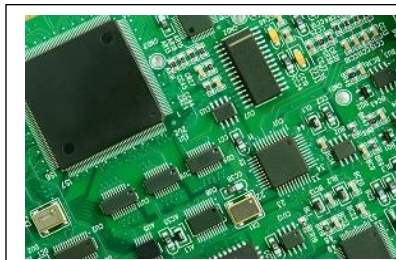


May 2017

U.S. EXPORT CONTROL REFORM: IMPACTS AND IMPLICATIONS FOR CONTROLLING THE EXPORT OF PROLIFERATION-SENSITIVE GOODS AND TECHNOLOGIES



BY ANDREA STRICKER

WITH DAVID ALBRIGHT

INSTITUTE FOR SCIENCE AND
INTERNATIONAL SECURITY |

202.547.3633

WWW.ISIS-ONLINE.ORG |

ISIS@ISIS-ONLINE.ORG |  [@THGOODISIS](https://twitter.com/THGOODISIS)

**U.S. EXPORT CONTROL REFORM:
IMPACTS AND IMPLICATIONS FOR
CONTROLLING THE EXPORT OF PROLIFERATION-SENSITIVE
GOODS AND TECHNOLOGIES**

**A POLICY DOCUMENT FOR THE
NEW PRESIDENT AND CONGRESS**

By Andrea Stricker with David Albright

Institute for Science and International Security

May 2017

We wish to thank three anonymous reviewers for their invaluable contributions to this paper. We would also like to acknowledge the work of Jerrica Goodson, who while a research fellow at the Institute for Science and International Security, contributed importantly to this paper.

COVER IMAGE CREDITS:

Top left: Electronic circuit board, selensergen via Adobe Stock

Top right: MKS Baratron Pressure transducer, via Ebay.com

Bottom: Fighter jet, Tsuguto Hayashi via Adobe Stock

REPORT IMAGE CREDITS:

Licenses have been obtained for all
Adobe Stock images used in this report.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	ii
PART I: EXPORT CONTROL REFORM INITIATIVE (ECR)	1
Goals and Justification	1
Background: U.S. Export Control System	2
ECR Implementation Plan and Status	6
Changes to the Major Control Lists Governing Proliferation-Sensitive Goods and Technologies	12
Enforcement Authorities and Changes	22
Preliminary Data on ECR Initiative Impacts	24
PART II: VIEWS ABOUT THE EXPORT CONTROL REFORM INITIATIVE	29
PART III: FINDINGS AND RECOMMENDATIONS	41

EXECUTIVE SUMMARY

The United States' export control system serves a vital role in preventing the spread of proliferation-sensitive goods to the nuclear, missile, and military programs of our adversaries, such as Iran and North Korea. Both countries, among others, mount aggressive efforts to obtain controlled goods from the United States and other suppliers. Stopping these countries from succeeding requires a robust, effective export control system.

The U.S. control system is complex. Authorities and control lists are delegated to multiple federal agencies, and the system was created largely piecemeal to prevent the spread of sensitive goods during the Cold War. Governmental and non-governmental analyses, along with the relevant exporting sectors of industry, have noted for decades serious problems with the system, including the slow pace of obtaining an export license, overregulation of small parts, the failure of the government to standardize and interconnect information technology (IT) systems, and inefficiencies and redundancies in export law enforcement efforts. With these criticisms in mind, the Obama administration set out in 2009 to carry out a wholesale reform of the system and in 2010 launched the Export Control Reform Initiative (ECR Initiative). The ECR Initiative planned to create a single export licensing agency, merge commodity control lists into a single list, adopt a common IT system, and move most export enforcement efforts under the purview of a single agency. These so-called "four singles" were never achieved due to a shortage of time and a lack of Congressional support for carrying out a bureaucratic restructuring of this scale. Several important and impactful reforms did occur, however, bringing the reforms part of the way to completion.

The ECR Initiative at its core attempted to address the question of what the appropriate balance is between increasing U.S. exports and trade and maintaining strict control of sensitive goods in order to enhance national security objectives. Overall, we assess that the reforms tilted the balance more toward increasing exports and trade at the expense of controls and national security. As a result of the reforms, thousands of items usable in military systems and equipment are now more readily available to long time U.S. allies, as well as to some countries of governance or transshipment concern. Little effort was devoted to better securing the most proliferation-sensitive goods. In response to the inherent question asked by the reforms: should the United States loosen controls on items that are being made available from other countries – the answer reached appears to have been tilted to the affirmative. As a result, it is far from clear whether U.S. adversaries such as Iran and North Korea are now increasingly able to obtain sensitive parts and components to outfit their military and other sensitive programs.

The export control reforms were announced by the Obama administration to Congress and the business community as an effort to fix overregulation of the most innocuous items and allow allies to obtain needed items more easily, while more tightly regulating the most sensitive goods. These goals are not problematic if the items truly are innocuous and the changes addressed legitimate concerns of the government, allies, and exporters. However, the effort may have simply contributed to increasing the world's supply of sensitive goods usable in military programs

– and thereby increasing availability of such goods to adversaries. This result is likely to be at odds with overarching U.S. national security goals in the long term. Serious review is needed to answer important questions, such as: what damage, if any, has been done to national security objectives by the freer availability of goods usable in military equipment? Where are these goods today? Are they remaining with legitimate end users or are they being sent onward to proliferant states such as Iran, Syria, Pakistan, or North Korea? Are the goods being misused in countries favored by U.S. export control reforms? Is there a need to re-visit controls on some of the goods? What about the integrity of the process for determining the control status of goods in the reformed “catch and release” system? The Obama administration did not have to answer these questions through any substantive reporting or testimony during a review. It is now time for Congress to become involved to ensure that this review and reporting is performed by the executive branch. The risks of not performing such a review may be that only a major scandal associated with the spread of deregulated goods would necessitate a review *ipso post facto*, which is not a preferable way to conduct policy.

In addition, most agree that finishing the ECR Initiative as originally envisioned would be challenging but that stopping the process before the intended completion also has its own risks. A review should seek to determine whether not completing the reforms is on balance a net positive or negative. Have the reforms as completed to date improved the effectiveness of U.S. export controls regarding the transfer of proliferation-sensitive goods? Should the Trump administration push to finish the reforms, in whole or in part? It is important for the Trump administration and Congress to take stock of the ECR Initiative’s accomplishments, including determining the impacts of completing or not completing the process.

The Institute for Science and International Security became interested in the results of President Obama’s ECR Initiative in 2015, after hearing differing opinions about the impacts of the reforms. The reforms generated intense controversy among experts, officials, company officials, and practitioners who were involved in the initiative or had seen initial results regarding the control of proliferation-sensitive goods. The Institute decided to investigate the reforms and contact a wide range of officials and experts to better understand and assess the ECR Initiative. This resulting report is intended to serve as a guide for the Trump administration and the 115th session of Congress. It is not intended to be an exhaustive review of every change made under the ECR Initiative, but to focus on those reforms with implications for the control of proliferation-sensitive commodities and technologies. We understand that some readers may disagree strongly with some of the suggestions based on their own experiences in government or industry; however, we have attempted to achieve a balanced assessment of this complex issue and hope that at least some recommendations will appeal to each audience. We welcome feedback and comments on this paper.

In Part I of this report, we explain the main elements of the ECR Initiative, including its goals, justification, intended impacts, and status. We also provide an overview of the U.S. export control system, including its licensing and enforcement functions. We describe how the ECR Initiative has impacted government functions more broadly based on preliminary data.

Part II discusses the positive, negative, and neutral views of more than a dozen experts we interviewed about the effects of the reforms. These off-the-record meetings included discussions with the following: Obama administration officials and other government personnel (at the time of interviews) who were instrumentally involved in implementing the ECR Initiative, from the Department of Commerce, Department of State, and Department of Homeland Security; U.S. prosecutors; a former law enforcement official from Homeland Security Investigations; lawyers in private practices with former senior federal law enforcement and export control implementation experience; professional staff of members of Congress; a Congressional expert; and private sector representatives. This last group included: the former head of an industry association with senior experience in federal export control implementation; an executive partner at a trade compliance group; and a senior executive in trade compliance at a major international company headquartered in the United States. We also appreciate the informal feedback of several Senate and House Congressional staff members who added importantly to our final version of this paper during meetings in mid-2017. We appreciate the candidness of all of these participants and that they allowed us to better understand the reforms and their impacts through each of their particular lenses of expertise.

In Part III we offer policy solutions for mitigating the potential threats identified in Parts I and II that may have been opened by the reforms. These solutions are aimed at better securing efforts to prevent the spread of proliferation-sensitive goods under a reformed U.S. export control system. We also suggest ways for the Trump administration and Congress to further implement and strengthen the reforms.

Highlights of the ECR Initiative and Recommendations

Transfers of Goods from the United States Munitions List to the Commerce Control List

The ECR Initiative involved the transfer of thousands of items from the United States Munitions List (USML) under the Arms Export Control Act's (AECA) International Traffic in Arms Regulations (ITAR) and administered by the State Department's Directorate of Defense Trade Controls (DDTC), to the Commerce Control List (CCL) under the Export Administration Regulations (EAR), which is administered by the Commerce Department's Bureau of Industry and Security (BIS). The EAR is maintained by the president's annual renewal of the state of emergency under the International Emergency Economic Powers Act (IEEPA) following the expiration in 2001 of the Export Administration Act (EAA). The CCL allows for the more flexible export of former USML items that the government deemed to be not worthy of the strictest control. The EAR also allows for the unlicensed export of certain categories of goods to country groups, whereas the ITAR does not specify this ability. The ITAR as administered by the State Department usefully allows the Secretary of State to weigh in on transfers of the most sensitive military items as to their impact on foreign policy and national security objectives.

A substantial part of the ECR Initiative involved an elaborate bureaucratic and time intensive process of reviewing and moving individual goods from the USML to the CCL. This process was thorough, technically rigorous, and involved what is often pointed to as unprecedented

interagency collaboration. The effort required the entirety of six years of the reforms, or from 2010 to 2016.

Nonetheless, on balance, we find that the transfer of goods from the USML to the CCL represented a weakening of controls. This is due in part to the number of licensing exceptions, or terms under which an entity does not have to obtain a U.S. government license, that are available on the CCL. In addition, some of the exceptions include well-known countries of transit concern such as Turkey. Overall, there is a broad conception that goods on the CCL are controlled less effectively than those on the USML. An example of this is the fact that categories 1-3 of the USML covering firearms, artillery, and ammunition were not transferred to the CCL due to concern that doing so could lead to the proliferation of firearms internationally. Federal law enforcement agencies vehemently opposed the transfer of these items to the CCL due to fears that they would spread more rapidly or be re-transferred to unintended end users. Overall, they feared that the transfers would complicate national and international security objectives.

In addition, some of the firearms prepared for transfer are inherently deadly weapons that should not be in the hands of U.S. adversaries or those who would use them for their own nefarious objectives, including in civil wars or to violently put down domestic uprisings. It is worth noting that Turkey is in the midst of an authoritarian crackdown and may be seeking weapons and other sensitive items for such use. The planned list transfers include high caliber sniper rifles and weapons that could be later modified to render them even more deadly. They could also be exported to actors that would seek to use them against U.S. troops in conflict situations. The new administration needs to ask: What beneficial purpose would the transfers serve? Some have argued for the transfers as export promotion, but we would urge the administration to ask what security risk this poses.

We understand that the categories 1-3 transfers appear imminently prepared for completion by the State Department. We would urge Congress and the administration to quickly become involved and halt the effort, given the extent of concerns. Moving forward with the transfers appears risky and it would also diminish the State Department's ability to weigh in on the security impact of arms related transfers. At the very least, if they are transferred, some of the most deadly weapons should require stricter controls and not be granted eligibility for license exceptions on the CCL.

A major objective of the Obama administration was to reduce the number of items on the USML in order to allow more time and resources for officials to scrutinize export requests for the remaining goods on that list. More scrutiny is a worthwhile goal. However, as stated above, it is difficult to see how the administration's pledge to erect "higher fences" around those remaining "crown jewels" has been accomplished. In fact, the administration appears to have devoted little effort to developing enhanced protection of the items remaining on the USML. Nothing in practice was done to strengthen the controls on the USML side, or for that matter, controls for those goods already on the CCL, while placing more goods on the CCL has led to an increase of exports of thousands of sensitive items that alone are typically innocuous but have dual uses in outfitting military systems and equipment. The effects of this deregulation are still not

adequately understood. Some loopholes in the form of general licensing and other exceptions also could have been addressed, but were not, under the reforms.

Given the time and amount of effort involved, however, there would be little technical justification to move goods back to the USML from the CCL unless there is overriding evidence of the need for such transfers. If studies and evidence of problems find that certain items should go back to the USML, this could be considered. A potential tightening of the licensing process and reduction in the number of goods allowed exceptions by the Commerce Department may be warranted as well as adding additional criteria for making decisions about the control status of exports. In general, the effects of these transfers require intensive governmental studies as to their effects on U.S. and international security.

Some nuclear-related items were transferred from the USML to the control of the Department of Energy (DOE) under the Atomic Energy Act (AEA). The transfer of nuclear-related items from the USML to the DOE was viewed as beneficial and not a weakening of controls. Nonetheless, a review of the implementation and effectiveness of this transfer is needed. In addition, a review is needed to determine if higher fences should be applied to certain critical items on both the USML and CCL.

Strategic Trade Authorization. The critical exception created for the USML goods moved to the CCL is the Strategic Trade Authorization (STA). This exception, which involves the former USML items under a newly created 600 series category of goods on the CCL, is the mechanism that allows for unlicensed exports within a certain set of criteria to a specified group of countries. The ultimate end user must be a government, although the initial importer can be a company. The STA group of countries includes most NATO members and other close U.S. allies to which the U.S. government seeks to export military related items to more easily. The importing entities are subject to a range of controls, such as having already been vetted for a previous Commerce Department license. However, they may exploit this exemption over time and onward proliferation may occur outside the awareness or scrutiny of the United States. It is also possible that an approved government recipient could send goods to unauthorized end users. USML categories 1-3 goods, if transferred over, would be eligible for the STA as currently envisioned.

Specially Designed

The Obama administration harmonized definitions on the USML and CCL, in particular what constitutes the control of goods that are “specially designed” for use in a sensitive piece of equipment. The stated intention of that change was to narrow the scope of the controls over smaller parts and items that are used in larger military equipment, thus freeing them from overregulation.

The new specially designed definition is controversial and needs to be reviewed. The changes to the definition of specially designed goods on the USML and CCL may have weakened enforcement efforts overall due to what U.S. prosecutors view as the definition’s problematic interpretation and historical cases. This may render it as having weak standing in court. U.S.

attorneys may now seek to prosecute only the most clear-cut cases relating to country sanctions violations, such as those involving Iran, North Korea, or China. A governmental study is needed to look at how enforcement of the ITAR and EAR specially designed definitions are implemented by federal agencies following the reforms and how the changes are interpreted in practice by U.S. prosecutors and courts.

The Trump administration should revisit and consider strengthening the design intent definition changes or otherwise change the definition to one that will have a better chance of holding up in court.

Export Enforcement Coordination Center

The standing up of the Export Enforcement Coordination Center (E2C2) was a key accomplishment of the ECR Initiative. E2C2 provides de-confliction of cases and ensures that all enforcement agencies are aware of what others are doing or have collected on a particular case, helps delegate and streamline export investigations among agencies, and builds more effective criminal investigations. We find that its role should be strengthened and broadened, and it should be granted devoted, annual funding by Congress, including the ability to hire its own employees who are currently drawn from the Department of Homeland Security (DHS) and other agencies. Its existing deconfliction mandate would be supported through increased resources thus allowing for an expanded and more efficient deconfliction process.

E2C2's intelligence coordination mandate could also be bolstered and broadened. Its mandate could be broadened further to coordinate pre- and post-shipment verification performed by the various export agencies.

The Trump administration and Congress should also establish E2C2 as an information sharing point of contact for companies and academic institutions, since it already successfully acts as a deconfliction center and works with export control implementation, intelligence, and enforcement agencies. Such an initiative should encourage companies to voluntarily report on, or even require them to report on, suspicious approaches by potentially illicit customers to purchase controlled or sensitive goods. In turn, the E2C2 could provide tips or other information about what to watch for in the way of suspicious activities. Legislation may be required to provide liability protections for companies and to allow for declassifications of government information provided to industry.

Need to Bolster Enforcement Efforts

The Department of Justice (DOJ) should provide guidance to U.S. prosecutors stating that strong criminal enforcement of trade control violations is a national priority for the administration. It should also encourage prosecutions of violations not involving traditional U.S. adversary countries or countries of transit concern, in addition to reiterating the need for ongoing focus on sanctioned countries.

DOJ should commit to more aggressively investigating, indicting, and extraditing those involved in outfitting Iran's nuclear, missile, or conventional weapons programs in defiance of U.S. laws and sanctions. During the Obama administration's efforts to negotiate and maintain the Iran nuclear deal, there was an excessive denial or non-processing of extradition requests and lure memos out of a misplaced concern about their effect on the deal.

Consolidating Enforcement at Homeland Security Investigations While Leaving Voluntary Compliance in Place

Problems need to be addressed concerning an increased overlap of authorities between the Commerce Department's Office of Export Enforcement (OEE), which is authorized to conduct export enforcement of CCL goods, and the Department of Homeland Security (DHS)'s Homeland Security Investigations (HSI), which has authority to handle both USML and CCL goods. By not completing the fourth single – or folding OEE into HSI as originally envisioned – OEE and HSI now have even more jurisdictional overlap of controlled items than before the ECR Initiative was initiated. This is due to the fact that HSI already had enforcement authority for both USML and CCL goods and OEE only had jurisdiction over CCL goods. Now that thousands of USML goods have transferred to the CCL, jurisdictional overlap between these agencies has significantly increased. The result is increased confliction issues and the possible expenditure of unneeded resources. Complicating matters is the role of the Federal Bureau of Investigation (FBI) which can handle general national security cases involving proliferation-sensitive goods.

