

Re-focusing Export Control:

A Review of the Obama Administration's Export Control Reform Initiative and Suggestions for the Future

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Table of Contents

- I. Introduction.....2
- II. Technology Defined.....4
- III. Current U.S. Export Control Legal Framework6
- IV. Current Issue with the U.S. Export Control Legal Framework.....11
 - a. Extension of Current Expired Authorities Does Not Address Technology Export Issues of Today.....11
 - b. Licensing Process is Overly Bureaucratic and Lacks Transparency.....12
 - c. Jurisdictional Concerns and Inconsistencies.....13
 - d. Controlled Items Often Do Not Have Sensitivities That Warrant Control Under the ITAR or EARs.....15
 - e. End-Use and End-User Monitoring Requirements Are Insufficient17
 - f. The Inadequacies of the Current Export Control Framework Harm U.S. Industry.....18
- V. Obama Administration Export Control Reform Efforts to Date.....20
 - a. Creation of a “Positive” USML List.....21
 - b. Creation of the “Series 600” for Commerce Control List (CCL) Items.....23
 - c. Strategic Trade Authorization (STA) Exemption from the CCL.....24
 - d. DoD Legal Concurrence Requirement.....25
 - e. Examination of ECRI Efforts to Date.....25
- VI. Legal Solutions to Strengthen Export Control Reform.....27
 - a. New Congressional Legislation.....28
 - i. Single Export Control Agency (SECA).....28
 - ii. Single Export Control List (SECL).....31
 - iii. Enhancing End-Use and End-User Monitoring and Enforcement.....32
 - b. Strengthening Controls over Sensitive Technologies Globally.....33
 - i. Defense Trade Treaties.....34
 - ii. Ratification of the United Nations Arms Trade Treaty.....36
- VII. Conclusion.....38

I. Introduction

Technology allows society to advance in ways that were previously inconceivable. Technology makes information sharing instantaneous, travel faster, and has given birth to an entire generation that dreams up inventions and innovations previously impossible just a few years ago. Just as technology has the potential to advance the world, it is equally capable of contributing to its destruction.¹ Military technology in particular has the potential to protect, but also has unimaginably damming consequences when used with malicious intentions.

The U.S. export control regime seeks to protect military and sensitive technologies from falling into the hands of those adverse to U.S. national security interests. The current export framework is decades old and based on a Cold War-era conditions that are not compatible with meeting emerging U.S. national security challenges and foreign policy objectives.² The Obama Administration is making great strides overhaul the current U.S. export system through the Export Control Reform Initiative (ECRI). The goal of the ECRI effort is to focus on “controlling the most critical products and technologies” while “enhancing the competitiveness of key United States manufacturing and technology sectors.”³ Ideally, new regulatory efforts will place “higher fences” around fewer and more sensitive items while eliminating or reducing controls on items

¹ See generally Jesse Emspak, *10 Good Techs Turn Bad*, Discovery News (October 14, 2013, 07:00AM EST), <http://news.discovery.com/tech/gear-and-gadgets/10-good-techs-turned-bad-131012.htm>.

² *Export Control: First Final Rules Go into Effect*, U.S. State Department Media Note, (October 15, 2013), <http://www.state.gov/r/pa/prs/ps/2013/10/215428.htm>

³ Press Release *President Obama Lays the Foundation for a New Export Control System to Strengthen National Security and the Competitiveness of Key U.S. Manufacturing and Technology Sectors*, White House, Office of the Press Secretary (August 30, 2010), <http://www.whitehouse.gov/the-press-office/2010/08/30/president-obama-lays-foundation-a-new-export-control-system-strengthen-n>. [hereinafter 2010 White House Press Release] The president first announced his intention to seek an overhaul of the export control system in August 2009.

of limited national security concern.⁴ Proponents of the ECRI reform see it as an important effort to protect U.S. national security while ensuring the U.S. remains a leader in science and technology development and innovation.⁵ They also see ECRI as promoting interoperability between the U.S. partners and allies and strengthen its position within global competitiveness.⁶ Conversely, opponents of ECRI are concerned it will lead to deregulation of sensitive technologies, resulting in threats to U.S. national security by putting destructive technologies into the hands of human rights violators, enemy combatants, and other bad actors.⁷

This paper examines the Obama Administration's ECRI effort to date. First, this paper will discuss technology and how its definition covers a variety of facets. Second, this paper will review the legislative framework that creates the current export regime. Third, this paper will provide a brief overview of the issues caused under the current regime and how it falls short of accomplishing the objectives of U.S. export control. Fourth, this paper will discuss the Obama Administration's recent efforts to implement some of the recommended ECRI proposals and will make observations about the potential for its effectiveness. Fifth, this paper will offer

⁴ *USA Moves to Improve Arms Export Regulation Process*, Defense Industry Daily (July 20, 2012, 19:25 UTC), <http://www.defenseindustrydaily.com/usa-moves-to-reform-arms-export-regulation-process-04665/>.

⁵ See Coalition for Security and Competitiveness, <http://www.securityandcompetitiveness.org/members/>. Membership includes Aerospace Industries Association, American Association of Exporters and Importers, AMT - The Association for Manufacturing Technology, Business Roundtable, Chamber of Commerce Space Enterprise Council, Coalition for Employment Through Exports, Electronic Industries Alliance, General Aviation Manufacturing Association, Government Electronics and Information Technology Association, Industrial Fasteners Institute, Information Technology Industry Council, National Association of Manufacturers, National Defense Industrial Association, National Foreign Trade Council, Satellite Industries Association, Space Foundation, TechAmerica, and U.S. Chamber of Commerce.

⁶ *Id.*

⁷ See generally, David Fitzgerald, *Leaving the Back Door Open: How Export Control Reforms Deregulation May Harm America's Security*, 15 N.C. J.L. & Tech. On. 65 (2014); William Hartung, *Risks and Returns: The Economic Illogic of the Obama Administration's Arms Export Reforms*, International Policy Report, Center for International Policy (August 2013).

suggestions for building on and improving the Obama Administration’s current ECRI in order to effectively overhaul U.S. export control. Finally, this paper will summarize and conclude.

II. Technology Defined

Controlling sensitive technologies starts by defining the parameters of what is included in the definition of a technology. Defining what constitutes “technology” is complex and oftentimes nonsensical and circular. This is because technology can be an item, the information that created the item, or the outputs of what an item does. In order to control the sensitive technology, any regulation must start by defining the parameters of what is actually controlled. And as one can imagine, way technology is defined by norms and U.S. government agencies can vary just enough to be problematic from a compliance standpoint.

For example, recent norms in the transfers of technology in the international context are generally categorized into three elements: material basis, the know-how, and the operation of the technology.⁸ The material portion of technology represents the equipment, metal goods, electronics, mechanical instruments, and automatic machinery and instruments.⁹ The know-how includes software, manuals, designs, technical advice, information, and assistance.¹⁰ Operation of the technology encompasses the functioning portion of the material, including service, training, and usage.¹¹

Under the International Traffic in Arms Regulation (ITAR)¹², the Department of State is charged with overseeing the military export regime and takes a different approach to defining

⁸ Jakik Kasto, *International Law of Technology International Law Series No. 1*, 80-81 (1992).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See detailed explanation of ITAR in Section III of this paper.

technology through a series of definitions and terms. For instance, “defense article” includes technical data recorded or stored in any physical form, models, mockups, or other items that reveals technical data directly relating to items designated on the U.S. Munitions List (USML).¹³ “Defense service” includes furnishing design, development, engineering, manufacturing, production, assembly, testing, repair maintenance, modification, operation, demilitarization, destruction, processing, or use of defense articles. It also includes furnished technical data controlled under the USML, as well as military training of foreign units.¹⁴ ITAR also defines “technical data” as the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification of defense articles.¹⁵ Through this various terminology, ITAR defines technology very broadly and for all practical purposes includes every piece of information, tangible and intangible, related to a defense article. For example, a fighter jet specifically designed for the U.S. Air Force is ITAR-controlled, including all the parts, schematics, operating manuals, engineering plans, training materials, and practically every nut, bolt, and window pane used to hold the fighter jet together.¹⁶

The Export Administration Regulations (EARs),¹⁷ which are administered by the Department of Commerce, takes another approach to defining technology. The EARs view “technology” as the specific information necessary for the development, production, or use of a product.¹⁸ “Technical data” also includes many forms such as blueprints, plans, diagrams, models, formulae, tables, engineering design and specifications, manuals, and instructions

¹³ 22 C.F.R. § 120.6 (2014).

