



Defense Trade Advisory Group Working Task #1

Export Control Reform - Unintended Consequences

Plenary Session
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Working Group Members

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Task of DTAG Working Group

- Identify potential negative impacts and unintended consequences of the Export Control Reform (ECR) Initiatives on industry and provide recommendations on how to overcome/minimize such impacts. *Dated July 25, 2013*



Industry's Support of ECR

- Industry supports the ECR initiative to overhaul the nation's export control system and recognize that fundamental reform of the current system is necessary to enhance national security by:





Working Group - Key Discussion Point

- Recalibrating requirements = *Rapid changes to jurisdictional controls and technology classification.*
- Working Group focused on salient long and short term changes industry will encounter in response to the *plethora of regulatory changes.*
- Conscious decision not to get into the weeds on issues that have *"already left the station."*
- Major paradigm shift = Education and familiarization of the new and revised regulations.



Sorting out the Unintended Impact of ECR

Primary focus of proposed and final rules to date:

- Transfer of articles/items from the ITAR to EAR
- Creation of a new 600 series under the CCL
- Reconciling of key definitions and assessing whether such terms are interchangeable between the applicable regulations.

*“There are known knowns; there are things we know that we know.
There are known unknowns; that is to say,
there are things that we now know we don't know.*

***But there are also unknown unknowns –
there are things we do not know we don't know.”***

Donald Rumsfeld, Former U.S. Secretary of Defense

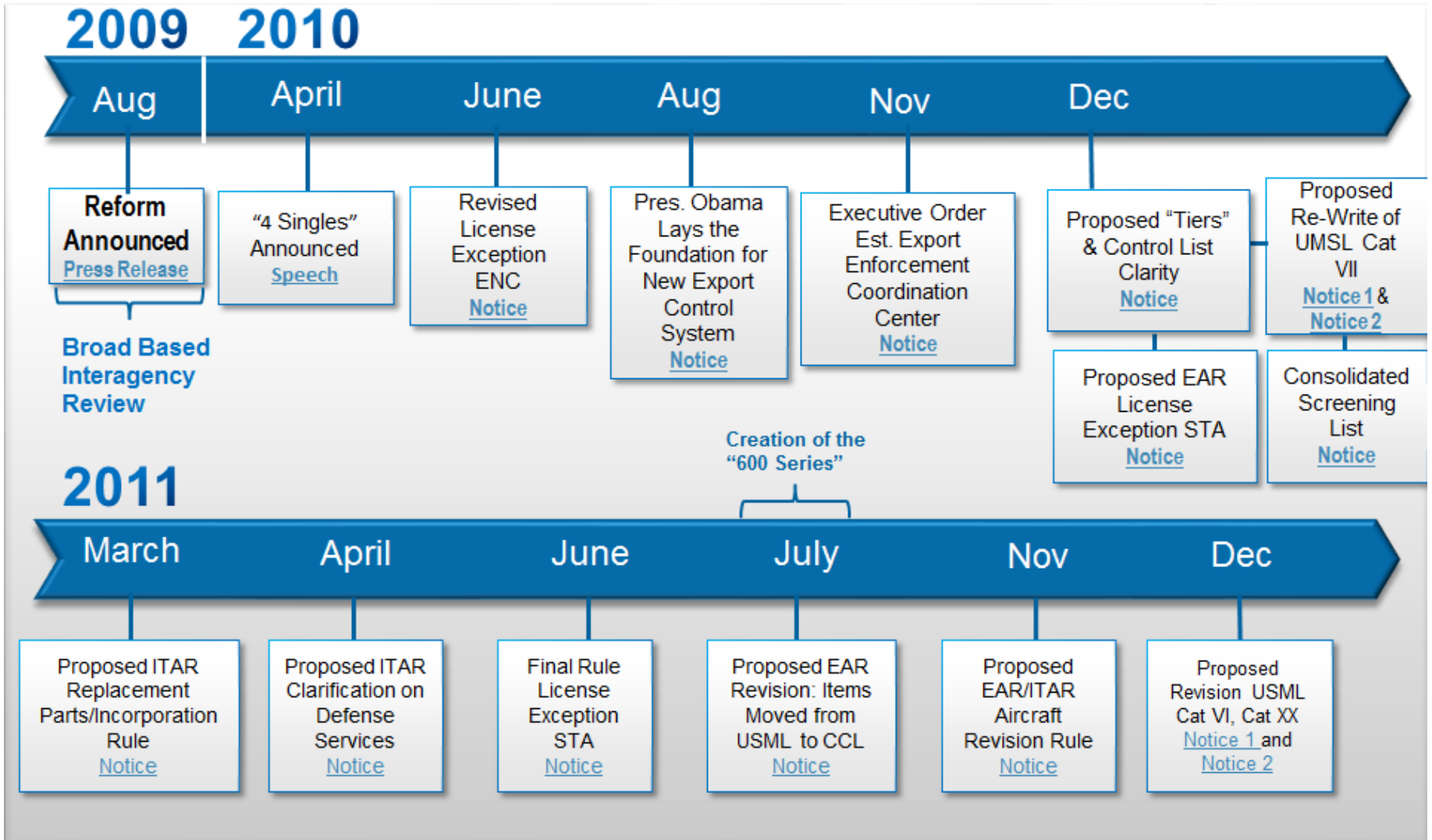


For the Prepared & Unprepared





Snap-Shot of Significant ECR Events





Snap-Shot of Significant ECR Events (Cont.)

2012

2013

March

Opening of Export Enforcement Coordination Center (E2C2)
[Notice](#)

April

Final Revision/Proposed Rule USML Cat VIII
[Notice](#)

June

Revised Definition of "Specially Designed"
[DDTC & BIS](#)

Jan

NDAA Includes Authorization for Satellite Exports
[Notice](#)

Mar

Exec. Order, First Formal Notification of Reform Process
[Notice](#)

Foreign Trade Regulation AES Updates
[Notice](#)

2013

Apr

First pair of ECR Final Rules: Revisions to USML Cat VIII, XIX, XXI, "Specially Designed" and "Transition" Rules
[DDTC and BIS](#)

BATF&E USMIL ECR Update
[Notice](#)

May

Proposed Rule USML Cat XV, Creation of "500 Series," Definition of "Defense Service"
[DDTC and BIS](#)

July

ECR Final Rule: Revisions to USML Cat VI, VII, XIII, XX
[DDTC and BIS](#)