In general, HSI has claim to wider authorities and a larger cadre of employees than Commerce's OEE. We recommend, while recognizing that this recommendation is controversial to some, that the Trump administration should fold Commerce's criminal enforcement sections in OEE into HSI, as originally envisioned under the ECR Initiative. However, BIS's authority and expertise to evaluate voluntary compliance would be retained and operate in parallel to DDTC's voluntary disclosure process. The FBI would maintain its current role. This reform would be a positive step toward making the enforcement system more efficient and consolidate DHS/HSI as the primary agency responsible for enforcement of the EAR and CCL items.

In this process, the Trump administration should also direct BIS to evaluate and, as necessary, reform its voluntary self-disclosure process to operate more in the fashion of DDTC's voluntary disclosure process. DDTC's process is viewed as more lenient toward accidental violations than BIS's, but levying of harsher penalties for egregious or repeat violators.

Consolidated Screening List

Another major accomplishment was the creation of a Consolidated Screening List (CSL) in 2010 of entities and individuals so that exporters and the government no longer need to consult up to six separate lists for denied parties.

Information Technology Improvements

We find that the administration should direct the Defense Technology Security Administration (DTSA) to continue its efforts begun under the ECR Initiative to institute more integrated government IT platforms for export administration and licensing and work to overcome barriers in IT system compatibilities. Congress should fund this effort.

The formation of some elements of a common IT system occurred on the government's end by implementing use of a previously created Department of Defense (DOD) government IT interface for licensing, USXPORTS. It is being used by the State Department, but the Commerce Department has not yet transitioned to the platform.

Other Recommendations

The administration should review other exceptions, such as the Additional Permissive Re-export exception under the CCL, and seek to close such loopholes that could be exploited by illicit actors. It should investigate and put a stop to any practice by the Commerce Department that involves issuing licenses for EAR 99 indexed goods without first investigating whether the goods are subject to the USML.

The administration should work to establish "watch lists" for major nuclear, missile, and military technologies based on existing control lists and proliferant state smuggling efforts and distribute them to relevant companies. Not all such goods are currently covered by export controls; however, they may be sought by a proliferant state, and they should be considered for inclusion on control lists. In addition, these lists could inform which items on the USML and CCL need higher fences.

The administration and Congress should continue to hear issues raised by the business community about ease of exporting and comprehending regulations under the reformed system, particularly those experienced by small businesses, which are under-resourced in many cases to cope with the massive compliance changes and may still be adjusting. They should assess whether exporters are still having difficulties determining the control status of goods under the new system. They should make practical changes and continue to address issues of undue administrative and regulatory burdens without sacrificing the primary mission of controlling the export of proliferation-sensitive goods.

Administration and Congressional Review

Critical to moving forward is reviewing and refreshing the ECR process. Toward those goals, the president should establish at the National Security Council (NSC) a special advisor who would be wholly focused on export control coordination, implementation, and enforcement matters.

In order to better understand the reforms to date, the Trump administration should direct BIS and HSI to provide a joint report that performs an in-depth sampling and assessment of former USML goods' status, locations, and end uses. The reporting should contain statistics about specific goods authorized and actually exported and where these goods are today. It should

include statistics on license or exception denials, close calls in exporting to unauthorized end users, and use of pre- and post-shipment and end use checks and related results. Reporting should also involve critically examining the results of enforcement efforts and investigations including real world examples.

The administration should request that BIS conduct a thorough examination of the end uses of STA exception goods processed since 2011, or near the start of the reforms, to ensure that the exception is not being taken advantage of over either the short or long term, particularly by countries of transit concern that fall into the STA authorized category. A BIS priority should be to continually conduct checks on goods exported since the exception's creation to ensure that they have not been re-transferred.

Congress can play a role, if needed, by passing legislation requiring in-depth reporting as described above on a consistent basis, such as in biannual reports. Each of the described reporting efforts should include information on cases in which nefarious attempts to procure U.S. exports by unauthorized end users were successfully blocked or not blocked by the new system. The reports should contain specific, targeted questions that require the executive branch to critically self-examine and indicate how well the system is performing based on data and actual incidents.

Congress should direct the Government Accountability Office (GAO) to produce a comprehensive report looking at the impacts of the ECR Initiative regarding the control of proliferation-sensitive goods and improvement or degradation in government functions. This effort should attempt to assess the impact of the freer flow of goods on U.S. security interests and use specific, targeted questions, such as the ones above, in order to obtain a critical look at executive branch activities.

Congress should request a GAO report on the status of enforcement-related changes to the export control system, including the increased overlap between OEE and HSI, and query whether prosecutors are now more discouraged in bringing EAR cases to court or are having difficulty enforcing the new definition of specially designed.

Congress should hold a series of hearings during its next session to gauge the impact and success of the ECR Initiative. Through the hearings and studies, Congress should assess whether new action, including legislation, is required to repair flaws in the system and ensure proliferation-sensitive goods are adequately controlled.

The administration should utilize the results of all of these review efforts to repair weaknesses in the system or add additional criteria for obtaining proliferation-sensitive goods. Export licensing and enforcement agencies should review all of the reporting in an interagency effort to determine if changes are needed. Congress should structure the legislation so that the agencies have clear incentives to respond to the review effort.

As part of this review, Congress should consider the question of whether to implement comprehensive export control legislation and finish the implementation of the ECR Initiative's

originally envisioned four singles. Congress should consider review and passage of an Export Control Reform Act as originally proposed by an ECR Initiative Presidential Task Force. The legislation would create a single export control list, a single export licensing agency, and a consolidated primary export enforcement agency (merger of OEE into HSI).

Absent that action, Congress should update and pass a new EAA and eliminate the annual renewal requirement under the IEEPA as currently required. The original's expiration in 2001, rendering the EAR subject to IEEPA and U.S. presidents renewing annually the state of emergency regarding export regulation under that statute, is not an ideal mechanism for export enforcement.

There are also enforcement related concerns in perpetually using IEEPA for export enforcement. Other countries are reportedly more hesitant to cooperate on mutual assistance or extradition requests for IEEPA cases because offenses are often viewed as political crimes with no similar statutes in the receiving nation. As a result, U.S. prosecutors typically add other charges (such as fraud, making false statements, smuggling, etc.) to IEEPA violation cases in order to bolster the chances that a judge or foreign magistrate will adequately acknowledge the dual criminality necessary for international law enforcement assistance. There is also concern that a single court case overturning an IEEPA violation could bring down the EAR enforcement system. A new EAA or comprehensive export control reform legislation would obviate these problems.

As this review occurs, *U.S. Export Control Reform: Impacts and Implications for Controlling the Spread of Proliferation-Sensitive Goods and Technologies*, provides a baseline of information about the ECR Initiative. It is also a way to start assessing the reforms completed during the Obama administration, in addition to those that are still needed. Over the next year, the president and Congress should place this issue high on their agendas for study, review, and further action.

PART I. EXPORT CONTROL REFORM (ECR) INITIATIVE

Goals and Justification

In August 2009, President Obama authorized an interagency task force at the National Security Council to conduct a review of the U.S. export control system. The effort included an Intelligence Community assessment about U.S. national security goals in the context of controlling the spread of proliferation-sensitive goods and technologies. In April 2010, former Defense Secretary Robert Gates announced the preliminary results of the review and steps to be taken under an official Export Control Reform (ECR) Initiative. Among the administration's goals of the ECR Initiative were to: introduce practical reforms to what it viewed as an archaic and overly complex U.S. export control system, including an effort to streamline the licensing of exports; increase U.S. economic competitiveness by reducing perceived overregulation, particularly on military goods and spare parts; promote ease of transactions and trade with U.S. allies; harmonize information technology (IT) systems; lower costs and administrative burdens on government and industry overall; reduce redundancies among and increase coordination of export control enforcement agencies; and strengthen nonproliferation efforts by allowing the government to focus more attention on the most critical proliferation-relevant transactions.¹



*Official portrait of Barack Obama
via Wikimedia Commons*

The end goal of the administration's reform effort was to fully streamline the U.S. export control system into what it called "the four singles" – the singles would establish a single licensing agency, a single control list, a unified information technology (IT) system, and a primary enforcement agency. The creation of the four singles has not occurred, but a key effort of the reforms has largely been completed, namely to move less sensitive military use goods on the U.S. Munitions List (USML) and controlled by the International Traffic in Arms Control Regulations (ITAR) to the Commerce Control List (CCL), under the Export Administration Regulations (EAR). This movement would allow for the easier export of these items to selected U.S. allies and partners. The administration claimed that this reform would reduce administrative burdens on regulating less sensitive military use technology. Prior to the reforms, the USML was governed by

¹ The White House, Office of the Press Secretary, "Fact Sheet on the President's Export Control Reform Initiative," April 20, 2010, <https://www.whitehouse.gov/the-press-office/fact-sheet-presidents-export-control-reform-initiative>

a strict definition of the military nature or “design intent” of an item, so that even such smaller items as spare parts or components were controlled simply because they were intended to be used in a larger piece of military equipment.² This reform would be instrumental, in the administration’s view, to addressing the post-Cold War reality that military goods no longer needed to be subject to such strict regulation, but considered more in terms of their potential dual uses. This is especially true since, as stated by the pre-ECR Initiative 2009 Intelligence Community review, “By 2025, virtually all next generation technologies would come from the commercial sector and then find their way into defense applications.”³ Additional goals described by the Obama administration are available on an export control reform specific website.⁴

Background: U.S. Export Control System

For historical context, it became a matter of U.S. policy as early as the 1930s to control the export of military goods and munitions to regions of tension and to prevent influxes of arms to governments and actors that would misuse them.⁵ In the 1940s, with the dawn of the atomic age, the U.S. government instituted controls on nuclear related exports to prevent the proliferation of nuclear material, facilities, and technology. In the 1970s, the two key U.S. export control legal mechanisms, the ITAR and the EAR, controlling exports of military and dual-use goods, respectively, were created to control the flow of proliferation-sensitive goods to Cold War Eastern bloc countries. The EAR addressed security concerns caused by the increased production of civilian goods that could be misused for military purposes. For example, in the 1970s and 1980s, proliferant states or territories such as South Africa, Pakistan, Iraq, Iran, Libya, North Korea, and Taiwan exploited weak private sector export controls in Western countries to obtain the wherewithal to make nuclear weapons.⁶ Over time what evolved in the United States, instead of a centralized export control agency with one control list and delegated legal authorities, was the current piecemeal export control system of multiple legal statutes delegating authority over certain goods, services, and transactions to different federal agencies.

The system remains highly complex despite the reforms.⁷ In general, with regards to proliferation-sensitive goods and technologies, several legal statutes regulate exports. The Arms

² Testimony of Brian Nilsson, Deputy Assistant Secretary of Defense Trade Controls, Bureau of Political-Military Affairs, Department of State, before the House Small Business Committee, Washington, D.C., February 11, 2016, <http://www.state.gov/t/pm/rls/rm/2016/252401.htm>

³ Ibid.

⁴ “About Export Control Reform,” www.export.gov/ecr/ (accessed January 2017).

⁵ Letter from William J. Lowell, Managing Director, Lowell Defense Trade LLC, to Charles B. Shotwell, Director, Office of Defense Trade Control Policy, Directorate of Defense Trade Controls, Department of State, February 7, 2011. Available at ProPublica: <https://www.propublica.org/documents/item/798408-lowell-comments-ecr-usml-catvii-and-positive-list.html>

⁶ See for example a history of nuclear proliferation via illicit nuclear procurement in David Albright, *Peddling Peril: How the Secret Nuclear Trade Arms America’s Enemies* (New York: Free Press, 2010).

⁷ Fuller descriptions of these laws, control lists, and agency authorities can be found in Ian F. Fergusson and Paul K. Kerr, *The U.S. Export Control System and the President’s Reform Initiative* (Washington, D.C.: Congressional Research Service, July 14, 2011), <https://www.fas.org/sgp/crs/natsec/R41916.pdf>

Export Control Act of 1976 (AECA) regulates military equipment, technology, and software through the ITAR and its control list, the USML. The USML is administered by the State Department's Directorate of Defense Trade Controls (DDTC). The USML also controls some nuclear-related items.

The EAR controls "dual-use" commodities (articles having both military and civil applications). These regulations were promulgated under the authority of the Export Administration Act (EAA). However, the EAA expired in 2001 and has not been re-authorized by Congress. The requirements of the EAR are kept in force, instead, through the authority of the president under the International Emergency Economic Powers Act (IEEPA). The IEEPA allows the president to respond to emergencies impacting the "national security, foreign policy, or economy of the United States," including to "investigate, regulate, or prohibit" a series of activities including commerce.⁸ The Commerce Department's Bureau of Industry and Security (BIS) administers the EAR and lists controlled items on the CCL. Such dual-use items increasingly require safeguarding because of their potential misuse in military applications, including nuclear weapons, unsafeguarded nuclear energy programs, missile, and weapons of mass destruction (WMD) related applications. The CCL also regulates Nuclear Suppliers Group (NSG) Part II list goods and nuclear dual-use equipment. These include proliferation sensitive items like pressure transducers, vacuum pumps, and mass spectrometers. Items listed on the CCL may be eligible for certain license exceptions. BIS revises the EAR periodically in consultation with DDTC, the Department of Defense (DOD), and other agencies.

The Department of Energy (DOE) and the Nuclear Regulatory Commission (NRC) are given authority under the Atomic Energy Act (AEA) of 1954 to implement Chapter 10 Code of Federal Regulations (CFR) Part 810 and Part 110, respectively. DOE and the NRC regulate the exports of nuclear technology, assistance, information, and materiel relating to military applications of atomic energy. Under the ECR Initiative, most items from ITAR category XVI "Nuclear Weapons Related Articles" were placed under the AEA and DOE's purview, except for modeling and simulation tools.⁹ Tangential to the reforms, there were changes made to Section 810, and in general, these changes represent an increase in oversight. DOE now requires the express approval of the Secretary of Energy for exports to 77 countries that previously required no specific authorization. DOE also increased its control over the back-end of the fuel cycle, specifically enumerating regulations for the storage and transport of irradiated materials.

The Treasury Department is also involved in controlling transactions with embargoed countries, entities, and individuals that pose proliferation threats, pursuant to presidential authority under

⁸ Department of Treasury, *United States Code Annotated Title 50, War and National Defense, Chapter 35. International Emergency Economic Powers*, Available at [www.Treasury.gov](http://www.treasury.gov): <https://www.treasury.gov/resource-center/sanctions/Documents/ieepa.pdf>

⁹ U.S. Federal Register, Vol. 78, No. 20, *Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XVI, Proposed Rules*, January 30, 2013, <https://www.federalregister.gov/documents/2013/01/30/proposed-rules-revision-of-us-munitions-list-category-xvi>; Karen Alaniz, Sandia National Laboratories, "Atomic Energy Act-NAP-23: Implementation at Sandia National Laboratories," Power Point presentation, dated 2014, <http://ecco.lanl.gov/History/2014/Alaniz.pdf>

the IEEPA and the Trading with the Enemy Act. Finally, DOD contributes to decisions on licensing, particularly commercial and defense technology related issues.¹⁰

In 2007, prior to President Obama's two terms in office, the Government Accountability Office (GAO) wrote that the U.S. export control system posed a high risk to national security "because these programs, established decades ago, were ill-equipped to address the evolving 21st century challenge of balancing national security concerns and economic interests." Issues of concern included "poor interagency coordination, inefficiencies in the license application process, and a lack of systematic assessments." The system also operated on "disparate, sometimes antiquated information technology systems" and had a serious need for "deconfliction" of law enforcement processes, such as multiple enforcement agencies independently investigating the same criminal case.¹¹ The National Research Council of the National Academies also found in a 2009 report that many commodities were controlled unilaterally by the United States in a fashion that did not balance national security interests with the exporting high-technology sector of the economy.¹² In general, a majority of current and former U.S. officials, industry representatives, and experts have long viewed export control reform as needed in order to reduce complexity, strengthen effectiveness, and improve government functions, but disagreed on the nature of reforms required and what specifically should be done. Members of Congress overall supported the general goal of export control reform;¹³ however, once the changes to the USML and CCL were suggested and the plan for the four singles was announced, many expressed in hearings their concern about the impact. These included doubts about whether the envisioned wholesale restructuring was wise and concerns about exceptions for groups of countries on the CCL.¹⁴

Those industrial sectors exporting defense and dual-use articles have complained for years that the U.S. system had become unnecessarily byzantine, confusing, and resource intensive and that many exports are needlessly overregulated. One example they often gave was one of the focuses of the reforms – reducing stringent restrictions on exports of spare parts that were components

¹⁰ Fergusson and Kerr, *The U.S. Export Control System and the President's Reform Initiative*, July 14, 2011.

