Early steps toward a streamlined export control system



Proposed streamlining changes to the ITAR should provide an increased opportunity for exporting and re-exporting certain defence items. Curt Dombek, Thad McBride and Reid Whitten consider the proposals and their possible benefits for business.

On 7 November 2011, the U.S. State Department published a proposed rule amending the International Traffic in Arms Regulations ('ITAR') by narrowing the categories of aircraft and related equipment controlled on the United States Munitions List ('USML'). Concurrently, the U.S. Department of Commerce, Bureau of Industry and Security ('BIS') published a proposed rule adding five new Export Control Classification Numbers ('ECCNs') to the Commerce Control List, which lists items controlled under the Export Administration Regulations ('EAR'). The two rules are linked, as the new ECCNs in BIS's proposed rule will cover those items carved out of the ambit of ITAR controls by the State Department's proposed rule.

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Background

The two interrelated proposed changes represent the second step in the Administration's ongoing Export Control Reform Initiative (the 'ECR' or the 'Initiative'). The ECR began in earnest when BIS published a proposed rule on 15 July 2011 that laid out a regulatory construct for harmonizing the USML and the CCL. According to a Department of Commerce website [1], the Initiative will be implemented in three phases: Phases I and II will reconcile various definitions, regulations, and policies for export controls, and build toward Phase III, which is envisioned to create a single control list, single licensing agency, unified information technology system, and enforcement coordination centre.

In a supplement to its proposed rule, the State Department explained that the proposed revisions to the USML and CCL are only an interim step toward reconciling definitions and integrating the ITAR and EAR control lists. Advance notice of the 7 November proposed rule was released in December 2010 and comments received, as well as the Administration's review of that advanced notice, suggested that fundamentally altering the structure of the USML by creating tiers and aligning it with the CCL, could create havoc in the carefully tailored compliance systems maintained by exporters and re-exporters. Therefore, the revisions proposed in these 7 November rules move toward a streamlined export control regulation regime, but do not fully implement the tiered levels of control that are envisioned eventually to develop out of the Initiative.

Under the structure laid out in the 15 July proposed rule, the 7 November proposed rules describe how certain military aircraft and related articles and technical data currently controlled under USML Category VIII – Aircraft and Associated Equipment – would be controlled under the CCL. In crafting these proposed changes, the U.S. Department of Defense performed a review of Category VIII of the USML in coordination with the departments of State and Commerce. The review was designed to identify types of USML Category VIII articles that were either (i) inherently military and otherwise warranted control on the USML or (ii) common to civil aircraft applications, possessing parameters or characteristics that provide a critical military or intelligence advantage to the United States, and that are almost exclusively available from the United States. Generally, if a Category VIII USML article did not fit either of these criteria, it was designated under one of the new ECCNs created by the rule proposed by BIS. If an article satisfied one or both of these criteria, it remained on the USML.

The changes

The proposed changes are most notable for moving items *from* ITAR control (the USML) *to* EAR control (the CCL), after years of regulations that expanded the USML. The changes are not meant to weaken ITAR controls. Rather, the changes are designed to focus ITAR controls on protecting those items that will maintain a military advantage for the United States and to use the EAR to allow exporters to reach the same

Links and notes

[1] http://export.gov/ecr/index.asp

[2] The STA exception provides an exception to the licensing requirement for the export, re-export, or transfer of specified items to a certain, enumerated countries that pose relatively low risk that the items will be used for a purpose that the licence requirements were designed to prevent.

answers about permissible exports that previously were delivered by the Directorate of Defense Trade Controls after a licensing process under ITAR.

ITAR

Currently, the USML covers generic parts for military aircraft, regardless of the item's military significance. In fact, the USML lists all parts, components, accessories, and attachments that are specifically designed or modified for a defence article, a blanket control from which there are certain exceptions. In essence, Category VIII controls almost every part of a military plane but the tyres.

If the proposed changes go into effect, the USML will contain an affirmative list of specific types of parts, components, accessories, and attachments that continue to warrant control on the USML. The proposed USML Category VIII descriptions are honed to a specific list of items that the authors of the proposed rule believe have definite military significance. One catch-all style category that remains in the State Department's proposed rule covers parts and components specially designed for what are essentially stealth aircraft. All other Category VIII parts and components that fall under the current catch-all ITAR control and are not specifically listed in the new rule will be moved to the CCL. This is a significant change that will remove a large volume of low level aircraft parts from ITAR control.

