and Trademark Office (PTO) foreign filing license is obtained, the transfer of the technical data contained in a patent application is subject to those agency controls.

Additionally, the PTO issued a notice reminding patent practitioners that the PTO foreign filing license only authorizes export for the purpose of filing a foreign patent application and does not authorize export or reexport for any other purpose.<sup>50</sup> Thus, exporters still need to consult the controls of other agencies for products embodying the subject matter of the patent applications.

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<sup>45</sup> 16 U.S.C. §§ 1361 *et seq.*, 1401-1407, 1538, and 4107.

<sup>46</sup> Pub. L. No. 102-440, 106 Stat. 2224 (1992).

<sup>47</sup> Pub. L. No. 85-929, 72 Stat. 1784, 1785 (1958) (codified at 21 U.S.C. § 348).

<sup>48</sup> FDCA §§ 801, 802.

<sup>49</sup> FDCA § 802(b)(2).

<sup>50</sup> 73 Fed. Reg. 42,781 (July 23, 2008).

The PTO does not place export restrictions on technical data generated in a foreign country if the data is being sent to an inventor overseas before filing for a U.S. patent.

Other disclosure restrictions may apply if the patent application is under a secrecy order from a defense agency. In those cases, a permit is required to export or file a patent application abroad.<sup>51</sup>

### [9]—Environmental Protection Agency

A variety of legislation authorizes the Environmental Protection Agency (EPA) to regulate the export of environmentally sensitive substances. The Toxic Substances Control Act (TSCA)<sup>52</sup> governs chemical exports. The TSCA requires that exporters of certain chemicals send a notification of export to the EPA.<sup>53</sup> Export notification is not required for all chemicals and low concentrations of chemicals normally subject to notification may be exempt.<sup>54</sup> The TSCA places additional restrictions on the export of highly toxic chemicals such as PCBs, lead, and asbestos.

The EPA and the Customs and Border Patrol together enforce the Clean Air Act,<sup>55</sup> which places restrictions on the export of ozone-endangering gases. The Resource Conservation and Recovery Act (RCRA)<sup>56</sup> governs the export of hazardous waste. Exporters must file a notification of intent to export to the EPA, which the EPA then sends to the receiving country. The country must agree to the shipment before the exporter can proceed. During the shipment, the hazardous waste materials must be accompanied by appropriate documentation. On a yearly basis, the exporter must submit to the EPA a report of all hazardous waste shipments. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)<sup>57</sup> governs export of pesticides. If pesticides are made solely for export and are not registered for use in the United States, the exporter must file a document from the foreign receiving party that it is aware that the pesticide is not registered, and therefore not marketable, in the United States. Additionally, the product must be labeled “Not Registered for Use in the United States,” and comply with several labeling and FIFRA requirements.

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<sup>51</sup> See 35 U.S.C. § 181.

<sup>52</sup> Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified at 42 U.S.C. § 2601 *et seq.*).

<sup>53</sup> See TSCA § 12(b).

<sup>54</sup> 40 C.F.R. § 707.60(c).

<sup>55</sup> 42 U.S.C. §§ 7401-7671.

<sup>56</sup> Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified at 42 U.S.C. § 6901 *et seq.*).

<sup>57</sup> Pub. L. No. 80-104, 61 Stat. 163 (1947) (codified at 7 U.S.C. § 136 *et seq.*).

**[10]—Department of Justice****[a]—Bureau of Alcohol, Tobacco,  
Firearms, and Explosives**

The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) is an agency within the Department of Justice that specializes in law enforcement issues, such as the control of firearms and explosives.<sup>58</sup> To export firearms governed by the National Firearms Act,<sup>59</sup> exporters must submit the ATF's Application and Permit for Permanent Exportation of Firearms (Form 9).

Note that other agencies may regulate the export of firearms and ammunitions. Some of these items may fall under the AECA of 1976,<sup>60</sup> which requires a license from the Department of State.<sup>61</sup> Guns and ammunition used for sporting purposes usually require a license from the Department of Commerce.

**[b]—Drug Enforcement Agency**

The Drug Enforcement Agency (DEA) administers regulations of certain narcotic drugs and non-narcotic controlled substances.<sup>62</sup> Generally, to export these substances, exporters must obtain a registration from the Attorney General.<sup>63</sup>

**[11]—Department of Agriculture**

The Department of Agriculture's Animal and Plant Health Inspection Services (APHIS) administers regulations on the import and export of certain plants. Pursuant to the Tobacco Seed and Plant Exportation Act, APHIS may require an export certificate prior to export.

**[12]—Department of Transportation****[a]—Federal Aviation Administration**

The Federal Aviation Administration (FAA) issues export airworthiness certificates for aircraft that meet certain FAA standards.<sup>64</sup> In addition to aircraft, aircraft engines, propellers, and other aircraft articles are eligible for export airworthiness certificates.<sup>65</sup> Exporters must

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<sup>58</sup> See Chapter 12 *infra* for a more extensive discussion of ATF regulations.

