



# The U.S. Export Control System and the President's Reform Initiative

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July 14, 2011

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

R41916

## Summary

The 112<sup>th</sup> Congress may consider reforms of the U.S. export control system. The balance between national security and export competitiveness has made the subject of export controls controversial for decades. Through the Export Administration Act (EAA), the Arms Export Control Act (AECA), the International Emergency Economic Powers Act (IEEPA), and other authorities, the United States restricts the export of defense items or munitions, so-called “dual-use” goods and technology—items with both civilian and military applications—certain nuclear materials and technology, and items that would assist in the proliferation of nuclear, chemical, and biological weapons or the missile technology used to deliver them. U.S. export controls are also used to restrict exports to certain countries on which the United States imposes economic sanctions. At present, the EAA has expired and dual-use controls are maintained under IEEPA authorities.

The U.S. export control system is diffused among several different licensing and enforcement agencies. Exports of dual-use goods and technologies are licensed by the Department of Commerce, munitions are licensed by the Department of State, and restrictions on exports based on U.S. sanctions are administered by the U.S. Treasury. Enforcement of export controls is conducted by these agencies as well as by units of the Department of Homeland Security (DHS) and the Department of Justice (DOJ).

Aspects of the U.S. export control system have long been criticized by exporters, non-proliferation advocates, and other stakeholders as being too rigorous, insufficiently rigorous, cumbersome, obsolete, inefficient, or any combination of these descriptions. In August 2009, the Obama Administration launched a comprehensive review of the U.S. export control system. In April 2010, Defense Secretary Robert M. Gates proposed an outline of a new system based on four singularities:

- a single export control licensing agency for both dual-use and munitions exports,
- a unified control list,
- a single enforcement coordination agency, and
- a single integrated information technology (IT) system.

The creation of a single control list has been the Administration's focus to date. Interim steps have also been taken to create a single IT system and to establish an export coordination center. No specific proposals have been made concerning the single licensing agency.

In contrast to the Administration's approach, legislation has been introduced to reauthorize or rewrite the EAA in the 112<sup>th</sup> Congress. The Export Administration Renewal Act of 2011 (H.R. 2122, Ros-Lehtinen) would renew the currently expired Export Administration Act through 2015, update its penalty and enforcement provisions, and provide stricter foreign policy controls on countries designated as state sponsors of terrorism. A separate title would amend the Arms Export Control Act to permit generic parts and components for defense articles to be controlled differently than sensitive defense articles on the U.S. Munitions List. By contrast, the Technology Security Act of 2011 (H.R. 2006, Berman) would rewrite the dual-use export control statute by giving the President the authority to control exports for national security and foreign policy reasons and to create the mechanisms for doing so. Each bill would, if passed, have implications for the President's reform efforts.

In considering the future of the U.S. export control system, Congress may weigh the merits of a unified export control system—the end result of the President's proposal—or the continuation of the present bifurcated system by reauthorizing the present EAA or writing new legislation. In doing so, Congress may debate the record of the present dual-use system maintained by emergency authority, the aims and effectiveness of the present non-proliferation control regimes, the maintenance of the defense industrial base, and the delicate balance between the maintenance of economic competitiveness and the preservation of national security.

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## Overview of the U.S. Export Control System

The United States restricts the export of defense items or munitions, so-called “dual-use” goods and technology, certain nuclear materials and technology, and items that would assist in the development of nuclear, chemical, and biological weapons or the missile technology used to deliver them. A defense item is defined by regulation as one that is “specifically designed, developed, or configured, adapted, or modified for a military application,” has neither “predominant civilian application” nor “performance equivalent to an item used for civilian application ... and has significant military or intelligence application such that control is necessary.”<sup>1</sup> Dual-use goods are commodities, software, or technologies that have both civilian and military applications.

U.S. export controls are also used to restrict exports to certain countries on which the United States imposes economic sanctions, such as Cuba, Iran, and Syria. Through the Export Administration Act (EAA), the Arms Export Control Act (AECA), the International Emergency Economic Powers Act (IEEPA), and other authority, Congress has delegated to the executive branch its express constitutional authority to regulate foreign commerce by controlling exports. In addition, the United States controls certain exports in adherence to several multilateral non-proliferation control regimes.

Various aspects of the U.S. export control system have long been criticized by exporters, non-proliferation advocates, and other stakeholders as being too rigorous, insufficiently rigorous, cumbersome, obsolete, inefficient, or any combination of these descriptions. Some contend that U.S. export controls overly restrict U.S. exports and make firms less competitive. Others argue that U.S. defense and foreign policy considerations should trump commercial concerns. In January 2007, the Government Accountability Office (GAO) designated government programs designed to protect critical technologies, including the U.S. export control system, as a “high-risk” area “that warrants a strategic re-examination of existing programs to identify needed changes.” GAO’s report cited poor coordination among export control agencies, disagreements over commodity jurisdiction between the Departments of State and Commerce, unnecessary delays and inefficiencies in the license application process, and a lack of systematic evaluative mechanisms to determine the effectiveness of export controls.<sup>2</sup>

On August 13, 2009, President Obama announced the launch of a comprehensive review of the U.S. export control system, and this was followed in April 2010 with a speech by Secretary of Defense Robert M. Gates announcing key elements of the Administration’s agenda for reform, with additional elaborations in subsequent months. Secretary Gates proposed a four-pronged approach that would establish

- a single export control licensing agency for both dual-use and munitions exports;
- a unified control list;
- a single enforcement coordination agency; and

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<sup>1</sup> *International Traffic in Arms Regulations*, 22 C.F.R. 120.3.

<sup>2</sup> U.S. Government Accountability Office (GAO), *High-Risk Series: An Update*, GAO-07-310, January 2010. While GAO noted some improvements, the export control system was still considered a “high-risk” area in 2011; see GAO, *High-Risk Series: An Update*, GAO-11-278, February 2011.

- a single integrated information technology system, which would include a single database of sanctioned and denied parties.

The House Committee on Foreign Affairs held its first hearing on the reform proposals on May 12, 2011. During the hearing, Chairwoman Ileana Ros-Lehtinen criticized the scope and pace of the reforms, reportedly asserting that “a compelling case has not been made for the wholesale restructuring of the current system,” and that the reforms are “straining the system and its personnel to its breaking point.”<sup>3</sup> On May 26, 2011, Ranking Member Howard Berman introduced the Technology Security Act (H.R. 2006), a comprehensive rewrite of U.S. dual-use controls that would confer upon the President “broad and flexible authority to deploy controls to counteract current and future national security threats.”<sup>4</sup> On June 3, Chairwoman Ros-Lehtinen introduced the Export Administration Renewal Act of 2011 (H.R. 2122), which would renew the currently expired Export Administration Act through 2015, amend certain other provisions of the act, and amend the Arms Export Control Act to permit differential control over parts and components on the U.S. Munitions List.

In its administration of this authority, the executive branch has created a diffuse system by which exports are controlled by differing agencies under different regulations. This section describes the characteristics of the dual-use, munitions, and nuclear controls. The information contained in this section also appears in chart form in **Appendix A**.

## **The Dual-Use System**

### **The Export Administration Act (EAA)**

The EAA of 1979 (P.L. 96-72) is the underlying statutory authority for dual-use export controls. The EAA, which is currently expired, periodically has been reauthorized for short periods of time. The last incremental extension expired in August 2001. At other times, and currently, the export licensing system created under the authority of the EAA has been continued by a presidential declaration of a national emergency and the invocation of the International Emergency Economic Powers Act (IEEPA; P.L. 95-223). The EAA confers upon the President the power to control exports for national security, foreign policy, or short-supply purposes. It also authorizes the President to establish export licensing mechanisms for items detailed on the Commerce Control List (CCL) (see below), and it provides guidance and places certain limits on that authority.<sup>5</sup>

Several attempts to rewrite or reauthorize the EAA have occurred over the years. The last comprehensive effort took place during the 107<sup>th</sup> Congress. The Senate adopted legislation (S. 149) in September 2001, and a House version (H.R. 2581) was developed by the then-House

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<sup>3</sup> “Ros-Lehtinen Skeptical of Scope, Pace of Export Control Reform Initiative,” *Inside U.S. Trade*, May 13, 2011.

<sup>4</sup> “Background and Key Provisions of the Technology Security Act,” [http://democrats.foreignaffairs.house.gov/press\\_display.asp?id=844](http://democrats.foreignaffairs.house.gov/press_display.asp?id=844).

<sup>5</sup> Under IEEPA authority, the President may “investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.” P.L. 95-223, Sec. 203(a)(1)(B).

International Relations Committee and the House Armed Services Committee. The full House did not act on this legislation.

The EAA, which was written and amended during the Cold War, was based on strategic relationships, perceived threats to U.S. national security, international business practices, and existing commercial technologies, many of which have changed dramatically in the past 25 years. Some Members of Congress and most U.S. business representatives see a need to liberalize U.S. export regulations to allow American companies to engage more fully in international competition for sales of high-technology goods, some of which may be commercially available from foreign competitors. Other Members and some national security analysts contend that liberalization of export controls over the past decade has contributed to foreign threats to U.S. national security, that some controls should be tightened, and that Congress should weigh further liberalization carefully.