¹¹ Government Accountability Office, *2015 High Risk Report: Ensuring Effective Protection of Technologies Critical to U.S. National Security*, GAO-15-290, February 11, 2015,

http://www.gao.gov/highrisk/ensuring_protection_of_technology/why_did_study#t=0 ;

http://www.gao.gov/highrisk/ensuring_protection_of_technology/why_did_study#t=1

¹² National Research Council of the National Academies, *Beyond "Fortress America": National Security Controls on Science and Technology in a Globalized World* (Washington, D.C.: National Academies Press, 2009),

<https://www.nap.edu/read/12567/chapter/1>

¹³ 111th Congress, 2nd Sess., *Hearing before the House Committee on Foreign Affairs: The Impact of U.S. Export Controls on National Security, Science, and Technological Leadership*, January 15, 2010,

<https://www.gpo.gov/fdsys/pkg/CHRG-111hhrg54471/pdf/CHRG-111hhrg54471.pdf>; 111th Congress, 2nd Sess., *Hearing before the House Committee on Foreign Affairs Subcommittee on Terrorism, Nonproliferation, and Trade: Transshipment and Diversion: Are U.S. Trading Partners Doing Enough to Prevent the Spread of Dangerous Technologies?* July 22, 2010, <https://www.gpo.gov/fdsys/pkg/CHRG-111hhrg57609/pdf/CHRG-111hhrg57609.pdf>

¹⁴ 112th Congress, 1st Sess., *Hearing before the House Committee on Foreign Affairs: Export Controls, Arms Sales, and Reform: Balancing U.S. Interests, Part I*, May 12, 2011, <https://www.gpo.gov/fdsys/pkg/CHRG-112hhrg66294/pdf/CHRG-112hhrg66294.pdf>; 112th Congress, 2nd Sess., *Hearing before the House Committee on Foreign Affairs: Export Controls, Arms Sales, and Reform: Balancing U.S. Interests, Part II*, February 7, 2012, <https://www.gpo.gov/fdsys/pkg/CHRG-112hhrg72788/html/CHRG-112hhrg72788.htm>

of larger pieces of military equipment. Smaller, less sensitive military related goods were controlled down to the last small part, nut, and bolt, simply because such components had been “modified” or “specifically designed” for a military purpose. An example would be all parts and components of an entire aircraft, such as a Blackhawk helicopter.

Moreover, the smaller, less sensitive goods were also considered to be under U.S. jurisdiction once overseas. If a foreign buyer required a spare part, it needed to go through a rigorous U.S. licensing process via the State Department’s DDTC, when it may find the part more easily available from another country. This encouraged foreign manufacturers that made commodities with ITAR controlled goods to “design out” items – a term used by the U.S. government and industries to describe removing those goods and replacing them with commercially produced items made elsewhere. These products are then frequently marketed as “ITAR free.”

Licensing applications for those single parts had also become an administrative burden – accounting for some 76 percent of State Department reviewed applications prior to the ECR Initiative, according to the Obama administration.¹⁵ The administration stated that it was spending unnecessary time reviewing and processing licenses for smaller goods and was unable to devote that attention to stronger enforcement of goods that mattered most to U.S. national security.¹⁶ A key motivation for the reforms was thus to reduce the administrative burden for perceived, less sensitive military related exports to U.S. allies, including NATO member states. Most of the purchases of the smaller USML goods represented repeat licenses for NATO members that the U.S. government had regularly approved for decades, meaning there was superfluous redundancy and delays.

Because the EAR allows for special licensing exceptions for exports to certain country groups, the Obama administration decided that reducing the administrative burden and creating more flexibility for certain military related exports required moving thousands of military goods from the USML to the CCL. As part of the ECR Initiative, the administration created a new country group exception called the Strategic Trade Authorization (STA). Exports of CCL goods to this country group would be allowed under the STA exception under certain conditions. In a final determination, the administration required that the goods’ ultimate end user must be an approved government even though the initial importing entity can be a company. Pre-authorization for these companies included the criteria that they had received a prior U.S. government license.¹⁷ The exception extended only to a preapproved list of 44 countries including most NATO members and several other allies that enforce the four major

¹⁵ *Testimony of Brian Nilsson*, February 11, 2016.

¹⁶ American Bar Association, *Assistant Secretary of Commerce for Export Administration Kevin Wolf’s Discussion at ABA Brown Bag Lunch about Export Control Reform and the Definition of ‘Specially Designed,’* MP3 recording, December 16, 2014, http://www.americanbar.org/content/dam/aba/administrative/international_law/specialized_manufacturing.authcheckdam.mp3

¹⁷ Venable LLP, “International Trade Alert: License Exception Strategic Trade Authorization: Understanding How it May Work for You,” September 2013, <https://www.venable.com/license-exception-strategic-trade-authorization-understanding-how-it-may-work-for-you-09-30-2013/>

nonproliferation conventions – the Wassenaar Arrangement, the Missile Technology Control Regime (MTCR), Australia Group, and the Nuclear Suppliers Group (the full country list is included for reference further below).¹⁸ According to the administration, “the solution to accomplishing the policy instruction of the President and the national security objectives of Secretary Gates did not lie within the ITAR... given the absence of the authority to create different groups of countries....” The CCL with its more flexible statutory authority allowed for license exceptions and a corresponding reduction in the licensing burden.¹⁹

In summary, the United States, as the third largest exporter in the world with exports totaling approximately \$1.6 trillion in 2015, was, to many, facing unnecessary bureaucratic impediments.²⁰ Washington D.C. corporate and trade law firm, Fried Frank, summarized this view in 2011: “...As other countries have increased their technological prowess, more and more goods that the U.S. controlled for export have become available through non-U.S. sources – thereby costing U.S. companies business without providing a corresponding benefit to U.S. security interests.”²¹

ECR Implementation Plan and Status

The export control reforms announced in 2010 by then Secretary of Defense Gates outlined a plan to repair deficiencies and streamline the export control system by creating “four singles” – a single control list, a single licensing agency, a single export law enforcement agency, and a single IT platform.²² The initiative was to occur in three phases. Phases I and II could be enacted by executive action, but Phase III would require Congressional legislation to complete.



*Official portrait of Robert Gates
via Wikimedia Commons*

¹⁸ Kevin Wolf, Assistant Secretary of Commerce for Export Administration, Bureau of Industry and Security, Department of Commerce, *Training Slides: Implementation of Export Control Reform*, Last revised November 14, 2014. Available at www.bis.gov

¹⁹ Kevin Wolf's Discussion at ABA Brown Bag Lunch, December 16, 2014.

²⁰ CIA World Factbook, “Country Comparison: Exports, 2015 estimate,” <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2078rank.html>

²¹ Fried Frank, *Memorandum: A Progress Report on the Obama Administration's Export Control Reform Agenda*, July 14, 2011, <http://www.friedfrank.com/siteFiles/Publications/7-14-2011%20-%20TOC%20Memo%20-%20A%20Progress%20Report%20on%20the%20Obama%20Administration's%20Export%20Control%20Reform%20Agenda.pdf>

²² Department of Defense, *Remarks by Secretary Gates to the Business Executives for National Security on the U.S. Export Control System*, April 20, 2010, <http://www.fas.org/sgp/news/2010/04/gates-export.html>

Phase I would harmonize legal definitions and regulations between the ITAR and the EAR and lay down the framework for the reformed system. This process would include interagency technical and policy reviews to determine goods that would be moved from the USML to the CCL. Both lists would be revised to be more “positively constructed” and explicit about goods that fell under which controls, but particularly the USML, which controlled most goods designed or modified for military use. Any goods that did not require strict control would be moved to the CCL. According to former Secretary of Defense Gates, the goal was to more effectively protect the “crown jewels” that allowed the United States to maintain its military advantage.²³

Secretary Gates also envisioned a tiered system of controls, where proliferation-sensitive items would be more controlled. Yet the tiering system was ultimately abandoned as implementation moved forward.²⁴ Phase I would also create a law enforcement communication and deconfliction center to improve coordination and prevent overlapping efforts by enforcement agencies. It would determine the IT needs of the system and begin creating a single point for all licensing applications for U.S. exporters. In addition, it would create a consolidated screening list for U.S. exporters to check exports against sanctioned individuals and entities, replacing up to six separate lists that exporters had to consult.²⁵

Under Phase II, DOD would oversee the USML to CCL review process in what was termed the “Bright Line Review.” The USML to CCL transfers would occur with an initial proposal for some 74 percent of USML goods – or 14,000 of some 19,000 – to be placed under a new 600 series category on the CCL.²⁶ The STA exception would then enable more flexible export of the former USML items to 44 U.S. allies, including most NATO member states and a few other close U.S. military allies such as Japan and South Korea; however, eight of those countries would be allowed an STA exception only for less strictly controlled goods.

Phase II would also seek Congressional funding for “enhanced enforcement” and “IT infrastructure” including the “transition toward a single electronic licensing system.”²⁷ By Phase II, according to the administration, prosecutors would find it easier to determine which control lists covered certain goods and enable them to produce more indictments and convictions against violators.

Phase III would create the “singles” and fully implement the ECR Initiative. It would merge the control lists, consolidate all licensing at a single agency, merge law enforcement agencies, and “implement a single, enterprise-wide IT system” for licensing and enforcement.²⁸ The licensing and civil compliance activities of the Commerce and State Departments would be folded into the

²³ Ibid.

²⁴ Ibid.

²⁵ The White House, Office of the Press Secretary, “Fact Sheet on the President’s Export Control Reform Initiative,” April 20, 2010, <https://www.whitehouse.gov/the-press-office/fact-sheet-presidents-export-control-reform-initiative>

²⁶ According to a senior U.S. government official of the Obama administration, 2016.

²⁷ “About Export Control Reform,” www.export.gov/ecr/

²⁸ “Fact Sheet on the President’s Export Control Reform Initiative,” April 20, 2010.

newly established licensing agency which would use the single control list and a common IT system. Therefore, BIS and DDTC would no longer exist in their current form. The new licensing agency would still conduct pre- and post-license checks in conjunction with the single law enforcement agency and activities would be de-conflicted through an investigations center (described further below). The Department of Homeland Security's (DHS's) Customs and Border Protection (CBP) would be responsible for export inspections. The single enforcement agency would also have responsibility for conducting pre-shipment checks, shipment inspections, and end-use checks. The enforcement agency would coordinate those activities with the deconfliction center.

Under Phase III, the enforcement resources of the Commerce Department, including its criminal investigative division, would be merged into DHS's Homeland Security Investigations (HSI). HSI would thus be the primary enforcement agency and only agency with direct statutory authority to investigate export violations, with the Federal Bureau of Investigation (FBI) retaining general investigative authority to become involved in cases not exclusively assigned to another federal agency. The rationale for the enforcement merger was that under the AECA and the ITAR, DHS/HSI has both domestic and international authority for enforcement of ITAR related exports, but they also have the same authority to enforce the EAR. DHS/HSI has the ability to address criminal violations of the ITAR and the EAR internationally, whereas the Commerce Department's Office of Export Enforcement's (OEE's) criminal investigators are limited to EAR violations and must coordinate with DHS/HSI to conduct enforcement activity abroad. The HSI division also employs approximately 6,800 special agents stationed domestically and worldwide (with some 450-500 dedicated to export enforcement). HSI has over 200 agents stationed abroad in more than 50 countries. OEE's number of investigators abroad are limited to just seven officers in a handful of countries. ICE and CBP also handle border security and customs related shipment checks. The enforcement system in the United States and its changes under the ECR Initiative are explained later in more detail.

Phase I activities are complete. In practice, the Phase I harmonization of many key definitions occurred after moving many goods from the USML to the CCL. The USML and the CCL design intent catch-all clauses were also updated. Another accomplishment was the December 2010 creation of the Consolidated Screening List (CSL) combining all prohibited recipients of goods or transactions into one list for exporters.

A key achievement under Phase I was the establishment of the Export Enforcement Coordination Center (E2C2) to deconflict enforcement activities, streamline export investigations, and build more effective criminal investigations. E2C2 was also mandated to coordinate and deconflict licensing compliance activity, carry out U.S. government outreach to industry, and to coordinate with the intelligence community. Enforcement agencies are now supposed to submit cases to E2C2 to ensure better coordination, including the receipt of any information from other agencies relevant to the same case.

Phase II reached *de facto* completion before President Obama left office. As of October 2016, the administration had finalized the transition of 18 of 21 USML item categories to the CCL. Transfers

of categories 1-3 of the USML governing firearms, artillery, and ammunition transfers were not completed.²⁹ Transferring these items has proven extremely difficult, in part, due to opposition from senior officials at U.S. federal law enforcement and homeland security agencies. In May 2012, *The Wall Street Journal* viewed and reported on an internal U.S. government memorandum authored by these agencies and sent to the administration. It indicated concerns that the proposed reforms would have adverse ramifications on U.S. and international security and that they would negatively impact efforts to control domestic gun violence incidents and international firearms trafficking.³⁰



Image credit: homank76 via Adobe Stock

Experts interviewed for this paper stated that the three USML firearms relevant categories had been prepared for transfer to the CCL until the December 2012 shooting at an elementary school in Newtown, Connecticut caused the administration to suspend the transfer plan due to expected official and public opposition.³¹ The internal government memorandum viewed by *The Wall Street Journal* also contained concerns that the STA mechanism could allow firearms to be more freely exported to certain U.S. allies, including some NATO member states that remain countries of trafficking concern.³² In 2012, GAO wrote as the reforms were proceeding that the administration had not adequately assessed their potential impact, particularly “the proposed benefits and risks of proposed export control list reforms” with regards to license determinations and end-use monitoring.³³ One expert with whom we spoke for this paper stated that no agency during President Obama’s second term fought strongly for jurisdiction over these goods. It appears likely that the categories 1-3 of the USML will be moved to the CCL at some point during the Trump administration.

The original intent of the ECR Initiative was to keep satellites and satellite-related items on the USML, contrary to the wishes of U.S. satellite technology companies. Satellite technology and equipment were made subject to USML controls due to concerns about technology transfers to countries of national security concern, in particular an incident involving U.S. companies assisting the Chinese space launch effort. The 1998 National Defense Authorization Act transferred control of satellite licensing authorities from the Commerce Department to the State

²⁹ According to multiple U.S. government officials of the Obama administration, 2016.

³⁰ “White House Efforts to Relax Gun Exports Face Resistance,” May 1, 2012.

³¹ Discussions with former U.S. officials of the Obama administration, 2016.

³² “White House Efforts to Relax Gun Exports Face Resistance,” May 1, 2012.

³³ Government Accountability Office, *U.S. Agencies Need to Assess Control List Reforms’ Impact on Compliance Activities*, GAO-12-613, April 23, 2012, <http://www.gao.gov/products/GAO-12-613>

Department.³⁴ However, the 2013 National Defense Authorization Act allowed the president to transfer these goods back to the CCL. The final rule transferring this technology to the CCL went into effect in November 2014.³⁵ These goods exist on the CCL under a 9x515 series number, and the STA exception allows for transfers of the goods without a license to pre-authorized end users in that country group.

Under Phase II, some improvements of IT functions have taken place with broader government use of a previously existing DOD platform for internal export licensing records, called USXPORTS. USXPORTS serves as a central point of information about license approvals or denials. It is being used by DDTC, but the future of BIS's transition is uncertain. In July 2016, the Commerce Department's Inspector General found that BIS's transition to USXPORTS would require five years and an expenditure of \$2.6 million. The report also stated that "ineffective coordination and collaboration between BIS and DTSA [the Defense Technology Security Administration which is implementing USXPORTS] led to project delays."³⁶ In addition, BIS encountered several incompatibilities with the system, leading to the Inspector General's finding that BIS's transition to USXPORTS is uncertain. BIS is currently using its own system for processing export licenses called CUCESS. The Obama administration stated that it continued work on a single portal for exporters to submit licensing applications.³⁷

Phase III has yet to occur and will require Congressional legislation before it can take place. The Obama administration drafted legislation for finalizing the creation of the four singles but never submitted it to Congress due to lack of support for an interagency overhaul of that nature. Overall, the majority of experts with whom we spoke did not expect Phase III to occur before President Obama left office, a view that proved correct, due to reticence to dramatically change the system by many members of Congress and a general lack of legislative interest in undertaking this task. The U.S. business community has also opposed the creation of a single licensing agency, according to industry experts we spoke to for this paper. Achieving the four singles is, therefore, unlikely unless the Trump administration makes their achievement a significant priority and develops corresponding support in Congress.³⁸

³⁴ Stew Magnuson, "State Department Coming to End of Export Control Reform (Updated)," *National Defense Magazine*, June 2016, <http://www.nationaldefensemagazine.org/archive/2016/June/Pages/StateDepartmentComingtoEndofExportControlReform.aspx>

³⁵ U.S. Federal Register, *Amendment to the International Traffic in Arms Regulations: Revision of the U.S. Munitions List Category XV; Correction*, Citation 79 FR 66608, November 10, 2014, <https://www.federalregister.gov/documents/2014/11/10/2014-26631/amendment-to-the-international-traffic-in-arms-regulations-revision-of-us-munitions-list-category-xv>

³⁶ Department of Commerce, Office of the Inspector General, "Report in Brief: Full Transition to the Nation's Single Export Licensing System is Uncertain," OIG-16-037-A, July 5, 2016, https://www.oig.doc.gov/OIGPublications/2016-07-05_BIS%20USXPORTS%20RIB.pdf

³⁷ *Testimony of Brian Nilsson*, February 11, 2016.

³⁸ According to U.S. government officials of the Obama administration, 2016.