¹⁴ 22 C.F.R. § 120.9 (2014).

¹⁵ 22 C.F.R. § 120.10 (2014).

¹⁶ See generally The F35 Lightning II, <http://www.jsf.mil/index.htm>. (Last visited Apr. 22, 2104).

¹⁷ See detailed explanation of EAR in Section III of this paper.

¹⁸ 15 C.F.R. § 772.1 (2014)

written or recorded on other media or devices such as disk, tape, and read-only memories.¹⁹ The EARs also provides detailed definitions, including schematic and payloads for many of the technologies on the Commerce Control List (CCL), which require licenses prior to export²⁰ such as missiles, medical devices, unmanned aerial vehicles, civil aircraft, as well as many others.²¹ EARs, therefore also claims a broad definition of technologies.

These definitions show export control regulations today do not simply look at the item being exported as a standalone object and instead encompass every aspect of these sensitive technologies. Additionally, it illustrates the complexity of determining what is controlled under what regulation because the definitions vary from agency to agency. This adds to the complexity of not only enforcing export control regulations, but also ensuring compliance from an industrial standpoint.

III. Current U.S. Export Control Legal Framework

The United States leads the world in conventional arms trade and also has a robust stake in the export of dual-use technologies.²² Congress specifically noted:

[T]he United States and other free and independent countries continue [to] have valid requirements for effective and mutually beneficial defense relationships in order to maintain and foster the environment of international peace and security essential to social, economic, and political progress. Because of the growing cost and complexity of defense equipment, it is increasingly difficult and uneconomic for any country, particularly a developing country, to fill all of its legitimate defense requirements from its own design and production base.²³

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Richard Grimmett, *Conventional Arms Transfer to Developing Nations 2003-2010*, 3 (Congressional Research Services, September 22, 2011). Available at

<https://www.fas.org/sgp/crs/weapons/R42017.pdf>.

²³ 22 U.S.C. § 2751 (2010).

Export regulation of sensitive technology is critical to ensure U.S. national society, foreign policy, and economic considerations are not undermined because many U.S. technologies find their way to overseas purchasers and buyers.²⁴ The Obama Administration noted the goals of export control include “ensuring U.S. military forces, and those of allies and partners, continue to enjoy technological superiority over potential adversaries...[e]nhancing the ability of allies and partners to deter or defend themselves against aggression...[p]romoting regional stability, peaceful conflict resolution, and arms control.”²⁵ These objectives and goals are regulated by many U.S. governmental agencies.²⁶ The two main legislatively authorized agencies that implement and oversee the U.S. export control regime are the Department of State and the Department of Commerce.

The Department of State has a robust role in the export control framework. In 1976, Congress passed the Arms Export Control Act (AECA).²⁷ The AECA gives authority to the President to control the import and export of defense articles and defense services in furtherance of U.S. national security and foreign policy, as well as world peace.²⁸ AECA requires third-party transfer restrictions on exported items and gives notification requirements of pending and actual

²⁴ *Id.*

²⁵ Presidential Policy Directive -- United States Conventional Arms Transfer Policy, PPD-27 (Jan. 15, 2014), <http://www.whitehouse.gov/the-press-office/2014/01/15/presidential-policy-directive-united-states-conventional-arms-transfer-p>.

²⁶ See U.S. Department of Treasury, the Office of Foreign Assets Control (OFAC). <http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx> (last visited 3/30/2014). OFAC generally focuses on the geographical destination of an item rather than the nature of the item itself.

²⁷ 22 U.S.C. § 2278 (2010).

²⁸ *Id.* at (a)(1).

arms sales to Congress.²⁹ Under the AECA, the President is authorized to designate technologies as defense articles or services and can promulgate regulations of such items import and export.³⁰

Executive Order 11958 delegates regulatory authority of AECA to the Department of State.³¹ Within the Department of State, the Directorate of Defense Trade Controls (DDTC) oversees the export of defense articles and services that are primarily military in nature under the ITAR.³² Within the ITAR, the USML lists 21 general categories of defense articles and services that DDTC is responsible for overseeing and regulating.³³ These categories include firearms; guns and armament; ammunition and ordnance; launch vehicles, missiles, ballistic missiles, rockets, torpedoes, bombs, and mines; explosives and energetic materials; vessels of war, tanks and military vehicles; aircraft and associated equipment; military training equipment and training; protective personnel equipment and shelters; military electronics optical and guidance; and control equipment; auxiliary military equipment; toxicological agents; spacecraft systems and associated equipment; nuclear weapons, design, and testing; classified articles not otherwise enumerated; direct energy weapons; and submersible vessels, oceanographic and associated equipment.³⁴ There is no positive, specific list of item covered by the USML's 21 categories.

The Department of Commerce also plays a significant role in the export control framework. Congress passed the Export Administration Act (EAA) in 1979,³⁵ which laid the

²⁹ *Id.*; See also 22 U.C.S. § 2776 (2010).

³⁰ *Id.* at (f).

³¹ Exec. Order No. 11958 (1977).

³² U.S. State Department, Directorate of Defense Trade Controls (DDTC) Homepage, <https://www.pmddtc.state.gov/> (Last visited Mar. 30, 2014).

³³ *The United States Munitions List (USML)*, 22 C.F.R. § 121.1 (2014)

³⁴ *Id.* at Category I- XXI.

³⁵ Export Administration Act of 1979, Pub. L. 96-72, 93 Stat. 503, 50 U.S.C. app. 2401 – 2420 (1979).

foundation for the Export Administration Regulations (EARs).³⁶ The EARs regulate “dual use” items that have both commercial and military applications and the potential to prompt national security concerns.³⁷ Some controls are designed to restrict access to dual use items by countries or persons that might apply such items for purposes inimical to U.S. interests.³⁸ These include controls designed to stem the proliferation of weapons of mass destruction and controls designed to limit the military and terrorism support capability of certain countries.³⁹ Examples of dual use items include inflatable boats and components; information security technology and information; lavatories for military aircraft; life jackets; mirrors; modems; paraffin wax; non-military remotely piloted vehicles; shot guns shells; and slew of other items having potential sensitivities if used for nefarious purposes.⁴⁰ Dual use controls are considered part of the export regime that limits exports of sensitive technologies for national security and foreign policy reasons.⁴¹

Additionally, the Department of Commerce, through the Bureau of Industry and Security (BIS) maintains the CCL. The CCL is a positive, accumulative list of EARs that codes each good or item subject to export controls or licensing procedures. Some dual-use technologies require a license from the Department of Commerce prior to exportation. However, many of the

³⁶ See John T. Matersons, *Legal Authority Export Administration Regulation*, The Office of the Chief Counsel for Industry and Security (Jan. 23 2013). Available at http://www.bis.doc.gov/index.php/forms-documents/doc_view/16-legal-authority

³⁷ 15 C.F.R. § 730.1 (2014); 15 C.F.R. §730.3 (2014).

³⁸ 15 C.F.R. § 730.6 (2014).

³⁹ *Id.*

⁴⁰ 15 C.F.R § Part 744 (2014); *Commerce Control List*, Supp. 1 to Part 744, Index 1, Alphabetical Index to the Commerce Control List, March 26, 2014. Available at <https://www.bis.doc.gov/index.php/regulations/commerce-control-list-ccl>

⁴¹ 15 C.F.R. § 732.2(a)(2) (2014)

items listed on the CCL are exempt from the licensing process in their own right or may be exempt from licensing based on the end-user export location.⁴²

Not all agencies having a significant role in the export control framework are supported by Congressional authorization for the role they play. One agency is noticeably absent from the legal framework is the Department of Defense (DoD). DoD involvement with export determinations is a consultation role for licensing applications received by the Department of State and the Department of Commerce. Consultations are coordinated through the DoD Defense Technology Security Administration (DTSA). DTSA aims to preserve the U.S. defense edge by protecting the proliferation and diversion of technology that could prove detrimental to U.S. national security.⁴³ DTSA engages U.S. partners and allies to increase interoperability and protect critical technologies, as well as facilitates the health of the U.S. industrial base.⁴⁴ DTSA is responsible for coordinating the approximately 30,000 annual cases of direct commercial sales export licenses and commodity jurisdiction requests sent to DoD and received from the Departments State and Commerce.⁴⁵ Most importantly, DTSA develops and adjudicates the final DoD position based on input provided by DoD departments and agencies, and recommends final action on licensing applications to the Department of State or Commerce consistent with U.S. national security and DoD technology security objectives.⁴⁶

⁴²*Export Administration Regulations, supra* note 35.

