

US Export Control Reform: Have you missed anything?

After four years, the reformation is finally at hand. In 2013, US export control reform moved beyond planning with a barrage of proposed final rules, final rules, and transition rules. Some of the proposed rules became effective in 2013 after a 6-month transition period and others will become effective in January 2014. Moreover, throughout the year, new definitions, corrections, clarifications, and interim guidelines have been issued with immediate effect. Exporters only have a limited time to adapt their systems to the new regulations, so it is important to keep track of the developments as they occur.

Process summary

The US Department of Commerce, which is charged with administration of the Export Administration Regulations ("EAR"), and the US Department of State, which administers the International Traffic in Arms Regulations ("ITAR"), have issued hundreds of pages of regulations in support of export control reform ("ECR"). While legislation is necessary to fully complete the "Four Singularities" announced by Defense Secretary Robert Gates in 2010,¹ the agencies have been strategically transferring defense items within and off the highly restricted ITAR US Munitions List ("USML") onto a re-designed EAR Commerce Control List ("CCL") with more flexible controls, thereby accomplishing Gates' other catch phrase, "higher fences around fewer items."

Generally, each set of transfers undergoes a process of interagency review, stakeholder input, publication of a proposed final rule, a public comment period, final draft publication, 38(f) notification to Congress (30 days), and publication of the final rule before it becomes effective 180 days later. Only the last two steps have definitive time periods. For eight USML categories for which final rules have been published, the time period from close of comments to final rules has been 12-18 months. It remains to be seen whether the remaining 13 categories will take as long due to the regularization of the process.

¹ The Four Singularities, i.e., a single licensing agency, a single enforcement agency, a single control list, and a single IT portal, are discussed fully in a report by the Congressional Research Service, *The U.S. Export Control System and the President's Reform Initiative* (Sept 20, 2013), available at <http://www.fas.org/sgp/crs/natsec/R41916.pdf>.

Export control reform 2013: Where we stand

This chronology summarizes final actions and pending reforms as of November 25, 2013. The corresponding Federal Register notices should be studied in order to understand fully the effect of the new regulations.

Jan. 2, 2013: Satellite export control reform was included in the 2013 National Defense Authorization Act ("NDAA"). While exports and reexports of all satellites, regardless of sensitivity or availability, will continue to be prohibited if destined to China, North Korea, Iran, and other countries subject to comprehensive arms or other embargoes, controls are otherwise to be tailored appropriately based on the risk of diversion to unauthorized end-users or end-uses. This amendment paved the way for the May 24, 2013, proposed rules.

Jan. 31, 2013: State and Commerce published a pair of proposed rules for transitioning USML **Category IV (Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs and Mines)**, some of which will move to the CCL, under the new 600-series Export Control Classification Number ("ECCN"). Comments closed Mar. 18, 2013, and the final rules have been in process for eight months.

May 24, 2013: State and Commerce published a pair of proposed rules to transition certain satellites from USML **Category XV (Spacecraft Systems and Related Articles)** to the CCL, pursuant to the amendment to the NDAA mentioned above. Comments closed July 8, 2013. A Presidential Determination was issued on Oct. 25, 2013, to enable the transition. This rule will transfer commercial communication satellites back to the CCL, as well as certain lower-performance remote sensing satellites, planetary rover vehicles, planetary and interplanetary probes, and most parts and components of satellite bus and payloads.

May 24, 2013: State republished its definition of "**Defense Services**," first published April 13, 2011. The republished definition proposed removing ITAR controls on research projects related to defense articles with foreign persons if the information was already in the public domain or intended for publication, except in some limited circumstances. State sought additional public feedback until July 8, 2013. The final rules have been in process for four months.

July 8, 2013: State and Commerce published the second set of final rules, revising USML **Categories VI (Vessels of War and Special Naval Equipment), VII (Tanks and Military Vehicles), XIII (Auxiliary Military Equipment), and XX (Submersibles)**, which will become effective on Jan. 6, 2014. Among other changes, SCUBA gear has been moved to the EAR from Category XIII, military submarines have been moved to Category XX and rescue subs to the EAR, and most unarmed and unarmored military vehicles have been moved to the EAR.

July 25, 2013: State and Commerce published a second round of proposed rules for USML **Category XI (Military Electronics)**, following comments received after the first publication on Nov. 28, 2012. Comments closed on Sept. 9, 2013, and the final rules have been in process for just two months.

Oct. 3, 2013: State and [Commerce](#) published 20 pages of rules to make **technical corrections** to the Initial Implementation Rules, which took effect on Oct. 15, 2013.