For reference, the implementation status and Federal Register final rules involving the USML categories and goods moved to the CCL as of the end of the Obama administration are included here:

ECR IMPLEMENTATION STATUS^(a)

USML Category		Key Milestones		Federal Register Notice(s)	
No.	Description	Effective Date	Transition End Date	Final Rule	Correction Rule
I	Firearms	TBD	TBD	TBD	TBD
II	Artillery	TBD	TBD	TBD	TBD
III	Ammunition	TBD	TBD	TBD	TBD
IV	Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs, and Mines	07/01/2014	06/30/2016	79 FR 34	79 FR 36393
V	Explosives and Energetic Materials, Propellants, Incendiary Agents, and Their Constituents	07/01/2014	06/30/2016	79 FR 34	79 FR 36393
VI	Surface Vessels of War and Special Naval Equipment	01/06/2014	01/05/2016	78 FR 40922	79 FR 26
VII	Ground Vehicles	01/06/2014	01/05/2016	78 FR 40922	79 FR 26
VIII	Aircraft and Related Articles	10/15/2013	10/14/2015	78 FR 22740	78 FR 61750
IX	Military Training Equipment	07/01/2014	06/30/2016	79 FR 34	79 FR 36393
X	Personal Protective Equipment	07/01/2014	06/30/2016	79 FR 34	79 FR 36393
XI	Military Electronics	12/30/2014	12/29/2016	79 FR 37536	79 FR 77884
XII	Fire Control/Sensors/Night Vision	12/31/2016	12/30/2018	81 FR 70340	TBD
XIII	Materials and Miscellaneous Articles	01/06/2014	01/05/2016	78 FR 40922	79 FR 26
XIV	Toxicological Agents	12/31/2016	12/30/2018	81 FR 49531	TBD
XV	Spacecraft and Related Articles	11/10/2014	11/09/2016	79 FR 27180	79 FR 66608
XVI	Nuclear Weapons Related Articles	07/01/2014	06/30/2016	79 FR 34	79 FR 36393
XVII	Classified Articles, Technical Data, and Defense Services	10/15/2013	10/14/2015	78 FR 22740	78 FR 61750
XVIII	Directed Energy Weapons	12/31/2016	12/30/2018	81 FR 49531	TBD
XIX	Gas Turbine Engines and Associated Equipment	10/15/2013	10/14/2015	78 FR 22740	78 FR 61750
XX	Submersible Vessels and Related Articles	01/06/2014	01/05/2016	78 FR 40922	79 FR 26
XXI	Articles, Technical Data, and Defense Services Otherwise Not Enumerated	10/15/2013	10/14/2015	78 FR 22740	78 FR 61750

(a) DDTC website, "Export Control Reform," <http://pmdtdc.state.gov/ECR/index.html>

In the next sections, we provide a recapitulation of the delegation of authorities and changes to the control lists of the U.S. export control system with respect to control of proliferation-sensitive goods. We also discuss authorities and functions governing the enforcement of export controls and changes made to those functions. We draw preliminary conclusions about the impact of the reforms from the limited data available.

Changes to the Major Control Lists Governing Proliferation-Sensitive Goods and Technologies

United States Munitions List



Image Credit: Department of State

As previously described, the USML, administered by the Department of State's DDTC, controls sensitive goods designed for defense or military use including munitions, technology, and defense services. The USML is governed by the AECA's ITAR.

The ECR Initiative sought to move items from the USML to the CCL in order to decrease what the administration considered to be overregulation on certain military items, firearms, and small parts that the United States sought to export to key allies, including NATO member states, but could not do so easily. It also sought to de-regulate altogether militarily insignificant items and some defense related training and services. The majority of former USML items that were moved to the CCL are now covered by the "600 series" export control classification number (ECCN) and still require a Commerce Department license for export unless the STA licensing exception applies.³⁹ Items that were deregulated altogether from the USML included minor parts and components. The Obama administration stated that movement of USML items to the CCL and the related STA special exception created under the CCL would allow for a reduction in licensing applications overall. The administration also considered the USML and CCL to have too vague a definition of the "design intent" of goods and sought to make it more clear what goods were controlled and by which list.⁴⁰

The USML still controls some nuclear related items or nuclear defense articles under Categories VI, X, XIII, XVI, and XIX. It still controls, for example, the export of naval nuclear propulsion plants, protective equipment against nuclear contamination, nuclear energy conversion devices, and nuclear weapons design and testing related items.⁴¹ Others have been moved to the CCL, or in the case of many of the items in category XVI placed under the authority of the DOE.

³⁹ Wolf, *Training Slides: Implementation of Export Control Reform*, Last revised November 14, 2014. .

⁴⁰ Kevin Wolf, Assistant Secretary of Commerce for Export Administration, and Timothy Mooney, Senior Export Policy Analyst, Regulatory Policy Division, Bureau of Industry and Security, Department of Commerce, *Briefing Slides, The Definition of Specially Designed*, July 19, 2013, https://www.bis.doc.gov/index.php/forms-documents/doc_view/790-updated-specially-designed-presentation-for-update

⁴¹ *International Traffic in Arms Regulations, Part 121: United States Munitions List*, https://www.pmddtc.state.gov/regulations_laws/documents/official_itar/ITAR_Part_121.pdf

Changes to the Design Intent Definition

The reforms harmonized both the USML's and the CCL's definitions of design intent for goods which covers items not specifically enumerated on the control lists, or their "catch-all" clauses.⁴² Catch-all controls are designed to stop the export of goods, both listed and non-listed, that could be destined for a sanctioned country or later used for a banned purpose or by a banned end user. They are instituted in particular to cover items that are below the ideal threshold for use in military related programs but are inventively modified or used regardless. Under this reform, the administration instituted what it deemed a more "positively constructed" definition for USML Categories VIII and XIX by updating both lists' definitions and removing the ITAR's design intent definition "specifically designed," which covered goods that were not only specifically designed for military use but also more broadly "developed, configured, adapted, or modified for a military application." The ITAR definition was updated and synchronized with the EAR definition to be, "specially designed."⁴³ Parts and components of weapons systems controlled under the ITAR, if specially designed, are now essentially limited to those that are designed *exclusively* for use in a USML-controlled item or weapons system. If a part is designed for a weapons system, but the designer also had in mind knowledge of some other future use of the part in an item not enumerated on the USML, then the part is not considered specially designed.⁴⁴

The change to the ITAR definition is a mechanism by which certain goods are no longer controlled under the ITAR but are now subject to the EAR. The previous "specifically designed" definition also captured not just the final military end product, such as the previous example of a Blackhawk helicopter for instance, but also all of its parts and components as long as they were designed or modified for military use. This was known as the "see-through rule." Similarly, for the CCL's design intent definition for 600-series items, a part, component, accessory, attachment, or software is not specially designed if it was not developed with the knowledge that it would be used in a CCL- (or USML)-controlled good.

The administration's justification for changing the design intent definition was that a more precise listing of controlled items would enable an exporter to easily determine whether to apply for a license. Exporters (and prosecutors seeking to make legal cases) would not be required to try to determine what design intent a particular engineer or manufacturer had for each good because it would either be listed or not.

⁴² Wolf and Mooney, *Briefing Slides, The Definition of Specially Designed*, July 19, 2013; Miller and Chevalier, "Primer on the New Specially Designed Definition," May 31, 2013, <http://www.millerchevalier.com/Publications/MillerChevalierPublications?find=102606>

⁴³ 22 Code of Federal Regulations Ch. 1, *International Traffic in Arms Regulations, Part 121 – The United States Munitions List*, April 1, 2013 edition, https://www.pmddtc.state.gov/regulations_laws/documents/official_itar/ITAR_Part_121.pdf; Wolf, *Training Slides: Implementation of Export Control Reform*, Last revised November 14, 2014.

⁴⁴ 22 Code of Federal Regulations Ch. 1, *International Traffic in Arms Regulations, Part 121 – The United States Munitions List*.

According to critics of this reform, whose views we will explain more fully in Part II, the updated specially designed definition and movement of goods to the CCL lessens regulations on the nature and ultimate use of commodities, technology, software, and defense services by actually reducing regulations so much so that it literally forces exporters, investigators, and prosecutors to look to the original designer's intent for the goods to determine if they are controlled. A few experts with whom we spoke stated that enforcing the controls will rely on just what the administration said they would not – a subjective interpretation by a particular good's designer of the intended use of a good, rather than the government's interpretation. Former director of the State Department DDTC Office of Defense Trade Controls Policy, William J. Lowell, for example, wrote in a 2011 letter to DDTC that the proposed change in definition of design intent would make it more difficult for prosecutors and courts to enforce laws when goods have later been modified or used for military use by the end user.⁴⁵ He wrote that the exclusivity of the specially designed definition was the position the U.S. government litigated against in a 2008 EAR case called *United States v. Lachman* (see Box 1 on following page). He asserted that the administration was now adopting the argument of the defendants it had prosecuted, that the exporter could not expect a military use of the goods that were subsequently modified by the Indian defense industry.⁴⁶ In court, the U.S. government had argued during the case:

*An exclusive use definition would permit easy evasion of the regulation through the deliberate design of items that implicate national security concerns so that they have both permitted and prohibited uses... Thus, statutory and regulatory concerns cannot be achieved if the regulation is construed to allow the exportation of controls designed to be used with embargoed commodities so long as they had other potential uses.*⁴⁷

One rule that remains unchanged under the ITAR is that if a foreign-made good contains a *single* USML listed item it is subject to U.S. jurisdiction. However, this rule is different under the EAR, which is important to note for goods that have been transferred from the USML to the CCL. The EAR has, instead, a so-called “*de minimis* rule” that frees goods from U.S. jurisdiction if they contain less than 25 percent CCL-controlled goods. This rule stands except in cases of sanctioned and arms embargoed countries. Foreign-made goods in those countries remain subject to U.S. jurisdiction if they use even a single CCL item. An example of such a case is the 2016 sales of Boeing and Airbus airplanes to Iran.⁴⁸

⁴⁵ Letter from William J. Lowell, Managing Director, Lowell Defense Trade LLC, to Charles B. Shotwell, Director, Office of Defense Trade Control Policy, Directorate of Defense Trade Controls, Department of State, February 7, 2011. Available at ProPublica: <https://www.propublica.org/documents/item/798408-lowell-comments-ecr-usml-catvii-and-positive-list.html>

⁴⁶ Letter from William J. Lowell, Managing Director, Lowell Defense Trade LLC, to Candace M. J. Goforth, Director, Office of Defense Trade Control Policy, Directorate of Defense Trade Controls, Department of State, August 2, 2012, Available at Document Cloud: <https://www.documentcloud.org/documents/798411-lowell-comments-specially-designed-definition.html#document/p2/a127805>

⁴⁷ *United States v. Lachman*, 387 F.3d 42, 52 (1st Cir. 2004).

⁴⁸ Eric L. Hirschhorn, Under Secretary for Industry and Security, Department of Commerce, *Remarks at the Society for International Affairs Fall Conference*, October 28, 2013. <http://www.bis.doc.gov/index.php/section-232-investigations/47-about-bis/newsroom/591-remarks-of-eric-l-hirschhorn-under-secretary-for-industry-and-security-society-for-international-affairs-fall-conference-october-28-2013>

Lowell also wrote in his 2011 letter that the administration was underestimating the sensitivity of deregulating some smaller parts from USML controls.⁴⁹ He expressed concern that these goods would be able to flow more freely to U.S. adversaries such as China, Russia, Iran, and North Korea and allow other countries to learn how to produce them.⁵⁰ Concern about deregulation of spare parts on the USML was also expressed by former Department of Justice (DOJ) official Steven W. Pelak, who was the first National Coordinator of Export Control/Embargo Enforcement from 2007 to 2013. He believed that even such minor part deregulation would undermine U.S. national security goals. He noted that deregulated smaller goods are sought, for example, by “the Iranians [who] are constantly looking for spare parts for old U.S. jets.”⁵¹

Opposing, positive views to these criticisms about the change in design intent definition are contained in Part II. Part II also contains additional, lengthier arguments of critics about why the IEEPA poorly enforces controls meant to be enforced by the AECA.

Catch-and-Release

To determine whether an item is now controlled by the USML, an exporter can use a step-by-step yes/no question system.⁵² DDTC employs this “catch-and-release” mechanism to determine whether or not an item is specially designed, and thereby listed on the USML. An item will be “caught,” or controlled for export, if:

- “As a result of ‘development’ [it] has properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions in the relevant ECCN or USML paragraph;” or

⁴⁹ Letter from Lowell to Shotwell, February 7, 2011.

⁵⁰ Letter from Lowell to Goforth, August 2, 2012.

⁵¹ Cora Currier, “In Big Win for Defense Industry, Obama Rolls Back Limits on Arms Exports,” *ProPublica*, October 14, 2013, <http://www.propublica.org/article/in-big-win-for-defense-industry-obama-rolls-back-limits-on-arms-export>

⁵² “About Export Control Reform,” Fact Sheet 3, www.export.gov/ecr/

Box 1: Lachman Case

The problem in the new definition of specially designed is illustrated by the 2004 case *U.S. v. Lachman*, involving the export to India’s missile program of a control panel for a hot isostatic press (“HIP”) without the necessary export license from the Commerce Department. The control panel was designed to control five heat zones, sufficient for a large, export-controlled HIP, and equipped with a switch to reduce it to two zones. The manufacturer installed the control panel with a non-export controlled, much smaller HIP that just needed two zones to operate. The U.S. government successfully argued that the control panel required a validated license because it qualified as “specially designed ... accessories and controls” for an embargoed larger HIP. In fact, India later acquired a larger HIP and used this control panel to operate it for banned military uses.

According to the U.S. Court of Appeals’ decision:

The government contended that the term “specially designed” included all controls that were designed so that they could be used with regulated HIPs, whether or not such controls could also be used with non-regulated HIPs. The defendants, on the other hand, argued that the term encompassed only those controls designed exclusively for use with an embargoed HIP.^(b)

Today, there is concern that the control panel would not be considered specially designed under the new ECR definition. The manufacturer could state legitimately that the control panel was designed for a military purpose, but the designer also had in mind knowledge of some other future use of the part in an item that is not enumerated on the USML or the CCL. Moreover, he or she could also testify that the control panel was designed without knowing that that it would be used in a CCL- (or USML)-controlled good. Under the new definition of specially designed, the risk is that a clearly illegal export would be viewed as legal and that the manufacturer, who could even be the one that sought to evade U.S. export control laws to sell the good, may have his or her testimony given weight in court by stating that other non-military or non-controlled uses were envisioned. In addition, proving that the manufacturer knew that the item was intended for a banned use may be difficult.

(b) U.S. v. Lachman, Nos. 03-2274, 03-2275.
387 F.3d 42 (2004)

http://www.legale.com/decision/2004429387F3d42_1423/U.S.%20v.%20LACHMAN

- “[It] is for use in or with a commodity or defense article ‘enumerated’ or otherwise described on the CCL or USML.”

If an item does not meet either of these criteria, it is not specially designed; therefore, it does not need an export license from DDTC. Even if an item is caught, it can be “released” if it meets one of several additional criteria.⁵³ In general, these criteria seek to exclude minor parts or components that have a civilian equivalent from requiring a license. If the item is released by the USML, exporters need to check the CCL and go through that list’s specially designed definition in order to ensure the good is not controlled.⁵⁴

A lawyer interviewed by *National Defense Magazine* in mid-2016, Joseph D. Gustavus, stated that clients continue to have problems interpreting the catch-and-release provisions of the ITAR and its new specially designed definition.⁵⁵ Other industry representatives have expressed that the initial learning curve was steep but that they have adjusted.⁵⁶ The administration has stated that the system is much easier for exporters to determine a particular good’s control status.

Commerce Control List



Image credit: Department of Commerce

The CCL, to briefly re-summarize, regulates dual-use items, or items that have both a civil and military application. It also uses an updated definition of specially designed. The CCL receives authority from the EAA and its corresponding EAR. However, the EAA expired in August 2001. The EAR is now continued through a declaration of emergency pursuant to the IEEPA. The CCL is administered by the Department of Commerce’s BIS.

⁵³ Wolf and Mooney, *Briefing Slides, The Definition of Specially Designed*, July 19, 2013.

⁵⁴ Directorate of Defense Trade Control, Department of State, “Specially Designed DDTC,” https://www.pmddtc.state.gov/licensing/dt_SpeciallyDesigned.htm

⁵⁵ Stew Magnuson, “State Department Coming to End of Export Control Reform (Updated),” *National Defense Magazine*, June 2016, <http://www.nationaldefensemagazine.org/archive/2016/June/Pages/StateDepartmentComingtoEndofExportControlReform.aspx>

⁵⁶ See commentary of various industry representatives in: Valerie Insinna, “Defense Industry Hopeful Trump Will Pick Up Obama’s Legacy of Export Control Reform,” *Defense News*, January 20, 2017, <http://www.defensenews.com/articles/defense-industry-hopeful-trump-will-pick-up-obamas-legacy-of-export-control-reform>

As previously described, under the ECR Initiative, former USML goods moved to the CCL now fall under the EAR and its definition of foreign-made goods. This means that “...If the value of controlled US-origin content is less than 25%, then the foreign-made item is generally not subject to U.S. jurisdiction. This is the case “even when incorporated into foreign-made items or uncontrolled items,” except in the case of sanctioned countries. This change from the USML’s definition of foreign-made goods largely eliminates the incentive for foreign companies in non-embargoed destinations to design-out U.S. origin items, particularly parts and components.”⁵⁷

In the nuclear dual-use realm, the CCL regulates the export of NSG Part II list dual-use nuclear equipment.⁵⁸ This includes proliferation sensitive items like pressure transducers, certain vacuum pumps, mass spectrometers, and high explosive containment vessels.⁵⁹ The CCL has a general prohibition against exporting goods with applications in:

- Nuclear explosive activities
- Unsafeguarded nuclear activities
- Safeguarded and unsafeguarded nuclear activities which include components for:
 - Facilities for the chemical processing of irradiated special nuclear or source material;
 - Facilities of the production of heavy water;
 - Facilities for the separation of isotopes of source and special nuclear material; and
 - Facilities for the fabrication of nuclear reactor fuel containing plutonium.