### **Administration**

The Bureau of Industry and Security (BIS) in the Department of Commerce administers the dual-use export control system. The export licensing and enforcement functions that now form the agency mission of BIS were detached from the International Trade Administration (ITA) in 1985 in order to separate it from the export promotion functions of that agency within the Department of Commerce. In FY2010, BIS processed 21,662 export license applications worth approximately \$66.2 billion—\$38.4 billion of which were licenses for crude oil exports. It denied less than 1% of license applications, although some licenses were approved with conditions. BIS was appropriated \$100.3 million in FY2010 and has 364 full-time employee positions. The President's FY2012 request for BIS is \$111.2 million. In addition to its export licensing and enforcement functions, BIS also enforces U.S. anti-boycott regulations concerning the Arab League boycott against Israel.

### **Implementing Regulations**

The EAA is implemented by the Export Administration Regulations (EAR; 15 C.F.R. 730 et seq). As noted above, the EAR are continued under IEEPA's authority in times when the EAA is expired. The EAR set forth licensing policy for goods and destinations, the applications process used by exporters, and the CCL. The CCL is the list of specific goods, technologies, and software that are controlled by the EAR. The CCL is composed of 10 categories of items:

- nuclear materials, facilities, and equipment;
- materials, organisms, microorganisms, and toxins;
- materials processing;
- electronics;
- computers;
- telecommunications and information security;
- lasers and sensors;
- navigation and avionics;
- marine; and



- propulsion systems, space vehicles, and related equipment.

Each of these categories is further divided into functional groups: equipment, assemblies, and components; test, inspection, and production equipment; materials; software; and technology. Each controlled item has an export control classification number (ECCN) based on the above categories and functional groups. Each ECCN is accompanied by a description of the item and the reason for control. In addition to discrete items on the CCL, nearly all U.S.-origin commodities are “subject to the EAR.” This means that any product “subject to the EAR” may be restricted to a destination based on the end-use or end-user of the product. For example, a commodity that is not on the CCL may be denied if the good is destined for a military end-use or an entity known to be engaged in weapons proliferation.

## **Licensing Policy**

The EAR set out the licensing policy for dual-use commodities. Items are controlled for reasons of national security, foreign policy, or short supply. National security controls are based on a common multilateral control list; however, the designation of countries to which those controls are applied is based on U.S. policy. Foreign policy controls may be unilateral or multilateral in nature. Items are controlled unilaterally for anti-terrorism, regional stability, or crime control purposes. Anti-terrorism controls proscribe nearly all exports to the four countries designated as state sponsors of terrorism by the Secretary of State—Cuba, Iran, Sudan, and Syria—and North Korea. Foreign policy-based controls are also based on adherence to multilateral non-proliferation control regimes, such as the Nuclear Suppliers’ Group, the Australia Group (chemical and biological precursors), and the Missile Technology Control Regime (MTCR).

The EAR set out timelines for the consideration of dual-use licenses and the process for resolving interagency disputes. Within nine days of receipt, Commerce must refer the license to other agencies (State, DOD, or the Nuclear Regulatory Commission [NRC], as appropriate), grant the license, deny it, seek additional information, or return it. If the license is referred to other agencies, the agency to which it is referred must recommend that the application be approved or denied within 30 days. The EAR provide a dispute resolution process for a dissenting agency to appeal an adverse decision. The interagency dispute resolution process is designed to be completed within 90 days. This process is depicted graphically in **Appendix B**.

## **Enforcement and Penalties**

Because of the expiration of the EAA, current penalties for export control violations are based on those contained in IEEPA (50 U.S.C. 1701 et seq). For criminal penalties, the IEEPA sanctions individuals up to \$1 million or up to 20 years imprisonment, or both, per violation (50 U.S.C. 1705(b)). Civil penalties under IEEPA are set at \$250,000 per violation.

Enforcement is carried out by the Office of Export Enforcement (OEE) at BIS. OEE has a staff of approximately 166 in Washington, DC, and eight domestic field offices. OEE is authorized to carry out investigations domestically and works with DHS to conduct investigations overseas. OEE also conducts pre-license and post-shipment verification along with in-country U.S. embassy officials overseas. The Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (P.L. 111-195) authorized certain enforcement activities to be undertaken by the Department of Commerce pursuant to the EAA.

## **Military Export Controls**

### **Arms Export Control Act (AECA)**

The AECA of 1976 (P.L. 94-329) provides the President with the statutory authority for the control of defense articles and services.<sup>6</sup> It sets out foreign and national policy objectives for international defense cooperation and military export controls. Section 3(a) of the AECA sets forth the general criteria for countries or international organizations to be eligible to receive U.S. defense articles and defense services provided under the act. It also sets express conditions on the uses to which these defense items may be put. Section 4 of the AECA states that U.S. defense articles and defense services shall be sold to friendly countries “solely” for use in “internal security,” for use in “legitimate self-defense,” to enable the recipient to participate in “regional or collective arrangements or measures consistent with the Charter of the United Nations,” to enable the recipient to participate in “collective measures requested by the United Nations for the purpose of maintaining or restoring international peace and security,” and to enable the foreign military forces “in less developed countries to construct public works and to engage in other activities helpful to the economic and social development of such friendly countries.” The AECA also contains the statutory authority for the Foreign Military Sales program, under which the U.S. government sells U.S. defense equipment, services, and training on a government-to-government basis.

### ***Congressional Requirements***

A prominent feature of the AECA is the requirement for congressional consideration of foreign arms sales proposed by the President. This procedure includes consideration of proposals to sell major defense equipment and services, or to retransfer such military items to other nations. The procedure is triggered by a formal report to Congress under Section 36 of the AECA. In general, the executive branch, after complying with the terms of the applicable section of U.S. law (usually those contained in the AECA), is free to proceed with an arms sales proposal unless Congress passes legislation prohibiting or modifying the proposed sale.

Under Section 36(b) of the AECA, Congress must be formally notified 30 calendar days before the Administration can take the final steps to conclude a government-to-government foreign military sale or issue an export license for commercial sales of major defense equipment valued at \$14 million or more, defense articles or services valued at \$50 million or more, or design and construction services valued at \$200 million or more. In the case of such sales to NATO member states Japan, Australia, or New Zealand, Congress must be formally notified 15 calendar days before the Administration can proceed with the sale. However, the prior notice thresholds are higher for Japan, Australia, and New Zealand. These higher thresholds are \$25 million for the sale, enhancement, or upgrading of major defense equipment; \$100 million for the sale, enhancement, or upgrading of defense articles and defense services; and \$300 million for the sale, enhancement, or upgrading of design and construction services, so long as such sales to these countries do not include or involve sales to a country outside of this group of nations.

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<sup>6</sup> This authority was previously vested with Secretary of State.

## **Licensing Policy**

The International Traffic in Arms Regulations (ITAR) set out licensing policy for exports (and some temporary imports) of U.S. Munitions List (USML) items. A license is required for the export of nearly all items on the USML. Canada has a limited exemption, as it is considered part of the U.S. defense industrial base. In addition, the United States has recently signed treaties with the United Kingdom and Australia to exempt certain defense articles from licensing obligations to approved end-users in those countries. These treaties were ratified by the Senate in 2010. Unlike some Commerce Department dual-use controls, licensing requirements are based on the nature of the article and not the end-use or end-user of the item. The United States prohibits munitions exports to countries either unilaterally or based on adherence to United Nations arms embargoes. In addition, any firm engaged in manufacturing, exporting, or brokering any item on the USML must register with the Directorate of Defense Trade Controls (DDTC) at the State Department and pay a yearly fee, which is currently on a sliding scale between \$2,250 and \$2,750, whether or not it seeks to export during the year.

## **Administration**

Exports of defense goods and services are administered by the Directorate of Defense Trade Controls (DDTC) at the Department of State. DDTC is a component of the Bureau of Political-Military Affairs and consists of four offices: Management, Policy, Licensing, and Compliance. In FY2010, DDTC was funded at a level of \$12.2 million. It had a staff of 81 and completed action on 82,095 export license applications. DDTC's FY2012 budget request is for \$11.3 million.

