Initial Implementation of Export Control Reform

Kevin Wolf
Assistant Secretary of Commerce for Export Administration

Note: This presentation is merely a summary of official statements and final rules published by the Departments of Commerce and State. Final rules, as well as the Export Administration Regulations and International Traffic in Arms Regulations, must be reviewed to determine the full scope of any applicable requirements.

Date of Last Revision: April 17, 2013
Topics

- ECR Background/Summary
- Determining Changes in Jurisdiction
  - Revised USML
  - 600 Series Framework
  - “Specially Designed”
- Authorization for Items Moving from USML to CCL
  - Grandfathering DDTC Approvals
  - EAR License Exceptions
  - BIS Licenses
  - DDTC § 120.5(b) Approvals
- Export Clearance
- Reexport Considerations
ECR Background

• In August 2009, President Obama directed the agencies involved in the U.S. export control system to conduct a broad-based review of export controls to identify additional ways to enhance U.S. national security.

• In April 2010, former Secretary of Defense Gates described how national security required a fundamental reform of the export control system.
ECR Background

• To enhance national security, the Administration determined that the export control system needed to be reformed to:
  – Increase interoperability with NATO and other close allies;
  – Reduce the current incentives for companies in non-embargoed countries to design out or avoid US-origin content; and
  – Allow the Administration to focus its resources on the transactions of greater concern.
ECR Background

• To implement the objectives, the Administration needed to:
  – Identify the specific sensitive and other items on a more positive USML that warrant individual license reviews even for ultimate end use by NATO and other regime allies; and
  – Amend the EAR and the CCL to control all formerly USML items that would no longer be on the revised USML so that they still could be controlled as military items, but in a more flexible way regarding such allies.
Summary

• Items that are now defense articles but that are no longer listed on the revised USML categories will become subject to the EAR’s “600 series” ECCNs.
• Licenses from Commerce will still be required to export and reexport most 600 series items worldwide (minus Canada), unless an EAR license exception is available.
• New license exception STA will be available to authorize exports and reexports to 36 countries if (a) for ultimate end use by a government of such countries, (b) return to the US, or (c) in connection with an existing authorization.
• Will make defense trade in the supply chain for NATO and other allies more efficient.
• Will have compliance obligations.
• Final rules available at www.bis.doc.gov.
Take a Breath

• The flurry of new rules and descriptions will make the proposed changes seem far more complex than they really are.

• We realize it will take some time to get familiar with the details behind the essence of the effort summarized on the previous slide, hence the delay in the effective date and the training efforts.

• Said one exporter: “The current system is sometimes arbitrary, dumb, and over-controls things, but I understand it. The future system is intelligent, tailored, and will help my exports to allied countries, but I don’t understand it -- yet.”
The Departments of Commerce and State have published proposed or final rules on the following aspects of ECR:

- **Framework:** more “positive” USML and establishment of “600 series” structure
- **Revised USML categories:** will publish over 2013 proposed and final revisions to USML categories and corresponding “600 series” ECCNs
- **“Specially Designed”:** definition of the term for both the ITAR and EAR
- **Transition/Implementation:** grandfathering, changes to license exceptions and license structure

- All changes in the jurisdictional status of items will need to comply with the congressional notification requirements of § 38(f) of the AECA.
- Executive Order 13637 sets out the new delegations of authority for the administration of the new rules.
- Final rules will have a six-month delay in implementation after publication (in addition to a two-year optional grandfathering period for existing USML authorizations.)
Determining Changes in Jurisdiction

• Is my item(s) still subject to the ITAR?
  – Review the relevant revised and existing USML categories
  – Example: items previously controlled under USML Category VIII
    • End item: if not listed in VIII(a), (d), (e), or (f), then moving to the CCL’s new 9A610 (aircraft)
    • Part, component, accessory, or attachment: if not “specially designed” for stealth aircraft in VIII(h)(1) or listed in VIII(h)(2)-(26), then moving to CCL’s new 9A610 (aircraft); if not listed in XIX(a)-(f), then moving to CCL’s new 9A619 (engines)
    • Software or technology (unclassified): if commodity stays on USML, then the software and technology directly related to it stay in VIII(i) or XIX(g); otherwise moving to CCL’s new 9D610/9E610 (aircraft software/technology) or 9D619/9E619 (engine software/technology)

Note: many “catch-all” controls moving from USML to CCL
Determining Changes in Jurisdiction

• What if I have a prior commodity jurisdiction (CJ) determination?
  – CJs that determined item was subject to the ITAR
    • If item is moving from the USML to the CCL, then CJ superseded. No need for additional CJ unless there is doubt.
  – CJs that determined item was subject to the EAR
    • If item was not classified in an existing “-018” ECCN at the time of determination, the item will not be controlled under the 600 series
    • If item was not listed on the CCL at the time of determination (i.e., designated EAR99), the item will remain EAR99, unless later enumerated in an entry on the USML or CCL
Determining Changes in Jurisdiction

- For items moving from the USML to the CCL, the next step is to determine the item’s classification under the EAR to determine whether a license is required, and if so, what license exceptions may be available
  - 600 series framework
  - Definition of “specially designed”
Determining Changes in Jurisdiction: 600 Series Framework

Former USML items (and -018 items) listed in the “Items” paragraph.