Strategic Trade Authorization

Items listed on the CCL 600 series of ECCNs (which accounts for the majority of transferred USML goods) may be eligible for Strategic Trade Authorization. The STA authorizes exports of CCL controlled goods without a license to pre-authorized end users that are one of 36 countries that are either a NATO member and/or a member of four major nonproliferation conventions, including:

Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Turkey, & United Kingdom. (Of these, Argentina, Australia, Austria, Finland, Japan, New Zealand,

⁵⁷ *Opening Remarks of Kevin J. Wolf, Assistant Secretary of Commerce for Export Administration, Department of Commerce, before the House Committee on Small Business hearing, Export Control Reform: Challenges for Small Business?* February 11, 2016.

⁵⁸ Fergusson and Kerr, *The U.S. Export Control System and the President’s Reform Initiative*, July 14, 2011, p. 7.

⁵⁹ Steven Clagett, Director, Nuclear and Missile Technology Controls Division, Department of Commerce, *Briefing Slides: Update on BIS Dual Use Nuclear Controls and Licensing*, July 18, 2013, https://www.bis.doc.gov/index.php/forms-documents/doc_view/787-nuclear-technology-policy-nuclear-technology-policy-licensing-issues-trends

South Korea, and Sweden are not NATO members but qualify under their adherence to nonproliferation regimes).

An additional eight countries or territories are eligible for transfers of goods controlled only for national security reasons but not for nuclear, chemical, biological, or missile proliferation reasons:

Albania, Hong Kong, India, Israel, Malta, Singapore, South Africa, & Taiwan.⁶⁰ (Of these, Albania is a NATO member).

This accounts for 44 eligible destinations in total.



Image credit: frender via Adobe Stock

The STA does not allow exports of certain goods, for example, MTCR controlled items, pathogens and some toxins, chemical weapons related items, and encryption technology.⁶¹ All aspects of the STA transaction must be within the criteria of the exception, and the end use or end user must not be prohibited. The key criterion, for example, is that the ultimate end user must be a government *and* the importing entity must have previously received a U.S. government export license and thus have been previously vetted. The STA does not allow for unauthorized re-exports without a Commerce license. It does allow repeat exports without a need to apply for multiple licenses as long as the ECCN, item description, and consignee information remain unchanged. U.S. exporters are also expected to keep records of consignees. Consignees must adhere to the following stipulations: they are aware they are being shipped a good under the STA; they are informed of the ECCN; they cannot transfer or re-export the good except to the intended government end user; and they will provide ongoing documentation to the U.S. government upon request.⁶² In addition, the STA allows the exporter to decide under what category they are exporting a good. For example, an exporter can choose the code GOV for a government customer or RPL for replacement parts.

⁶⁰ William Arvin, Senior Export Policy Analyst, Regulatory Policy Division, Bureau of Industry and Security, Department of Commerce, *Briefing Slides: License Exception STA*, July 11, 2012, Available at <https://www.bis.doc.gov/index.php/forms-documents/compliance-training/export-administration-regulations-training/596-license-exception-sta/file>

⁶¹ 15 CFR 740.20 – License Exception Strategic Trade Authorization (STA), Available at <https://www.law.cornell.edu/cfr/text/15/740.20> ; Arvin, *Briefing Slides: License Exception STA*, July 11, 2012.

⁶² Ibid.

Critics' concerns about the STA mechanism are detailed in Part II. These concerns include that the STA exception could open up a loophole for once U.S. export control-compliant companies or illicit procurement agents posing as legitimate end users to obtain large quantities of CCL items. There is also a concern that those efforts could go undetected for a long period of time.

Other Exceptions and Potential Loopholes

One additional exception that exists for CCL items *not* exported under the STA is called the Additional Permissive Re-export (APR) exception. The exception allows for the re-export by certain countries of certain CCL goods, such as electronics components, without obtaining a license.⁶³ In particular, the APR exception allows U.S. goods that have been exported to a company's overseas inventory to be re-exported without obtaining a re-export license from the U.S. government. This exception applies for companies, for example, that want an inventory of goods abroad but do not yet know the ultimate end user upon the original export. In essence, they are storing these goods abroad pending a later sale so that they can deliver them more quickly to the customer. The acceptable end destinations for the APR exception include problematic transshipment locations such as Hong Kong, which is well known as a transfer point for goods going to China. The APR exception pre-dates the ECR Initiative but was raised as an ongoing control loophole by an expert we spoke to for this paper. It is discussed further in Parts II and III.

Another problematic loophole is related to goods not specifically listed on the CCL, but still subject to the EAR and requiring a Commerce Department license, according to an expert with whom we spoke. An exporter must determine whether a good is specifically listed on the CCL, and if not, it is classified as an EAR99 good that could still be subject to a license requirement. EAR99 goods may require a license from the Commerce Department if the exporter seeks to send the good to a sanctioned or embargoed country, end user, or end use, or has reason to believe the good may be diverted to certain problematic end users. For EAR99 indexed goods that may require a license, the expert was concerned that the Commerce Department does not coordinate or verify with State/DDTC to ensure that the item is not covered by the USML prior to considering issuance of a license. The expert was unsure whether this loophole had been closed during the reforms.

Commerce Department Resources

The Obama administration was concerned early on that the Commerce Department would not have adequate resources to carry out its greater administrative functions, which includes licensing many more items that were formerly on the USML and carrying out enforcement activities for those items. Those concerns have not ended. In the Commerce Department's fiscal year (FY) 2017 *Budget in Brief* report, BIS noted the findings of an independent study on staff workload conducted by outside experts at DHS's Federally Funded Research and Development

⁶³ § 740.16 *Additional Permissive Reexports (APR)*, Available at: <https://www.law.cornell.edu/cfr/text/15/740.16?qt-ecfrmaster=2#qt-ecfrmaster>

Center: “Preliminary findings indicate that BIS staff levels are not in line with growth in export license applications and enforcement activities. Despite the extraordinary commitment and tireless effort of our employees, we have reached the tipping point.”⁶⁴ Congress increased BIS’s funding to \$112,500,000 in FY 2016 over \$102,500,000 in FY 2015 in order to help with the increased licensing and enforcement load.⁶⁵ BIS’s budget request amounted to \$126,945,000 for FY 2017. \$3.305 million of the increase would go to export administration which would enable BIS to “keep pace with the increase in work due to the Presidential Export Control Reform (ECR) Initiative....” \$4.115 million would go to export enforcement due to “the increase in licensing/Strategic Trade Authorization (STA) workload....” The report continued, “Failing to fund the enforcement aspect of ECR will leave this Presidential initiative incomplete and will erode the current effectiveness of BIS’s export enforcement efforts.” However, it is worth noting that for criminal investigations, there are now more U.S. agents than ever available for enforcement actions. Previously, for the items that were on the USML, investigations were conducted by HSI. Now that they have moved to the CCL, the same commodities are still investigated by HSI and supplemented by Commerce’s OEE.

BIS has also added a reported 24 employees to handle licensing for the new 600 series items.⁶⁶ However, its international contingent of export enforcement officers continues to number only seven, including those stationed in China (2), Hong Kong, India, Germany, Singapore, and the United Arab Emirates (UAE).⁶⁷

Compliance at BIS versus DDTC

The compliance programs at both BIS and DDTC offer companies the opportunity to submit voluntary disclosures (known as VDs at DDTC, and VSDs at BIS, or voluntary self-disclosures). If a company mistakenly or inadvertently exports a controlled good to an unauthorized end user or learns later that the good has ended up in the hands of such an end user, the company has a chance to submit a voluntary disclosure of the incident. However, the company must initiate the disclosure and demonstrate that it has fully disclosed the inadvertent export. These disclosures may lead to mitigated penalties for companies if they are found to have been either deceived in the process of making a sale or negligent in their due diligence efforts to determine the nature of the buyer of their product. Voluntary disclosures are not necessarily mitigating depending on the circumstances; they may lead to civil monetary penalties, stricter monitoring of a company and the licenses it seeks over a certain time period, law enforcement investigations, or even criminal

⁶⁴ Penny Pritzker, Secretary, Bureau of Industry and Security, Department of Commerce, *The Department of Commerce Fiscal Year 2017 Budget in Brief*, <http://www.osec.doc.gov/bmi/budget/FY17BIB/AllFilesWithCharts2.pdf>

⁶⁵ Ibid.

⁶⁶ According to a senior U.S. government official of the Obama administration, 2016.

⁶⁷ Department of Commerce, Bureau of Industry and Security, *Fiscal Year 2017 President’s Submission*, <http://www.osec.doc.gov/bmi/budget/FY17CBI/BIS%20FY%202017%20President's%20Budget%20Final.pdf>, see FY 2016 Annual Performance Plan, p. 52.

penalties.⁶⁸ Companies are warned that not reporting such incidents will factor in adversely in any compliance investigation or penalty assessment.

An expert we interviewed for this paper stated that DDTC is generally viewed by companies as more fair to deal with than BIS. BIS tends to penalize companies for truly inadvertent exports simply because they violated federal regulations. DDTC will tend to give companies the benefit of the doubt and assume that they will make mistakes in the course of doing business. However, DDTC seeks larger penalties than does BIS for egregious violators that have repeat violations and do not fix their compliance efforts. In 2014, according to interviews conducted for a journal article on export control reform, DDTC processed 1,134 VDs and BIS processed just 225 VSDs (however, a higher number processed by DDTC is difficult to correlate with a greater willingness of companies to more frequently make disclosures, since the commodity list transfers were still occurring).⁶⁹ In Part II, we explain further the views of an expert on how voluntary disclosures are handled at BIS versus DDTC.

Nuclear Regulatory Commission Controls

Tangential to the ECR were changes made to regulations governing the control of direct-use nuclear exports. Exports related to the production of nuclear material and nuclear technology and services, such as those listed under NSG Part I, are overseen by the NRC's Nuclear Regulatory Commission Controls (NRCC). DOE's National Nuclear Security Administration (NNSA) oversees the sharing of U.S. atomic energy technology, materials, and equipment with foreign countries. The NRC and DOE make decisions in consultation with one another and with the State Department and DOD. They derive authority from the AEA of 1954 to implement the CFR Part 110 and Part 810, respectively.⁷⁰ In short, the NRC and DOE regulate exports of nuclear technology, assistance, and materiel for peaceful uses.

From a legal standpoint, direct-use nuclear controls remain largely unchanged. There were, however, several changes made to Sec 810 of the AEA which DOE issued into final rule in February 2015. For example, DOE now requires the expressed approval, or "specific authorization (SA)," of the Secretary of Energy for exports to 77 countries that previously required only general authorization (GA). It also moved three countries from the specific authorization to the general authorization category. The motivation for the change was to "require more rigorous review of exports to countries and territories that do not now have significant civil nuclear programs or benefit from large nuclear trade volumes, but collectively

⁶⁸ See James E. Bartlett III and Jonathan C. Poling, "Defending the 'Higher Walls' – The Effects of U.S. Export Control Reform on Export Enforcement," *Santa Clara Journal of International Law*, Vol. 14, Issue 1, December 7, 2015, <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1196&context=scujil>

⁶⁹ Ibid, p. 33.

⁷⁰ Nuclear Regulatory Commission, "Part 110 – Export and Import of Nuclear Equipment and Material," <http://www.nrc.gov/reading-rm/doc-collections/cfr/part110/>; National Nuclear Security Administration (NNSA), "10 CFR Part 810," <https://nnsa.energy.gov/aboutus/ourprograms/nonproliferation-0/npac/policy/10cfr810>

represent a significant possible risk of technology transfer and eventual proliferation.”⁷¹ DOE has also increased its control over the back-end of the fuel cycle, specifically enumerating regulations for the storage and transport of irradiated materials.⁷² Several other changes were adopted under the final rule, such as better articulation of licensing and authorizations for end destinations, and increased specificity of rules governing foreign nationals working at NRC-licensed facilities.⁷³

DOE assessed in its economic impact review prior to the rule changes that it expected a reduction in trade volume due to the greater restrictions on exports to SA countries, suggesting a primary nonproliferation motivation for the direct-nuclear use control changes.⁷⁴

Enforcement Authorities and Changes

The U.S. export control enforcement system remains as complex as the licensing side. Domestic and international criminal violations of the ITAR and the EAR are enforced by DHS’s ICE and its HSI division. HSI agents number approximately 6,800 with around 450-500 working on export cases. They have the authority to conduct warrantless border searches, obtain export data from companies without a search warrant, attain search warrants, and make arrests. The DOJ’s FBI has no direct statutory authority to enforce export violations but does so under its general authorities as delegated by the Attorney General. DOJ can pursue legal action against domestic or international violations.



Image credit: Immigration and Customs Enforcement via WikiMedia Commons

The Commerce Department’s OEE also has authority to conduct domestic criminal investigations of the EAR (but not the ITAR) and possesses a cadre of some 125 officers who are authorized to obtain warrants, conduct searches, and make arrests. This number of agents was increased

⁷¹ Department of Energy, *Analysis of Economic Impact, Final Rule 10 CFR 810*, February 3, 2016, pp. 2-3, <http://nnsa.energy.gov/sites/default/files/nnsa/inlinefiles/810%20HQ-524020- Economic Analysis FINAL.pdf>

⁷² National Nuclear Security Administration (NNSA), “10 CFR Part 810,” <https://nnsa.energy.gov/aboutus/ourprograms/nonproliferation-0/npac/policy/10cfr810>

⁷³ Ibid; NNSA, “Guidance to the Revised Part 810 Regulation: Assistance to Foreign Atomic Energy Activities,” Current as of May 31, 2016, <https://nnsa.energy.gov/sites/default/files/nnsa/inlinefiles/Guidance to the Revised Part 810 Regulation 0.pdf>

⁷⁴ Department of Energy, *Analysis of Economic Impact, Final Rule 10 CFR 810*, February 3, 2016, p. 3, <http://nnsa.energy.gov/sites/default/files/nnsa/inlinefiles/810%20HQ-524020- Economic Analysis FINAL.pdf>

following the ECR Initiative. OEE may conduct overseas investigations with the coordination/concurrence of DHS/HSI.⁷⁵ The State Department's DDTC does not have criminal investigation authorities and must pass cases to HSI or the FBI for further action.

DOE mainly uses the FBI's WMD unit for domestic cases involving direct-use nuclear goods. DOJ's Alcohol, Tobacco, Firearms, and Explosives (ATF) Bureau also enforces some USML import controls on firearms, and DOD's Defense Criminal Investigative Service (DCIS) conducts investigations on commercial technology or information transfer cases relating to its licensing efforts with the FBI, DOE, or HSI leading the investigation.⁷⁶

BIS, DDTC, and the Treasury Department's Office of Foreign Assets Control (OFAC) have civil administrative authorities to handle export control enforcement and licensing compliance. They can prohibit exports (or transactions with respect to OFAC) to certain entities and individuals if they have evidence of violations. The Commerce Department's Office of Export Analysis (OEA) can, for example, list parties for export denial and deny exports under the Denied Persons List. It can also issue Temporary Denial Orders while an investigation proceeds. The State Department maintains a List of Parties Debarred Pursuant to the ITAR and can also recommend entities or individuals to be placed on the Denied Persons List. OFAC can list entities and individuals in order to deny financial transactions under the Specially Designated Nationals (SDN) List.⁷⁷ As discussed above, Phase I of the reforms established in 2010 a Consolidated Screening List for all such denied parties to ease the task of exporters.

According to U.S. government officials and GAO reporting, the overlapping authorities of export enforcement agencies frequently led to multiple agencies working on or conducting investigations on the same cases without knowing or coordinating their efforts.⁷⁸ By executive action, Phase I of the ECR Initiative established E2C2 in order to institute communication and deconfliction on export enforcement cases. All enforcement agencies were then required to submit case information to E2C2 to ensure that existing information relating to the case did not reside with another agency. The Center began operations in March 2012 and has a reported positive hit rate in 52 percent of all submitted cases.⁷⁹ In other words, 52 percent of deconflicted cases handled by the E2C2 have been found to have existing cases or information residing with another agency. E2C2 primarily identifies the existing information and puts the originating agency in touch with another agency or agencies. E2C2 has also been instrumental in helping to resolve disputes over which agency should handle enforcement over a particular case.

⁷⁵ U.S. Federal Register, *Enforcement Responsibilities of Commerce and Customs under the Export Administration Act*, 50. Fed. Reg. 41,545, October 11, 1985.

⁷⁶ In-depth descriptions of these authorities are available in a 2006 Government Accountability Office report, *Export Controls: Challenges Exist in Enforcement of an Inherently Complex System*, GAO-07-265, December 2006, <http://www.gao.gov/assets/260/254812.pdf>

⁷⁷ "About Export Control Reform," Fact Sheet #5, <http://www.export.gov/ecr/>

⁷⁸ Discussions with current and former U.S. government officials of the Obama administration, 2016; Government Accountability Office, *Export Controls: Challenges Exist in Enforcement of an Inherently Complex System*, GAO-07-265, December 2006, <http://www.gao.gov/assets/260/254812.pdf>

⁷⁹ "About Export Control Reform," Fact Sheet #5.

It is also mandated to coordinate licensing compliance activity, U.S. government outreach to industry, and coordination with the intelligence community. If the four singles were instituted and a single primary enforcement agency created, the Obama administration planned to maintain E2C2 in a coordinator role.