<sup>59</sup> Pub. L. No. 474, 48 Stat. 1236 (1934) (codified as amended as 26 U.S.C. ch. 53).

<sup>60</sup> Pub. L. No. 90-629, 82 Stat. 1320 (1968) (codified as amended at 22 U.S.C. §§ 2751 *et seq.*).

<sup>61</sup> 22 U.S.C. § 2778.

<sup>62</sup> 21 U.S.C. §§ 953 *et seq.*

<sup>63</sup> 21 U.S.C. § 957(a)(2). Some exceptions to the registration requirement exist. See 21 U.S.C. § 953 for the full list.

<sup>64</sup> 14 C.F.R. § 21.329.

<sup>65</sup> 14 C.F.R. § 21.331.

provide the importing country with all documents that it requires, obtain foreign entry clearance for the aircraft, safely transport the aircraft to its destination, and cancel the aircraft's U.S. registration and airworthiness certificate. Exporters must then return the FAA's Registration and Airworthiness Certificate and certify that the U.S. registration of the aircraft has been canceled.<sup>66</sup>

### **[b]—Maritime Administration**

The Maritime Administration regulates the disposal of ships and vessels. For the scrapping of fishing vessels, fish processing vessels, and certain fish tender vessels<sup>67</sup> weighing 1,000 gross tons or more, special export restrictions apply.<sup>68</sup> Among other limitations, the scrap cannot be sold or used by persons from certain countries, nor exported to those countries.<sup>69</sup>

### **[13]—Consumer Products Safety Commission**

The Consumer Products Safety Commission (CPSC) administers controls on the export of consumer products not in conformity with an applicable safety standard or declared to be a banned hazardous substance. The authorizing acts are the Consumer Product Safety Act<sup>70</sup> and the Federal Hazardous Substances Act.<sup>71</sup>

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<sup>66</sup> 14 C.F.R. § 21.335.

<sup>67</sup> Restrictions only apply to those vessels that had their fishery endorsement revoked pursuant to Pub. L. No. 106-554, App. D, 114 Stat. 2763 (2000).

<sup>68</sup> 46 C.F.R. § 221.15(d).

<sup>69</sup> The countries are listed in 46 C.F.R. § 221.13(a)(4).

<sup>70</sup> 15 U.S.C. §§ 2051 *et seq.*

<sup>71</sup> 15 U.S.C. §§ 1261 *et seq.*

## § 1.04 Export Clearance

The Census Bureau, Customs and Border Protection (CBP), and Postal Service play an indirect role in the export process through their involvement in export clearance.

### [1]—Census Bureau

The Census Bureau gathers and publishes statistical information on exports, collected through the Automated Export System (AES).<sup>1</sup> AES is the electronic system for gathering export information that replaced the paper Shipper's Export Declaration (SED).<sup>2</sup> Subject to certain exemptions, all exports falling under the CCL or the USML of the ITAR must file a report through the AES.<sup>3</sup> The Census Bureau has the authority to require exporters to verify information concerning exports within three years of product shipment.<sup>4</sup> Foreign trade data collected through the AES system is published online on the Census Bureau's website and frequently updated.<sup>5</sup> For all exports of physical goods, an Electronic Export Information (EEI) must be filed through the AES by the U.S. Principal Party in Interest (USPPI) or the USPPI's authorized agent.<sup>6</sup> The filer must be physically located in the United States at the time of filing, and have an Employer Identification number (EIN) or Dun and Bradstreet Number (DUNS). If the filer does not have an EIN or DUNS, the filer must obtain an EIN from the Internal Revenue Service.<sup>7</sup> Two electronic filing options, pre-departure or post-departure, are available to the USPPI or authorized agents for transmitting EEI. The electronic post-departure filing takes into account that complete information concerning export shipments may not always be available prior to exportation and accommodates these circumstances by providing for filing of EEI after departure when authorized.<sup>8</sup>

Prior to filing EEI, the USPPI or the authorized agent must be certified to file through the AES. Filing also may be completed through a designated service center that has been certified to transmit

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<sup>1</sup> 15 C.F.R. § 30.4; 13 U.S.C. § 301. While the Census Bureau uses the data gathered by AES for statistical reporting only, several other government agencies use the data to regulate exports. See Chapter 11 *infra* for a more extensive discussion of AES.

<sup>2</sup> 15 C.F.R. § 30.4(a).

<sup>3</sup> 15 C.F.R. § 30.60(a).

<sup>4</sup> 15 C.F.R. §§ 30.11 *et seq.*

<sup>5</sup> Foreign trade data is available at <http://www.census.gov/foreign-trade/data/index.html> (last visited Aug. 23, 2013).

<sup>6</sup> 15 C.F.R. § 30.2(a).

<sup>7</sup> 15 C.F.R. § 30.3(a).