Critics of the defense trade system have long decried the delays and backlogs in processing license applications at DDTC. A National Security Presidential Directive (NSPD-56), signed by President Bush on January 22, 2008, directed that the review and adjudication of defense trade licenses submitted under ITAR are to be completed within 60 days, except where certain national security exemptions apply. Previously, except for the congressional notification procedures discussed above, DDTC had no defined timeline for the application process. The average license processing time was 17 days in FY2011. As a result of National Security Council guidelines implemented in June 2009, processing times for resolving commodity jurisdiction cases—another area of concern for GAO in its “high-risk” report—had been reduced to 36 days in 2010 from 112 in 2002.<sup>7</sup>

## **Enforcement and Penalties**

The AECA provides for criminal penalties of up to \$1 million or 10 years of imprisonment, or both, for each violation. The AECA also authorizes civil penalties of up to \$500,000 and debarment from future exports. DDTC has a small enforcement staff (19 in the Office of Defense Trade Compliance) and works with the Defense Security Service and the Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) units at the Department of Homeland Security (DHS). DDTC assists DHS and the Department of Justice (DOJ) in pursuing criminal investigations and prosecutions. DDTC also coordinates the Blue Lantern end-use monitoring program, in which in-country U.S. embassy officials conduct pre-license checks and post-shipment verifications.

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<sup>7</sup> U.S. Government Accountability Office (GAO), *High-Risk Series: An Update*, GAO-11-278, February 2011.

## **Nuclear Controls**

A subset of the above-mentioned dual-use and military controls are controls on nuclear items and technology. Controls on nuclear goods and technology are derived from the Atomic Energy Act of 1954, as amended, and the Nuclear Non-proliferation Act of 1978, as well as from the EAA and the AECA. Controls on nuclear exports are divided between several agencies, based on the product or service being exported. The Nuclear Regulatory Commission (NRC) regulates exports of nuclear facilities and material. The NRC licensing policy and control list are located at 10 C.F.R. 110. BIS licenses “outside the core” civilian power plant equipment and maintains the Nuclear Referral List as part of the CCL. The Department of Energy licenses the export of nuclear technology. DDTC exercises licensing authority over nuclear items in defense articles under the ITAR.

## **Defense Technology Security Administration (DTSA)**

DTSA is located in the Department of Defense, Office of the Under Secretary of Defense for Policy under the Assistant Secretary of Defense for Global Security Affairs. DTSA coordinates the technical and national security review of direct commercial sales export licenses and commodity jurisdiction requests received from the Departments of Commerce and State. It develops the recommendation of DOD on these referred export licenses or commodity jurisdictions based on input provided by the various DOD departments and agencies and represents DOD in the interagency dispute resolution process. Not all licenses from DDTC or BIS are referred to DTSA; memorandums of understanding govern the types of licenses referred from each agency. DTSA coordinates the DOD position with regard to proposed changes to the ITAR and the EAR. It also represents DOD in the interagency process responsible for compliance with multinational export control regimes.

## **Enforcement of U.S. Export Controls**

Enforcement of the U.S. export control system is undertaken by the agencies responsible for export licensing, the Department of Homeland Security (DHS), the Department of Justice (DOJ) (National Security Division and the Federal Bureau of Investigation [FBI]), and the Defense Criminal Investigative Service. Their activities can be summarized as follows:

- **Office of Export Enforcement (OEE) at the Bureau of Industry and Security (BIS).** OEE investigates violations of the dual-use export control regime. OEE is authorized to conduct domestic investigations and works with the Immigration and Customs Enforcement Agency (ICE) of DHS on investigations of export control violations overseas. OEE refers civil violations to the Office of Chief Counsel at BIS and criminal violations to DOJ.
- **Office of Defense Trade Compliance (ODTC) at the Directorate of Defense Trade Controls (DDTC).** ODTC primarily administers internal civil enforcement actions, including charging letters and consent agreements, policies of denial, debarments, transaction exceptions, and reinstatements. ODTC provides agency support to investigations and criminal enforcement actions primarily conducted by ICE and the FBI.
- **Office of Enforcement, Nuclear Regulatory Commission (NRC).** Investigates export control violations of nuclear facilities and material licensed by the NRC's

Office of International Programs. The Office of Enforcement refers criminal violations to DOJ.

- **Immigration and Customs Enforcement (ICE) of DHS.** As with its predecessor at the U.S. Customs Service, ICE has been the lead agency for export enforcement activities. The Counter-Proliferation Investigations (CPI) Unit investigates violations of dual-use and munitions export controls, exports to sanctioned countries, and violations of economic embargoes. ICE supplements and provides enforcement capacity to the export licensing agencies (BIS and DDTC) and undertakes investigations based on its own and other agency intelligence. In addition, export controls are enforced at the port of departure by DHS Customs and Border Protection.
- **National Security Division of DOJ.** The counter-espionage section of this division undertakes criminal prosecutions resulting from investigations conducted by the licensing agencies, ICE, and the FBI. An October 2007 DOJ National Export Enforcement Initiative established task forces between the licensing and enforcement agencies and U.S. Attorney's Offices in 20 cities to coordinate export control prosecutions and has facilitated new counter-proliferation coordination among law enforcement agencies, export licensing agencies, and the intelligence community.
- **Federal Bureau of Investigation (FBI).** The FBI's Weapons of Mass Destruction Directorate receives and analyzes intelligence regarding proliferation networks, provides specialized training on counter-proliferation for the National Export Enforcement Initiative, and cooperates with above-mentioned investigative partners and export licensing agencies.
- **Defense Criminal Investigation Service (DCIS).** DCIS is the criminal investigative arm of the Inspector General of DOD. Among its varied activities, DCIS investigates the transfer of sensitive defense technologies to proscribed nations and criminal elements.

## Multilateral Control Regimes

In addition to U.S. controls, there are four major multilateral control regimes: the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group, and the Wassenaar Arrangement.<sup>8</sup> The Commerce Department observed on December 9, 2010, that “[m]ost items on the CCL are controlled in accordance with the United States’ commitments” to four major multilateral export control regimes.<sup>9</sup> In addition to the controls described in the box below, all of these regimes have catch-all controls, which allow for the control of non-listed items if they are to be used for a military or proliferation-related purpose.

Because, as noted, the Export Administration Act (EAA) has expired, there is only one law in force explicitly requiring the U.S. government to adhere to a multilateral export control regime. The Arms Export Control Act requires the Secretary of State to maintain, as part of the U.S.

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<sup>8</sup> For more information about these regimes, see CRS Report RL33865, *Arms Control and Nonproliferation: A Catalog of Treaties and Agreements*, by Amy F. Woolf, Mary Beth Nikitin, and Paul K. Kerr.

<sup>9</sup> “Commerce Control List: Revising Descriptions of Items and Foreign Availability,” *75 Federal Register*, No. 236, December 9, 2010.

Munitions List, “a list of all items on the MTCR Annex” that are not controlled pursuant to the EAA. The Atomic Energy Act requires the executive branch to control nuclear-related items, but the law does not explicitly require that these items be the same as those controlled by the Nuclear Suppliers Group.

### **Multilateral Control Regimes**

- **Australia Group:** a voluntary, informal, export control arrangement founded in 1985 and consisting of 41 members. It has a set of export guidelines, as well as six common control lists. These lists include dual-use chemical manufacturing and biological equipment, chemical weapons precursors, and biological agents.
- **Missile Technology Control Regime (MTCR):** an informal voluntary export control arrangement established in 1987. The 34 members of the regime agree to adhere to common export policy guidelines applied to lists of controlled items. The MTCR guidelines call on each partner country to exercise restraint when considering transfers of equipment or technology, as well as “intangible” transfers, that would provide, or help a recipient country build, a missile capable of delivering a 500 kilogram warhead to a range of 300 kilometers or more. The MTCR annex contains two categories of controlled items. Category I items are the most sensitive. There is “a strong presumption to deny” such transfers, according to the MTCR guidelines. Regime partners have greater flexibility with respect to exports of Category II items.
- **Nuclear Suppliers Group (NSG):** an informal association of nuclear exporters founded in 1975 and currently consisting of 46 members. NSG members voluntarily agree to coordinate exports of civilian nuclear material, as well as nuclear-related equipment and technology, to non-nuclear-weapon states.<sup>10</sup> The group’s guidelines include lists of materials and equipment subject to export control, in addition to requiring importers to offer nonproliferation and physical security assurances.
- **Wassenaar Arrangement:** a voluntary export control regime approved in 1996 and currently consisting of 40 members. Its participants agree to control exports and retransfers of items on a munitions list and a list of dual-use goods and technologies. According to its Guidelines and Procedures, the Wassenaar Arrangement is not formally targeted at “any state or group of states,” but is designed “to contribute to regional and international security and stability, by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, thus preventing destabilizing accumulations.” Participants exchange information regarding transfers and licenses for items covered by the arrangement.

## **The President’s Export Control Initiative**

On August 13, 2009, President Obama announced the launch of a comprehensive review of the U.S. export control system. Defense Secretary Robert M. Gates announced key elements of the Administration’s agenda for reform in a speech on April 20, 2010, with additional elaborations in subsequent months. Secretary Gates proposed a four-pronged approach that would create a single export control licensing agency for both dual-use and munitions exports; adopt a unified control list; establish a single enforcement coordination agency; and create a single integrated information technology system, which would include a single database of sanctioned and denied parties.

<sup>10</sup> The Nonproliferation Treaty (NPT) defines a nuclear-weapon state as “one which has manufactured and exploded a nuclear weapon or other nuclear explosive device” prior to January 1, 1967. These states are China, France, Russia, the United Kingdom, and the United States.