As previously described, the final phase of the ECR Initiative would have merged the enforcement resources of the Commerce Department's OEE into DHS/HSI, which has broad enforcement authority to enforce the ITAR, EAR, and address criminal violations internationally. OEE's compliance resources would be transferred to the new single licensing agency, and OEE would no longer exist.

Similar to its concerns over the Commerce Department, the administration worried that E2C2 would not be adequately funded. To date, funds for the establishment and maintenance of E2C2, with the exception of salaries, are drawn from ICE funds. No funds have yet been appropriated by Congress to maintain or expand E2C2. Moreover, employees of E2C2 are drawn from other agencies and stationed at E2C2, as opposed to being direct employees of E2C2.

It is worth noting that in 2010, as part of the ECR Initiative, Congress passed uniform penalties for violations of the CCL or USML as part of the Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA). It standardized maximum prison sentences for a violation of the USML and CCL that previously caused USML violations to count as half the sentence of a CCL violation.⁸⁰ In October 2015, the administration reported that sentences still remain too low due to "the tendency of sentencing courts to grant significant downward departures from the ranges specified in the U.S. Sentencing Guidelines..." and pressed for legislative action to establish mandatory minimum sentences.⁸¹ CISADA also restored authority to Commerce Department special agents, which since 2001 was being deputized by the U.S. Marshals Service due to the expiration of the EAA.

Preliminary Data on ECR Initiative Impacts

It is difficult to obtain a clear depiction of impacts of the ECR Initiative without extensive data, which would include tracking the end use and end users of USML to CCL transferred goods. Most of this data will remain law enforcement sensitive. The administration made some data available that allows for an interpretation of the impact of changes on government functions with regards to controlling exports and impacts on exports themselves. We call for more public reporting by the Trump administration in Part III.

⁸⁰ Ibid.

⁸¹ Ibid.



Image credit: Yang MingQi via Adobe Stock

According to data reported by DDTC and BIS, as expected, the volume of licensing applications has gone down at DDTC and increased at BIS. In February 2016, the administration reported a 56 percent reduction in licensing volume at DDTC due to USML goods that have been moved to the CCL. According to the administration, DDTC has been able to “enhance efforts to safeguard against illicit attempts to procure sensitive defense technologies.” However, the basis for that statement is unclear, according to several experts we spoke to for this paper.⁸² In its FY 2015 report on end use monitoring, DDTC indicated that it “adjudicated 44,103 export license applications,” which was approximately a 50 percent decrease from the pre-ECR 2012 level, or “over 86,000 licenses.”⁸³ According to BIS’s *Annual Fiscal Year 2017 President’s Submission* which contains the most recent data available, BIS reported analyzing 37,398 licensing applications in FY 2015.⁸⁴ This number increased somewhat over its FY 2014 figure of 32,535 licensing applications.⁸⁵

CCL 600-series exports are now accounting for multibillion dollar trade. BIS data focusing specifically on exports of 600-series (former USML) items show that since the ECR rule went into effect in October 2013 and up until June 2016, these goods totaled 194,849 shipments and accounted for \$12.1 billion. Of this total, STA exception goods accounted for \$1.4 billion. Top country recipients of these goods were Japan, Canada, the United Kingdom, South Korea, Mexico, Israel, Germany, the United Arab Emirates, Italy, and French Guiana, where a space center is run by France and the EU.⁸⁶

BIS data on the use of the STA indicates that between July 2011 and June 2016, 766 companies used the STA exception accounting for a total of \$2.0 billion in shipments. During this period, top

⁸² Department of State, Office of the Spokesperson, “Export Control Reform Update,” February 10, 2016, <http://www.state.gov/r/pa/prs/ps/2016/02/252355.htm>

⁸³ Department of State, Directorate of Defense Trade Control, *End-Use Monitoring of Defense Articles and Defense Services, Commercial Exports FY 2015*, https://www.pmddtc.state.gov/reports/documents/End_Use_FY2015.pdf; Department of State, Directorate of Defense Trade Control, *End-Use Monitoring of Defense Articles and Defense Services, Commercial Exports FY 2012*, http://pmddtc.state.gov/reports/documents/End_Use_FY2012.pdf

⁸⁴ Department of Commerce, Bureau of Industry and Security, *Fiscal Year 2017 President’s Submission*, <http://www.osc.doc.gov/bmi/budget/FY17CBI/BIS%20FY%202017%20President's%20Budget%20Final.pdf>

⁸⁵ Department of Commerce, Bureau of Industry and Security, *Statistics of 2014 BIS License Authorizations*, https://www.bis.doc.gov/index.php/forms-documents/doc_view/1266-2014-statistical-analysis-of-bis-licensing

⁸⁶ Department of Commerce, Bureau of Industry and Security, *Export Control Reform: The U.S. Exports for 600-Series and 9x515 Items Under BIS Jurisdiction, October 15, 2013 to June 30, 2016*, https://www.bis.doc.gov/index.php/forms-documents/doc_view/1538-2016-2nd-quarter-statistics-of-ecr-exports

36 country group STA recipients were Japan, South Korea, the United Kingdom, the Netherlands, Australia, Sweden, and Turkey. Of the additional authorized eight countries or territories, Taiwan, Israel, Singapore, India, South Africa, and Hong Kong accounted for top recipients of STA goods. Albania and Malta did not receive any goods under the STA exception. During the time period of the reporting, there were 4,522 ultimate consignees of STA goods. 3,018 received one-time shipments and 326 received ten or more shipments. 846 ultimate consignees of the total received 600-series ECCN goods transferred from the USML.⁸⁷

Available data indicate that DDTC is conducting fewer physical verification or end-use checks on exported goods than BIS. Many of DDTC's cases involved firearms violations. During FY 2015, DDTC's end use check program, Blue Lantern, conducted 329 pre-license checks and 241 post-shipment checks in 83 countries. The program uncovered that of 662 cases during FY 2015, 173 cases, or 26 percent, had unfavorable findings. Twelve percent, or 28 cases, were determined to involve indications of either negligent or willful diversion or re-export. Sixteen of the 28 cases involved one end-user in the Caribbean and firearm diversion; another case involved firearm diversion by a European firearms re-seller.⁸⁸

BIS's OEE carries out the Sentinel program, the physical verification and end-use check effort for CCL licensed goods. It conducts pre-license checks, post-shipment verifications on licensed goods, and post-shipment verifications on non-licensed goods. BIS does not publish a great deal of information about the Sentinel program's activities. Upon request BIS's OEA provided a Power Point slide indicating a total of 1,031 end use checks in 55 countries during FY 2015. Of the majority regions, 381 of the checks were carried out in Asia, 283 were conducted in Europe, and 238 were carried out in the Middle East.⁸⁹ BIS stated that specific information about compliance checks, such as percentages that led to unfavorable findings or what goods they involved, was unavailable. BIS's *Annual Fiscal Year 2017 President's Submission* report indicates that in FY 2015, BIS's OEA generated "409 enforcement leads, which resulted in 200 enforcement outreaches, 38 enforcement cases, 28 detentions, and 10 warning letters. OEA initiated 21 Entity List nominations, which involved efforts to stem WMD, military modernization, and improvised explosive device proliferation efforts. OEA also provided case support to 48 OEE field office investigations."

With regards to enhancing enforcement, the Obama administration stated during implementation that the ECR Initiative would render export violations more easily prosecuted, due to the control list transfers and definitional design intent changes. Current and former U.S. enforcement officials we interviewed for this paper believed that since the reforms were enacted, EAR criminal prosecutions had decreased and that the government had chiefly sought to

⁸⁷ Department of Commerce, Bureau of Industry and Security, *BIS License Exception Statistics, Strategic Trade Authorization (STA) Exports, July 2011-June 2016*, http://www.bis.doc.gov/index.php/forms-documents/doc_view/1537-sta-use-july-2011-june-2016

⁸⁸ Department of State, Directorate of Defense Trade Control, *End-Use Monitoring of Defense Articles and Defense Services, Commercial Exports FY 2015*, https://www.pmddtc.state.gov/reports/documents/End_Use_FY2015.pdf

⁸⁹ Department of Commerce, Bureau of Industry and Security, *End-Use Check Program, FY15*, Power Point Slide, Provided in September 2016.

prosecute major country sanctions related to IEEPA violations (discussed further in Part II). Overall, in seeking to assess whether U.S. prosecutorial action has increased or decreased during reform implementation, limited data is available. DOJ's National Security Division provides reporting on major criminal export related cases between 2010 and June 2016. From the time period of October 2013 (when many of the ECR list changes went into legal effect) and June 2016, there were some 22 export related cases that were adjudicated.⁹⁰ Not all cases are listed, and many resulting in a conclusion or sentencing during the time period may have begun many years earlier. However, the primary focus of U.S. prosecutorial action during this period, and even prior to 2013, appears to have been on major IEEPA country sanctions violations. Iran accounts for the majority of criminal cases. This assessment does not include a look at civil penalties for settled EAR violations that never went to court, which is outside the scope of our effort to examine the increase or decrease of criminal enforcement action during and after the reforms. Understanding what currently motivates or dissuades U.S. prosecutors from seeking criminal indictments for proliferation-sensitive goods cases, including any impact of the movement of goods to the EAR, may require official inquiries to a large sampling of U.S. prosecutors.

Perceptions of Industry Regarding Changes

Last year, during the most recent Congressional hearings to provide an update on the ECR Initiative, a series of problems and impacts were detailed and commented on by members of Congress. At the February 2016 hearing of the House Committee on Small Business, practitioners indicated that small businesses had in particular been adversely impacted by the reforms due to the burden of compliance and delays, even if they viewed the reforms overall as positive for the growth of exports.⁹¹



Image credit: raven via Adobe Stock

Andrea Appell, director of BPE Global, stated, "...the lack of clear definitions can create a roadblock for export." Nevertheless, Appell stated regarding a House member's comment about the Obama administration's goal in 2011 to double exports, "...I can speak from the basis of our

⁹⁰ Department of Justice, National Security Investigations division, *Summary of Major U.S. Export Enforcement, Economic Espionage, Trade Secret, and Embargo-Related Criminal Cases, January 2010 to the present*, Updated June 27, 2016, https://www.justice.gov/nsd/files/export_case_list_june_2016_2.pdf/download

⁹¹ 114th Congress, 2nd Sess., *Hearing before the Subcommittee on Agriculture, Energy, and Trade of the House Committee on Small Business, Export Control Reform: Challenges for Small Business? (Part I)*, February 10, 2016, <https://www.gpo.gov/fdsys/pkg/CHRG-114hhrg98594/html/CHRG-114hhrg98594.htm>

clients, that the export reform is working, right? It's making things easier. It is facilitating exports." Jennifer Robertson-Ahrens, president of Robert Forwarding Company, described the difficult impact of the reforms on freight forwarding companies. The interpretation of ECCNs on the CCL was particularly difficult: "When it comes to the ITAR, it is very self-explanatory what to do...when it comes to using an ECCN, depending on what the classification is and depending what country we are going to, it really depends on what regulations and what government restrictions you have per country." In terms of freight forwarders, the challenge has been shippers not assigning ECCNs and the burden falling to the forwarder to do so, she noted. "If a shipper does not give us this information correctly, we are liable to civil and criminal prosecution for improper exports." She continued, "As this goes on every six or seven months with the evolution, it is changing how we are working, and it is delaying our processes." Robertson-Ahrens also stated:

As a freight forwarder, we are under enforcement agencies, we are considered the last line of defense for U.S. Border Protection, for the Office of Foreign Asset Control, Bureau of Industry and Security, TSA, Transportation Security Authority (sic), and the Federal Maritime Commission. We have a lot of people to answer to. So regulations that are clear and laid out clearly towards us make a huge difference on how we are able to execute our work.

She also described long delays at CBP because export officers are unaware of the requirements for CCL exports and ECCNs.

At the hearing, as usefully noted by the managing partner and vice president of the Trade Compliance Group, Craig Ridgley, the impacts of the ECR Initiative on small businesses are not fully understood. He suggested that BIS and DDTC survey SME (small-medium enterprise) exporters to "ask them which elements of the ECR Initiative have been beneficial and which have not." He stated that "long licensing times and opaque regulations are continuing concerns." Yet, "progress has been made in streamlining the regulations and increasing clarity and objectivity of the USML." Ridgley continued, "In some conferences that I have attended, and in training sessions that I have conducted, the pain of the ECR is almost palatable. Significant time and company resources are being invested in the cost of transitioned items in the overall implementation of the ECR Initiative."

One member of Congress also asked about the impact of the enforcement changes, but the witnesses did not comment on the subject.

These testimonies from small business representatives indicate that lesser resourced companies continue to struggle with implementing the reforms and have concerns regarding the added costs of doing business and making potentially expensive compliance mistakes. The hearings also indicate that Congress continues to stay somewhat engaged on the ECR Initiative's effects. Parts II and III touch further on the perceptions of and issues faced by industry regarding the reforms.

PART II: VIEWS ABOUT THE EXPORT CONTROL REFORM INITIATIVE

Part II discusses the positive, negative, and neutral views of more than a dozen experts we interviewed about the effects of the reforms. Our off-the-record meetings included discussions with the following: Obama administration officials and other government personnel (at the time of interviews) instrumentally involved in implementing the ECR Initiative from the Department of Commerce, Department of State, and Department of Homeland Security; U.S. prosecutors; a former law enforcement official from Homeland Security Investigations; lawyers in private practices with former senior federal law enforcement and export control implementation experience; professional staff of members of Congress; a Congressional expert; and private sector representatives. This last group included: the former head of an industry association with senior experience in federal export control implementation; an executive partner at a trade compliance group; and a senior executive in trade compliance at a major international company headquartered in the United States.

Understanding this issue in depth required the insight of these practitioners and experts who had worked on the effort or seen its initial results. Key themes immediately emerged from these discussions, and they are divided below into issue areas.



Image credit: vege via Adobe Stock

Issue 1: What are the effects of deregulation, specifically on nonproliferation efforts as a result of USML to CCL transfers?

Negative views:

A private lawyer with export control implementation experience felt that the movement of goods from the USML to the CCL was presented by the Obama administration as a practical effort to update an outdated system, while the true motivation was to remove regulations on the export of military goods at the expense of strong nonproliferation efforts. The DHS official, former law enforcement official, a U.S. prosecutor, a staff member at Congress, and two private lawyers with former federal experience, held negative views about the control list changes and believed that a freer flow of military goods out of the United States had resulted and may negatively impact U.S. security interests. Overall, the law enforcement officials, both current and former, who are on the front lines with years of investigatory experience, characterized the ECR Initiative as a large-scale weakening of U.S. export controls and believed prosecutorial action had declined.

Positive views:

U.S. government officials from the Departments of Commerce and State were committed to the administration's motivation for the reforms and supported the need for them. A Department of Commerce official underlined his support from his own experience as a lawyer prior to starting government work; this experience gave him insight into why reforms were needed. He stated that the reforms had had no negative impact on nonproliferation efforts, and that the primary target of the effort was to reduce confusion over listing and controls. He stated that all arms prohibitions, for example, remained in place with regards to embargoed countries.

The Department of Commerce official took the view that the ECR Initiative actually allowed for more focus on nonproliferation due to reduced bureaucratic burdens, and thus would conclude that the reforms had had a positive impact on nonproliferation efforts overall. He stated that a goal of the reforms was to lead to more appropriate use of U.S. government resources, including a reduction in the time required to issue licenses and make exports. By also reducing the amount of subcomponents regulated, he believed that the U.S. government had achieved a net increase in time for investigations relating to licensing and exports.

Neutral views:

Several experts noted that it is difficult to judge whether the freer flow of former USML controlled goods has begun to cause any negative repercussions due to a lack of study and government data on the spread of such goods. About half of the experts interviewed stated that the administration has not released enough data on the effects of the reforms.

Issue 2: How have the reforms affected enforcement efforts and prosecutions?**Negative views:**

Three current and former law enforcement officials, including a U.S. prosecutor with whom we spoke, were concerned about the weaker statutory authority of the EAR as enforced by the president's declaration of an emergency under the IEEPA and the added negative impact on prosecuting these cases due to the change in definition of the design intent of goods. They believed that U.S. prosecutors would find it more difficult to bring cases to court and win them and that prosecutors were already not prosecuting such cases. The private lawyer with former government experience in export control implementation stated that he had observed and understood through the course of his law practice that the changes have been detrimental to prosecutors bringing export cases. The private lawyer with former export control enforcement experience agreed that prosecutors would now seek to bring only the most clear-cut cases to trial. The DHS official said that the design intent definition change was a "huge issue" for DOJ and the enforcement community. They were concerned that cases would decline because of items moving to the dual-use oriented CCL rather than the stricter, military goods focused USML. They also believed that very few EAR cases had been brought to court since the reforms. The former

U.S. enforcement official stated that the IEEPA could be more seriously challenged in court than the AECA, leading to cases being thrown out. The DHS and the former enforcement officials stated that there were very few EAR cases resulting in indictments apart from the easier to win IEEPA country sanctions or embargo violation cases.

A U.S. prosecutor stated that efforts to bring export control cases to court had been hampered by the movement of goods from the USML to CCL. This prosecutor stated that in the course of weighing cases to prosecute, whether they are USML or CCL goods is a major factor because the EAR, with its coverage of goods with both a military and civil use, is more difficult to enforce in court. Thus, more goods outside the purview of the AECA resulted in a reduction of cases prosecutors would otherwise bring to court. The lawyer with export control implementation experience stated that the changes had “muddied the waters” in federal court by moving items that had previously been on the USML and subject to the AECA, which he deemed to be highly enforceable, to the CCL and subject to the EAR. He stated that the administration did not make available data that would capture the thinking of prosecutors.