<sup>8</sup> 15 C.F.R. § 30.4. For example, for exports of seasonal and agricultural commodities, only estimated quantities, values, and consignees may be known prior to exportation.

electronically complete EEI to AES. Becoming an authorized agent requires successfully completing a certification process in which exporters must file a Letter of Intent (LOI) detailing the company's background and promise to comply with export requirements. A USPPI using an agent does not have to be certified, but the certified authorized agent must have a properly executed power of attorney or written authorization from the USPPI.<sup>9</sup>

Mandatory information required for shipments transmitted to the AES include the name, address, identification, and contact information of the USPPI, date of export, ultimate consignee, U.S. state of origin, country of ultimate destination, method of transportation, conveyance name/carrier name, carrier identification, port of export, related party indicator,<sup>10</sup> domestic or foreign indicator,<sup>11</sup> commodity classification number, commodity description, primary unit of measure and quantity, shipping weight, and value.<sup>12</sup> In addition, "conditional" data elements must be reported if they apply to the specific shipment.<sup>13</sup> All information collected is kept confidential.

The AES performs a check against current U.S. export regulations in order to ensure the exporter's compliance. Data from AES provides information about the exporter to the Bureau of the Census, BIS, and other agencies.<sup>14</sup> The exporter must make corrections, amendments, or cancellations to the EEI as soon as they become aware of any changes to the shipment. In addition, the exporter must respond to error messages or non-compliance warnings generated by the AES.<sup>15</sup> When an EEI is accepted by AES, the user receives an Internal Transaction Number (ITN) as proof that the shipment was accepted and is filed with AES.<sup>16</sup>

## [2]—Customs and Border Protection

The U.S. Customs and Border Protection (CBP) is an agency of the Department of Homeland Security (DHS) charged with verifying that the import and export of goods complies with U.S. laws and regulations. The CBP primarily plays an enforcement role with respect to export control regulations promulgated by other government agencies. Before exporting goods,<sup>17</sup> the exporter, or the agent of the exporter,

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<sup>9</sup> 15 C.F.R. §§ 30.5 *et seq.*

<sup>10</sup> Used to indicate when a transaction involves trade between a USPPI and an ultimate consignee where either party owns directly or indirectly ten percent or more of the other party

<sup>11</sup> Indicates if the goods exported are of domestic or foreign origin.

<sup>12</sup> 15 C.F.R. § 30.6.

<sup>13</sup> 15 C.F.R. § 30.6.

<sup>14</sup> 15 C.F.R. § 30.60.

<sup>15</sup> 15 C.F.R. § 30.9.

<sup>16</sup> 15 C.F.R. § 30.1.

must provide CBP with the EEI, filed through the AES.<sup>18</sup> Arms or war munitions illegally exported may be in violations of customs laws and subject to seizure or forfeiture. In the event of seizure, written notice of any fine or penalty incurred as well as any liability to forfeiture is given to each party with an interest in the seized property.<sup>19</sup> The notice also informs each interested party of their right to apply for relief.<sup>20</sup> CBP is responsible for accepting and evaluating petitions for relief from fines, forfeitures, and penalties and for petitions seeking the compensation from sales of seized and forfeited property.<sup>21</sup> Petitions must be filed with the Fines, Penalties, and Forfeitures Office of the CBP.<sup>22</sup> In addition, petitions for relief from penalties must be made within sixty days of notice of the penalty and petitions for relief from seizures must be made within thirty days of notice of the seizure.<sup>23</sup> A Fines, Penalties, and Forfeitures Officer evaluates the petitions and may grant relief, depending on the circumstances. However, any decision by the Officer to reduce a penalty or remit a forfeiture upon condition of payment will be cancelled if the specified amount is not paid within sixty days of notice of the decision.<sup>24</sup>

Administrative decisions of CBP on petitions may be protested. If protested, the port director will review and act on a protest within two years from the date the protest was filed.<sup>25</sup> Furthermore, any person whose protest has been denied may contest the denial by filing a civil action in the United States Court of International Trade<sup>26</sup> within 180 days after notice of denial of a protest.<sup>27</sup>

### [3]—Postal Service

Goods sent through the U.S. Postal Service are subject to the U.S. export control regime and as such, mailers must comply with all applicable U.S. regulations. The Postal Service addresses non-postal export regulations concerning U.S. mailings in its International Mail Manual.<sup>28</sup> The regulations are administered by the OFAC, the Census

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<sup>17</sup> Some exceptions to a pre-departure filing of the EEI through the AES system exist. See, e.g., § 15 C.F.R. § 30.5(c).

<sup>18</sup> 19 C.F.R. § 192.14(a); See § 1.04[1] *infra*.

<sup>19</sup> 22 U.S.C. § 401.

<sup>20</sup> 19 U.S.C. § 1618.

<sup>21</sup> 19 C.F.R. § 171.0.

<sup>22</sup> 19 C.F.R. § 171.1.

<sup>23</sup> 19 C.F.R. § 171.2.

<sup>24</sup> 19 C.F.R. § 171.22.