The Administration's blueprint envisions that these changes would be implemented in three phases, with the final phase requiring legislative action. In Phase I, preparatory work would be undertaken to harmonize the Commerce Control List (CCL) with the U.S. Munitions List (USML) and to establish a tiered control structure that would allow items to "cascade" from tier to tier as technology evolves. Standardized licensing processes among the control agencies would be developed, and an "Enforcement Fusion Center" to synchronize enforcement would be created along with a single electronic gateway to access the licensing system. Phase II would implement a harmonized licensing system with two identically structured tiered control lists, potentially allowing for a reduction in the amount of licenses required by the system. Certain items could be moved from the USML to the CCL, for which congressional notification would be required; unilateral controls on certain items would be examined; and consultations would take place with multilateral control regimes partners to add or remove multilateral controls on certain items.

Under the proposal, the new export control system would debut in Phase III. A single licensing agency would be established; the two harmonized, tiered control lists would be merged with mechanisms for review and updating; and a single IT system for licensing and enforcement would become operational. Finally, an Export Enforcement Coordination Center, which was created by executive order on November 9, 2010, would be housed and funded by the Department of Homeland Security. Changes in agency structure may require legislation and may be proposed in the 112<sup>th</sup> Congress.

In a February 2011 speech, BIS Assistant Secretary Kevin Wolf elucidated seven principles driving the Administration's export control reform efforts:

- Controls should focus on a small core set of key items that can pose a serious national security or intelligence threat to the United States and its interests.
- Controls should be fully coordinated with the multilateral export control regimes in order to be effective.
- Unilateral controls must address an existing legal or foreign policy objective.
- Control lists must clearly identify which items are controlled and be easily updated as technology emerges, matures, or becomes widely available.
- Licensing processes must be predictable and timely.
- Enforcement capabilities must be enhanced to address non-compliance and increase capacity to interdict unapproved transfers.
- Controls must address counterterrorism policy and the need to export items that support homeland security priorities.<sup>11</sup>

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<sup>11</sup> Remarks of BIS Assistant Secretary for Export Administration, Kevin Wolf, to Exportkontrolltag 2011, Munich, Germany, February 25, 2011.

## **The Four Singularities**

### **A Single Licensing Agency**

In his speech introducing the Administration's reform efforts, Secretary Gates described the bureaucratic structure of the U.S. export control system as a "byzantine amalgam of authorities, roles, and missions scattered around different parts of the federal government."<sup>12</sup> As noted above, licensing is divided between the Department of Commerce for dual-use items, the Department of State for munitions, the Department of the Treasury for certain sanctions, and the Nuclear Regulatory Commission and Department of Energy for certain nuclear materials and technologies. These entities operate under different statutory authorities and enforce different regulations. While there are mechanisms in place for license referrals and to address licensing disagreements, critics have long maintained that the multi-agency structure contributes to institutional squabbling among the different agencies responsible for export control licensing. Having one licensing system would also end disputes about commodity jurisdiction over a given item.

On June 30, 2010, then-National Security Adviser General Jim Jones announced that the Administration intended to create an independent licensing agency with cabinet members from existing control agencies serving as a board of directors. While the Administration has not proffered specific details about this new agency, it is expected to take over the licensing functions of BIS, DDTC, and OFAC. Civil and administrative enforcement functions of BIS and DDTC are likely to be housed in the new unified licensing agency. Licensing procedures of the NRC for nuclear materials and of the Department of Energy for technology will not be moved. According to an Administration official, this is due to the relatively small volume of licensing undertaken for nuclear materials as well as by the small universe of exporters.<sup>13</sup>

One rationale advanced by General Jones is that a unified licensing structure would end the stovepipe situation whereby no agency collectively knows what has been licensed (or denied) by the U.S. government. Under current referral processes, dual-use licenses are referred by BIS to the Department of Defense, the Department of State (Economic Energy and Business Bureau [EEB], International Security and Non-Proliferation [ISN] Bureau, and the regional bureaus), and in some instances to the Treasury's Office of Foreign Assets Control (OFAC) for review. However, Department of Commerce licenses are not referred to DDTC. DDTC refers munitions licenses to DOD and to the above-mentioned bureaus at State, but not to Commerce. OFAC licenses are referred only to State's EEB. As a result, situations have arisen whereby licenses requested by the same exporter to the same destination have been approved by one license agency and denied by another.

While a single licensing agency may do away with the stovepipe issue, the envisioned single information technology system (see below) among the current agencies may also address this problem. In addition, licenses would still need to be referred to other bureaus at State and DOD, so interagency policy differences may continue to exist.

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<sup>12</sup> Secretary of Defense Robert M. Gates, speech before the Business Executives for National Security, April 20, 2010, available at <http://www.defense.gov/speeches/speech.aspx?speechid=1453>.

<sup>13</sup> Discussion with National Security Council official, March 18, 2011.



**Table I. President's Export Control Reform Initiative**

Phase	Control List	Licensing	Enforcement	Information Technology
I	Refine, understand, harmonize definitions to end jurisdictional confusion between two lists; establish new control criteria	Implement regulatory-based improvements to streamline licensing	Synchronize and de-conflict enforcement; create Enforcement Fusion Center	Determine enterprise-wide needs
II (requires congressional notification; requires additional funding)	Restructure two lists into identical tiered structures; apply criteria; remove unilateral controls where appropriate; submit proposals multilaterally to add/remove controls	Complete transition to mirrored control list; fully implement licensing harmonization	Expand outreach and compliance	Transition toward a single electronic licensing system
III (requires legislation)	Merge two lists into a single list; implement process for updating list	Implement single licensing agency	Consolidate enforcement activities under one agency	Implement a single system for licensing and enforcement

**Source:** Prepared by Dianne Rennack, CRS, based on White House Fact Sheet, April 20, 2010

### Dual-Nationals

One example of the effort that will be necessary to create a unified export control system may be seen in the dual-national issue. The White House announced on March 11, 2010, that it would take action to eliminate “obstacles to exporting to companies employing dual nationals.” Specifically, the Administration announced that it would “begin to harmonize” conflicting standards used by the Departments of Commerce and State to determine a foreign person’s nationality—a step that these departments must take in order to make certain export control decisions.<sup>14</sup> The Commerce Department, according to a 2010 Government Accountability Office (GAO) report, determines “nationality for release of technology to a foreign national” based on that person’s “most recent citizenship or permanent residence.”<sup>15</sup>

The State Department, however, considers not only a foreign national’s current citizenship status, but also their country of birth if it differs from the person’s country of citizenship or permanent residency. Even if a foreign entity is approved for a manufacturing license agreement or a technical assistance agreement with a U.S. firm, the State Department must approve the transfer of technical data, defense services, and defense articles to dual nationals and third-party nationals employed by the foreign entity.<sup>16</sup> “If a person’s country of birth is prohibited from receiving U.S.

<sup>14</sup> For example, determining the appropriateness of releasing technical data to employees of a foreign firm engaged in a defense project with a U.S. firm.

<sup>15</sup> Government Accountability Office, *Export Controls: Observations on Selected Countries’ Systems and Proposed Treaties*, May 2010, GAO-10-557.

<sup>16</sup> The State Department’s Directorate of Defense Trade Controls, according to the GAO, “considers a third-country national to be an individual from a country other than the country which is the foreign signatory” to a “technical assistance or manufacturing license agreement. A third-country national may also be a dual national if he or she holds nationality from more than one country.” GAO-10-557.

arms, as are China, Iran, and North Korea, State collects additional information to confirm that the individual has no significant ties to his or her country of birth,” according to the GAO.

Both the State Department and private-sector experts argue that these requirements are contentious because, in addition to being administratively burdensome, they are a potential employment discrimination issue in other countries; in order to comply with the regulations, non-U.S. employers may need to limit employment opportunities in potential violation of their countries’ employment laws.<sup>17</sup>

After publishing a proposed rule on August 11, 2010,<sup>18</sup> the State Department published a final rule on May 16, 2011, that would amend the ITAR to allow the transfer of defense articles and technical data to dual or third-party nationals who are “bona fide, regular employees, directly employed by the foreign consignee or end-user.”<sup>19</sup> Such transfers

must take place completely within the physical territory of the country where the end-user is located, where the governmental entity or international organization conducts official business, or where the consignee operates, and be within the scope of an approved export license, other export authorization, or license exemption.

The end user or consignee must take a variety of measures designed to prevent the diversion of any exports; the final rule includes a requirement for the end user to screen employees for “substantive contacts with restricted or prohibited countries” listed in the ITAR.<sup>20</sup> The rule, which will become effective on August 15, 2011, also explains that, although “nationality does not, in and of itself, prohibit access to defense articles or defense services, an employee that has substantive contacts” with persons from prohibited countries “shall be presumed to raise a risk of diversion,” unless the State Department determines otherwise.