July

Proposed Rule USML Cat XI
[DDTC & BIS](#)

Oct

Initial Implementation of ECR Corrections
[DDTC & BIS](#)

Effective Date: Revisions to USML Cat VIII, XIX, XXI, "Specially Designed" and "Transition" Rules
[DDTC and BIS](#)



Snap-Shot of Significant ECR Events (Cont.)

2014

Jan

Continued
Implementation
of ECR
Corrections
[DDTC](#) & [BIS](#)

Final Rule:
Revisions to
USML Cat IV,
V, IX, X
[DDTC](#) and
[BIS](#)

Effective
Date:
Revisions to
USML Cat VI,
VII, XIII, XX
[DDTC](#) and
[BIS](#)

--- As of 01/07/2014



Issuance of Federal Register Changes

Federal Register **86 +** Industry is drinking from a fire hose



Concern # 1 – Export Control Regimes Under ECR



- **ITAR** – Continues to maintain regulatory control over defense items (Those items considered critical to maintaining U.S. military strategic advantage). **No change.**
- **600.x-Series** – Is the new regulatory list that has also resulted in a new regulatory regime to control those less sensitive defense items. The “regulatory regime” has fewer restrictions than the ITAR, but greater restrictions than what is currently called out for under the EAR. **New**
- **Legacy CCL Commodities** – Continues to maintain regulatory control over dual-use commodities requiring. **No change.**



Concern # 2 - General Industry Apprehension

- Enforcement and compliance variations between the USG agencies.
- Compliance versus enforcement under ECR.
- Voluntary Self Disclosures under ECR.
- Dual & multiple agency disclosure under ECR.
- Disclosure to one agency and not the other resulting in “directed” disclosure under ECR.

Recommendation: USG compliance and enforcement entities must remain sensitive that administrative errors will occur as industry navigates through new licensing and jurisdictional changes.

Concern # 3 – Temporary Destabilization of Industries' Compliance Posture



- Managing the continuous stream of FR changes has unintentionally destabilized industry's ability to effectively establish consistent compliance processes.
- Industry's concern to remain compliant and the USG's response during this major jurisdictional shift.
- ECR changes to date has produced challenging business maneuvers for defense manufactures and suppliers to **fully implement and manage** the jurisdictional changes and regulatory mandates.

Recommendation: USG Regulators should remain sensitive that industry will require time beyond the implementation dates, grandfathering, etc. to mend the link in the chain.



ECR Concern # 4 – Extent of ECR Implementation Cost (Direct & Indirect)

Significant time, money, and company resources are being invested in evaluating the operating cost of transitioning items and the general implementation of ECR.