<sup>25</sup> 19 U.S.C. §§ 1514 *et seq.*; 19 C.F.R. §§ 174.21 *et seq.*

<sup>26</sup> 28 U.S.C. § 2632.

<sup>27</sup> 19 C.F.R. §§ 174.31 *et seq.*

<sup>28</sup> See The International Mail Manual and follow the links to Chapter 5, Nonpostal Export Regulations, available at <http://pe.usps.com/text/imm/welcome.htm> (last visited Aug. 23, 2013).

Bureau's Foreign Trade Regulations (FTR), the Department of Commerce's BIS, the Department of State's DDTC, the U.S. Department of Agriculture (USDA), and the U.S. Fish and Wildlife Service (USFWS).

OFAC prohibits mailings to certain countries<sup>29</sup> or to a blocked person. Blocked persons include individuals and entities, regardless of mailing destination, on the Specially Designated Nationals (SDN) List.<sup>30</sup> In addition, mailings cannot be sent to entities with greater than fifty percent ownership by blocked person. However, a general license allows mailing materials to blocked countries or persons under certain conditions. These items may include donations for humanitarian causes, books, CDs, and newspapers. For items that do not fall under a general license exception, the mailer may apply for a specific license. Civil and criminal penalties may apply for violation of this OFAC regulation.

Under the U.S. Census Bureau's Foreign Trade Regulations (FTR),<sup>31</sup> mailers may be required to file electronic export information.

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<sup>29</sup> The prohibited countries are the Balkans, Belarus, Burma, Cote d'Ivoire, Cuba, Democratic Republic of the Congo, Iran, Iraq, Lebanon, Liberia, Libya, North Korea, Somalia, Sudan, Syria, Yemen and Zimbabwe. See <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx> (last visited Aug. 23, 2013).

<sup>30</sup> See "512 Prohibited Destinations, Specially Designated Nationals, and Blocked Persons," The International Mail Manual, available at [http://pe.usps.com/text/imm/immc5\\_002.htm](http://pe.usps.com/text/imm/immc5_002.htm) (last visited Aug. 23, 2013).

<sup>31</sup> 15 C.F.R. part 30.

### § 1.05 The National Export Initiative

In August 2009, President Obama directed a broad-based inter-agency review of the U.S. export control system with the goal of strengthening national security and the competitiveness of key U.S. manufacturing and technology sectors by focusing on current threats and adapting to the changing economic and technological landscape. The review determined that the export control system is overly complicated, contains too many redundancies, and, in trying to protect too much, diminishes our ability to focus our efforts on the most critical national security priorities. As a result, in March 2010 the Obama Administration announced the National Export Initiative (NEI), which seeks to double U.S. exports over a five-year period by addressing these issues.<sup>1</sup>

As a part of the NEI, the Administration began the Export Control Reform Initiative, which aims to fundamentally reform the U.S. export control system. Pursuant to this effort, BIS is conducting a retrospective review of portions of the Export Administration Regulations (EAR) to determine how they might be clarified or streamlined to be more effective or less burdensome. In April 2010, former Secretary of Defense Gates explained that fundamental reform is needed in each of the export control system's four component areas: (1) transformation to a single control list, (2) a single licensing agency, (3) a single information technology system, and (4) a single primary enforcement coordination agency.<sup>2</sup>

The Administration plans to implement the reform in three phases. The first two phases involve short- and medium-term adjustments to the current export control system, with a focus on establishing harmonized control lists and processes among the Departments of Commerce, State, and the Treasury, to the extent practicable, in order to build toward the third phase of the single control list, licensing agency, information technology system, and enforcement coordination agency. Under this approach, new criteria for determining what items need to be controlled and a common set of policies for determining when an export license is required will be implemented. The Administration's goal is that the control list criteria will be based on transparent rules, which will reduce the uncertainty faced by U.S. allies, U.S. industry, and its foreign partners and will allow the government to erect higher walls around the most sensitive items in order to enhance national security.<sup>3</sup>

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<sup>1</sup> Exec. Order No. 13,534, 75 Fed. Reg. 12,433 (Mar. 11, 2010).

<sup>2</sup> Robert M. Gates, Sec. of Def., Remarks at the Business Executives for National Security (Export Control Reform) (April 20, 2010) (hereinafter Gates' Remarks of April 20, 2010).

<sup>3</sup> 76 Fed. Reg. 47,528 (Aug. 5, 2011).

**[1]—Single Controls List**

As part of the Export Control Reform Initiative, the Administration seeks to create two consolidated control lists that span multiple agencies.<sup>4</sup>

**[a]—Single Controls List for Persons**

On December 9, 2010, the Administration announced a new online tool that combines the various screening lists used by Commerce, State, and Treasury.<sup>5</sup> This downloadable file aggregates the individual lists to make screening of persons easier.<sup>6</sup> The list includes the following:

Department of Commerce<sup>7</sup>

Denied Persons List

Unverified List

Entity List

Department of State<sup>8</sup>Parties sanctioned by the Bureau of International Security  
and Non-proliferation

AECA Debarred List

Department of the Treasury<sup>9</sup>

Specially Designated Nationals List

However, this consolidated list does not comprise all persons on government watch lists.<sup>10</sup> This is because some controls apply broadly to classes of persons in addition to those specifically appearing in the various lists.<sup>11</sup> Further, the consolidated list is not updated immediately when an agency adds a new entity. It lags behind the Federal Register

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<sup>4</sup> Gates' Remarks of April 20, 2010.