⁴³ Defense Technology Security Administration Homepage, <http://www.dtsa.mil/>. (Last visited Mar. 31, 2014)

⁴⁴ *Id.*

⁴⁵ Licensing Directorate, DTSA, <http://www.dtsa.mil/Directorates/Licensing> (last visited Mar. 31, 2014).

⁴⁶ *Id.*

IV. Current Issue with the U.S. Export Control Legal Framework

As the leader of conventional arms transfers world-wide, the U.S. rules of export control profoundly influence who U.S. industry can conduct with business abroad. Based on a 2011 Congressional Research report, the United States owns half of the global arms trade industry and in 2010 entered into arms sales agreements valued at \$21.3 billion.⁴⁷ The 2010 leading purchasers of U.S. exported conventional arms included Saudi Arabia, Egypt, Pakistan, Taiwan, Israel, South Korea, Australia, Japan, Greece, and the United Arab Emirates.⁴⁸ While some might conclude the United States strength in the conventional arms market is sufficient to leave the current export control regime as is,⁴⁹ the strength and health of the U.S. defense industry in relation to U.S. national security concerns is precisely the justification for why an overhaul of the export control regime is necessary.

a. Extension of Current Expired Authorities Does Not Address Technology Export Issues of Today

While the AECA is still in effect and grants power to the President to oversee the most sensitive of U.S. technologies, the EAA that controls the dual-use technologies covered by the EARs overseen by the Department of Commerce expired in 1994.⁵⁰ Every President since that time has authorized the continuance of the EAAs provisions in place at the time of its expiration

⁴⁷ *Grimmett, supra* note 19, at 3.

⁴⁸ *Id.*

⁴⁹ See *Fitzgerald, supra* note 6

⁵⁰ See *Matersons, supra* note 31. The Act expired in August 20, 1994, and was reauthorized by Pub. L. 106-508 (November 13, 2000). During the lapse, a national emergency declared under Executive Order 12924 (August 19, 1994) and extended by annual Presidential notices, continued in effect the provisions of the Export Administration Regulations. The Act lapsed again on August 20, 2001 and the President, through Executive Order 13222 of August 17, 2001 (66 Fed. Reg. 44025 (August 22, 2001)), has continued the Regulations in effect under the International Emergency Economic Powers Act.

via executive order under the International Economic Emergency Powers Act.⁵¹ Attempts to enact export legislation have not come to fruition. The Senate was successful in passing the Export Administration Act of 2001 in September 2001, which was intended to revamp the EAA.⁵² However, Congress has taken no action to overhaul the legislation since. Thus, the current dual-use control system is based on Cold War mentalities and does not reflect the realities of unconventional warfare and non-state actors faced by the United States today.

b. Licensing Process is Overly Bureaucratic and Lacks Transparency

The rigorous and confusing labyrinth of regulations that controls exports is often times consuming and cumbersome. This is true regardless of whether the Department of State, Commerce, or both are responsible for reviewing the export request. Approved export license determinations can take anywhere from months to several years to obtain.⁵³ In addition, decision-making behind such determinations lack transparency and is often nebulous. Many decisions are made on a case-by-case basis with no clear process of the rationale behind the determination.⁵⁴ Lack of transparency is also fueled by the fact that neither the Departments of State or Commerce identify which agencies input was critical to the disapproval of an export application.⁵⁵ In addition, there is also a lack of an appeals process for unfavorable decisions.⁵⁶ For example, if DTSA makes an ultimate determination that a certain export licenses should be

⁵¹ *Id.*

⁵² Export Administration Act of 2001, S.149.ES, 107th Cong. (2001).

⁵³ 2010 White House Press Release, *supra* note 3.

⁵⁴ *Export Control: Commercial Military Sales: the United State Munitions List; and the International Traffic in Arms Regulations*, 20 No. 3 Intl. Quarterly ART 2, Sec. E(1)-(2) (July 2008).

⁵⁵ *Id.*

⁵⁶ *Id.*

denied by the Department of State or Commerce, it is unclear if an appeals process is available to industry and to whom such an appeal should be made.

Frustrations with the timeframe for approvals and lack of transparency have an increasing impact on U.S. industries. According to the Coalition for Security and Competitiveness, the interagency squabbles, lack of transparency, lack of expertise on new technologies and non-collocation of technical expertise leads to confusing and inconstant results.⁵⁷ The lengthy and often confusing licensing processing times and the lack of transparency especially affect the small and medium enterprises' (SMEs) ability to compete in international markets.⁵⁸ SMEs oftentimes do not have the resources that large firms can dedicate to sorting out the complex compliance requirements.⁵⁹ Even with the Obama Administration's ECRI underway, the SME community is still asking the President to identify ways BIS and DDTC can be more accessible, responsible, and user friendly to industry.⁶⁰

c. Jurisdictional Concerns and Inconsistencies

Determining whether the Departments of States or Commerce, or other U.S. government agency has jurisdiction over an export controlled items is often difficult to ascertain. The EARs specifically note that “[one] should be aware that in some instances [one] may have to comply with more than one regulatory program.”⁶¹ The intricate network of export regulations and implementing agencies, contribute to confusion among manufacturers about which technologies

⁵⁷ Letter from The Coalition for Security and Competitiveness, to the President on 2010 CSC Recommendations to Create a 21st Century Technology Control System (Jan. 11, 2010). Accessible at <http://www.securityandcompetitiveness.org/proposals/show/2253.html>. [hereinafter *CSC Letter to POTUS*]

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at Rec. #3.

⁶¹ 15 C.F.R. § 732.2(a)(2) (2014).

are controlled and which ones do not require a license. As noted earlier, “technical data” is particularly problematic because ITAR and EAR defines the term slightly differently.⁶² An analysis of what the intent was at the time of development of a particular technology or product was created adds additional confusion.⁶³ Intent dictates whether a technology is controlled by ITAR or EAR and oftentimes not easily discernible.⁶⁴ Sometimes it is unclear if a product was “originally specifically designed, developed, configured, adapted or modified in any way for a military application, military end-item or a commercial satellite, spacecraft or launch application,” particularly if it is currently used in commercial application.⁶⁵

While the ITAR and EARs both have tools to determine whether an item is subject to a particular jurisdiction, this does not always resolve the issue.⁶⁶ Each agency operates under unique procedures and applies its own policies independent of the other.⁶⁷ Neither the Departments of State nor Commerce review or coordinate license applications with the other, leading to gaps and disparate licensing requirements for nearly identical products.⁶⁸ In some cases duplicative authorities create confusion over whether both agencies require a license for a technology and related information and there is often inconsistency about whether an item is controlled and by whom.⁶⁹ The export control framework creates redundancies and jeopardizes

⁶² *Supra* notes 14 and 18.

⁶³ Kevin Wolf, Partner- Bryan Cave LLP, *ITAR/EAR Export Control Jurisdiction Issues for Exporters and Government Contractors*, National Conference Management Association World Congress 2006 (April 10, 2006). Available at <http://www.ncmahq.org/files/filedownloads/ppts/1302.ppt>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See DS-4076 Commodity Jurisdiction (CJ) Determination Request Form, http://pmdtc.state.gov/commodity_jurisdiction/documents/DS4076.pdf;

⁶⁷ *2010 White House Press Release*, *supra* note 48.

