

Loosening Satellite Export Controls

Law360, New York (May 04, 2012, 2:56 PM ET) -- Since 1999, strict controls on the export of U.S. satellites and satellite components have drastically eroded U.S. manufacturers' market share in the global satellite industry. On April 18, 2012, the U.S. Departments of State and Defense released the "1248 report" containing findings related to reducing some of those controls.

The 1248 report assesses the national security risks of removing certain satellites and related components from the tightly controlled United States Munitions List and transferring them to the generally less restrictive Commerce Control List. The report concludes that most communications satellites, lower-performing remote sensing satellites and related components could be transferred from the USML to the CCL without harming U.S. national security. The transfer of these items to the CCL could greatly benefit the U.S. satellite industry by significantly easing the export controls placed on its products.

Background

Commercial satellites and related components are unique in that they are the only category of items required by law to be placed on the USML and the only dual-use items (i.e., items with both civilian and military applications) controlled as munitions. Typically, the president has the authority to determine whether a controlled item should be placed on the CCL and controlled under the Export Administration Regulations or placed on the USML and controlled under the International Traffic in Arms Regulations.

In 1999, however, Congress removed the president's authority to change the jurisdictional status of commercial satellites and related components following revelations that U.S. satellite manufacturers had improperly transferred missile design information to China. In 2010, Congress passed legislation requiring the secretary of state and the secretary of defense to assess the national security risks of removing satellites and related components from the USML and to make general recommendations for improving U.S. space export control policy.[1]

The 1248 Report

In a finding that could present new export opportunities for U.S. satellite manufacturers, the report concludes that many controls on satellites and related technologies are no longer necessary and that maintaining these items on the USML leaves U.S. satellite manufacturers at a distinct competitive disadvantage. The report notes that the United States is the only country that controls all items modified in any way for use with a commercial satellite.

The report also recognizes that the United States is the only country that controls the reexport of foreign-origin satellites containing U.S.-origin satellite-related items and is the only country that classifies all commercial satellites and related items as munitions. The report suggests that subjecting commercial satellite systems, components and related technologies to strict ITAR controls is anachronistic, because a substantial number of these items have moved from military use to predominantly civil use over the past 15 years and therefore no longer properly belong on the USML.

In order to keep the regulations current and ease the export controls placed on satellites and related components, the report proposes transferring the following items to the CCL:

- communications satellites that do not contain classified components;
- remote sensing satellites with performance parameters below certain thresholds; and
- systems, subsystems, parts and components associated with these satellites and with performance parameters below certain thresholds specified for items remaining on the USML.

Items that provide the United States a military or intelligence advantage in space would remain on the USML, including the following:

- satellites that perform a purely military or intelligence mission;
- remote sensing satellites with high performance parameters;
- systems, subsystems, parts and components unique to the above satellite types and not common to dual-use satellites; and
- services in support of foreign launch operations for USML- and CCL-designated satellites.

Benefits for U.S. Satellite Exporters

The proposed changes to the CCL could vastly expand the export opportunities available to U.S. satellite manufacturers. As the report notes, the rules governing items listed on the CCL “provide[] for flexible controls that can be applied or removed as technology becomes readily available on the global market and transitions away from predominantly military uses to commercial purposes.” Notably, the proposed changes also would allow U.S. exporters to take advantage of the Strategic Trade Authorization license exception implemented in June 2011, which permits the export without a license of many items listed on the CCL to 36 countries, including NATO members and other close U.S. allies.

Transferring commercial satellites and related components to the CCL would also broaden export opportunities for U.S. satellite manufacturers by making it easier to reexport satellite components without having to obtain an additional license. Unlike the CCL, there is no de minimis exception for items listed on the USML. Thus, satellite components incorporated into foreign-made satellites always require a license for reexport. Transferring commercial satellites and related components to the CCL would allow industry to take advantage of the de minimis exception, which would permit the reexport of satellite components to most countries as long as they were incorporated into a foreign satellite containing less than 25 percent by value of controlled U.S.-origin material.

Limitations

The proposed changes to the CCL would not open the gates for export to every country. Under the report's recommendations, the CCL would continue the current policy of prohibiting the export of satellites and related components to certain destinations and end-users, including embargoed countries and China. The report argues that China in particular warrants "special scrutiny" because it "implements active and effective technology acquisition techniques that target U.S. space-related technologies."

The de minimis rule described above also would not apply to transfers of controlled items to embargoed countries and China. Thus, the export to any of these countries of a foreign-made satellite containing even a negligible amount of U.S.-controlled material would still require an additional license, and applications for such a license would be subject to a policy of presumptive denial.

Special Export Controls

The report also makes recommendations that would lower or eliminate the cost of Special Export Controls (SECs) for certain satellites and components. The report recommends a more flexible application of SECs for items that remain on the USML. SECs such as Department of Defense monitoring are currently required for exports of satellites and related items for launch in a foreign country unless the country is a NATO member or other major U.S. ally.

Certain SECs, however, are discretionary for other activities licensed under the ITAR. The industry is currently required to reimburse the DOD only for monitoring costs associated with mandatory SECs. Allowing the DOD to waive or exempt certain activities from monitoring and require reimbursements from industry for all SECs likely could shift the costs and controls associated with lower-risk activities to higher-risk activities that are not currently subject to monitoring.

Conclusion

Although the proposals contained in the report hold the potential to benefit U.S. satellite exporters immensely, they are still a long way from becoming law. In order for the transfer of commercial satellites and related components from the USML to the CCL to occur, Congress first would need to pass legislation returning the authority to determine the export control jurisdictional status of such items to the president.

The proposed transfer also would require a formal notice-and-comment rulemaking procedure and congressional notification. The potential upside of such changes, however, is clear: The United States would stand in a better position to regain a broader share of the global satellite industry.

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[1] This requirement was published in Section 1248 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. No. 111-84), thus the report is often referred to as the “1248 report.”

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