<sup>5</sup> Press Release, The White House, President Obama Announces First Steps Toward Implementation of New U.S. Export Control System, 2010 WL 4994445 (Dec. 9, 2010), available at <http://www.whitehouse.gov/the-press-office/2010/12/09/president-obama-announces-first-steps-toward-implementation-new-us-expor> (hereinafter Obama's Dec. 9, 2010 Announcement) (last visited Aug. 23, 2013).

<sup>6</sup> See [http://www.export.gov/ecr/eg\\_main\\_023148.asp](http://www.export.gov/ecr/eg_main_023148.asp) (last visited Aug. 23, 2013) and follow the links to the "Consolidated Screening List" to obtain the downloadable file.

<sup>7</sup> See § 1.02[1] *supra* for a discussion of the Department of Commerce's lists.

<sup>8</sup> See § 1.02[2] *supra* for a discussion of the Department of State's lists.

<sup>9</sup> See § 1.02[3] *supra* for a discussion of the Department of Treasury's list.

<sup>10</sup> See § 1.02 *supra*.

<sup>11</sup> For example, some Treasury sanctions cover agents of those entities designated on a screening list and entities in which a designated entity has an interest. These end-users may not themselves be listed on a screening list.

notices by several days in some instances. Thus, exporters should still check recent Federal Register notices to ensure adequate screening.

### **[b]—Single Controls List for Items and Activities**

The Administration's ultimate goal is to merge the Department of Commerce and Department of State lists of items and activities controlled. This merger involves a multiple step process. First, the government must develop new criteria for determining which items to control and a structured procedure for determining when it requires a license for export. These new control criteria and licensing policies will reflect: (1) whether the item provides a military or intelligence advantage; and (2) the item's foreign availability. Second, the controls lists must be revised in accordance with the newly developed criteria. Third, the revised lists must be uniformly structured so that they can be practically merged. Although the goal is a single list, it must still maintain a jurisdictional "bright line" between the ITAR and the EAR.<sup>12</sup> Further, the lists must use positive language and be written in such a manner that persons who are not knowledgeable about export controls can still determine the item's jurisdictional status and classification based on the item's technical specifications and capabilities.<sup>13</sup> The Administration intends to establish a three-tiered framework of controls based on the new criteria. The overall concept is that if an item falls within one of the three tiers, it will be controlled at the level set by the licensing policy for that particular tier. If an item does not fall within the control criteria as providing a military or intelligence advantage, but nonetheless falls within controls for other reasons such as foreign policy or multilateral agreements, it should be controlled in the lowest tier. Finally, items not falling within any of the tiers should not be controlled for export under the ITAR or the EAR.

### **[2]—Tiered CCL and USML Lists**

In December 2010, the Administration announced that it began the first step to overhaul the CCL and the USML.<sup>14</sup> It published a draft rule that sets out uniform criteria and procedures for determining whether items should still be subject to export controls.<sup>15</sup> The new procedure groups items into three tiers of major control levels, each with a different set of criteria:<sup>16</sup>

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<sup>12</sup> 75 Fed. Reg. 76,937 (Dec. 10, 2010).

<sup>13</sup> See 75 Fed. Reg. 76,664 (Dec. 9, 2010) (requesting public comments on how to make the CCL clearer and more "positive").

<sup>14</sup> Obama's Dec. 9, 2010 Announcement.

<sup>15</sup> 75 Fed. Reg. 76,930 (Dec. 10, 2010).

<sup>16</sup> 75 Fed. Reg. 76,931 (Dec. 10, 2010).

Tier 1: High level controls, the so-called “crown jewels,”<sup>17</sup> apply to:

- Weapons of mass destruction (WMDs);
- Unmanned delivery systems for WMDs;
- Facilities, plants, and items for producing, processing, or using WMDs, nuclear materials, or unmanned delivery systems for WMDs; or
- Items “almost exclusively available”<sup>18</sup> in the United States that provide critical military or intelligence advantages.

Tier 2: Medium level controls apply to items almost exclusively available from regime partners or adherents that:

- Provide a substantial military or intelligence advantage; or
- Make a significant contribution to the indigenous development, production, use, or enhancement of a Tier 1 or 2 item.

Tier 3: Low level controls apply to items not otherwise controlled in Tiers 1 or 2 and:

- Provide a significant military or intelligence advantage;
- Make a significant contribution to the indigenous development, production, use, or enhancement of a Tier 1, 2, or 3 item;
- Are controlled by national security, foreign policy, or human rights reasons; or
- Are controlled pursuant to a multilateral agreement and do not otherwise meet the control criteria in Tier 1, 2, or 3.