⁶⁸ *Id.*

⁶⁹ *Id.*

each agency's cases, causing export enforcement challenges overall.⁷⁰ As noted above, this is particularly challenging to the SMEs who lack resources to sort out solutions to potential jurisdictional issues.⁷¹

d. Controlled Items Often Times Do Not Have Sensitivities That Warrant Control Under the ITAR or EARs

Between the ITAR and EARs, the net that covers export control is very broad, and in many instances catches items that have no particular sensitivity merely because the U.S. military commissioned the development of a technology. Export bureaucracy is wasted on license application and reviews for technologies that raise no national security concerns and have no bearing on protecting the U.S. technological edge.⁷²

Many items designed for military purposes end up being controlled when no real sensitivity exist because the USML categories under ITAR are so broad and all encompassing. For example, in 2007 when the Zodiac Group attempted to sell toilets designed for airplanes to foreign buyers, it learned that the lavatories were ITAR-controlled because it was originally designed for use in military planes.⁷³ Similarly, many innocuous items like nuts, bolts, and tubing used in tractors and earthmovers, alongside military aircraft, have been caught in ITAR's net and require a license for export.⁷⁴ Clearly the sensitivities of the equipment and material

⁷⁰ *Id.*

⁷¹ *CSC Letter to POTUS*, supra note 54.

⁷² *Background on Export Control*, International Trade Advisors, <http://www.internationaltradeadvisors.com.au/index.php/u-s-export-reform/moving-controlled-items-from-the-itars-usml-to-the-ears-ccl/>.

⁷³ Cliff Burns, *Toilet Training*, Export Law Blog (May 23, 2007, 4:12 PM), <http://www.exportlawblog.com/archives/date/2007/05>.

⁷⁴ *Freeing bolts and gear knobs: Industry hopes new Congress will untie some export-restrictions knots*, Armed Forces Journal (January 1, 2007), <http://www.armedforcesjournal.com/freeing-bolts-and-gear-knobs/>.

involved in these examples are not what Congress had in mind when it created the regulations to assure a U.S. technological edge or protect national security. It is hard to imagine a scenario where a toilet could be used in the wrong hands to undercut U.S. national security interests or be considered so ground-breaking to justify the need to control it. While this example is comical and perhaps extreme, the case of brake pads for M1A1 tankers also illustrates a more common place example of the over-inclusive export control web. The brake pads used on the M1A1 tanker are virtually identical to the brake pads used on ordinary fire trucks.⁷⁵ The brake pads classified for use on fire trucks can be exported virtually to all countries without a license, but the tank pads require a license and end use controls prior to export for a nearly identical product.⁷⁶

The lack of sensitivity of some U.S. controlled technologies is also apparent when considering the rapid development and relevance of current technologies. The lifecycles for many new technologies is currently six months to a year and the archaic regulations created decades ago do not keep pace with this ever-changing evolution.⁷⁷ Calls for the constant evaluation of items controlled on the CCL are repeatedly sought to ensure what is being controlled is not germane from a national security standpoint.⁷⁸ Additionally, the CCL does not currently undergo a comparison of the foreign availability of similar U.S. controlled technologies.⁷⁹ Often time technologies controlled on the EAR actually become less sensitive when compared to what is already commercially available from U.S. partners and allies.⁸⁰

⁷⁵ *Id.*

⁷⁶ 2010 White House Press Release, *supra* note 3.

⁷⁷ CSC Letter to POTUS, *supra* note 54, at Rec. #6

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

e. End-Use and End-User Monitoring Requirements Are Insufficient

Both ITAR and EARs attempt to curtail the transfer of sensitive technologies through end-use monitoring requirements. Technologies transferred under ITAR may not be used for unauthorized purposes and the receiving party must agree not to re-transfer title or possession of such defense articles or services.⁸¹ The ITAR end-use and end-user requirements for exported items controlled under the USML are monitored under the Blue Lantern Program, which reviews the end-use of defense articles, defense services, and brokering activities exported through commercial channels.⁸² While the Blue Lantern program does make strides to monitor the end-use of those technologies most vulnerable to exploitation, it is a resource constrained program.⁸³ In 2012, the Blue Lantern Program on a budget of \$2.1 million was only able to initiate 820 checks on end-use and was only able to close 706 cases out of the 86,000 license applications received for the same year.⁸⁴ This means that less than 1% of the most sensitive technologies exported from the United States were verified to be compliant with end-use and end-user requirements.⁸⁵

The EARs is similarly littered with prohibitions on end-use and end-users and restrictions on re-transfer to third parties.⁸⁶ Despite these restrictions, enforcement of end-use monitoring is often non-existent. For example, Congressional hearings after the Gulf War revealed that of the 771 export licenses granted for Iraq, only one was ever checked for its end-use to ensure it was

⁸¹ 22 U.S.C. 2753(a)(2).

⁸² 22 U.S.C. 2785 (2010)

⁸³ End Use Monitor of Defense Articles and Services Commercial Export FY12, http://pmdtc.state.gov/reports/documents/End_Use_FY2012.pdf.

⁸⁴ *Id.* at 1-2.

⁸⁵ *Id.*

⁸⁶ *See* 15 C.F.R. § 736.2.

being utilized for civilian purposes.⁸⁷ A former Chairman of the House Oversight Committee complained the “Commerce Department issues licenses for commodities not knowing if the goods are what they purport to be; ever reach their intended destination; or are used for the stated legitimate purpose.”⁸⁸ He further noted certificates not to re-export are “little more than paper salve to the conscience of the government and U.S. corporations” and do little to prevent the re-transfer to sensitive technologies.⁸⁹

The lack of monitoring under the ITAR and EARs undermines the objectives of each regulation. Exported sensitive technologies are easily being converted into destructive devices that threaten U.S. national security interests.⁹⁰ Partner and allied nations that do not enforce U.S. end-use monitoring requirements are oftentimes found to be the suppliers of otherwise controlled U.S. technologies.⁹¹ Without a strong mechanism to ensure end-use and end-user monitoring, the United States effort to prevent the transfer of sensitive technologies to global bad actors is compromised.

f. The Inadequacies of the Current Export Control Framework Harm U.S. Industry

Despite the fact that the United States leads the world in conventional arms trade, the over-complicated and cumbersome export control regime threatens to weaken the defense industry as a whole, as it already has done in some sectors. For instance, companies producing

⁸⁷ Ronald J. Sievert, *Urgent Message to Congress—Nuclear Triggers to Libya, Missile Guidance to China, Air Defense to Iraq, Arms Suppliers to the World: Has the Time Finally Arrived to Overhaul the U.S. Export Regime? –The Case for Immediate Reform of Our Outdated Ineffective, and Self-Defeating Export Control System*, 37 *Tex. Int'l L.J.* 89, 97-98 (Winter 2002).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Fitzgerald, supra* note 6.

⁹¹ See generally Bill Gertz, *Treachery—How America’s Friends and Foes Are Secretly Arming Our Enemies*, Crown Forum, New York (2004).

computers (Hewlett-Packard and IBM), communications satellites (Hughes, now Boeing), aerospace technologies (United Technologies), and machine tools (MAG Industrial Automation Systems) have voiced concerns about the uneven competition between U.S. and foreign industry due to ITAR and EARs restrictions.⁹² U.S. components are being designed out of foreign systems and some foreign companies, such as the satellite manufacturer Thales Alenia Space and the rocket motor manufacturer Swiss Propulsion Laboratory, advertise its products as "ITAR-free" and totally free of U.S. content.⁹³ In some cases, there is evidence that ITAR and EARs have solidified market niches for foreign competitors in the areas of aerospace (the European Aeronautic Defence and Space Company), satellites (Thales Alenia Space), composite carbon manufacturing equipment (the Spanish firm M. Torres), and night vision equipment, which is produced by numerous firms in France, Israel, South Africa, China, and Russia.⁹⁴ The restrictions also impact who can work for U.S. industry and often time cuts out or compartmentalizes the brightest and best foreign scientists and researchers whose work could potentially contribute to the development and innovation of various U.S. technologies.⁹⁵

The ITAR and EAR restrictions create an estimated \$9 billion per year loss to U.S. industry due to over-restrictive export controls.⁹⁶ This is significant because one third of defense industry output is supported by defense exports and the regulations affect industry's

⁹² Michael B. Wallerstein, *Losing Controls: How U.S. Export Restrictions Jeopardize National Security and Harm U.S. Competitiveness*, *Foreign Affairs* (Nov./Dec. 2009), <http://www.foreignaffairs.com/articles/65502/mitchel-b-wallerstein/losing-controls>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

ability to create American jobs and invest in new defense capabilities for the future.⁹⁷

Moreover, this loss is often unjustified because the Department of State and Commerce approve the majority of export license application. In April 2010, former Defense Secretary Gates called for the removal of licensing requirements for the bulk of the tens of thousands of license applications to the European Union and North Atlantic Treaty Organization (NATO) countries that overwhelmingly received approved export license and insisted resources should be concentrated on placing “higher walls...around fewer, more critical items.”⁹⁸

V. Obama Administration Export Control Reform Efforts to Date

The Obama Administration undertook an interagency review of the export control framework in 2009 to determine what, if any changes were needed.⁹⁹ The results showed export control reform was badly needed in four main tenants: aligning current control lists, consistent application of licensing policies across agencies, enhanced export enforcement, and transition to a single information technology system to administer export controls.¹⁰⁰ The Obama Administration started the ECRI to resolve some of these concerns and to ensure higher walls are placed around the most sensitive products and technologies.¹⁰¹ The effort also seeks to enhance the competitiveness of key U.S. manufacturing and technology sectors.¹⁰² The overall goals of the ECRI are to create a single control list, a single licensing agency, a single information

⁹⁷ Leon Panetta, Secretary of Defense, Building Partnership in the 21st Century Address at the U.S. Institute of Peace (June 28, 2012). Available at <http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1691>.