Order of review:
- **.a - .w**: specifically enumerated end items, materials, parts, components, accessories, and attachments
  - Some items may be “specially designed”
- **.y**: specifically enumerated parts, components, accessories, and attachments that are “specially designed”
- **.x**: “specially designed” parts, components, accessories, and attachments that are not specifically enumerated

Note: when classifying any item subject to the EAR, consult Supp. No. 4 to Part 774
Determining Changes in Jurisdiction: “Specially Designed”

- New definition of “specially designed” is based on a catch-and-release construct
- Requires answering a series of yes/no questions that lead to an objective determination whether an item is “specially designed”
- Definition is found in Part 772 and will be described in an online decision tree tool BIS will publish
Authorization for Items Moving from USML to CCL

• I have items moving from the USML to the CCL. What are my options for getting licenses or other approvals?
  – Options for currently authorized transactions:
    • Grandfather existing DDTC licenses, agreements, or other approvals beyond effective date of final rule per DDTC transition plan
    • Maintain DDTC approval until effective date but pre-position BIS license application or utilize license exception or NLR designation upon effective date
  – Options for future transactions after effective date:
    • Obtain BIS license or use license exception (or NLR, if 600 series item destined to Canada or if .y item destined to country other than those in Country Group E:1 or China)
    • Obtain DDTC license, agreement, or other approval if eligible under § 120.5(b) of the ITAR
Authorization for Items Moving from USML to CCL: Grandfathering DDTC Approvals

<table>
<thead>
<tr>
<th></th>
<th>Contains only items transitioning to CCL</th>
<th>Contains both transitioning and non-transitioning items</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>DSP-5</strong></td>
<td>May use for up to 2 years after effective date of transition unless license expires or returned. May amend after effective date on case-by-case basis.</td>
<td>Valid for all items until expiration. May amend after effective date on case-by-case basis.</td>
</tr>
<tr>
<td><strong>DSP-61 DSP-73</strong></td>
<td>Valid until expiration. May amend after effective date on case-by-case basis.</td>
<td></td>
</tr>
<tr>
<td><strong>TAA MLA WDA</strong></td>
<td>May use for up to 2 years after effective date of transition unless agreement expires. May amend after effective date on case-by-case basis.</td>
<td>May use for up to 2 years after effective date of transition unless agreement expires. Agreement may be kept valid beyond the 2-year period by submitting amendment to authorize transitioning items under §§ 120.5(b) and 123.1(b).</td>
</tr>
</tbody>
</table>

See DDTC’s transition plan for full details.
Authorization for Items Moving from USML to CCL: EAR Authorization

9A610 Military aircraft and related commodities.

License Requirements

Reason for Control: NS, RS, MT, AT, UN

<table>
<thead>
<tr>
<th>Control(s)</th>
<th>Country chart</th>
</tr>
</thead>
<tbody>
<tr>
<td>NS applies to entire entry except 9A610.u, .v, .w, and .y</td>
<td>NS Column 1</td>
</tr>
<tr>
<td>RS applies to entire entry except 9A610.y</td>
<td>RS Column 1</td>
</tr>
<tr>
<td>MT applies to 9A610, .u, .v, and .w</td>
<td>MT Column 1</td>
</tr>
<tr>
<td>AT applies to entire entry</td>
<td>AT Column 1</td>
</tr>
<tr>
<td>UN applies to entire entry except 9A610.y</td>
<td>See § 746.1(b) for UN controls</td>
</tr>
</tbody>
</table>

License Exceptions

LVS: $1500
GBS: N/A
CIV: N/A
STA:
(1) Paragraph (c)(1) of License Exception STA (§ 740.20(c)(1) of the EAR) may not be used for any item in 9A610.a (i.e., “end item” military aircraft), unless determined by BIS to be eligible for License Exception STA in accordance with § 740.20(g) (License Exception STA eligibility requests for “600 series” end items). (2) Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2) of the EAR) may not be used for any item in 9A610.

paragraph a-w  paragraph x-y
Authorization for Items Moving from USML to CCL: EAR License Exceptions

9A610 Military aircraft and related commodities.