It is worth noting that, according to the State Department, “most diversions of U.S. Munitions List ... items appear to occur outside the scope of approved licenses, not within foreign companies or organizations providing access to properly screened dual national or third country national employees.”<sup>21</sup>

## **The Single Control List**

To date, the Administration has concentrated on rationalizing the control lists to form the basis from which other reforms will flow. The Administration first seeks to transform the current

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<sup>17</sup> “Amendment to the International Traffic in Arms Regulations: Dual Nationals and Third-Country Nationals Employed by End-Users,” *Federal Register*, vol. 75, no. 154, August 11, 2010, p. 48625.

<sup>18</sup> *Ibid.*

<sup>19</sup> “International Traffic in Arms Regulations: Dual Nationals and Third-Country Nationals Employed by End-Users,” *Federal Register*, vol. 76, no. 94, May 16, 2011, p.28174. Paul Conlin, Sebastien Beauregard, R. Luc Beaulieu, and Richard A. Wagner, “Proposed ITAR Amendment Regarding Dual Nationals and Third-Country Nationals,” *Mondaq*, August 31, 2010.

<sup>20</sup> “Substantive contacts,” according to the rule, “include regular travel to such countries, recent or continuing contact with agents, brokers, and nationals of such countries, continued demonstrated allegiance to such countries, maintenance of business relationships with persons from such countries, maintenance of a residence in such countries, receiving salary or other continuing monetary compensation from such countries, or acts otherwise indicating a risk of diversion.”

<sup>21</sup> *Federal Register*, vol. 75, no. 154.

USML from a “negative list” characterized by general descriptions of articles and design-intent-based criteria to one resembling the current CCL, a “positive” list of dual-use items that are controlled according to objective criteria or parameters. Each of the items on the resulting USML list will be assigned to a tier that will determine its level of control. The Administration has created three tiers applicable to both the CCL and the USML to categorize a different level of control (emphasis added):

- Tier 1 articles are those that are *almost exclusively available from the United States* and provide a *critical* military or intelligence advantage.
- Tier 2 articles are those that are *almost exclusively available from countries that are members of the multilateral export control regimes* that control such items and (1) provide a *substantial* military or intelligence advantage, or (2) make a substantial contribution to the indigenous development, production, use, or enhancement of a Tier 1 or Tier 2 item.
- Tier 3 articles are those that provide a *significant* military or intelligence advantage; make a significant contribution to the indigenous development, production, use, or enhancement of a Tier 1, Tier 2, or Tier 3 item; or are otherwise controlled for national security, foreign policy, or human rights reasons.

Each category of the USML would be screened by an interagency team led by DOD, which would determine the tier in which each item would be placed. The first exercise in this effort would be the publication of a proposed revision of Category VII (tanks and military vehicles) of the USML to assign tier designations to each item on the list.<sup>22</sup> A revision exercise for Category VIII (aerospace and aircraft electronics), Category XI (electronics), and Category XV (space items) is reportedly underway as well.<sup>23</sup> The Administration has not formally proposed licensing policies to go along with these tiers; however, it has adopted a license exception for dual-use products that does correspond to the tiered system (see below).

Part of the rationale for creating the tiers is that it will allow items to “cascade” from tier to tier as technology evolves. These tiers, as noted by BIS Under Secretary Hirschhorn, would “focus controls on the most sensitive items while allowing for more flexible authorizations for relatively mature technologies that are widely available.”<sup>24</sup> While foreign availability can presently be a reason for decontrol of dual-use goods, companies currently have to petition the government for a foreign availability finding. On the dual-use side, BIS Assistant Secretary Wolf reportedly has stated that foreign availability “will absolutely be relevant” to which tier the government places a CCL-controlled item, and he has urged industry to provide foreign availability information to the government in comments on the proposed tiers.<sup>25</sup>

Under the present system, foreign availability has not been considered as a factor in munitions licensing decisions. Although the same tiered structure is to be used for both dual-use and munitions items, the Administration has not publicly stated the extent to which foreign availability will be assessed for defense items. It is also unclear whether the Administration has

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<sup>22</sup> 75 *Federal Register* 76930, December 10, 2010.

<sup>23</sup> “Momentum on Controls Reform,” *Washington Trade Daily*, March 2, 2011.

<sup>24</sup> BIS Under Secretary Eric L. Hirschhorn, speech before the Export Control Forum, Irvine, CA, February 28, 2011.

<sup>25</sup> “Wolf Says Foreign Availability Critical for New Export Control Tiers,” *Inside U.S. Trade*, February 2, 2011.

the resources to adequately assess foreign availability for each item on the resulting positive control lists.

### **Commercial Communications Satellites**

Although most items on either the CCL or the USML were placed there by executive discretion or by international agreement, one category of items are on the USML by statute: commercial communications satellites (CCS). Prior to 1990, CCS were controlled exclusively by the Department of State under the authority of Section 38 of the Arms Export Control Act (P.L. 90-629). Despite having both military and civilian uses, CCS were considered munitions as many satellites and associated technologies were originally designed “specifically” for military purposes and continue to have “significant military or intelligence applications as defined by regulation.” In 1990, however, President George H.W. Bush ordered a review of dual-use items, including CCS on the U.S. Munitions List (USML), which resulted in satellites without military performance characteristics being moved to Department of Commerce jurisdiction. In 1996, President Clinton transferred all CCS (along with commercial jet “hot section” technology) to Commerce jurisdiction with enhanced licensing procedures. Following 1998 revelations by the Cox Committee that U.S. satellite manufacturers provided missile design information and skills to China through the improper transfer of launch failure analysis, Congress returned the authority, effective March 15, 1999, to license exports of CCS to the Department of State (P.L. 105-261).

The satellite industry claims that this transfer has led to licensing delays and lost sales resulting from regulatory uncertainty, and it has lobbied to revert export controls to Commerce Department jurisdiction. Satellites launched for commercial communication purposes may contain embedded sensitive technology, such as positioning thrusters, signal encryption, mating and separation mechanisms, and multiple satellite/reentry vehicle systems, which as stand-alone items are also controlled under the U.S. Munitions List. (USML). Industry claims that because State’s “see-through” policy of requiring licenses for parts and components embedded in CCS, foreign satellite manufacturing are designing out U.S. parts and components and advertising them as ITAR-free (i.e. free of munitions licensing requirements). In addition, Tiananmen Square sanctions and other waiver restrictions have precluded U.S. exports to China, a competitive launch destination.

Section 1248 of the 2010 National Defense Authorization Act (P.L. 111-84) directed the Secretaries of State and Defense to conduct a review of U.S. space export control policy, including a risk assessment of removing satellite and related components from the USML. An interim assessment, which was reported to Congress in May 2011, found that CCS, related components, and integration and launch information “with certain exceptions, conditions and limitations” could be removed from the USML and transferred to the CCL “without posing an unacceptable security risk.” A final review is expected to be delivered to Congress in the fall of 2011. In the 112<sup>th</sup> Congress, the House debated an amendment to National Defense Authorization Act of 2012 (A.331, H.R. 1540) on May 25, 2011, to allow the President to transfer satellites and related components from the USML. The amendment was withdrawn by the sponsor (Representative Rohrabacher), pending the release of the final Section 1248 report. In addition, legislation (H.R. 1727) to allow the President to transfer satellites and components from USML was introduced by Representative Ruppertsberger on May 4, 2011. The Administration may seek such legislation as it determines whether to migrate items certain on Category XV (space systems) from the USML to the CCL.

The Administration is also taking another interim step toward the creation of a single control list for dual-use and munitions items called the “bright line” process. This process is to determine which items should be controlled as dual-use goods and which should be controlled as munitions. The bright line is being determined at the commodity level, based on technical specification and military needs, and is not an overarching concept or framework. The Administration describes the bright line as necessary, in part, because of the USML’s current reliance on design intent (i.e., whether an item was “specifically designed, modified, or adapted” for military use) and its catch-all controls of parts and components of these items.<sup>26</sup> While the CCL is described as more

<sup>26</sup> “Revisions to the U.S. Munitions List, Advanced Notice of Proposed Rulemaking,” 75 *Federal Register* 76935, December 9, 2010, at 76937.

“positive”—it is based on technical parameters rather than design intent—it contains entries containing the term “specially designed” for a specific purpose that may need to be modified to conform to bright line standards.

An unanswered question related to the creation of a “bright line” between the two control lists and their eventual harmonization is the status of parts and components. Under the EAR, the license requirement is based on the finished product, generally without regard to its parts and components. However, a foreign product containing more than 25% U.S. content (10% U.S. content in the case of a transaction to a country identified as a state sponsor of terrorism) may require a re-export license. However, for ITAR-controlled items, DDTC has employed a jurisdictional interpretation known as a “see-through” rule, which may require U.S. re-export controls on parts and components incorporated into end products manufactured overseas.<sup>27</sup> BIS Under Secretary Eric L. Hirschhorn has stated that the decontrol of parts and components from the USML or their migration to the CCL “should eliminate many problems associated with the ‘see-through’ rule.”<sup>28</sup>

According to current Administration thinking, the USML will contain “only those items that have exclusive or predominant government or military use and provide at least a significant military or intelligence advantage to the United States.”<sup>29</sup> The reconstituted Munitions List would then be aligned with the CCL by adopting its A-E commodity organization structure and adding two additional categories: F and G for ITAR specific controls. As a result of this alignment, each USML category will be divided into seven groups: A—equipment, assemblies, and components; B—test, inspection, and production equipment; C—materials; D—software; E—technology; F—defense services; and G—manufacturing and production authorizations.