⁹⁸ Press Release, White House Chief of Staff Daley Highlights Priority for the President's Export Control Reform Initiative (July 19, 2011). Available at <http://www.whitehouse.gov/the-press-office/2011/07/19/white-house-chief-staff-daley-highlights-priority-presidents-export-cont>

⁹⁹ 2010 White House Press Release, supra note 3.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

technology system, and a single primary enforcement coordination agency.¹⁰³ The Obama Administration made headway towards accomplishing some of the goals in several key areas.

a. Creation of a “Positive” USML List

The Obama Administration has taken steps under its authority to streamline the categories on the USML. The President is authorized to designate items as defense articles and defense services for the purposes of regulation under the USML.¹⁰⁴ The President is also authorized to periodically review the items on the USML to determine what items, if any no longer warrant export controls so long the President provides notice to Congress of the intended removal and the nature of any controls to be imposed on that item under any other provision of law.¹⁰⁵ The Obama Administration has leveraged this authority to revise the USML categories in order to create a more “positive” list of defense technologies that are covered under its licensing process.¹⁰⁶ The intent is to remove less sensitive technologies and ensure the highest protection of the “crown jewels” from a national security standpoint.¹⁰⁷ BIS noted that “differentiat[ing] between those military items that... are ‘critical to maintaining a military or intelligence advantage to the U.S. and those that require more flexible controls so they can be easily exported to NATO countries and other U.S. allies’ is critical to export reform.”¹⁰⁸

¹⁰³ *Id.*

¹⁰⁴ 22 U.S.C. § 2778 (a) (2010)

¹⁰⁵ 22 U.S.C. § 2778 (f) (2010)

¹⁰⁶ *Supra* footnote 93; See also 2010 White House Press Release, *supra* note 3.

¹⁰⁷ *Panetta, supra* note 86.

¹⁰⁸ Nicholas Rosenberg and Grayson Yeargin, *The 600 Series: As part of Export Control Reform, the U.S. government shifts former Munitions List items to a new category on the Commerce Control List*, Nixon Peabody (May 1, 2013), http://www.nixonpeabody.com/files/156663_Export_Controls_Alert_1MAY2013.pdf.

On October 28, 2013, the first final rules for Category VIII (Aircraft and Associated Equipment) and Category XIX (Gas Turbine Engines) went into effect.¹⁰⁹ Overhauls of Categories IV (Missiles, Launch Vehicles), V (Explosives), IX (Military Training Equipment), X (Protective Personnel Equipment), and XVI (Nuclear Testing Equipment) were published on January 2, 2014, entering into effect on July 1, 2014.¹¹⁰ The final rules clarify what specific items are covered under these USML categories. For example, Category IV (Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs and Mines) was revised to create a positive list of covered items. Under paragraph (a), rather than simply listing “space launch vehicles (SLVs), missiles, bombs, torpedoes, depth charges, mines, and grenades” as ITAR-controlled, the final rule details what is covered in twelve distinct categories, including payload requirements.¹¹¹ Simultaneously, rules were developed for each category to determine how items no longer suitable for control under the USML would be handled by the Department of Commerce.¹¹² The Obama Administration predicts that this effort alone will resolve many of

¹⁰⁹ Press Release Export Control: First Final Rules Go Into Effect (Oct. 15, 2013), <http://www.state.gov/r/pa/prs/ps/2013/10/215428.htm>. [hereinafter Press Release State 2013]

¹¹⁰ Amendment to the International Traffic in Arms Regulations: Third Rule Implementing Export Control Reform, 79 Fed. Reg. 34 (Jan. 2, 2014) (to be codified at 22 C.F.R. § 1221, 123, 124, and 125. Available at <http://www.gpo.gov/fdsys/pkg/FR-2014-01-02/pdf/2013-31323.pdf>.

¹¹¹ *Id.* Specifically, Category IV now includes: (1) Rockets, SLVs, and missiles capable of delivering at least a 500-kg payload to a range of at least 300 km (MT); (2) Rockets, SLVs, and missiles capable of delivering less than a 500-kg payload to a range of at least 300 km (MT); (3) Man-portable air defense systems (MANPADS); (4) Anti-tank missiles and rockets; (5) Rockets, SLVs, and missiles not meeting the criteria of paragraphs (a)(1) through (a)(4) of this category; (6) Bombs; (7) Torpedoes; (8) Depth charges; (9) Anti-personnel, anti-vehicle, or anti-armor land mines (*e.g.*, area denial devices); (10) Anti-helicopter mines; (11) Naval mines; or (12) Fragmentation and high explosive hand grenades.

¹¹² Control of Military Training Equipment, Energetic Materials, Personal Protective Equipment, Shelters, Articles Related to Launch Vehicles, Missiles, Rockets, Military Explosives, and Related Items, 79 Fed. Reg. 264 (Jan. 2, 2014) (to be codified at 15 C.F.R. § 740 and 774). Available at <http://www.gpo.gov/fdsys/pkg/FR-2014-01-02/pdf/2013-31322.pdf>.

the issues related to export control.¹¹³ Many sensitive technologies, such as bombers, fighters, unmanned aerial vehicles, and their key subsystems, parts, and components – remain on the USML.¹¹⁴ Less sensitive items like, parts, components, cockpit gauges, steel brake wear pads, and fuel filters are now subject to the more flexible authorities of the CCL.¹¹⁵ The remaining Categories of the USML are anticipated to be revised sometime over the next year.¹¹⁶

b. Creation of the “Series 600” for Commerce Control List (CCL) Items

As the USML categories are revised, the items removed from its control are transferred to the CCL and the jurisdiction of the Department of Commerce.¹¹⁷ Like all other dual-use items, the former USML items are categorized and assigned to an Export Control Classification Number (ECCN). The 600 series code was specifically created to accommodate items that were previously controlled under the USML or that are covered by the Wassenaar Arrangement Munitions List.¹¹⁸ The “6” in the code entry indicates that an item is a munition ECCN within the CCL.¹¹⁹ 600 Series ECCNs are subject to control based on national security, regional stability, anti-terrorism, and United Nations embargos.¹²⁰ Notably, all items controlled for national security reasons and most items controlled for regional stability require that an exporter

¹¹³ *Press Release State 2013*, *supra* note 98; See also *Press Release Fact Sheet: Announcing the Revised Export Control System* (Oct. 15, 2013), <http://www.whitehouse.gov/the-press-office/2013/10/15/fact-sheet-announcing-revised-us-export-control-system>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Supra* note 99 and 100.

¹¹⁸ 22 C.F.R. § 772, at 5 (Definition of Terms) (2014). Available at http://www.bis.doc.gov/index.php/forms-documents/doc_view/838-772. See also Section VI(b)(ii) of this paper for more information on the Wassenaar Arrangement.