License Requirements

Reason for Control: NS, RS, MT, AT, UN

<table>
<thead>
<tr>
<th>Control(s)</th>
<th>Country chart</th>
</tr>
</thead>
<tbody>
<tr>
<td>NS applies to entire entry except 9A610.u, v, w, and y</td>
<td>NS Column 1</td>
</tr>
<tr>
<td>RS applies to entire entry except 9A610.y</td>
<td>RS Column 1</td>
</tr>
<tr>
<td>MT applies to 9A610.u, v, and w</td>
<td>MT Column 1</td>
</tr>
<tr>
<td>AT applies to entire entry</td>
<td>AT Column 1</td>
</tr>
<tr>
<td>UN applies to entire entry except 9A610.y</td>
<td>See § 746.1(b) for UN controls</td>
</tr>
</tbody>
</table>

License Exceptions

LVS: $1500
GBS: N/A
CIV: N/A
STA:

(1) Paragraph (c)(1) of License Exception STA (§ 740.20(c)(1) of the EAR) may not be used for any item in 9A610.a (i.e., “end item” military aircraft), unless determined by BIS to be eligible for License Exception STA in accordance with § 740.20(g) (License Exception STA eligibility requests for “600 series” end items).

(2) Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2) of the EAR) may not be used for any item in 9A610.

Review “License Exceptions” section in ECCN, § 740.2, and applicable License Exception section in Part 740 to determine availability of License Exceptions for 600 series items.

paragraph a-w paragraph x-y
Authorization for Items Moving from USML to CCL: EAR License Exceptions

• Restrictions on use of License Exceptions for 600 series
  – May only use those license exceptions listed in § 740.2(a)(13)
  – Country Group D:5 (except § 740.11(b)(2) of GOV)
  – Major Defense Equipment sold under a contract exceeding certain values
  – Other applicable restrictions in § 740.2 (e.g., MT-controlled items) or specific section of applicable license exception
Authorization for Items Moving from USML to CCL: EAR License Exceptions

- License Exceptions for 600 series
  - LVS (§ 740.3): $1500 for most 600 series commodity ECCNs
  - TMP (§ 740.9): streamlined; expanded scope for exports to U.S. person’s subsidiary, affiliate, or facility abroad
  - RPL (§ 740.10): allows 600 series parts to repair EAR or ITAR items under certain conditions
  - GOV (§ 740.11): streamlined; expanded to authorize contractor support personnel and to provide for certain shipments for or on behalf of USG and DoD-directed shipments
  - TSU (§ 740.13): expanded to allow releases of technology and source code in the U.S. to bona fide, full time regular employees of U.S. universities
  - STA (§ 740.20): additional requirements for 600 series items
Authorization for Items Moving from USML to CCL: EAR License Exceptions

• License Exception STA: requirements for all items subject to the EAR
  – ECCN must authorize
  – All reasons for control that apply to the transaction must be authorized to use STA
    • NS, CB, NP, RS, CC, SI: Country Group A:5 (§ 740.20(c)(1))
      – Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, 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, and United Kingdom
    • NS only: Country Group A:6 (§ 740.20(c)(2)) [NOT available for 600 series items]
      – Albania, Hong Kong, India, Israel, Malta, Singapore, South Africa, & Taiwan
Authorization for Items Moving from USML to CCL: EAR License Exceptions

License Exception STA

- Process for all items subject to the EAR:
  1. Provide consignee with ECCN
  2. Obtain consignee statement
  3. Notify consignee that shipment (or specific items within a shipment) is (are) under STA
  4. Keep record showing which shipments belong to each consignee statement

- Consignee statement – five points:
  - Aware that items are to be shipped under STA.
  - Been informed of ECCN by ______________.
  - No subsequent License Exception APR (a) or (b) shipments.
  - Agrees not to ship or transfer in violation of EAR.
  - Agrees to provide documents to USG upon request.
Authorization for Items Moving from USML to CCL: EAR License Exceptions

• License Exception STA: additional requirements for 600 series items only
  – For ultimate end use by USG or government of country in Country Group A:5 (“STA-36” countries);
  – For return to the United States; or
  – If USG has otherwise authorized its use.
Authorization for Items Moving from USML to CCL: EAR License Exceptions

• License Exception STA: additional requirements for 600 series items only
  – Non-U.S. parties must have been previously approved on a State or Commerce license
  – Consignee statement must also address ultimate end user restrictions for 600 series items and agree to end use check
  – Eligibility request required for end item aircraft in 9A610.a
Authorization for Items Moving from USML to CCL: EAR License Exceptions