In addition, the Administration published a proposed rule to implement a new licensing policy.<sup>19</sup> The Strategic Trade Authorization License Exception (STA) lifts the license requirement for certain EAR items to some countries. In accordance with structuring licensing

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<sup>17</sup> A “crown jewel” or “critical” item is something that provides a capability that would pose a serious threat to national security if not controlled. Examples include: armed hostilities, disrupting foreign relations affecting national security, compromising communications intelligence systems, disclosing technical developments vital to national security, or assisting the foreign development of WMDs. 75 Fed. Reg. 76,665 (Dec. 9, 2010).

<sup>18</sup> The term “almost exclusively available” means the item is available from only a small number of countries that have export controls covering that item. 75 Fed. Reg. at 76,665 (Dec. 9, 2010).

<sup>19</sup> 75 Fed. Reg. 76,653 (Dec. 9, 2010).

policies to match the new controls list, the STA will not be available for Tier 1 items. The Administration also began the second step of revising the current lists according to the abovementioned criteria. After the initial reevaluation, approximately 74% of the items formerly controlled on the USML will be either moved to Commerce's jurisdiction on the CCL or decontrolled completely as not falling within one of the three tiers.<sup>20</sup> For example, the following is the proposed entry for Category VII(a)(2)(iii) using positive language and indicating the tiered structure:<sup>21</sup>

(iii) Armor systems, components, or parts (e.g., active protection systems, plates, appliqués, tiles) as follows:

(A) (Tier 1) Developmental armor components or parts.

(Tier 2) Transparent armor components or parts produced from armor materials controlled in VII(c)(3) as follows:

(1) (Tier 2) Having  $E_m$  greater than or equal to 1.3; or  
Having  $E_m$  less than 1.3 and meeting NIJ Level III standards with areal density as follows:

(ii) (Tier 2) Less than or equal to 30 pounds per square foot; or

(ii) (Tier 3) Between 30 and 40 pounds per square foot

### [3]—Recent Activity

Although the initial plan was to have a single tiered control list, the Administration has decided as an interim step to implement revisions to both the USML and the CCL that are more positive but not yet tiered. The President plans to proceed with building positive lists now and afterward return to structural changes.<sup>22</sup>

The Administration is proposing to transfer hundreds of thousands of less sensitive parts and components off the USML and onto the Commerce Department's CCL by creating a framework for controlling militarily less significant defense articles, largely generic parts and components, on the CCL rather than the USML. In parallel, the Administration aims to create a more positive, but yet not tiered USML category of specific types of parts, components, accessories, and attachments that continue to warrant control on the USML.<sup>23</sup> All other parts, components, accessories, and attachments would become

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<sup>20</sup> President Obama's Dec. 9, 2010 Announcement.

<sup>21</sup> 75 Fed. Reg. 76,932 (Dec. 9, 2010).

<sup>22</sup> 76 Fed. Reg. 41,958 (July 15, 2011).

<sup>23</sup> 76 Fed. Reg. 41,959 (July 15, 2011).

<sup>24</sup> 76 Fed. Reg. 41,960 (July 15, 2011).

subject to the new 600 series controls in Category 9 of the CCL to be published separately by the Department of Commerce.<sup>24</sup>

State, Commerce, and Defense Department are close to completing a review of all the twenty-one USML categories and should continue to publish the draft rules for public comments. However, each transfer requires the review and approval of Congress. On January 2, 2013, President Obama signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2013, which restores the authority to the President the determination of whether the removal of satellites from the USML is in the best national security interest of the U.S.<sup>25</sup> The passage of the bill effectively allowed the Obama Administration to rebuild USML Category XV that currently includes controls on satellites and related items. On May 24, 2013, the State and Commerce Departments published in the Federal Register its newly proposed USML Category XV and the list of satellites that would be transferred to the CCL.<sup>26</sup>

#### [a]—Military Tanks

The Administration selected Category VII of the USML, which controls military tanks and related vehicles, as the first set of items to undergo reevaluation.<sup>27</sup> On July 15, 2011, BIS published a proposed rule that describes how articles the President determined no longer warrant control under Category VII of the USML would be controlled under the CCL. This proposed rule was published in conjunction with a proposed rule by the Department of State that proposed amendment to the ITAR to revise Category VII of the USML to describe more precisely the military ground vehicles warranting control on the USML. This proposed rule attempts to establish a clear “bright line” between the USML and the CCL for the control of military ground vehicles and removes from Category VII of the USML articles that the President determines no longer warrant control on the USML.<sup>28</sup> 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.<sup>29</sup> Changes include the removal of most unarmored and armored military vehicles, trucks, trailers, and trains, unless “specifically designed” as firing platforms for weapons above .50 caliber, and armored vehicles, either unarmed or with inoperable weapons, manufactured before 1956.