The specially designed definition complicated bringing those cases to court because the intended design of a good could now be denied or made subject to the interpretation of the good’s manufacturer. The lawyer with export control implementation experience stated that the U.S. government’s adoption of the exclusivity definition explained in Part I, rendered parts and components of weapons systems that are controlled only if “specially designed” for use in an USML-controlled item subject to private actors deciding their control status, rather than the president or State Department. Private actors would essentially control whether such weapons parts and components are considered “defense articles” and controlled for export under the ITAR.

The lawyer with export control enforcement experience stated that a new “record keeping requirement” under the EAR definition of specially designed complicated bringing cases to court. The requirement states that absent any records or documentation kept by the original designer of the goods indicating otherwise, an item may not be excluded from being considered specially designed. This, he said, would further have the effect of forcing prosecutors to bring designers of goods to court to decide on the good’s design intent or force courts to consider defendants’ arguments that they had no records about design intent and thus they did not know the potential controlled use of an export. These cases are less likely to be won because a court or judge may view the government’s being required to decide the control status of a good during court proceedings as an *ex post facto* determination, and thus, decide that a defendant also could not have known the control status at the time of export.

This lawyer also stated that U.S. prosecutors were attempting to bring different charges that they know will hold up in court. He highlighted the November 2013 case of *United States v. Khazaei* involving the attempted export to Iran of sensitive technical manuals and specification sheets for the U.S. Air Force’s Joint Strike Fighter jet engines and diagrams, blueprints, and other documentation relating to the F35 engine. The documents were clearly marked “ITAR Tech Data.” Nevertheless, the U.S. government did not initially charge Khazaei with an AECA offense

but with Interstate Transportation of Stolen Property. He ultimately did plead guilty to an AECA offense later in the case.

In addition, the lawyer believed the design definition change would lead to time delays and “arbitrary” licensing decisions or determinations about whether a part or component is controlled.

This lawyer also noted that even parts specially and solely designed for weapons systems may not be controlled for export under the ITAR, particularly regarding military aircraft. In explaining the narrowed scope of the ITAR, he pointed out that federal law now states: “For example, a part common to only the F-14 and F-35 is not specially designed for purposes of the ITAR.”

Several problems with the IEEPA governing substantially more goods were pointed out by experts. The lawyer with export control enforcement experience believed that the president and Department of Commerce had exceeded their statutory authority as provided by Congress under the IEEPA. In his view, the president did not have emergency authority to invoke the IEEPA based on the absence of the EAA to regulate the export of munitions because the AECA is the law governing this. Thus, he expected courts to dismiss EAR cases governing 600-series items.

The former enforcement official stated that cooperation from foreign countries has historically been better for enforcing criminal AECA cases than IEEPA cases. A U.S. prosecutor stated that in addition to creating problems for U.S. prosecutors bringing cases, the IEEPA was often seen by foreign countries as holding less legal weight and complicated their willingness to cooperate on transnational export violation cases. Both a U.S. prosecutor and former law enforcement official stated that there are fewer extradition cases relating to IEEPA violations.

Notably, these law enforcement experts stated that Obama administration officials dismissed these concerns in meetings when they voiced them. They felt that either administration officials did not want to understand or that the true motivation was to de-emphasize enforcement action more broadly by placing the goods under IEEPA jurisdiction.

Positive views:

The former industry association head with government experience in export control implementation believed there was no evidence to suggest that the volume of export cases had dropped since the reforms and that the U.S. government had won several recent challenges in court. He stated that judges have historically given the executive branch wide latitude under the IEEPA. He also suggested that civil settlements between governments and companies accused of EAR related violations show that enforcement continues apace under the reformed system.

A Department of Commerce official argued that unenforceability of the EAR due to the design intent definition change was a “myth” and that since the definition depended on answers to yes and no questions, the control status was clearer and less reliant on subjective determinations as

it was prior to the ECR Initiative. He dismissed the concerns of the enforcement experts with whom we spoke.

Issue 3: What are the effects of STA exception and other licensing exceptions?

Negative views:

The DHS official, former law enforcement official, a U.S. prosecutor, a staff member at Congress, and the two private lawyers with former federal experience believed that the STA created a loophole for exploitation by illicit procurement agents. They argued that such agents and entities could apply for the STA exception and use it to move large quantities of goods through repeated transfers until the activity was discovered by BIS or an enforcement agency. They believed adversary countries would take advantage of the exception and set up front companies to obtain sensitive goods. The former law enforcement official pointed to the example of Canada being allowed a USML license free exemption in the 1990s and China taking advantage of it by setting up front companies in Canada to obtain the goods. Enough criminal cases resulted from that exemption that it was eventually revoked (although Canada subsequently made adequate changes to have the exemption reinstituted).

Moreover, several of these experts were concerned that unless physical verification or end use checks are conducted, longstanding transshipment efforts could go undetected for many years. The staff member of Congress was concerned that physical verification or end use checks on the USML to CCL transferred goods may occur initially but level off over time. Then goods could be quietly sold onward by the original buyer. The experts also believed the STA shifted the onus of compliance to the importer of U.S. goods. This is because they are now required to maintain their own paperwork on the status of STA goods.

The staff member of Congress expressed concern that the STA could allow the government to lose track of 600-series CCL goods over time due to the European Union's (EU's) gradual shift to license-free transfers among member states. Recipients of goods may confuse requirements to obtain a U.S. license for re-transfer with the lack of EU requirements. He was also concerned that some of the STA countries, such as Turkey, Greece, or Eastern European countries, for example, do not have reliable export control systems which could encourage the re-transfer of goods to sanctioned countries or end users of national security concern.

Another staff member at Congress stated that the administration could have simply created a licensing exception under the ITAR. This point was denied by the administration as it claimed that difficult to negotiate bilateral treaties would be required for each country receiving an exception under the ITAR.

One person stated that the APR exception under the CCL was problematic for preventing illicit re-exports and is a loophole that needs to be closed. As described briefly in Part I, the APR was not part of the ECR Initiative but should have been closed, or at least fixed, as part of any reform effort. It allows for the unlicensed re-export of certain CCL goods from "cooperating countries"

to more controlled destinations. One defendant attempted to use the loophole in a case, *United States v. Wu*, to claim that electronics goods exported from the United States to Hong Kong and then re-exported from Hong Kong (which falls under the APR exception) to China, were exported legally under the APR exception.⁹² The effort ultimately failed but could succeed in other cases. One prosecutor also raised the issue of the Commerce Department's tendency to grant licenses for EAR99 indexed goods before reviewing whether a good is subject to the USML.

Positive views:

Regarding the above view, administration officials stated that previous attempts to conclude bilateral trade treaties with close allies to allow for ITAR exceptions, such as Australia and the United Kingdom, had resulted in treaties so complex in regulation, interpretation, and containing of variances depending on the country, that they were rarely used.⁹³ Moreover, these bilateral agreements were extremely complicated to put in place and required years of effort. The administration thus made the decision to move items to the CCL and have a country group exception such as the STA.

The Department of Commerce officials argued that an STA vetted party would be unlikely to violate their agreement because they had already been vetted for responsible behavior. They noted that any entity caught transferring goods would be subject to penalties, sanctions, and loss of its STA status. They also argued that if a buyer planned to re-transfer goods, they would do so regardless of how they obtained the goods – whether via a Commerce license or an STA exception. Department of State officials agreed that since the STA required re-exporting companies to acquire a license for export, and to keep their own records on the goods, they were in effect creating a longer trail of records for exports.

The trade compliance executive at a major international company stated that the STA exception had a moderately positive impact on her operations. From her perspective, she appreciated no longer requiring a license for every transaction. She gave the example of now finding it easy to deal with overseas suppliers to whom she needed to regularly transmit technical information. She found that the STA also eased transactions for replacement parts and government end user shipments. Many routine transactions had been greatly sped up from the previous 30-40 days wait for a license. She pointed out that some overseas partners initially did not want to sign paperwork regarding liability for STA authorized exports, but she reminded them that the responsibility of maintaining control of imported goods was already present with a Commerce license. She had no concerns that STA exception goods from her company were being re-exported, and as of the spring of 2016, had not seen a case of diversion. She felt that the vehicle used to export in the first place was not a deciding factor in illicit procurement attempts and that goods under licenses also ended up being diverted. She noted that her company had been

⁹² United States First Court of Appeals, First Circuit, *United States of America, Appellee, v. Zhen Zhou Wu, aka Alex Wu, Defendant, Appellant, United States of America, Appellee, v. Yufeng Wei, aka Annie Wei, Defendant, Appellant*, Nos. 11-1115, 11-1141, Decided March 19, 2013, <http://caselaw.findlaw.com/us-1st-circuit/1625449.html>

⁹³ Kevin Wolf's Discussion at ABA Brown Bag Lunch, December 16, 2014.

audited by the Commerce Department to ensure proper use of the STA exception and that they were found to be using it correctly. She believed the Commerce Department had done a good job explaining the STA exception abroad, mentioning that it had conducted multiple visits to key countries.

Issue 4: How do exporters view the new rules introduced under the ECR Initiative?

Negative views:

A staff member of Congress stated that the specially designed catch-and-release system put the onus on industry to determine the control status and many were hesitant to take on that burden. The mechanism, described in Part I, includes a series of yes or no questions leading to a step-by-step determination of the control status of a good. He stated that many preferred the old system where the government would have most of the responsibility of determining the control status of a good. However, this expert believed that the bureaucracy had room to make this definition more of an operating regulation and establish parameters more firmly for industry.

Positive views:

A Department of Commerce official claimed that the regulatory burden of the U.S. export control system needed to be reduced in order to improve both U.S. government and exporter functions. He stated that too many different opinions had been present within the U.S. government and for exporting companies about which list – the CCL or USML – a particular good should fall under, and whether a particular good was even controlled. This, in turn, led to confusion among U.S. prosecutors over bringing cases over export violations. The official believed that the catch-and-release mechanism now allowed exporters (and the government) to determine whether a particular good is controlled by the USML or CCL.

The former industry association head with prior export control implementation experience believed that industry was happy with the changes to the licensing process and thought it was more user friendly. The changes made it easier to find out the control status of a good and obtain answers from officials.

The trade control executive stated that adapting to the new changes required a significant amount of preparation, training, and reclassification of thousands of items according to the new controls, but that overall, the high initial cost was mitigated by a positive net impact.

Neutral views:

A Congressional staff member stated that the private sector had a mixed view of the ECR Initiative and USML to CCL transfers. He stated that some companies were pleased that their goods had been transferred and were subject to a more flexible licensing process. He had not heard complaints from industry and felt that the system was not any simpler, although perhaps more transparent. The trade control consultant noted that much of industry was split and many

sectors had not had their wish list met under the reforms. He had not heard any complaints from industry about the change in the specially designed definition.

The former industry association head stated that there were a number of “transition” complaints due to the transfers of goods to the CCL - not objections to the changes themselves per se - but annoyance that the reforms forced companies to learn new procedures, new control numbers, and interface with new people in the government. For companies that had many DDTC licenses and were USML proficient, a great deal of adjustment was required of their compliance people. He stated that a test would be whether in a few years they would think the new system is better or worse. He noted that BIS has a longstanding reputation for being easier to deal with than DDTC, and he expected grievances to dissipate as compliance officers learn a new routine.



Image credit: Federico Rostagno via Adobe Stock

Issue 5: Should the next president finalize the transfer of USML categories 1-3 governing firearms, artillery, and ammunition?

Negative views:

U.S. federal law enforcement and homeland security agencies have extensive concerns about transferring USML categories 1-3 to the CCL, as explained in Part I. The current and former enforcement officials we spoke to were concerned that the STA mechanism would allow for large shipments of arms and ammunition to countries with poor export controls or end users that would exploit the exception in order to re-transfer the high value items. This increased flow of U.S. arms could lead to further destabilization in regions of war or conflict. Thus, they were against finishing the transfers.

The former head of an industry association stated that he would be concerned about the increased exports of firearms being used against U.S. troops in conflict situations.

No positive or neutral views were offered by the pool of experts with whom we spoke.

Issue 6: What are views on the different voluntary disclosures processes?

Negative views:

The former industry association head stated that BIS's VSD process is seen as more automatically more punitive than the DDTC's VD process. BIS frequently penalizes inadvertent exports to unauthorized end users even if there is no demonstrable resulting damage to national security other than accidental violation of the EAR regulations.

Positive views:

The former industry association head stated that DDTC, when it decides to penalize a company – typically because there is a pattern of violations– it will usually seek large monetary penalties and monitoring of a company's exports. However, this occurs with regards to only a handful of companies per year. He stated that overall, DDTC is viewed as easier for companies to deal with because it recognizes that in the course of doing business, mistakes or inadvertent exports may occur.

Issue 7: How has E2C2 performed?

Negative views:

The private lawyer with export control implementation experience was unimpressed by the establishment of E2C2 and disagreed that there had been any significant deconfliction.

A DHS official stated that deconflicting cases without adequate resources required intensive manual effort absent more automated solutions, which were lacking at E2C2. Funding and personnel were not available to achieve a greater impact.

Positive views:

Current and former enforcement officials viewed the creation of E2C2 as a positive result of the reforms. They believed that the enforcement system is still broken until Phase III occurs but that positive steps could be taken to broaden E2C2's mandate and have Congress provide it with annual funding. A Commerce Department official viewed E2C2 as a useful clearinghouse for checking if another agency already has an active case.

The DHS official stated that when HSI agents are in the field and discover a case, E2C2 is the agency that helps decide which agency is supposed to provide enforcement action over a particular good. He stated that E2C2 is pioneering a new investigative approach by coordinating export control investigations between the Commerce Department, FBI, and DHS/HSI, along with engaging the intelligence community. He was, nonetheless, concerned about the difficulty of coordinating enforcement efforts between the enforcement agencies, even with a central coordinator. A former enforcement official stated that, as such, E2C2 was a useful stopgap measure to increase coordination of enforcement efforts. However, he hoped that the streamlining process would continue and reduce the problems of redundancies and duplication of authorities.

The DHS official stated that creating an intelligence hub at E2C2 was part of the original design and mandate of the agency and would like to see it further established. As a grand vision, he believed E2C2 could even be modeled on the U.S. National Intellectual Property Rights Coordination Center (IPR Center), making E2C2 the U.S. center for coordinating domestic and international export enforcement efforts. He also envisioned it as conducting increased outreach to the public and companies about export issues similar to that center's outreach on intellectual property rights issues. A current and a former enforcement official pointed out that there is currently no central U.S. government hub for sharing tips or information about export control violations. HSI and the FBI have tip lines for general criminal activity, but it is unclear to many laypeople where to submit suspect export control related information. Potentially complicating government effectiveness and communication further, the disparate federal agencies involved in export control enforcement also maintain their own in-house intelligence capabilities.

A staff member at Congress thought that it would be easy to gain support for increasing E2C2's capacities to coordinate export enforcement efforts beyond the deconfliction mandate.

Issue 8: What are views on merging most enforcement capabilities into DHS/HSI?

Negative views:

As indicated by the views above, our interviews revealed a large chasm between federal export control implementation and export enforcement communities. Commerce Department officials resisted the notion that the Phase III enforcement merger is necessary. They noted that OEE has authority to conduct international investigations if they coordinate with HSI. Officials were confident that OEE's export enforcement cases were handled well in-house and that there was no overlap with HSI regarding cases. They viewed OEE's dedicated enforcement agents as particularly specialized and useful for their enforcement mission.

The former industry association head pointed out that the Commerce Department and other enforcement agencies have not had a positive relationship for some 40 years and that the views on what should be done really depended on which side was asked. He was surprised that the enforcement community was still concerned about the Commerce Department's export promotion mandate since that issue led to the creation of what is now BIS in 1987. He also believed that OEE agents usefully have only one task, whereas HSI officials have many, and that their priorities lie more in drug interdiction and other areas than in export enforcement. In other words, he stated, the path of upward mobility at HSI does not lie in export control investigations. Savvy agents will always gravitate toward the activities that provide the greatest reward.

Positive views:

The DHS official stated that the Commerce Department viewed Phase III of the reforms as an "all-out assault," and as a result, other enforcement agencies such as HSI and OEE had not experienced an easy relationship. Current and former enforcement officials believed the Phase III

enforcement merger should occur. They view the Commerce Department's enforcement functions as extraneous, overlapping with DHS/HSI functions, not having as many investigatory authorities, and best suited to occur under an enforcement oriented agency rather than at an agency that also promotes exports. They feel that the recommended increase in Commerce enforcement agents is unsupported because the new enforcement duties merely supplement the already existing DHS/HSI dedicated duties and resources.

The former enforcement official argued that OEE gaining authority to conduct investigations for former USML goods has created even more redundancy in agencies investigating cases. He pointed out that a goal of the ECR Initiative was to reduce redundancy and overlap, yet stopping at Phase II dramatically increased the number of items policed by multiple agencies. The items on the USML were already policed by HSI and the FBI. With the movement of thousands of items to the CCL, OEE agents were added to the mix of possible investigative agencies. The ECR Initiative, in his view, thus dramatically increased the possibility of duplicative investigative activity. He stated that shifting approximately 125 Commerce Department special agents to HSI's special agent cadre of 450-500 agents handling export enforcement cases would be a more efficient use of government resources. He also stated that compliance programs (pre/post license checks) by OEE for the STA exception had failed to take advantage of these DHS/HSI agents already in the field, particularly in the overseas environment.