<table>
<thead>
<tr>
<th>ITAR Exemption</th>
<th>EAR License Exception</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 123.4</td>
<td>RPL, TMP</td>
</tr>
<tr>
<td>§ 123.16(b)(2)</td>
<td>LVS</td>
</tr>
<tr>
<td>§ 123.16(b)(5)</td>
<td>TMP</td>
</tr>
<tr>
<td>§ 123.16(b)(9)</td>
<td>TMP</td>
</tr>
<tr>
<td>§ 123.16(b)(10)</td>
<td>TSU</td>
</tr>
<tr>
<td>§ 123.19</td>
<td>TMP</td>
</tr>
<tr>
<td>§ 125.4(b)(1)</td>
<td>GOV</td>
</tr>
<tr>
<td>§ 125.4(b)(3)</td>
<td>GOV</td>
</tr>
<tr>
<td>§ 125.4(b)(4)</td>
<td>TSU</td>
</tr>
<tr>
<td>§ 125.4(b)(5)</td>
<td>TSU</td>
</tr>
<tr>
<td>§ 125.4(b)(10)</td>
<td>TSU</td>
</tr>
<tr>
<td>§ 126.4</td>
<td>GOV</td>
</tr>
<tr>
<td>§ 126.6(a)</td>
<td>GOV</td>
</tr>
</tbody>
</table>
Authorization for Items Moving from USML to CCL: BIS Licenses

- Free online submission system (SNAP-R); no cost associated with license application
- Default four-year validity period
- May export or reexport to *and* among end users listed on license
- No purchase order required
- No large agreements to draft or lengthy agreement guidelines to follow
- May pre-position applications prior to effective date of applicable final rule
Authorization for Items Moving from USML to CCL: DDTC § 120.5(b) Approvals

• DDTC may license items subject to the EAR pursuant to Executive Order 13637
  – § 734.3(e) of the EAR
  – §§ 120.5(b), 120.42, 123.1(b), and 123.9(b) of the ITAR
• Items subject to the EAR must be used in or with items subject to the ITAR
• Items subject to the EAR that are licensed under § 120.5(b) remain subject to the EAR
• Future transfers not covered by the ITAR approval will require BIS authorization for items subject to the EAR
• Potential violations pertaining to the use of § 120.5(b) may result in voluntary disclosures to both DDTC and BIS
Export Clearance

- **Furnishing Classification to Consignees**
  - Exports under EAR: must supply 600 series ECCN on export control documents
  - Exports under DDTC § 120.5(b) Approval: must supply EAR classification (§ 123.9(b)(2))

- **Automated Export System**
  - **BIS Authorizations**
    - All exports of 600 series items (except .y items) require AES filing, regardless of value or destination
    - Exports of .y items exempt from AES filing when value is $2500 or less or when destined for Canada
      - When AES filing required for .y items or if choose to report .y items, use C60 (DY6)
      - ECCN entry optional
    - All exports authorized under STA require AES filing
  - DDTC § 120.5(b) Approval
    - For items subject to the EAR, report the ECCN or EAR99 designation in “ECCN” field
    - For items subject to the ITAR, report USML category code
    - Reporting done under license type “S05”
Reexport Considerations

- **De minimis**: foreign-made items incorporating below *de minimis* levels of controlled U.S. content are generally not subject to the EAR
  - 0% *de minimis* amount for 600 series items destined for Country Group D:5 countries (maintains ITAR status quo for 126.1 countries such as China)
  - 25% *de minimis* for 600 series items destined for all other countries (ITAR will continue to have a zero *de minimis* “see-through” rule for all defense articles that remain on USML)

- **Direct product rule**: certain foreign-made items that are the direct product of certain U.S. origin technology or software are subject to the EAR when reexported to certain destinations
  - Foreign-made 600 series items that are the direct product of U.S.-origin 600 series technology or software require authorization under the EAR when reexported to countries in Country Groups D:1, D:3, D:4, D:5, or E:1
Contact Information

600 Series Licensing and Classification Requests: Munitions Control Division
• Director: Todd Willis, todd.willis@bis.doc.gov
• Deputy Director: Elena Love, elena.love@bis.doc.gov
• Deputy Director: Anthony Mitchell, anthony.mitchell@bis.doc.gov

Technical Product Questions on Aircraft and Gas Turbine Engines
• Office of National Security and Technology Transfer Controls: Gene Christiansen, gene.christiansen@bis.doc.gov
• Munitions Control Division: Jeff Leitz, jeffrey.leitz@bis.doc.gov

Regulatory Interpretation and Transition Guidance
• Regulatory Policy Division: rpd2@bis.doc.gov, 202-482-2440
• Office of the Assistant Secretary for Export Administration: steven.emme@bis.doc.gov

Outreach Assistance: Outreach and Educational Services Division
• Director: Rebecca Joyce, OESDseminar@bis.doc.gov, 202-482-4811
• Western Regional Office Director: Michael Hoffman, 949-660-0144

Web: www.bis.doc.gov    www.export.gov/ecr