As a result of this process, the Administration may seek to move some USML items to the CCL. Under the Arms Export Control Act (P.L. 90-629), the President may not remove any article from the USML until 30 days after providing notice to the House Foreign Affairs Committee, and the Senate Foreign Relations Committee, including a description of the nature of any subsequent controls on the item.<sup>30</sup> Assistant Secretary for Export Administration Kevin Wolf has identified items that may be moved to the CCL as those items that are only controlled by virtue of modification to their form or fit but do not provide a significant military advantage in and of themselves. The items that will be transferred as a result of this process may fall into five control categories: an amended existing export control classification number (ECCN), a new holding ECCN, a new Commerce Munitions List (CML) ECCN, a new ECCN, or catch-all EAR99 status.<sup>31</sup>

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<sup>27</sup> Export Administration Regulations, Part 772.2(b); “Wolf Says Five Export Control Terms Are Particularly Hard to Define,” *Inside U.S. Trade*, June 11, 2010.

<sup>28</sup> BIS Under Secretary Eric L. Hirschhorn, speech before the Export Control Forum, Irvine, CA, February 28, 2011.

<sup>29</sup> Remarks of BIS Assistant Secretary for Export Administration Kevin Wolf to Exportkontrolltag 2011; Munich, Germany; February 25, 2011.

<sup>30</sup> P.L. 90-629, Sec. 38(f).

<sup>31</sup> BIS Assistant Secretary for Export Administration Kevin Wolf’s remarks to Update Conference; Washington, DC, August 31, 2010, pp. 9-10.

### ***Strategic Trade Authorization License Exception***

As noted above, the Administration has not proposed the specific licensing criteria for each tier. However, it has adopted a new license exception for dual-use goods that may foreshadow future policy regarding the tiers. On June 16, 2011, BIS published a final rule creating a Strategic Trade Authorization (STA) license exception for certain transactions with two groups of countries that pose little risk of diversion.<sup>32</sup> To be eligible, exporters would have to provide notification to BIS of the transaction and a destination control statement notifying the foreign consignee of the terms of the exception's safeguard requirements, and they must obtain from the foreign consignee a statement acknowledging its understanding and willingness to comply with the requirements of the license exception.

Under the final rulemaking, STA would be available in various degrees to 44 countries. To a group of 36 countries made up of NATO partners and members of at least three multilateral non-proliferation control regimes, dual-use items controlled for national security (NS), chemical or biological weapons, nuclear non-proliferation, regional stability, crime control, or significant items (hot section jet technology) would be eligible for an STA. This would include almost all items on the CCL that are not controlled for statutory reasons. An additional eight countries would be eligible for exports, re-exports, or transfers controlled for NS-only and are not designated as STA-excluded.<sup>33</sup>

Dual-use items controlled for missile technology (MT), chemical weapons (CW), short supply (SS), or surreptitiously listening (SL) would not be eligible for export under STA. Certain implements of execution and torture, pathogens and toxins, software and technology for "hot-sections" of aero gas-turbine engines, and encryption have also been excluded from the STA. Items that will be placed in Tier 1 would also not be eligible for STA. According to former Commerce Secretary Locke, the license exception will eliminate the need for licenses for over 3,000 yearly types of transactions, affecting \$1.4 billion in exports.<sup>34</sup>

### **The Single Enforcement Structure**

The third singularity involves the creation of a streamlined export enforcement system. Under Phase I of the new approach, a single export "fusion center" would be created to "coordinate and de-conflict investigations, serve as a central point of contact for coordinating export control enforcement with Intelligence Community activities, and synchronize overlapping outreach programs."<sup>35</sup> On November 9, 2010, the Obama Administration issued Executive Order 13558, which created the Export Enforcement Coordination Center (EECC). The center is to be established within the Department of Homeland Security and carries on the functions of the existing National Export Enforcement Coordination Network (NEECN) in ICE. It is to consist of a Director from the Department of Homeland Security and two deputies appointed from the

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<sup>32</sup> "Export Control Reform Initiative: Strategic Trade Authorization License Exception," 76 *Federal Register* 35276, June 16, 2011.

<sup>33</sup> However, the final rule excludes NS controlled items from the Wassenaar Arrangement's Sensitive List to the 8 countries.

<sup>34</sup> BIS Press Release, June 16, 2011, [http://www.bis.doc.gov/news/2011/bis\\_press06162011.htm](http://www.bis.doc.gov/news/2011/bis_press06162011.htm).

<sup>35</sup> Speech of General Jim Jones, June 30, 2010, available at [http://www.aia-aerospace.org/assets/speech\\_jones\\_06302010.pdf](http://www.aia-aerospace.org/assets/speech_jones_06302010.pdf).

Departments of Commerce and Justice, with an Intelligence Community Liaison designated by the Director of National Intelligence.

The center is to function as the primary forum to coordinate export control enforcement efforts among the Departments of State, the Treasury, Commerce, Defense, Justice, Energy, and Homeland Security and the Director of National Intelligence and to resolve potential conflicts in criminal and administrative export control enforcement. It will serve as a liaison between law enforcement agencies and both the intelligence community and the export licensing agencies. The center will also be able to screen all license applications. Currently, the OEE at BIS is the only entity that can screen dual-use licenses, whereas ICE has the ability to screen licenses from DDTC and OFAC. The center will also establish government-wide statistical tracking capabilities for criminal and administrative enforcement activities. According to an Administration official, the EECC will be fully operational by the end of 2011.<sup>36</sup>

This entity is not to be confused with the National Export Control Coordinator, housed in the Justice Department, which is “responsible for ensuring full coordination between the Justice Department and the many other US law enforcement, licensing, and intelligence agencies that play a role in export enforcement.”<sup>37</sup> The role of the coordinator has been described as the chief prosecutor of export control enforcement with the authority to determine which cases to bring for criminal prosecution.

In Phase III, the Administration will request the movement of the BIS Office of Export Enforcement to ICE. Currently, ICE conducts investigations and criminal enforcement for DDTC and OFAC, and by virtue of its authority under the IEEPA, it shares dual-use investigations with OEE. Removal of OEE to ICE will end this overlap of authority. It is envisioned that the Phase III consolidated licensing agency will continue to have authority over administrative enforcement actions.<sup>38</sup>

## **A Single Information Technology System**

The fourth singularity is the creation of a single information technology system to be used to administer the export control system. The USXPORTS database, currently used by the Department of Defense to track license applications referred to it, will be expanded to State and Commerce. It will become the platform for a proposed single export license application form to be used by State, Commerce, and the Treasury’s Office of Foreign Assets Control. It will also be used by the Department of Energy, Immigration and Customs Enforcement, and the Export Coordination Enforcement Center.

This reform is being proposed to streamline the interagency review process. Currently, the agencies’ computer systems are not compatible and cannot seamlessly share licensing application information with referring agencies. OFAC uses a paper-based licensing system. BIS, in particular, has had difficulties in securing its system, which was hacked in late 2006. In response,

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<sup>36</sup> “Export Enforcement Coordination Center to Open by End of the Year,” *Inside U.S. Trade*, June 17, 2011.

<sup>37</sup> Department of Justice Press Release, June 20, 2007, [http://www.justice.gov/opa/pr/2007/June/07\\_nsd\\_440.html](http://www.justice.gov/opa/pr/2007/June/07_nsd_440.html).

<sup>38</sup> Conversation with NSC Official, March 18, 2011.

BIS completed a replacement of all its computers in 2010—a step that will help prepare it for the adoption of the single IT system.<sup>39</sup>

The Administration's plan calls for the adoption of USXPORTS first for internal communications such as license referrals, while exporters would continue to use the existing SNAP-R and D-Trade electronic license filing portals. Currently, a license submitted to BIS using the SNAP-R system must be converted to BIS's internal ECASS system for internal deliberation, and if sent for referral, it must be converted to the USXPORTS (for Defense) or D-Trade (for State).<sup>40</sup> The Administration has indicated it would eventually would like to facilitate interoperability between the license portals, the internal systems, and Customs' Automated Export System (AES), the information system that tracks actual movement of goods.

In conjunction with the single IT system, the Administration is developing a single license application form. To make this possible, the Administration is grappling with standardizing certain definitions between the different regulations, such as the use of the term "technology" in the EAR as opposed to the term "technical data" used in the ITAR.<sup>41</sup>

To assist in compliance with U.S. export regulations, BIS has also compiled a consolidated screening list of over 24,000 entities from existing Commerce, Treasury, and State Department screening lists. The list consolidates the BIS Denied Person List, Unverified List, and Entity List; the Department of State's Nonproliferation Sanctions List; the Directorate of Defense Trade Controls Debarred List; and the Office of Foreign Assets Control Specially Designated Nationals List.