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<sup>25</sup> National Defense Authorization Act for Fiscal Year 2013, H.R. 4310, 112th Cong. (2013).

<sup>26</sup> 78 Fed. Reg. 31,431 (May 24, 2013).

<sup>27</sup> 76 Fed. Reg. 41,966 (July 15, 2011).

<sup>28</sup> 76 Fed. Reg. 76,930 (Dec. 9, 2010).

<sup>29</sup> 76 Fed. Reg. 76,085 (Dec. 6, 2011).

**[b]—Aircraft**

In a similar action of the President's Export Control Reform Initiative, In November 2011, BIS published a proposed rule that describes how articles the President determines no longer warrant control under Category VIII of the USML, which controls aircraft and related items, would be controlled under the CCL. This proposed rule was published in conjunction with a rule by State proposing changes to the ITAR to amend the list of articles controlled under Category VIII to describe more precisely the military aircraft and related defense articles warranting control on the USML and to establish a clearer line between USML and the CCL regarding controls over military aircraft and related articles.<sup>30</sup> Similar to the changes in Category VII, State's proposed revision narrows the types of aircraft and related items controlled on the USML to only those that warrant control under the stringent requirements of the Arms Export Control Act.

**[c]—Gas Turbine Engines**

Another rule proposed by BIS in December 2011 proposes transferring control of military gas turbine engines under Category VI, VII, or VIII of the USML to the CCL. A corresponding rule was proposed by State to amend the ITAR to establish USML Category XIX to cover gas turbine engines and associated equipment currently covered in Categories VI, VII, and VIII.<sup>31</sup> The intent of these changes is to make clear that gas turbine engines for surface vessels, vehicles, and aircraft that meet certain objective parameters are controlled on the USML.

**[d]—Surface Vessels and Naval Equipment**

Also, in December 2011, State proposed to amend the ITAR to revise Category VI of the USML, which controls surface vessels of war and special naval equipment, to describe more precisely the combat vessels and other naval equipment warranting control on the USML. This proposed rule revises USML Category VI to establish a clear "bright line" between the USML and the CCL for the control of these articles. As with other categories, 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.<sup>32</sup>

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<sup>30</sup> 76 Fed. Reg. 68,694 (Nov. 7, 2011).

<sup>31</sup> 76 Fed. Reg. 76,072 (Dec. 6, 2011).

<sup>32</sup> 76 Fed. Reg. 80,306 (Dec. 23, 2011).

**[e]—Submersible Vessels**

Accordingly, in December 2011, State proposed to amend the ITAR to revise Category XX of the USML, which covers submersible vessels and related articles. 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).<sup>33</sup>

**[f]—Auxiliary Military Equipment**

In May 2012, BIS published a proposed rule outlining how auxiliary and miscellaneous military equipment and related articles the President determines no longer warrant control under Category XIII of the USML, which controls auxiliary military equipment, would be controlled under the CCL in new Export Control Classification Numbers (ECCNs) 0A617, 0B617, 0C617, 0D617, and 0E617 as part of the proposed new “600 series” of ECCNs. This rule also proposes to integrate into those five new ECCNs items within the scope of Wassenaar Arrangement Munitions List Category 17 that would be removed from the USML, or that are not specifically identified on the USML or CCL but that are currently subject to USML jurisdiction. Finally, this new rule proposes to control some items now classified under ECCNs 0A018, 0A918 and 0E018 under new ECCNs 0A617 and 0E617. This action would consolidate the above-mentioned auxiliary and miscellaneous military equipment and related articles on the CCL in the proposed new “600 series.” The proposed rule was published in conjunction with a proposed rule from State, which would amend the list of articles controlled by USML Category XIII.<sup>34</sup>

**[g]—Commercial Satellites**

Also as part of the USML rewrite, the Obama Administration is addressing the export of commercial satellites, which since 1999 have been required to remain on the munitions list. For years, industry officials have said current law goes too far and over-regulates the U.S. commercial satellite business. The Administration has scrubbed the USML’s Category XV, Spacecraft Systems and Associated Equipment, and is making recommendations for items to be transferred to the CCL. In a related Matter, on November 1, 2011, Congressman Berman

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<sup>33</sup> 76 Fed. Reg. 80,306 (Dec. 23, 2011).

<sup>34</sup> 77 Fed. Reg. 29,564 (May 18, 2012).

introduced the Safeguarding United States Leadership and Security Act of 2011.<sup>35</sup> This legislation would restore the President's ability to determine what export restrictions should apply to commercial satellites and related components. It would also prohibit outright any such exports to China, Iran, North Korea, Syria, Sudan, or Cuba.