EAR

To accommodate the items moving from the USML, new categories of classification will be added to the CCL. The rule proposed by BIS states that the articles that no longer warrant control under Category VIII of the USML would be controlled under the CCL in five new ECCNs: 9A610, 9B610, 9C610, 9D610, and 9E610. In addition, a small category of military aircraft, and technology related to such aircraft, are currently controlled under ECCNs 9A018, 9D018 and 9E018; under the proposed rule, such aircraft and related technology would be controlled under the new ECCNs 9A610, 9D610 and 9E610.

These new ECCNs make up part of the '600 series', a proposed class of EAR items created to control former ITAR items that do not otherwise fit an existing ECCN. The BIS proposed rule modifies the 15 July proposed rule by adding a general policy of denial for 600 series items for destinations that are subject to a United States arms embargo under the regional stability reasons for control.

There will also be a 10% *de minimis* rule for foreign products produced with 600 series items. The ITAR do not provide for *de minimis* treatment for any items currently listed on the USML, regardless of the significance or insignificance of the item to the end product containing it. In other words, under current rules, even the smallest, least significant ITAR item, if it forms part of any item not otherwise controlled for export, will be controlled under the ITAR. Under the proposed changes, however, a 600 series item may be exported without a licence where that item is incorporated into a larger item not controlled for export under the EAR, so long as all the 600 series items comprise less than ten percent of the value of the larger item.

The parts and components in the 600 series will qualify for the Strategic Trade Authorization ('STA') exception if they are intended for a government end-user in one of 36 countries that are currently eligible under the STA exception.[2] This includes such parts or components that are exported to manufacturers in those countries that are producing end items for delivery to those governments. End items in the EAR 600 series (as opposed to parts and components) will be subject to review by BIS before they will qualify for the STA exception.

Other details concerning licence exceptions for the 600 series are outlined in the proposed rule.

The effect

The proposed changes will provide an increased opportunity for exporting and re-exporting items that are no longer subject to ITAR control to NATO-member and other countries qualifying for the STA exception. Exporters will be able to deliver parts and components for end use by these governments without the added time of waiting for ITAR licensing and addressing the other attendant complexities of ITAR compliance. Moreover, as EAR items, these parts and components could be incorporated in the manufacturing of civilian EAR

end items and exported in accordance with the ECCNs for those end items (15 C.F.R. 770 Interpretation No. 2), encouraging increased manufacturing and export as the components become part of less strictly controlled products. The application of the EAR *de minimis* rule will also encourage additional exports of these parts and components.

The new rules could also encourage manufacturing of some civilian products to move back to the United States.

It is interesting to note that, under the proposed rules, a 600 series component could be made in the United States, manufactured into a larger civilian end product, and exported under the less restrictive ECCN of the end product. The same 600 series component, however, could be restricted for export, on its own, to foreign countries for manufacture into the same civilian product. This means that the new rules could also encourage manufacturing of some civilian products to move back to the United States – a welcome result for U.S. industry.

There is, in addition, the likelihood that some manufacturers will be relieved of ITAR registration requirements if all their products move to the CCL. Such exporters and re-exporters would also benefit from the elimination of technical assistance agreements or manufacturing licence agreements for the export of certain technology formerly controlled under the ITAR.

Conclusion

These proposed changes are only the early steps of a larger transformation, but the potentially broad effect of such a narrow shift illustrates just how much potential benefit may arise from the planned overhaul of the export control regulations. The devil is, as ever, in the details, and companies seeking to avail themselves of advantages provided under the proposed rules will need careful guidance to navigate these intricate, but potentially quite beneficial regulations.

The views expressed here are those of Sheppard Mullin's export control attorneys and do not represent the views of the President's Export Council Subcommittee on Export Administration, which is working on changes to the export control regulatory framework.

Curt Dombek is a partner in Sheppard Mullin's Government Contracts and Regulated Industries Practice Group, based in Los Angeles and London. Thad McBride is a partner in Sheppard Mullin's International Trade group and is resident in the firm's Washington, D.C. office. Reid Whitten is an International Trade associate in the Government Contracts & Regulated Industries practice group in the firm's Washington, D.C. office.

cdombek@sheppardmullin.com

tmcbride@sheppardmullin.com

rwhitten@sheppardmullin.com