

Impending U.S. Export Control Reform - Managing Your Compliance Program

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Last December, the Obama Administration took its first steps toward implementing major U.S. export control reform (Export Control Reform). The Export Control Reform will significantly impact businesses in the aerospace, automotive, defense, information technology, telecommunications, and software industries.

Export Control Reform will be comprehensive and complex. Understanding it will help you deal with its likely consequences for your business.

U.S. export controls under International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR) will be impacted by Export Control Reform. When fully implemented, the Export Control Reform will fundamentally change how and to what extent defense products, software, technology and services, dual-use items, and other assets providing military or intelligence advantage are controlled by the U.S. Government (Controlled Assets). It will significantly affect how U.S. businesses classify and obtain export licenses for Controlled Assets.

Long-Term Goals of Export Control Reform

- Create one unified U.S. export control list that includes all Controlled Assets. (Currently the U.S. Munitions List (USML) under the ITAR and the Commerce Control Listing (CCL) under the EAR have their own separate listings of Controlled Assets.)
- Have one U.S. Government agency administer U.S. export controls. (Currently the ITAR and its U.S. Munitions List are administered by the Department of State's Directorate of Defense Trade Controls (DDTC). The EAR and its CCL are administered by the Department of Commerce's Bureau of Industry and Security).
- Place U.S. export control enforcement at a singular agency, the Department of Homeland Security's newly created Export Enforcement Coordination Center. (Currently the DDTC through its enforcement arm, the Office of Defense Trade Controls Compliance, enforces the ITAR. The BIS through its enforcement arm, the *Office of Export Enforcement*, enforces the EAR.)
- Run the entire U.S. export control regime using one IT platform.

There is no stated timeline for the accomplishment of the long-term Export Control Reform goals.

Near-Term Goals of Export Control Reform

- Harmonize Controlled Item classification criteria in the USML and CCL, ensuring that both lists use objective standards (i.e., use "positive" quantifiable measurements to classify an item as having true "military utility"), rather than subjective standards (i.e., using the USML rubric "specifically designed or modified for military purposes" to classify ordinary items such as bolts, screws, or blankets)
- Create three-tiered control criteria (i.e., Tiers 1, 2, and 3) for an export license policy that will apply equally to Controlled Assets on the USML and CCL;
- Reclassify Controlled Assets between the USML and CCL, applying the control criteria to each list, and ensuring that a clear jurisdictional "bright-line" exists between the coverage of each list; and

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- Streamline the export licensing process for exports of lower-tiered Controlled Assets to specified U.S. allies and export control treaty partners (Regime Partners and Adherents), while at the same time scrutinizing exports of higher-tiered Controlled Assets to more sensitive destinations, end-uses, and end-users.

Initial Amendments Kicking-Off Export Control Reform

On December 10, 2010, the Department of State published a proposed amendment to ITAR, amending USML Category VII (Tanks and Other Military Vehicles). Category VII is a forerunner to the reformed USML in its entirety. The U.S. Government has indicated that many Controlled Assets currently covered by the USML deemed to be militarily insignificant will be moved from the USML to the CCL. By way of example, approximately 74% of the Controlled Assets currently covered by Category VII of the USML will be moved to the CCL.

By early 2012, the U.S. Government expects the entire USML to be reformed in a similar manner as one revised and tiered list as part of its near-term Export Control Reform goals. The timing for CCL reform is uncertain.

Emerging Export Control Reform Issues to Anticipate and Manage

Reclassification of Controlled Assets

With each successive release of a reformed category on the USML and CCL, businesses with Controlled Assets traditionally classified within that category must conduct a comprehensive reassessment of their current and future portfolio of products, software, technology, and services.

Businesses must establish (a) whether an item is now a Controlled Asset or (b) whether an existing Controlled Asset remains classified under that USML category as revised, is now classified under the CCL, or is no longer classified under either and thus no longer a Controlled Asset.

Businesses with Controlled Assets who fail to perform such a reassessment may run the risk of: (a) complying with the wrong U.S. export control (e.g., complying with the ITAR instead of the EAR), (b) submitting export license applications to the wrong agency (e.g., applying for an export license with the DDTC instead of BIS), or (c) failing to subject items to U.S. export controls as Controlled Assets.

Compliance with Multiple U.S. Export Controls

Traditionally, many businesses possessed Controlled Assets on only one control list and thus complied with either the ITAR or EAR, but not both. Now, based on the early indications given by amended USML Category VII, many items formally covered by the USML will be moved to the CCL, while many will remain on the USML. Businesses will have to establish whether their business portfolio items consist of Controlled Assets governed by both the ITAR and EAR and, if so, they must expand their export control compliance programs to comply with both U.S. export controls.

Single Controlled Asset Groups Covered by both Control Lists

While "positive" quantifiable measurements to classify Controlled Assets may make classification easier on the USML and CCL, such criteria may now cause different product-types from the same product group to be classified on both lists.

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For example, all weaponized armored vehicles will be controlled on the USML. However, cameras that enable the vehicle to see in the dark may be controlled on both the USML and CCL, depending on the performance qualities of the particular camera-type. If the camera is cryogenically cooled, for instance, it may remain as a Controlled Asset on the USML, and if it's not cooled cryogenically, it may end up as a Controlled Asset on the CCL.

Businesses will have to critically evaluate whether their Controlled Asset groups formerly controlled by one control list are now covered by both.

Rolling Reform

The near-term goals of Export Control Reform are rolling out. Release of an amended Controlled Asset category on the USML should necessitate a corresponding release of an amended category on the CCL to assume control of items moved off of the USML.

It is possible that businesses may find themselves in the position of having their Controlled Asset removed from the USML and left wondering as to whether it will be picked up on a forthcoming amended category of the CCL, if at all.

In the unlikely event this occurs, businesses may be forced to take a position with the DDTC and/or the BIS in the absence of controlling authority. In such case, the advice of legal counsel is suggested.

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We are monitoring Export Control Reform issues as they emerge and are positioned to work with clients to construe the new law and implement changes to their export control compliance programs. Visit our Export Control webpage (www.millercanfield.com/services-374.html) for subsequent updates on Export Control Reform, including forthcoming ITAR amendments to the USML and EAR amendments to the CCL.

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