



Export Controls Update

December 2010

State and Commerce Departments Issue Announcements Regarding the Export Control Reform Initiative

Last week, the United States Departments of State and Commerce issued announcements related to the export control reform initiative. As we previously reported, in April 2010, the Obama Administration proposed an overhaul of the current export control regulations by implementing: a single export controlled items list; a single licensing agency; a single enforcement agency; and a unified information technology infrastructure. According to the Administration, the reform process would occur in three phases. The first phase included making immediate improvements to the existing system through such measures as harmonizing definitions and implementing regulatory improvements to streamline the licensing process. In the second phase, the Administration would restructure the two export control lists into identical, tiered structures. Finally, the Administration's proposed third stage would complete the transition to a new export control system by finalizing the single list/agency approach. The recent announcements relate to phase II of the export control reform initiative and are described more fully below.

- State Department issues proposed rule to re-write United States Munitions List ("USML") Category VII (Tanks and Military Vehicles) – The proposed re-write of USML Category VII removes approximately 74 percent of the items formerly in that category. The proposed Category VII focuses on the key defense articles and related technical data that provide at least a "significant military or intelligence" advantage to the U.S. The re-write is formatted into three "tiers": (i) Tier 1 (T1) are those defense articles that are almost exclusively available from the U.S. and that provide a "*critical*" military/intelligence advantage; (ii) Tier 2 (T2) are those defense articles that are almost exclusively available from member countries of the multilateral export control regimes¹ and that provide a "*substantial*" military/intelligence advantage or contribution to the development of T1 or T2 items; and (iii) Tier 3 (T3) are those defense articles that provide a "*significant*" military/intelligence advantage or contribution to the development of T1, T2 or T3 items. The re-write is a "positive list" that describes controlled-items using an objective criteria similar to that used by the Commerce Control List ("CCL") (e.g., including technical specifications of controlled-items, qualities to be measured, units of measurement, etc.) rather than the broad, open-ended criteria the USML currently applies. The State Department is seeking public comments to ensure that the rewrite of USML Category VII properly and precisely describes the controlled items and related technical data. Comments are due by February 8, 2011.
- State Department issues a notice seeking comments regarding the methodology used to transform the USML to a "positive list" – As a companion to the USML Category VII re-write, the State Department also published for public comment the methodology it applied to revise Category VII into a "positive list." This methodology includes: (1) creating a "tiered" system (as described above) to distinguish the types of items that should be controlled at different levels; (2) creating a "bright line" between the USML and the CCL to reduce jurisdictional conflict; and (3) structurally "aligning" the USML and the CCL, which includes dividing the USML into the seven "Groups" similar to the CCL,² so that the lists can eventually be combined into a single list. Comments are due by February 8, 2011.

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- Commerce Department notice requesting comments on revising the CCL – The Commerce Department issued its own notice requesting comments on how the descriptions of controlled-items on the CCL could be more “positive” and “tiered,” similar to the methodology used for USML Category VII (described above). The agency seeks comments regarding: (a) the degree to which a controlled item provides the U.S. with “critical,” “substantial,” or “significant” military or intelligence advantage; or (b) the availability of CCL-controlled items outside the U.S. or certain group countries.³ Comments are due by February 7, 2011.
- Commerce Department proposed rule that would create a new license exception specified items for certain countries – This proposed rule would allow for a new license exception to the Export Administration Regulations (“EAR”) called License Exception Strategic Trade Authorization (“STA”). License Exception STA would allow for exports (including re-exports and in-country transfers) of most, but not all, CCL-controlled items. For example, the exception would not include items subject to short supply, surreptitious licensing, missile technology controls or chemical weapons controls, or items classified as ECCNs 0A981 or 0A983. Further, the license exception would have three types of authorizations. The first would allow for authorization to 37 destinations (the same as the “group countries” described above and in footnote three below). The second authorization would include transactions subject to national security controls of “lesser sensitivity,” and would include the destinations of Albania and Israel. The third authorization would be for civil end uses in 125 additional countries (e.g., it would *not* include, among others, China, Vietnam, Russia, Sudan, Iran or Libya). Comments are due by February 7, 2011.

In order to disseminate ongoing information regarding these announcements and its Export Control Reform Initiative, the Obama Administration has created a [webpage](#). The webpage features updates regarding the current status of the reform, “fact sheets” about the strategy of the reform, as well as a downloadable screening list that consolidates the export screening lists from the Departments of State, Commerce and Treasury.

As of December 23, 2010, Employers of Non-Immigrants Must Certify a Review of the Export Regulations

Last month the United States Customs and Immigration Service amended the I-129 nonimmigrant petition form. The new form requires the petitioning employer to certify that “it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined that” either: (1) “a license is not required from either U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person”; or (2) “a license is required from the U.S. Department of Commerce and/or the U.S. Department of State to release such technology or technical data to the beneficiary” and that the petitioner will restrict the beneficiary’s access to the technology at issue or will obtain the proper authorization. The rule focuses on the “deemed export” rule under the EAR—and a similar definition of export under the ITAR—which makes it a violation to transfer/disclose controlled technical data to a foreign person (defined as someone who is not a U.S. citizen or permanent foreign resident) without proper authorization from the appropriate agency. The new rule, which went into effect November 23, 2010, becomes mandatory for all employers as of December 23, 2010.

Federal Agents Raid the Headquarters of EOD Technology, Inc., a Security Contractor in Iraq and Afghanistan, for Suspected ITAR Violations

On Wednesday, December 8, 2010, federal agents raided the offices of EOD Technology, Inc. (“EODT”). According to the *Washington Post*, a federal official said that the raid related to alleged violations of the ITAR. EODT’s contracts focus on providing security and other services for the State and Defense departments in both Iraq and Afghanistan. In September, for example, the U.S. government awarded EODT with a contract to take over security for the U.S. Embassy compound in Kabul. In October, however, EODT had been cited by the Senate Foreign Relations Committee in a report for concerns that EODT hired Afghan guards that had been involved in activities at odds with U.S. interests in the region, including providing information to Iran.

The government’s raid of EODT comes shortly after Blackwater Worldwide (“Blackwater”), now known as Xe Services, LLC, entered into a consent agreement with the State Department’s Directorate of Defense Trade Controls (“DDTC”). Blackwater, similar to EODT, was engaged to provide security for the United States Embassy in Baghdad, the State Department, and the CIA. Blackwater was alleged to have committed 288 violations of ITAR, including exporting illegal weapons to Afghanistan, making unauthorized proposals to train troops in south Sudan, and providing sniper training for Taiwanese police officers. Blackwater agreed to pay \$42,000,000 in civil penalties under the terms of the consent agreement.

¹ These include members of the following: the Wassenaar Arrangement; Nuclear Suppliers Group; Australia Group; and the Missile Technology Control Regime. For more information, please [click here](#).

² The Export Control Classification Numbers (“ECCN”) on the CCL are divided into letter “Groups,” which are: (A) Equipment, Assemblies and Components; (B) Tests, Inspection and Production Equipment; (C) Materials; (D) Software; (E) Technology; (F) Defense Services; and (G) Manufacturing and Production Authorizations.

³ These group countries include: Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, Turkey, Ukraine or the United Kingdom.

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