With regard to the view that HSI agents are not adequately specialized and seek upward mobility outside of export enforcement cases, the former enforcement official stated that in his experience, HSI agents gained great prestige and upward mobility at the agency by successfully executing export enforcement investigations. He said that while agents may be moved to other topics of assignment after a successful export case, this did not have a negative impact on investigations overall. Moreover, each major domestic HSI field office has a group of agents dedicated exclusively to investigating export violations, which ensures a consistent focus.

Issue 9: What are views on Congressional oversight of the reform process?

Negative views:

In the area of Congressional oversight, many experts with whom we spoke expressed that, overall, they believed Congress had not exercised enough oversight over the ECR Initiative, apart from holding several hearings prior to and during ECR Phases I and II. The trade control consultant felt that Congress had even "abdicated" responsibility. The private lawyer formerly in export control implementation pessimistically felt that only an export scandal involving deregulated goods would encourage Congressional oversight over the ECR Initiative's impacts. A Congressional staff member felt that GAO needed to do more intensive reporting on the ECR Initiative and believed its previous reports were not rigorous enough. The former head of an industry association agreed that inadequate oversight from Congress was a problem and Congress needed to direct GAO to do more intensive reporting.

Neutral views:

A Congressional staff member, who was not enthusiastic about the reforms initially, was more resigned about them since he had seen no evidence of systemic issues sufficient to give rise to Congressional concerns. He had also heard no complaints from industry.

Issue 10: Does the continued annual re-authorization of the state of emergency under the IEEPA pose a potential challenge for the U.S. export control system?

Negative views:

A Congressional staff member warned that a new president could rule out re-authorization of the state of emergency under the IEEPA and an entire area of the U.S. export control system (implementation of the EAR) would be impacted and rendered legally unenforceable.

The former enforcement official was also concerned about annual reauthorization of the state of emergency under the IEEPA since there was no guarantee that it would occur. He stated that many foreign countries viewed IEEPA violations as political crimes because it also enforces sanctions, giving them a reason not to cooperate with requests for international legal or investigatory assistance. As a result, U.S. prosecutors typically add other charges (such as fraud, making false statements, smuggling, etc.) to IEEPA violation cases in order to bolster the chances that a judge or foreign magistrate will adequately acknowledge the dual criminality necessary for international law enforcement assistance. He was also concerned that a single court case overturning an IEEPA violation could bring down the EAR enforcement system.

The private lawyer formerly in export control enforcement stated that the IEEPA invoked national emergency powers, a fact unlikely to successfully protect the regulation of dual-use goods in court.

Positive views:

The former industry association head believed that the chances of a president not re-authorizing the state of emergency under the IEEPA were practically zero.

Commerce Department officials noted that the reauthorization of the state of emergency under the IEEPA carried the same legal weight as the AECA. One official believed that the IEEPA gave more flexibility for changes in a fast moving area which could otherwise be negatively impacted by slow amendments to comprehensive legislation.

Another Congressional staff member explained that the Commerce Department, especially, preferred annual re-authorization of the state of emergency under the IEEPA due to the uncertainty that could be created by new legislation replacing the EAR. In any case, this expert stated that without any driver of legislation such as the administration, industry, or Congress, new legislation was unlikely to be developed. He believed re-authorizing the EAA would come up for consideration in the next Congress.

PART III. FINDINGS AND RECOMMENDATIONS

This section contains our conclusions and recommendations for the next president and Congress. Based on the research in Part I and supported by the analysis of experts in Part II, we make recommendations on how to mitigate potential and emerging repercussions of the reforms. It also includes specific steps to take regarding the reforms and additional ways to strengthen export controls. In a point that is broadly understood, many effects of the ECR Initiative may not be recognized for several years, necessitating active data collection and analysis by the next administration and Congress. Nonetheless, several policies and actions can be put in place during President Trump's first year in office that would help address potential threats to the control of proliferation-sensitive goods resulting from the reforms and further the process of making export controls more effective.

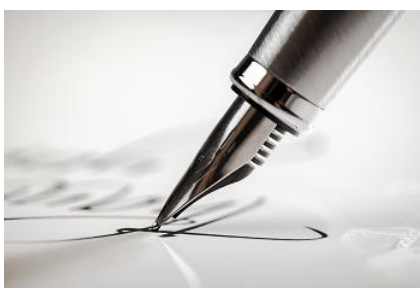


Image credit: BillionPhotos.com via Adobe Stock

- 1) The Trump administration should direct BIS and HSI to provide a joint report that performs an in-depth sampling and assessment of former USML goods' status, locations, and end uses. The reporting should contain statistics about specific goods authorized and actually exported and where these goods are today. It should include statistics on license or exception denials, close calls in exporting to unauthorized end users, and use of pre- and post-shipment and end use checks and related results. Reporting should also involve critically examining the results of enforcement efforts and investigations including real world examples. DHS/HSI has extensive international assets to supplement OEE's effort at conducting end use checks. It also has the capability via its Border Enforcement Analytics Program (BEAP), which mines hundreds of millions of U.S. export data to identify and turn up suspicious transactions for compliance checks. The report authors should obtain all relevant information about the spread of such goods, if applicable, from the State Department, Department of Treasury, FBI, and E2C2, and seek information from the intelligence community.

Reporting should provide both public and confidential versions. The confidential version should include proprietary licensing data and detailed information about goods, their end uses and end users, and should be provided to Congress for oversight purposes. The report should also include a section on which cases led to criminal indictments and prosecutions, and if they did not, why the government chose not to prosecute. The public version should contain less sensitive information, such as the number of investigations

conducted, percentage of those that resulted in inquiries or action, and regions of the world involved. It should describe several cases and include more information, particularly on the types of goods that led to follow-up action. It should discuss in broad terms whether criminal prosecutions have increased or decreased as a result of the reforms.

- 2) The administration should request that reporting include a thorough examination of the end uses of STA goods processed since 2011 to ensure that the exception is not being taken advantage of over either the short or long term, particularly by countries of transit concern that fall into the STA authorized category. A BIS priority should be to continually conduct checks on goods exported since the exception's creation to ensure that they have not been re-transferred.
- 3) The administration should review other licensing exceptions, such as the APR exception, and seek to close such loopholes that could be exploited by illicit actors. It should investigate and put a stop to any practice by the Commerce Department that involves issuing licenses for EAR99 indexed goods without first investigating whether goods are subject to the USML.
- 4) The administration should revisit and consider strengthening the design intent definition changes and change the definition to one that will have a better chance of holding up in court. The ECR Initiative appears to have created a weakening of this definition.
- 5) Congress should provide a line item for funding reporting if needed. Congress can also play a role by passing legislation requiring in-depth reporting as described above on a consistent basis, such as in biannual reports. Reporting efforts should include information on cases in which nefarious attempts to procure U.S. exports by unauthorized end users were successfully blocked or not blocked by the new system. Reports should contain specific, targeted questions that require the executive branch to critically self-examine and indicate how well the system is performing based on data and actual incidents. Congress should structure any legislation so that the agencies have clear incentives to respond to a review effort.
- 6) The administration should utilize the results of all of these review efforts to repair weaknesses in the system or add additional criteria for obtaining proliferation-sensitive goods. A potential tightening of the licensing process and reduction in the number of goods allowed exceptions by the Commerce Department may be warranted as well as adding additional criteria for making decisions about the control status of exports. Export licensing and enforcement agencies should review all of the reporting in an interagency effort to determine if changes are needed.
- 7) Congress should direct GAO to produce a comprehensive report on the impacts of the ECR Initiative regarding the control of proliferation-sensitive goods and improvement or degradation in government functions. The Obama administration's claim that the reforms would create a "higher fence" around the most important proliferation-sensitive goods

appears unfounded based on our report, since it remains unclear how the controls were made stricter for such goods. GAO should ask for its own targeted data or use data drawn from the joint BIS and DHS study recommended above about transfers from the USML to the CCL and goods exempted under the STA. The review should consider also the transfer of nuclear-related items from the USML to DOE. The report should answer whether U.S. adversaries have benefited from deregulation or changes in regulations. In addition, this effort should attempt to assess the impact of the freer flow of goods on U.S. security interests and use specific, targeted questions in order to obtain a critical look at executive branch activities.

- 8) Given the unclear status of whether prosecutors are now discouraged in bringing EAR cases to court or are having difficulty enforcing the new definition of specially designed, Congress should request a GAO report on the matter. GAO should query a large sampling of U.S. Attorneys in order to understand their current thinking in the post-ECR era. This report should also assess whether U.S. prosecutions of CCL 600 series goods have increased or decreased following the reforms. It should take into consideration the role of settlements between the government and companies. Congress should also request that GAO report on the status of enforcement-related changes to the export control system, including the increased overlap between OEE and HIS.
- 9) Because of the importance of export controls to U.S. national security, the president should establish a special advisor at the National Security Council (NSC). This person should be wholly focused on export control coordination, implementation, and enforcement matters. The official would facilitate coordination and resolve differences among agencies, fully implement and remediate problems in the export control reforms, and serve to ensure the effectiveness of export controls. Relevant officials are typically focused on these issues in addition to other nonproliferation related matters. The administration should also improve interagency coordination mechanisms for export control and contact between the law enforcement side of export controls and the policy implementation side.
- 10) DOJ should provide guidance to U.S. prosecutors stating that strong enforcement of EAR violations is a national priority for the administration. It should also encourage prosecutions of violations not involving traditional U.S. adversary countries or countries of transit concern, in addition to reiterating the need for ongoing focus on sanctioned countries.
- 11) DOJ should commit to more aggressively investigating, indicting, and extraditing those involved in outfitting Iran's nuclear, missile, or conventional weapons programs in defiance of U.S. laws and sanctions. During the Obama administration's efforts to negotiate and maintain the Iran nuclear deal, there was an excessive denial or non-processing of extradition requests and lure memos out of a misplaced concern about their effect on the deal. These actions, largely concentrated in the State Department, reportedly interfered in investigations and served to discourage new or on-going federal investigations of commodity trafficking involving Iran. This trend needs to be reversed by a policy to

encourage investigations of Iranian (and other pariah state) commodity trafficking efforts that includes a determined extradition process.

- 12) The administration should work to establish “watch lists” for major nuclear, missile, and military technologies based on existing control lists, along with proliferant state smuggling efforts, and distribute them to relevant companies. Not all such goods are currently covered by export controls but may be sought by a proliferant state. The administration should initiate an effort to make key goods on the watch lists licensable under export controls and subject to end-use verification. In addition, these lists could inform which items on the USML and CCL need higher fences. This effort would help close loopholes not covered by the reforms.
- 13) The administration and Congress should continue to hear issues raised by the business community about ease of exporting and comprehending regulations under the reformed system, particularly those experienced by small businesses, which are under-resourced in many cases to cope with the massive compliance changes and may still be adjusting. They should assess whether exporters are still having difficulties determining the control status of goods under the new system. They should make practical changes and continue to address issues of undue administrative and regulatory burdens without sacrificing the primary mission of controlling the export of proliferation-sensitive goods.
- 14) President Trump should not finalize the transfer of USML categories 1-3 given the extent of concerns about arms trafficking. Congress should intervene if needed. Moving forward with the transfers appears risky for international security objectives and arms trafficking prevention efforts and avoiding these weapons’ use against U.S. troops abroad. DDTC’s FY 2015 Blue Lantern program findings that the majority of re-transfer cases relate to firearms underscores this concern. These categories of goods should remain subject to the ITAR and USML, or at the very least if they are transferred, these deadly weapons should not be available under the STA exception.
- 15) The administration should direct BIS to reform its voluntary self-disclosure process to operate more in the fashion of DDTC’s voluntary disclosure process. In other words, BIS should not levy fines simply for mistakes or inadvertent exports by companies that otherwise make every effort to have strong export compliance programs. This may encourage more VSDs and better relationships between BIS and the companies with which it deals – which is even more important today given the increased licensing load for CCL items. Taking action against fewer companies, but producing demonstrably larger penalties for those companies that have proven to be negligent, appears to be a sounder approach.
- 16) The administration should direct DTSA to continue its efforts to institute more integrated government IT platforms for export administration and licensing. Congress should fund this effort.

- 17) Based on interviews and government data, improved communication and coordination of enforcement activities has resulted from the creation of E2C2. This is positive for enforcement efforts overall. E2C2's mission should continue and Congress should support its mandate by providing it with a dedicated supply of annually renewed funding plus any needed annual increases. E2C2's mandate would be more effective if it had more reliable and adequate funding and could also hire its own employees as needed rather than deriving them from DHS and other agencies. Its existing deconfliction mandate would be supported through increased resources thus allowing for an expanded and more efficient deconfliction process. E2C2's intelligence coordination mandate could also be bolstered and broadened. Its mandate could be broadened further to coordinate pre- and post-shipment verification performed by the various export agencies.
- 18) The administration and Congress should establish E2C2 as an information sharing point of contact for companies and academic institutions, since it already successfully acts as a deconfliction center and works with export control implementation, intelligence, and enforcement agencies. Such an initiative should encourage companies to voluntarily report on, or even require them to report on, suspicious approaches by potentially illicit customers to purchase controlled or sensitive goods. In turn, E2C2 could provide tips or other information about what to watch for in the way of suspicious activities. Such a mechanism would require legislation to create liability protection so that companies cannot be sued by other companies for providing that information. Moreover, at present, companies and the government are too separated by the barriers of classification. Legislation would also be needed to overcome classification problems which exist on the government's side for sharing information about active illicit procurement networks. At a minimum, the system should allow the government to deliver single instance, declassified or unclassified albeit confidential, information to industry.



Image credit: peshkova via Adobe Stock

Authorizing two-way information sharing would provide the U.S. government with actionable intelligence on illicit networks from companies and allow companies to better prevent unintentional exports to nefarious actors. As a coordinating body, E2C2 could easily ensure that relevant federal agencies receive these reports of suspicious activities. A precedent for voluntary reporting and cooperation would be the Cybersecurity Enhancement Act of 2014 which provides for a “voluntary public-private partnership to

improve cybersecurity.”⁹⁴ A form of mandatory reporting or information sharing is in place under the U.S. Bank Secrecy Act, which requires all companies to report on suspicious transactions, while providing liability protection.⁹⁵ The Act requires financial institutions to help the government “detect and prevent money laundering” by making Suspicious Activity Reports (STRs) about potentially criminal financial transfers to the Treasury Department’s Financial Crimes Enforcement Network (FinCEN).

- 19) The Commerce Department’s OEE is by most accounts highly specialized and talented at carrying out its mission of export enforcement of items on the CCL. Yet it has an overwhelming task at conducting physical verification and end-use checks on the vastly increased amount of goods being exported via the CCL and STA exception. In addition, it lacks international reach; it has only seven export control officers stationed abroad to conduct such checks, whereas DHS/HSI possesses hundreds of officers stationed abroad. From our analysis and interviews, the answer to resolving this imbalance does not appear to be increased funding or the addition of more OEE officers. Moreover, our interviews indicate that streamlining the export enforcement mission further would eliminate existing redundancies and benefit the effectiveness of the enforcement mission overall. By not completing the fourth single – or folding OEE into HSI as originally envisioned – OEE and HSI now have even more jurisdictional overlap of controlled items than before the ECR Initiative was initiated. This is due to the fact that HSI already had enforcement authority for both USML and CCL goods and OEE only had jurisdiction over CCL goods. Now that thousands of USML goods have transferred to the CCL, jurisdictional overlap between these agencies has significantly increased. The result is increased confliction issues and the possible expenditure of unneeded resources.

The president and Congress should fold OEE’s enforcement sections into DHS/HSI and integrate specialized OEE criminal investigators into the HSI export enforcement mission. DHS/HSI would then be the primary agency responsible for enforcement of the EAR and CCL items. The FBI should still retain general investigatory authority in export cases. BIS’s authority to evaluate voluntary compliance would be retained and operate in parallel to DDTC’s voluntary disclosure process. This would be a positive step toward making the enforcement system more efficient and consolidate DHS/HSI as the primary agency responsible for enforcement of the EAR and CCL items.

- 20) Congress should hold a series of hearings during its next session to gauge the impact and success of the ECR Initiative. It should also commission additional Congressional studies similar to the above recommended GAO reports to support these hearings. Through the hearings and studies, Congress should assess whether new legislation is required to repair flaws in the system and ensure proliferation-sensitive goods are adequately controlled.

⁹⁴ S.1353 (113th): *Cybersecurity Enhancement Act of 2014*, December 11, 2014. Available at: <https://www.govtrack.us/congress/bills/113/s1353/text>

⁹⁵ U.S. Department of the Treasury, Financial Crimes Enforcement Network, “FinCen’s Mandate from Congress,” http://www.fincen.gov/statutes_regs/bsa/

- 21) Congress should consider the question of whether to implement comprehensive export control legislation and finish the implementation of Phase III and the four singles. This would include review and passage of an Export Control Reform Act as originally proposed by the ECR Initiative Presidential Task Force. The legislation would create a single export control list, a single export licensing agency and a consolidated primary export enforcement agency (merger of OEE into HSI). Congress should proceed cautiously in the creation of a single licensing agency, control list, and related IT capability and ensure that the matter of how to accomplish the four singles effectively is worked out due to the implications of a bureaucratic restructuring of this size. Congress should hold a transparent review period and create a phased plan as part of such legislation.
- 22) Absent that action, Congress should update and pass a new EAA and eliminate the annual renewal requirement under the International Emergency Economic Powers Act (IEEPA) as currently required. The original expired in 2001 and has rendered the EAR subject to IEEPA and U.S. presidents renewing annually the state of emergency regarding export regulation under that statute. If it does not, as is the current practice, the president will need to reauthorize the state of emergency under the IEEPA on an annual basis.