## **Encryption**

While not announced as part of the four singularities, reform of encryption controls has been proposed as one of the first deliverables in the export control reform process. The Administration announced on March 11, 2010, that it would change a filing requirement for exporters of products with encryption capabilities. At the time, exporters of such products were required to file for a technical review by the Commerce Department, a process that, according to the White House announcement, could take "between 30-60 days." The announcement advocated replacing this process with "a more efficient one-time notification-and-ship process," which would ensure that the "U.S. government still receives information it needs for its national security requirements while facilitating U.S. exports and innovation for new products and new technologies."<sup>42</sup>

The Commerce Department announced on June 25, 2010, that it was amending the Export Administration Regulations (EAR) as "the first step in the President's effort to reform U.S.

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<sup>39</sup> *Export Practitioner*, September 2010, p. 22.

<sup>40</sup> "It May Take Two Years to Adopt Single Electronic Licensing System, BISer Says," *Export Practitioner*, August 2010, p. 26.

<sup>41</sup> "Single Export Application for All Agencies to be Unveiled, White House Official Says," *Export Practitioner*, January 2011, p. 31.

<sup>42</sup> According to an Administration official, controlling the export of products with encryption capabilities differs from controlling other exports because the United States generally wants to obtain information on exported encryption technology rather than prevent its export.



encryption export controls.”<sup>43</sup> As described by the Commerce Department’s Bureau of Industry and Security, the amendment to the EAR includes<sup>44</sup>

- replacing, for encryption products “of lesser national security concern,” the “30-day waiting requirement for a technical review” with a “provision that allows immediate authorization to export and re-export these products” after the exporter submits an electronic encryption registration to BIS;
- similarly replacing the 30-day requirement for most mass-market encryption products;<sup>45</sup>
- an “overarching note to exclude particular products that use cryptography from being controlled as ‘information security’ items”—a measure that implements changes approved by the Wassenaar Arrangement members in December 2009; this regulatory change eliminates controls under the CCL on “[m]any items in which the use of encryption is ancillary to the primary function of the item”; and
- a provision that makes most encryption technology eligible for export and re-export to non-governmental end-users in countries other than those of “greater national security concern.”

According to the June 2010 announcement of the EAR amendment, the United States “will also review other issues related to encryption controls.” The Obama Administration is currently developing new proposals to decontrol additional items. However, such measures would require approval by the members of the Wassenaar Arrangement.

## Congressional Activity

In the 112<sup>th</sup> Congress, two bills have been introduced to reform the U.S. export control regime. One would reauthorize the Export Administration Act (EAA) and amend some of its provisions, as well as amend provisions in the Arms Export Control Act (AECA) governing munitions licensing. The other would replace the EAA with a new Act that would provide the President the authority to create—within certain guidelines—a new dual-use export control licensing system. Each bill would have implications for the President’s export control initiative.

The Export Administration Renewal Act of 2011 (H.R. 2122) was introduced by House Foreign Affairs Committee (HFAC) Chairwoman Ros-Lehtinen on June 03, 2011. The legislation would renew the currently expired Export Administration Act through 2015, increase the penalty structure consistent with current IEEPA penalties, and provide enhanced statutory investigative and overseas enforcement authority to the Department of Commerce, consistent with the Comprehensive Iran Sanctions and Divestment Act of 2010 (P.L. 111-195). The bill also would amend the EAA’s foreign policy controls to extend the period of time to 36 months that a

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<sup>43</sup> “Encryption Export Controls: Revision of License Exception ENC and Mass Market Eligibility, Submission Procedures, Reporting Requirements, License Application Requirements, and Addition of Note 4 to Category 5, Part 2,” *75 Federal Register* 36481, June 25, 2010.

<sup>44</sup> Quotations describing the June 25 announcement are taken from *75 Federal Register*, no. 122 and from BIS statements available at <http://www.bis.doc.gov/encryption/default.htm>.

<sup>45</sup> The Commerce Department classifies certain products with encryption capabilities as “mass market” pursuant to a procedure described in the EAR.

government previously designated as a state sponsor of terrorism must abstain from acts of terrorism before it can be removed from the list. In addition, it would provide for congressional oversight by requiring that “significant” proposed regulations be submitted to the committees of jurisdiction (House Foreign Affairs, Senate Banking) for a 30-day period of advanced review.

Title II would permit generic parts and components for defense articles on the U.S. Munitions List to be treated differently than sensitive defense articles on the USML if such parts and components “do not have specialized or unique military or intelligence capabilities or significance.” Items removed from the USML would be subject to the same level of control as on the USML unless the President determines that it is (1) in the national interest to do so and (2) complies with notification requirements in the EAA, and (3) a consensus-based interagency process between State, Commerce, and Defense determines the subsequent level of control of items removed from the USML. Items removed from the USML would also face heightened restrictions to certain countries. Licenses for items removed from the USML on the Wassenaar Sensitive and Very Sensitive Lists would face a presumption of denial to China unless the President issues a national interest waiver and adheres to congressional notification requirements. In addition, a license for any item removed from the USML under this process would be denied to any country subject to United Nations or U.S. sanctions, or prohibited from purchasing arms from the United States under the ITAR.

On May 26, 2011, HFAC Ranking Member Berman introduced the Technology Security Act of 2011 (H.R. 2004), touted as the “the first comprehensive export control legislation to be proposed since 2001.”<sup>46</sup> The legislation gives the President the authority to control exports for national security and foreign policy reasons generally, including the prevention of proliferation of weapons of mass destruction, the prevention of terrorism, and the prevention of activities designed to interfere or disrupt critical infrastructure. The legislation asserts that U.S. national security requires the maintenance of leadership and competitiveness in the science, technology, and manufacturing sectors and that the implementation of export controls should be evaluated on an ongoing basis, and that export controls should be implemented on a multilateral basis (Sec. 102).

In exercising his authority to export controls, the President is directed to establish and maintain lists of items subject to control, lists of foreign persons or end-uses subject to control, licensing criteria and licensing alternatives—such as advanced notice in lieu of licensing, and compliance and enforcement measures. It expands the definition of dual-use items to include those that could be used for cyber or terrorist attacks. The legislation establishes penalties consistent with the IEEPA penalties (see above). The legislation also directs the President to establish an inter-agency Transfer Policy Committee to identify strategic threats requiring export controls and to implement policies to counter those threats. This committee is also charged with regularly reviewing the control list and establishing and maintaining a licensing system. The legislation requires the President to maintain current license requirements on countries supporting international terrorism, as well as current sanctions regarding missile proliferation and chemical and biological weapons proliferation. It also reauthorizes the anti-boycott provisions from the EAA.

The Technology Security Act (H.R. 2006) gives the President wide discretion in the creation of a dual-use export system. Under this legislation, the President is given the authority to establish

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<sup>46</sup> “Congressman Howard Berman Introduces Overhaul of US Exports Controls,” [http://democrats.foreignaffairs.house.gov/press\\_display.asp?id=844](http://democrats.foreignaffairs.house.gov/press_display.asp?id=844).

such a system and to determine where it goes. Conversely, the President could maintain the current system with some changes, such as the creation of the Transfer Policy Committee under these new authorities. By contrast, the EAA Reauthorization Act (H.R. 2122) would lock in the current dual-use system and update some features of it. Passage of this act likely would prevent the establishment of a unified licensing agency envisioned by the Administration as the EAA vests the dual-use system with the Secretary of Commerce. It also may affect efforts to streamline enforcement, as the EAA confers certain powers to the Commerce Department to enforce export controls. However, neither act would amend or modify the organizational aspects of the munitions licensing process.

In considering this legislation and the President's proposals, Congress could consider how to balance between national security and economic competitiveness in a changing global environment. In addition, Congress could address the benefits and costs of continuing the current bifurcated export control system or the creation of a unified system. At the same time, it may wish to scrutinize the current system administered under emergency authority. It may examine the relationship between U.S. multilateral non-proliferation commitments and the current export control regime. Congress may assess the ability to maintain the U.S. defense industrial base in terms of the current system, as well as the competitiveness of U.S. strategic sectors. These strategic, institutional, and economic considerations may shape the future of U.S. export controls.