¹¹⁹ *Id.*

¹²⁰ *Supra* note 97.

obtain a license before exporting a 600 Series item to every country in the world except Canada.¹²¹

c. Strategic Trade Authorization (STA) Exemption from CCL

The Strategic Trade Authorization (STA) exemptions are also part of the Obama Administration ECRI efforts. The STA exemption “authorizes the export, re-export, and transfer (in country) of specified items to destinations that pose relatively low risk that [such] items will be used for a purpose that license requirements are designed to prevent.”¹²² Exports, re-exports, and in country transfers in which the only applicable reasons for control are national security, chemical or biological weapons, nuclear nonproliferation , regional stability, crime control, and/or significant items are authorized for destinations in or nationals of 36 partner and allied nations.¹²³

STA exemptions are conditioned upon the certification of the receiving party that it will provide assurance against diversion of such items to other destinations.¹²⁴ The certification must indicate the receiver will not re-transfer the controlled technologies to third party end-users or be used for unapproved end-uses. The STA exemptions are not all encompassing and are not available for all CCL-controlled items. For instance, STA exemptions are not applicable for items that are controlled for reasons of encryption, short supply, surreptitious listening, missile

¹²¹ *Id.*

¹²² 15 C.F.R. §740.20 (2014).

¹²³ *Id.* at §740.20(c). 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, or the United Kingdom. Albania, Hong Kong, India, Israel, Malta, Singapore, South Africa, or Taiwan are also eligible to receive less sensitive items that are controlled for national security reasons only.

¹²⁴ *Id.* at §740.20(d)(2).

technology, or chemical weapons, as well as other defined categories.¹²⁵ In addition, items exported using this exemption are still required to be reported in an automatic export system and additional compliance measures apply to ensure an audit trail of any technologies exported under the automatic authorization.¹²⁶

d. DoD Legal Concurrence Requirement

Of brief mention, the Obama Administration's ECRI efforts also include strengthening the DoD role in the export licensing process. By Executive Order, the President assured DoD a role in revising the USML by requiring its concurrence prior to an item or categories of items being added or removed.¹²⁷ Additionally, Department of State is required to consult with DoD to ensure that foreign military sales made under DoD authority are not interfered with during a license application review.¹²⁸ While the Executive Order stops short at requiring DoD concurrence on all licensing determinations, it takes a necessary step toward establishing an authoritative role in the export control process.

e. Examination of ECRI Efforts to Date

The ECRI thus far is expected to see dramatic changes for U.S. industry exports in terms of licensing requirements and transparency. These efforts will facilitate trade while at the same

¹²⁵ *Id.* at §740.20(b)(2).

¹²⁶ See generally, *Export Control Reform Initiative Factsheet #4: License Exception "Strategic Trade Authorization" (STA)*, (Nov. 27, 2103),

http://export.gov/5C/static/ECR%20Factsheet%204%20-%20STA%20v%203_Latest_eg_main_047475.pdf;

Export Control Reform Initiative Fact Sheet #2: Myths and Facts (Nov. 27, 2013),

http://export.gov/5C/static/ECR%20Factsheet%202%20-%20Myths%20and%20Facts%20v%205_Latest_eg_main_047473.pdf.

¹²⁷ Exec. Order No. 11958 (Mar. 8, 2013). Available at <http://www.gpo.gov/fdsys/pkg/DCPD-201300143/pdf/DCPD-201300143.pdf>

¹²⁸ *Id.*

time ensuring U.S. national security interests are protected.¹²⁹ For example, when Category VII is revised, it is anticipated 11,000 (or approximately 90 percent) of the 12,000 category items licensed in 2009, and subject to stricter USML controls, will be shifted to the more flexible CCL list.¹³⁰ Of the 11,000 items that conceivably move, about 50 percent of the items will automatically be eligible for license-free treatment, subject to certain compliance and re-export requirements to U.S. allies and regime partners.¹³¹ Another 35 percent of transferred items would continue to require an export license, but may be exportable without a specific export license to close U.S. allies and multilateral export control regime partners if an exemption or agreements allows.¹³² The remaining 15 percent (or 1650 items) will likely fall to the bottom of the list and no longer be subject to a license requirement to almost all countries.¹³³ Overall, 55 percent (or 6,050 items) will no longer require a license prior to exportation for this category alone.¹³⁴

While the Obama Administration's efforts to date are a step towards a long overdue overhaul of export control, it is not enough to resolve all of the issues raised in Section IV of this paper, as well as those issues left unexplored. First, the efforts to date are conducted under the President's authority. Any changes underway today can just as easily be undone by a future administration. Without some legislative permanency, any successes these efforts may accomplish are at risk. Second, the plan to limit the number of items on the USML to those of

¹²⁹ Press Release, *Fact Sheet: Announcing the Revised U.S. Export Control System* (Oct. 15, 2013), <http://www.whitehouse.gov/the-press-office/2013/10/15/fact-sheet-announcing-revised-us-export-control-system> [hereinafter Press Release 2013]

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Press Release 2013, supra* note 129.

the highest sensitive is still untested. While in theory this effort will help clarify the jurisdictions between the Departments of State and Commerce, it does not make substantial headway in overhauling export reform. The items moved from the USML to the CCL's series 600 list still require a license prior to export. It is not clear how this effort will help to prevent nuts, bolts, and toilets from becoming caught in the bureaucratic licensing requirements. Third, the STA exemptions attempt to resolve this issue by eliminating the licensing requirements for those countries that the U.S. currently approves exports in the majority of cases. However, the only requirement for this special treatment is a promissory-type certification that the end-user will not re-transfer or use the exports for purpose not authorized. While this may fix the bureaucratic problems of the current export regime, it does nothing to strengthen the end-use monitoring requirements needed for such certification statements to be effective.

Overall, 2014-2015 will be a test of the effectiveness of the ERCI efforts to date as the new jurisdiction for various items comes into effect. ERCI's efforts to focus and re-shape the reach of the USML, align the USML and CCL, and the creation of exemptions for U.S. allied and partner nations is the start of a much needed overhaul of the export control regimes. These efforts, however must be continued and enhanced by Congressional input and oversight. It is only through Congressional action the steps necessary to ensure a complete export control overhaul will be accomplished, both domestically and internationally.

VI. Legal Solutions to Strengthen Export Control Reform

While the Obama Administration's is implementation of some of the goals of the ECRI, more actions are required to ensure the total permanency of the export control reform efforts and the protection of U.S. interests. First, as part of the export control overhaul, new Congressional legislation is needed to establish a single export agency, a single export control list, and more

authority to ensure end-use and end-user monitoring. Second, the United States must seek ways to enhance international arms trade controls worldwide. Defense Trade Treaties and ratification of the United Nation Arms Trade Treaty are two avenues to increase export controls globally in areas that are beyond U.S. jurisdiction.

a. New Congressional Legislation

New legislation is needed to ensure the Obama Administration’s ECRI is carried through into the future in order to overcome the archaic export control framework now in place. While the President has the Constitutional mandate as Commander and Chief that gives him or her authority over issues affecting national security, this position is not entrusted with authorities specifically enumerated to Congress.¹³⁵ Congress is specifically granted the authority to “regulate commerce with foreign nations.”¹³⁶ Therefore, because the purpose of export controls is to regulate sensitive technologies within commerce, Congress has the ultimate authority to legislate in this area.¹³⁷ While the current ECRI efforts to overhaul the USML and CCL are authorized, Congress should act to consolidate the existing export control framework into a comprehensive regulatory scheme that ensures efficiency, transparency, and accountability. In order to accomplish these goals, new legislation should encompass a single export agency, a single export control list, and more robust end-use and end-user requirements.

i. Single Export Control Agency (SECA)

The Obama Administration identified the need for a single export control agency (SECA) to administer and oversee the export control regime, but has yet to detail what this agency’s

¹³⁵ U.S. CONST. art. 2, § 2.

¹³⁶ U.S. CONST. art. 1, § 8.