Oct. 4, 2013: Commerce published a 63-page **Clarifying Rule** for the CCL, which also makes conforming changes to the Initial Implementation Rules, taking effect on Oct. 15, 2013. Among a raft of other clarifications, the rule contained eight pages of guidance on the terms "parts" and "components."

Oct. 10, 2013: State published new **Guidelines for Preparing Electronic Agreements** (TAAs, MLAs, and WDAs). This 216-page regulation requires careful analysis to determine whether it will affect current and future agreements.

Oct. 15, 2013: The effective date of the **Initial Implementation Rules** by State and Commerce that made final the **framework for export control reform**, first proposed July 15, 2011.² These rules created the ECCN 600-series, expanded the CCL Country Group List, including the new Country Group D:5 for arms-embargoed countries, amended most EAR license exceptions, and imposed special reporting rules for arms and major defense equipment, among other changes. It also included the final version of the definition of "**Specially Designed**" to determine if an item is for military use, using a "catch and release methodology."³ **Transition Rules** extended the expiration of existing export licenses and provided guidance during the transition period. New Red Flags were added to BIS's list, especially aimed at 600-series situations. Keep in mind that conforming changes were also made to AES.

Oct. 15, 2013: The effective date of the first set of final rules, revising USML **Categories VIII (Aircraft), XIX (Gas Turbine Engines), XVII (Classified Articles and Technical Data), and XXI (Miscellaneous Articles)**.⁴ The USML now covers only 13 enumerated aircraft types, gas turbine engines are specifically listed by thrust capacity, and some aircraft engines were transferred to new Category XIX. Most other aircraft, parts and components are moved to the CCL, with 10 new ECCNs, and varying control levels depending on sensitivity, i.e., non-enumerated military aircraft versus tires and life rafts.⁵

Oct. 25, 2013: The effective date of State's [interim final Brokering Rule](#), published Aug. 28, 2013, regarding the activities of brokers in export and import transactions involving defense articles and defense services. Significantly narrower than the 2011 proposed rule, the 2013 rule amends ITAR Part 129 by requiring registration only for foreign persons owned or controlled by a US person, or located within the United States. Brokering activities must be "on behalf of another," such as soliciting or promoting defense articles or defense services, but no longer reaches those activities undertaken within a registrant's corporate family.

² For a full discussion of these important regulations, please see our briefing, *Publication of the First Final Export Control Reform Rules: Don't Be Surprised, Be Prepared* (May 2013), available at http://www.cliffordchance.com/publicationviews/publications/2013/05/publication_of_thefirstfinalusexportcontro.html.

³ There are decision tools available on both the BIS and DDTC websites to help in determining whether an item is specially designed. See <http://www.bis.doc.gov/index.php/specially-designed-tool> and http://www.pmddtc.state.gov/licensing/dt_SpeciallyDesigned.htm.

⁴ For a discussion focused on the transfers of aircraft equipment, please see our briefing, *Publication of the First Final Export Control Reform Rules Focuses on the Aerospace Industry* (May 2013), available at http://www.cliffordchance.com/publicationviews/publications/2013/05/first_set_of_finalusexportcontrolreformrule.html.

⁵ There are Order of Review decision tools to guide exporters to the correct classification from the USML to the CCL on both the BIS and DDTC websites. See <https://www.bis.doc.gov/index.php/export-control-classification-interactive-tool> and http://test.pmddtc.state.gov/licensing/dt_OrderofReview.htm.

Oct. 31, 2013: Commerce issued updated **Guidance Regarding the Treatment of Dual and Third Country Nationals with respect to Deemed Reexports of Technology or Source Code Subject to the EAR.**

Because the different definitions of nationality used by Commerce (country of most recent citizenship) and State (country of birth) have not yet been harmonized, Commerce issued guidance allowing non-US companies to avoid EAR licensing obligations on deemed exports moved to the CCL that did not require licenses under ITAR under three authorizations: legacy BIS guidance, ITAR § 124.16, and ITAR § 126.18.

Conclusion

Many exporters have decided to transition their classifications and licenses to the EAR wherever possible as soon as possible to gain the benefit of flexible controls, avoid confusion for their overseas partners, and to prevent dual exposure and disclosure obligations for any potential violations.

While the US government shutdown may have slowed down the publication of new regulations, the goal was to announce all of the regulatory migrations by the end of 2013. Accordingly, the next two months may be very busy, as final rules for Categories V (Explosives), IX (Training Equipment), and X (Protective Equipment) have been pending for 16-17 months, and Categories XV (Satellites) and XI (Electronics) have been subject to regular attention.

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Contact

Wendy Wysong

Partner

E: wendy.wysong@cliffordchance.com

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Clifford Chance, 28th Floor, Jardine House, One Connaught Place, Hong Kong

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