- Tied to functional disciplines (*e.g., supply chain; procurement; engineering; programs; etc.*) in learning and complying with the regulation (*e.g., ongoing reclassification and jurisdictional changes*);
- *Employing and reassigning additional staff to work through the regulatory changes;*
- *Changes in production and information technology processes; and*
- *Employing consultants or other sources of expertise to help with the regulatory compliance changes.*

Recommendation: USG regulators must remain sensitive to the effects of regulatory changes and industry's global competitiveness. USG regulators must be open and agile to industry comments and simplification as industry implements changes.

ECR Concern # 5 –Managing Existing Authorizations



Existing Technical Assistance Agreements

- Discerning the appropriate licensing pathways for post transition activity and associated services on transitioned items becomes problematic and complex during the continued management of the authorization. Ability to obtain Commerce Licenses become relevant and existing licenses (DSP-5s; 61s; 73s) in furtherance of take on varying (transitioning & grandfathering) expiration dates.

Minor Amendments to Existing Agreements

- Agreements containing transitioning and non-transitioning items would remain valid until expiration, or for two-years from the effective date of final rule. Excessive processing of paperwork with little return or value.

ECR Concern # 5 –Managing Existing Authorizations



Transitioning/Grandfathering

- Pre/Post implementation creates multiple transaction options potentially involving the same items presents confusion and for CBP Outbound Officers and potential unwanted delay, detentions, and seizures.

Foreign Military Sales Activity

- FMS activity remains under the jurisdiction of State; however, associated parts/components transitions under the jurisdiction of Commerce. Jurisdiction of transitioned items when sold, leased or loaned by the DOD under FMS is still unclear. EAR 734.3 (1) (b) (vi) – Items not subject to EAR.

Recommendation: Continuation of the publication of FAQs to address dual jurisdictional and licensing pathways.

ECR Concern # 6 – Use of License Exception Strategic Trade Authorization



- Prerequisites requirements applied to exporter and foreign end-users transacting 600-series items creates administrative duplicity and dampens effective trade between the U.S. and its most favored allies.
- Requirement for all non-U.S. parties to the transaction to have been previously approved on a DDTC or BIS license. Purpose of this requirements is to provide assurances that the non-U.S. parties are trustworthy.
- An unending onerous requirement on both U.S. and Non-U.S. parties.

Recommendation: DDTC/BIS establish and make available a public database of non US parties listed on an approved list.



Final Comments (The Gales of ECR)



.... Or they can appear as a dynamic, inter-dependent series of incremental improvements to the U.S. export regime. *Difference is preparation and planning.*



Defense Trade Advisory Group (DTAG)

**Export Control Reform Impacts
on Industry**





Additional WG Slides

Observation – Applicability of Definitions Unclear in ITAR



Observation: The language constructs used in the ITAR and EAR are completely different. Among other differences, the application of definitions for terms used varies greatly. Where the EAR indicates when a global definition applies to a term via double-quotes and when a local definition applies to a term via single-quotes, the ITAR does not. Further, some definitions for the same term differ between the regulations.

Impact: Within the ITAR, it is unclear when a definition applies. For example, the term “aircraft” is defined in §121.3. The definition states that it applies to Category VIII. However, industry has been told that the definition applies only to the term “aircraft” used in VIII(a), and not to the term “aircraft” used in VIII(f). Without knowing when definitions apply and when they do not, the exporter is unable to self-classify with confidence. Inconsistent use and definition of terms between the regulations can also add confusion.

Recommendation: Employ the use of the EAR language constructs in the ITAR, in particular, the standards used to indicate when the definitions for various terms apply. In addition, attempt to align the language more closely by using the same terms where possible.



USG & Industry Perspectives

- The USG has been living and breathing ECR for years
 - Development of proposed rules
 - Review of industry comments for incorporation in final rules
 - Final rules, resulting in “cleanup” rules for more clarification
- Trade compliance in industry typically understaffed
 - Many within industry have difficulty finding the time to read proposed rules
 - Many within industry have difficulty finding the time to read final rules
 - particularly if the published category is not relevant, but the USG is embedding other information within the rules
 - Industry doesn’t have the “luxury” of not getting it right



Some Additional ECR Concerns

- Original Design Intent (Over Reliance on “Specially Designed”
 - What performance levels are the regulators specifically seeking to specify?
 - Reduced the burden of the ITAR, but transferred to complexity under the EAR by creating a new section of the EAR. Subsequently, a sanity check of the EAR should be highly consider to reconcile added changes.