¹³⁷ *Id.*

functions should be and under what authority it should operate. Under Executive Order 13558, President Obama created the Export Coordination Enforcement Center (ECEC) is housed under the Department of Homeland Security.¹³⁸ The ECEC is an interagency group that takes a whole-of-government approach to “strengthened and coordinated enforcement of United States export control laws and enhanced intelligence exchange in support of such enforcement efforts.”¹³⁹ The group coordinates efforts of the Departments of State, Treasury, Defense, Justice, Commerce, Energy, Homeland Security, the Office of the Director of National Intelligence, other executive branch departments, agencies, or offices as the President, from time to time, may designate.¹⁴⁰

While this Executive Order takes a step in the right direction of creating a single agency, it falls short of creating the type of agency with the weight and authority to oversee all export control issues. The ECEC is a coordination body only. It specifically does not “provide exclusive or primary investigative authority to any agency.”¹⁴¹ It lacks any true independence because its function and administration are subject to the Department of Homeland Security and its budget.¹⁴² The ECEC has no authority to resolve jurisdiction conflicts between agencies, and the Executive Order is silent both on concurrence of certain agencies when making export control determination, as well as how conflict resolution should occur.¹⁴³ Furthermore, because the ECEC is the creation of Executive Order, it is subject to the whims of political tides. The ability of each successive administration to shape the ECEC based on the current political

¹³⁸ Exec. Order 13558 (Nov. 9, 2010). Available at <http://www.whitehouse.gov/the-press-office/2010/11/09/executive-order-export-coordination-enforcement-center>.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at Sec. 2(b)

¹⁴¹ *Id.* at Sec. 5(c)

¹⁴² *Id.* at Sec. 4

¹⁴³ *Id.*

climate leaves one of the most critical national security functions open to an unchecked political or public caprice. The ECEC does not go far enough to resolve the over-complexity that exists under today's export control regime. A legislatively-created SECA is required to ensure successful export control overhaul.

A SECA is essential to create transparency and consistency in U.S. export control regulations. However, an agency that lacks authority to resolve the issues noted above is insufficient from overhauling export control. Conversely, a complete divorce from the current export control authorities would have unintended consequences. Each of the agencies currently involved in the export control regime bring a unique perspective on questions of technology control and a new SECA must ensure a holistic approach to account for the military, political, and economic impacts of approving or denying a license request.

To that end, Congress should enact legislation creating a new SECA independent of, but informed by, the Department of State, Commerce and Defense that currently oversee this regime. However, such legislation must be carefully crafted to ensure no usurpation or duplication of effort for the critical missions these agencies otherwise fulfill as part of their mandate. In other words, the new SECA must thrive and be successful because of the inputs of the existing export agencies versus trying to re-create or self-inform on military, political, and economic factors relevant to export control license approvals.

At a basic level, the SECA should act as an administrative coordinating venue but with strong enforcement oversight. It should be overseen by a Secretary responsible for coordinating the positions of each existing agency and ensuring consensus and concurrence is reached on controlled. Input from the existing agencies would be mandatory and consultation required when

consensus is not reached. For unresolved issues of high importance (such as national security, foreign policy, or economic impact, etc.) the SECA should be responsible for presenting export-control decisions to the President for final determinations.

The SECA must be required to report to Congress when proposed exports of major defense equipment, articles, and services meeting specific dollar thresholds are triggered under a license or treaty, regardless of their military or dual-use status.¹⁴⁴ The SECA must also have enforcement and end-use and end-user monitoring authority.¹⁴⁵ It must have the right to bring civil and criminal actions against exporters or purchasers that knowingly and willingly violate export control regulations. Finally, it should be required to report to Congress on administrative and criminal violations of export laws.

ii. Single Export Control List (SECL)

The Obama Administration's efforts to review and delist technologies on the USML are a positive step in moving the ECRI forward. However, the USML and CCL must be collapsed into one list to form a single accumulative list of export controlled items. Congress should ensure this consolidation through legislation that requires the single export control list (SECL) to take primacy and detailing what items are controlled on what level. The SECL should be a culmination of both military and dual-use technologies. It should offer varying levels of control to account for the range of least sensitive to most critical technologies. When possible, controlled items should specify what technical parameters of a particular technology are controlled. The SECL must harmonize existing licensing requirements and policies and ensure the license application process is clear and transparent to industry. The list should be subject to annual

¹⁴⁴ This would harmonize the reporting requirements currently required of the State Department and would resolve the lack of reporting on items shifted from the USML to the CCL.

¹⁴⁵ See Section VI(a)(iii) below for new legislative proposal on end-use monitoring.

review to determine appropriate removal of items which have little or no military or intelligence significance. Such a review must include a foreign availability assessment to determine whether sensitive technologies are already available globally and evaluate if U.S. controls are warranted if a positive determination is found.

A SECL overseen by a SECA eliminates the jurisdictional issues that exist under the current export control framework. Additionally, a SECL benefits U.S. manufactures by reducing the compliance costs to both large firms and SMEs who would have a one-stop-shop when determining if technology is controlled or not. A SECL administered by a SECA would also ensure consistency in licensing applications reviews, as well as a consolidated record of decisions and actions associated with controlled technologies. This would create the much need transparency, consistency, and accountability that is lacking in the current export control regime.

iii. Enhancing End-Use and End-User Monitoring and Enforcement

New legislation must also ensure the SECA has strong oversight and enforcement authority. From an administrative standpoint, a SECA allows a streamlined opportunity to track exported items and technologies. The SECA would be responsible for tracking the life cycle of a technology export from licensing application through end-use and end-user monitoring. This would create records from a technology transfer to be housed in one place in one system. This consolidation will make end-use and end-user monitoring easier to track and enforce. To that end, Congress must ensure strong enforcement provisions for the SECA. The new SECA must have investigative authority to query end users about the whereabouts and use of controlled technologies. End-users who fail to comply with the SECA's follow-up inquiries must be subject to various levels of legislatively-approved sanctions, including but not limited to warning letters,

watch lists, exclusions from end-use of certain technologies, ineligibility for military sale, and suspension or cancellation of contracts, and possibly sanctions.

The SECA must have the responsibility for monitoring and reporting to Congress on multiple export control offenders. It should also make recommendations to Congress for further legislative sanctions if it is found that an allied or partner nation are not abiding by the terms of end-use and end-user restrictions against third-party transfers. The SECA recommendations should include country monitoring to identifying systemic issues, removing STA exemption eligibly, or sanctions for repeat end-use and end-user violations.

Congressional action to overhaul the current export control regime by legislatively creating a SECA, SECL, and enhanced end-use and end-monitoring controls will ensure export control accomplishes the objectives of protecting national security and technological superiority. Moreover, these reforms taken at a Congressional level will ensure the overhaul to export control regulations has the longevity and authorization necessary to be effective in the long term. In addition to these legislative efforts, Congress should support enhancing export controls globally. This support can be accomplished by Congress supporting enactment of additional Defense Trade Treaties and ratifying the United Nations Arms Trade Treaty (UN Arms Trade Treaty).

b. Strengthening International Arms Trade Controls Globally

U.S. attempts to control sensitive technologies through export control is no longer a unilateral effort. U.S. executive or legislative action alone will not ensure effective export controls of sensitive technologies because such actions have limited influence outside of U.S. jurisdiction. Once the U.S. approves the export of a sensitive technology, the end-use and end-user is potentially beyond the U.S. export controls regimes reach. Global allies and partners

developing or receiving sensitive technologies must be part of the solution for controlling such technologies diversion. The United States must encourage and facilitate other nations to enact similar export control legislation on a domestic level. If other nations enact similar domestic legislation, the U.S. benefits from those protections when exporting sensitive technologies. U.S. end-use and end-user requirements will also more likely be respected by nations engaged with the United States to prevent the illicit transfer and derivation of sensitive technology. A global approach becomes particularly apparent as regional stability becomes more vulnerable to the nefarious use of dual-use technologies.¹⁴⁶ Guns, missiles, and nuclear bombs are rapidly being replaced with just as destructive computer viruses and electronic equipment. While political influence should be utilized to help ensure global controls, two efforts can be taken by the United States to help established stronger export controls for sensitive technologies from an international law context. Two such legal mechanisms include country exemptions through use of Defense Trade Treaties and ratification of the UN Arms Trade Treaty.

i. Defense Trade Treaties

The use of country exemptions from technologies listed on the USML is one way to ensure sensitive technologies are only exported from the U.S. to trusted end-users for approved end-uses through approved friendly communities. The U.S. currently has exemptions for Canada, Australia, and the United Kingdom for some, but not all, sensitive technologies included on the USML. The Canada exemptions have been part of the ITAR since its inception.¹⁴⁷ Australian and Canada recently received these special exemptions after entering into additional

¹⁴⁶ See *Fitzgerald, supra* note 6 at 93. Improvised Explosive Devices (IEDs) are a classic example of dual-use technologies that have been used on the battlefield of Afghanistan and Iraq against U.S. and allied nation forces. See also the Joint Improvised Explosive Device Defeat Organization Homepage, <https://www.jieddo.mil/index.aspx>.

¹⁴⁷ 22 C.F.R. §126.5 (2014).