On April 18, 2012 the Departments of Defense and State released the long-awaited 1248 report, which found that the national security risks associated with removing commercial satellites from the USML and transferring jurisdiction to the Commerce Department are manageable.<sup>36</sup> After conducting this review, The Departments of Defense and State identified satellite types, and related items that are not purely defense-related and thus should not be designated as defense articles on the USML or controlled under the ITAR administered by State because these satellites and related items do not contain technologies unique to the United States military industrial base nor are they critical to national security. In particular, the Departments believe the following items are more appropriately designated as dual-use items on the CCL and controlled under the EAR: Communications satellites (COMSATs) that do not contain classified components; remote sensing satellites with performance parameters below certain thresholds; and systems, subsystems, parts, and components associated with these satellites and with performance parameters below thresholds specified for items remaining on the USML.<sup>37</sup>

#### **[h]—Protective Personnel Equipment and Shelters**

On June 7, 2012, BIS published a proposed rule describing how articles the President determines no longer warrant export control under Category X of the USML, which controls protective personnel equipment and shelters, would be controlled under the CCL in new ECCNs 1A613, 1B613, 1D613, and 1E613. This proposed rule would control military helmets, previously controlled under ECCNs 0A018 and 0A988, under new ECCN 1A613. In addition, the rule amends ECCN 1A005 for body armor and ECCN 0A988 to remove machetes. The proposed rule was published in conjunction with a proposed rule from the State, which would amend the list of articles controlled by USML Category X.<sup>38</sup>

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<sup>35</sup> H.R. 3288, 111th Cong. (2010).

<sup>36</sup> Section 1248 of the National Defense Authorization Act of Fiscal Year 2010 provides that the Secretaries of Defense and State shall carry out an assessment of the risks associated with removing satellites and related components from the USML.

<sup>37</sup> Pub. L. No. 111-84, 110 Stat. 1248 (2010).

**[i]—Military Explosive Devices**

On January 31, 2013, BIS published a proposed rule describing how articles the President determines no longer warrant export control under Category IV of the USML, which controls articles related to launch vehicles, missiles, rockets, torpedoes, bombs, mines, and other military explosive devices, would be controlled under the CCL in new ECCNs 0A604, 0B604, 0D604, 0E604, 9A604, 9B604, 9D604, and 9E604. The rule would also amend ECCNs 0D001, 0E001, 9B115, 9B116, 9D001, 9D002, 9D003, 9D104, 9E001, 9E002, 9E101, and 9E102 to conform to the aforementioned new additions of ECCNs 0x604 and 9x604. The proposed rule was published in conjunction with a proposed rule from the State, which would amend the list of articles controlled by USML Category IV.

**[j]—Spacecraft Systems**

On May 24, 2013, BIS published a proposed rule describing how articles the President determines no longer warrant export control under Category XV of the USML, which controls spacecraft and related items, would be controlled under the CCL in new ECCNs 9A515, 9B515, 9D515, and 9E515 as part of the proposed new “500 series” of ECCNs. The proposed rule was published in conjunction with a proposed rule from the State, which would amend the list of articles controlled by USML Category XV.

**[k]—Decision Tools**

BIS announced that it will launch two new web-based interactive decision tools on its website on May 20, 2013, that will help users to classify items based on the new CCL Order of Review.<sup>39</sup> This was part of BIS’s outreach efforts to help users to better understand some of the changes associated with the Export Control Reform Initiative. The tools are to assist in exports that will take into effect on or after October 15, 2013. The first tool is the CCL Order of Review Decision Tool which will assist users in understanding and classifying items according to the CCL. The second tool is the “Specially Designed” Decision Tool which will help determine whether an item falls under the “specially designed” category under the EAR. The tools will only help classify items subject to the EAR.

**[4]—Multi-Agency Enforcement Centers**

As part Export Control Reform Initiative, on March 7, 2012, the Administration announced the official opening of two new national

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<sup>38</sup> 77 Fed. Reg. 33,688 (June 7, 2012).

multi-agency centers to improve how the U.S. Government administers its export control system.

The Export Enforcement Coordination Center (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 DHS with a leadership team comprised of officials from DHS, the Federal Bureau of Investigation, and the Department of Commerce.<sup>40</sup> 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 (CISADA), further strengthening the enforcement of U.S. export controls.<sup>41</sup>

The Information Triage Unit (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 processes, previously conducted exclusively within each respective agency 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.<sup>42</sup> Such screening contributes to more timely, predictable, and consistent processes that U.S. exporters engaged in global trade have confirmed are critical to their competitiveness. The ITU is housed at the Department of Commerce.

In support of the E2C2 and the ITU, the Director of National Intelligence has designated the Office of the National Counterintelligence Executive as the entity responsible for coordinating export control issues involving the Intelligence Community. This designation is another significant process improvement designed for more seamless and comprehensive access to intelligence to strengthen the export control.

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<sup>39</sup> 15 C.F.R. § 744 Supp. No. 4.

<sup>40</sup> Exec. Order No. 13,558.

<sup>41</sup> 75 Fed. Reg. 69,573 (Nov. 15, 2010).

<sup>42</sup> See Press Release, The White House, Latest Steps to Implement the President's Export Control Reform Initiative (March 7, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/03/07/fact-sheet-latest-steps-implement-presidents-export-control-reform-initi> (last visited Aug. 23, 2013).