## Appendix A. Basic Export Control Characteristics

**Table A-I. Export Control Characteristics**

Characteristic	Dual-Use	Munitions	Nuclear
Legislative Authority	Export Administration Act (EAA) of 1979 (expired); International Emergency Economic Powers Act of 1977 (IEEPA)	Arms Export Control Act of 1968, 1976 (AECA)	Atomic Energy Act of 1954; Nuclear Non-Proliferation Act of 1978
Agency of Jurisdiction	Bureau of Industry and Security (BIS)(Commerce)	Directorate of Defense Trade Controls (DDTC)(State)	Nuclear Regulatory Commission (NRC) (facilities and material)  Department of Energy (DOE) (technology)  BIS ("outside the core" civilian power plant equipment)  DDTC (nuclear items in defense articles)
Implementing Regulations	Export Administration Regulations (EAR) (15 C.F.R. 730 et seq)	International Traffic in Arms Regulations (ITAR) (22 C.F.R. 120 et seq)	10 C.F.R. 110—Export and Import of Nuclear Material and Equipment (NRC)  10 C.F.R. 810—Assistance to Foreign Atomic Energy Activities (DOE)
Control List	Commerce Control List (CCL)	Munitions List (USML)	List of Nuclear Facilities and Equipment; List of Nuclear Materials (NRC)  Nuclear Referral List (CCL)  USML  Activities Requiring Specific Authorization (DOE)
Relation to Multilateral Controls	Wassenaar Arrangement (dual-use)  Missile Technology Control Regime (MTCR)  Australia Group (CBW)  Nuclear Suppliers' Group	Wassenaar Arrangement (munitions)  MTCR	Nuclear Suppliers' Group  International Atomic Energy Agency
Licensing Policy	Based on item, country, or both. Anti-terrorism controls proscribe exports to five countries for nearly all CCL listings	Most Munitions License items require licenses; 21 proscribed countries.	General/Specific Licenses (NRC)  General/Specific Authorizations (DOE)

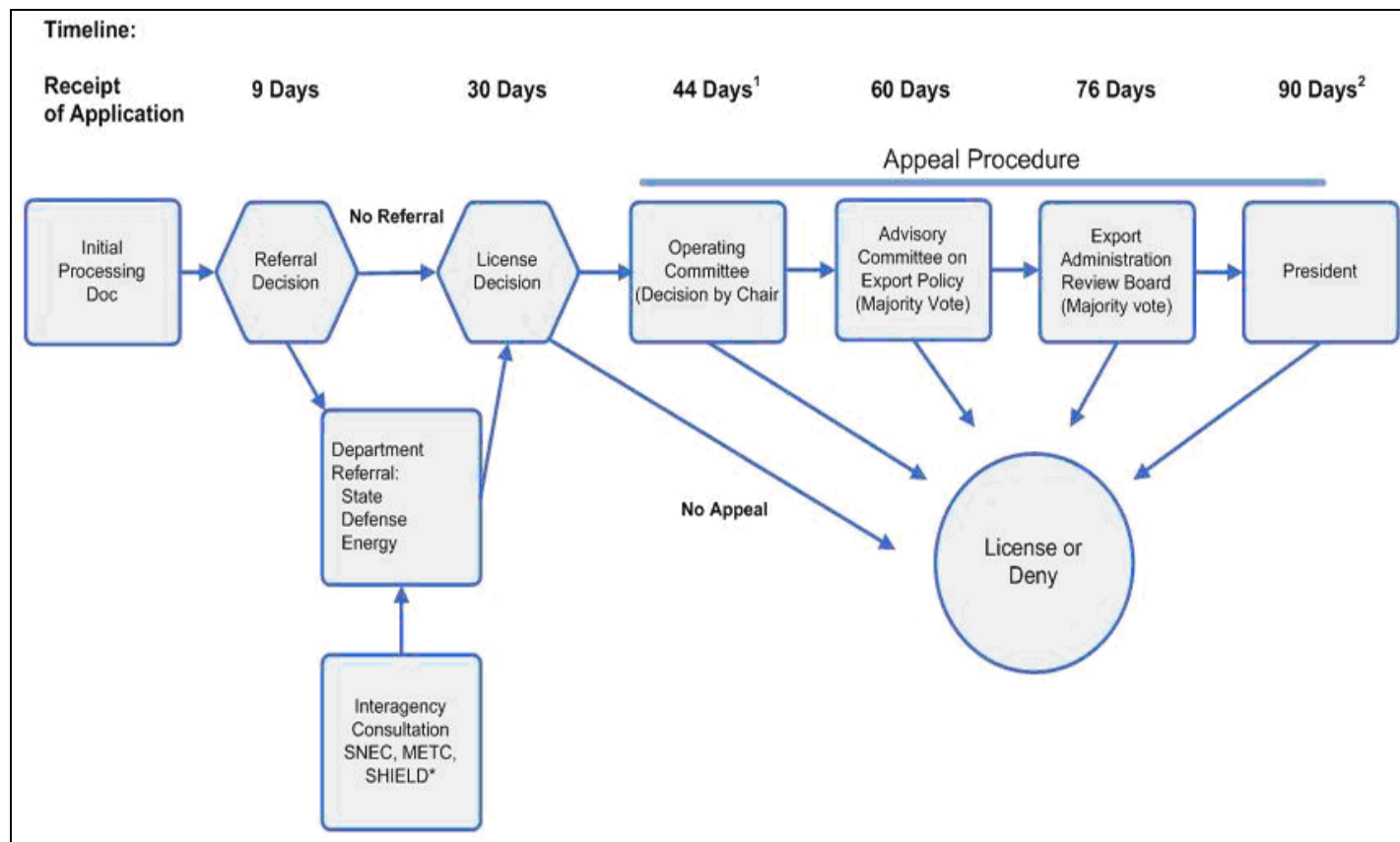
Characteristic	Dual-Use	Munitions	Nuclear
Licensing Application Timeline	Initial referral within nine days; agency must approve/deny within 30 days; 90-day appeal process (see <b>Appendix B</b> )	60 days with national security exceptions; congressional notification period for significant military equipment	No timeframe for license applications
Enforcement	Office of Export Enforcement (BIS) (OEE) (domestic)  Homeland Security (DHS): Immigration and Customs Enforcement (ICE); Customs and Border Protection (CBP)  Justice (DOJ): National Security Division; FBI	Office of Defense Trade Compliance (DDTC)  Defense Criminal Investigation Service (DCIS)(DOD) Defense Security Service (DOD)  DHS: ICE, CBP  DOJ: National Security Division; FBI	Office of Enforcement (NRC)  BIS-OEE DDTC-ODTC DCIS (DOD) DHS: ICE, CBP DOJ: National Security Division; FBI
Penalties	Criminal: \$1 million/20 years imprisonment  Civil: \$250,000/Denial of export privileges (IEEPA)	Criminal: \$1 million/10 years imprisonment  Civil: \$500,000/forfeiture of goods, conveyance  Denial of export privileges for either	Criminal: Individual—\$250,000/12 years to life imprisonment; Firm—\$500,000 (NRC and DOE)  Civil: \$100,000 per violation (NRC)

**Source:** Congressional Research Service (CRS).

# Appendix B. Dual-Use Export Licensing Process

**Figure B-1. Dual-Use Export Licensing Process**

(Executive Order 12981, December 1995)



**Source:** Prepared by Ian F. Fergusson, Congressional Research Service (CRS).

**Notes:** The time periods for the appeal procedure reflect a five-day window of appeal and an 11-day period for each body to make a decision.

<sup>2</sup> A license application must be resolved or appealed to the President within 90 days. The order does place a time limit on a presidential decision.

\* SNEC, Sub-Groups on Nuclear Export Policy, MTEC, Missile Technology/Export Control Group; SHIELD Chemical and Biological Weapons Control Group.

## **Appendix C. List of Acronyms**

AECA—Arms Export Control Act

AES—Automated Export System

BIS—Bureau of Industry and Security, Department of Commerce

CBP—Customs and Border Protection, Department of Homeland Security

CCL—Commerce Control List

CML—Commerce Munitions List

CPI—Counter-Proliferation Investigations

CW—Chemical Weapons

DCIS—Defense Criminal Investigation Service

DDTC—Directorate of Defense Trade Controls, Department of State

DHS—Department of Homeland Security

DOJ—Department of Justice

DTSA—Defense Technology Security Administration

EAA—Export Administration Act

EAR—Export Administration Regulations

ECCN—Export Control Classification Number

EECC—Export Enforcement Coordination Center

EEB—Economic, Energy, and Business Bureau, Department of State

FP—Foreign Policy Controls

GAO—Governmental Accountability Office

IEEPA—International Emergency Economic Powers Act

ICE—Immigration and Customs Enforcement Agency, Department of Homeland Security

ISN—International Security and Nonproliferation Bureau, Department of State

ITA—International Trade Administration, Department of Commerce

ITAR—International Traffic in Arms Regulations

MTCR—Missile Technology Control Regime

NEECN—National Export Enforcement Coordination Network

NRC—Nuclear Regulatory Commission

NS—National Security Controls

NSG—Nuclear Suppliers Group

OEE—Office of Export Enforcement

ODTC—Office of Defense Trade Compliance, DDTC

OFAC—Office of Foreign Assets Control, Department of the Treasury

SI—Significant Items Controls

SL—Surreptitious Listening Controls

SS—Short Supply Controls

STA—Strategic Trade Authorization

USML—U.S. Munitions List

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