Defense Trade Treaties (DTT).¹⁴⁸ State officials indicate the treaties represent a move from transactional licensing and towards a more risk-based approach.¹⁴⁹ The DTTs eliminate the case-by-case and licensing requirement and establishes approved communities of entities, facilities, and personnel eligible to export, transfer, or receive certain arms without licenses. The free transfer of certain arms between the United States and Australia, Canada, and the United Kingdom will ensure military equipment is standardized and interoperable with partner and allied nations, as well as ensures collaboration at an industrial level with the U.S.'s closest friend and allies.

More importantly than enhancing standardization and interoperability between the U.S. and partner nations, the DTTs require the signatories to implement domestic legislation that ensures protection of U.S. export-controlled items prior to the DTT being fully implemented on the U.S. end.¹⁵⁰ In other words, allied nations and partners must play by the rules established within the United States for sensitive technology controls or the partner nation is not meeting its obligations under the DTT. Such risk-based country exemptions could potentially be used as a mechanism to further encourage global export controls of sensitive technologies through domestic legislation. This approach is limited in its application, however. First, DTTs to date have only been offered to the closest of U.S. allies. It is unclear if the Department of State, the agency responsible for DTT negotiations, would be willing to establish a similar free flow of sensitive technologies with a foreign partner that carry a larger risk to U.S. interests than Australia, Canada, and the United Kingdom. Second, the DTTs only become effective when a

¹⁴⁸ See 22 C.F.R. §126.15 and §126.17 (2014)

¹⁴⁹ GAO Report to the Committee on Foreign Affairs, House of Reps. On Export Controls-Observations on Selected Countries' Systems and Proposed Treaties, GAO-10-557, 27 (May 2010). Available at <http://www.gao.gov/assets/310/305061.pdf>.

¹⁵⁰ See S. Res. 7728, 111th Cong. (2010) and S. Res. 7720, 111th Cong. (2010)

partner nation has implemented export control laws and regulations comparable to the United State. Implementing domestic legislation that is on par with U.S. standards may be difficult, if not impossible to accomplish especially when political factors are taken into consideration. So, while DTTs are a possible way to enhance sensitive technology controls worldwide, it is limited it in application. However, discounting the DTTs mechanism completely would eliminate an option toward ensuring export controls are implemented on a global level. The more countries that implement domestic legislation prohibiting the free flow of sensitive technologies, the stronger the United States efforts to protect against the diversion of sensitive technologies.

ii. Ratification of the UN Arms Trade Treaty

One of the strongest efforts the United States can take to ensure its export control regulations are effective on a global level is to ratify the United Nations Arms Trade Treaty (UN Arms Trade Treaty). Congress legislatively authorizes the President to initiate multilateral discussions with partner nations with the goal of reaching agreement for the control of international trade in armaments.¹⁵¹ As part of its multilateral efforts to reach agreement on armaments trade, the United States became a party to the non-binding Wassenaar Agreement.¹⁵² The Wassenaar Agreement includes 41 signatory countries that are looking to enhance regional and international security and stability “promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, thus preventing destabilizing accumulations.”¹⁵³ Participating nations seek, through its national policies, to ensure that transfers of these items do not contribute to the development or enhancement of

¹⁵¹ 22 U.S.C. 2751 (2010) (emphasis added)

¹⁵² Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Introduction, <http://www.wassenaar.org/introduction/index.html> (last visited Apr. 21, 2014).

¹⁵³ *Id.*

military capabilities which undermine these goals, and are not diverted to support such capabilities.”¹⁵⁴ The Wassenaar Arrangement also has a control list for dual use technologies and munitions that the signatory nations seek to control at the national level.¹⁵⁵ While the Wassenaar Arrangement makes strides on getting partner nations and allies to place controls on dual use and munitions technologies, it lacks authority to bind member states to fulfill its objectives and specific provisions. In order to ensure partner and allied nations are committed to controlling the trade of armaments and sensitive technologies, the United States must reach past the Wassenaar Arrangement and seek to enter into a binding multilateral agreement with similar objectives. The UN Arms Trade Treaty accomplishes the goal of the Wassenaar Arrangement but creates a binding commitment under international law.

The UN Arms Trade Treaty aims to foster peace and security by thwarting uncontrolled destabilizing arms flows to conflict regions.¹⁵⁶ It establishes a list of controlled items, which includes battle tanks, armored combat vehicles, large-caliber artillery systems, combat aircraft, attack helicopters, warships, missiles and missiles launcher, and small arms and light weapons.¹⁵⁷ Each treaty participant is charged with establishing and maintaining a national control system to regulate the export of ammunition/munitions fired, launched, or delivered by conventional arms, as well as the parts and components that could be assembled to create such conventional weapons.¹⁵⁸ The UN Arms Trade Treaty also encourages sharing information on diversion of

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at Control Lists.

¹⁵⁶ UN Arms Trade Treaty, Preamble (2013). Available at https://unoda-web.s3.amazonaws.com/wp-content/uploads/2014/03/Ch_XXVI_08.pdf#page=22

¹⁵⁷ *Id.* at art. 2.

¹⁵⁸ *Id.* at art. 3 and 4.

conventional arms between treaty participants, particularly with respect to investigations, prosecution, and other areas.¹⁵⁹

The United States became a signatory to the UN Arms Trade Treaty on September 25, 2013.¹⁶⁰ Ratifying the UN Arms Trade Treaty would help to meet the goals and objective of U.S. export control efforts by enhancing the controls over sensitive technologies on a global scale. The UN Arms Trade Treaty provisions already align with export controls in force in the United States. The United States would only benefit from being a ratifying party because it would extend U.S. reach to control sensitive technologies outside of U.S. broader through a commitment under international law by ratifying nations. While the UN Arms Trade Treaty does not specifically address dual-use technologies, it takes a step in the right direction to encourage nations to establish controls over convention arms exports. Enhancing the domestic export control framework of any nation through an international legal obligation only enhances U.S. interest abroad. The U.S. will be able to ensure that when end-use and end-user certifications are signed for U.S. sensitive technologies, it is more likely that a nation will abide by those commitments if it has similar requirement under its own domestic framework.

VII. Conclusion

The current export regime created under AECA and EAA is archaic and does not meet the needs of U.S. national security and foreign policy objectives. The framework is complex, duplicative, and has caused confusion for not only U.S. industry, but foreign purchasers. The licensing requirements differ under ITAR and EARs and jurisdiction conflicts arise. Moreover,

¹⁵⁹ *Id.*

¹⁶⁰ Status of the Arms Trade Treaty, <http://disarmament.un.org/treaties/t/att/deposit/asc>. (Last visited Apr. 21, 2014).

what is often caught in the ITAR and EARs licensing process has no true bearing on U.S. national security concerns.

The Obama Administration has taken the first steps to overhaul this outdated system. Efforts to review the USML and convert dual use items to the control of the Department of Commerce will help to eliminate the bureaucratic burden that U.S. manufacturer's face when trying to export less critical and sensitive technologies. Creating STA exemptions for countries also eliminates unnecessary bureaucratic resources for license application that are approved in the majority of cases.

Despite these efforts, more reform overhauls are needed to update the current U.S. export regime. Congress must act to pass new legislation to ensure export control is consistent and transparent into the future. Such legislation must ensure a new SECA is created with enough authority to coordinate input from all interested U.S. agencies. Additionally, a new SECL must be established in order to ensure protection of the U.S. "crown jewel" technologies that have high implications for U.S. national security. The SECA must also ensure the controls placed on sensitive technologies are upheld by foreign purchasers and must have the ability to take remedial actions for non-compliance. The U.S. must also work with partner nations and allies to help enhance export controls of sensitive technologies worldwide. This can be done by promoting other allies and partners to enact and implement convention arms and dual-use technologies legislation on a domestic level. The DTT process and ratifying the UN Arms Trade Treaty are two mechanisms that can help promote U.S. interests and controls over sensitive technologies worldwide.

Overhauling the U.S. export control legal framework is imperative to ensuring national security and foreign policy objectives are accomplished. It is also essential to ensure the U.S.

can maintain its healthy U.S. defense industry, which creates American jobs and fosters the U.S. economy. Congress and the Obama Administration need to build on the ECRI steps to ensure a holistic, robust approach to export control reform is adopted to enhance national security and guarantee U.S. technological edge.