
Obama Administration Moves Forward With Export Control Reform

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On March 7 and 8, 2013, President Obama took two important steps to further U.S. export control reform. First, the President notified Congress of the proposed transfer of certain items relating to aircraft and gas turbine engines from the jurisdiction of the State Department's International Traffic in Arms Regulations (ITAR), which govern the export of military products and technology, to the Commerce Department's Export Administration Regulations (EAR), which governs the export of commercial products and technology. The President also issued an Executive Order reallocating regulatory authorities under the Arms Export Control Act (AECA) to facilitate the shifts in jurisdiction.

Congressional Notification of Transfer

U.S. manufacturers and exporters have for many years struggled with the broad scope of the ITAR, which applies to parts and components of military products as well as to end products. The items covered by the ITAR are described in the U.S. Munitions List (USML). Compared to the licensing regime under the EAR, ITAR export licensing requirements are relatively strict and inflexible. Moreover, there are a number of "gray areas" that can make it difficult to determine which set of regulations applies to a particular item.

As part of an initiative the Obama Administration first announced in 2010, the Departments of Commerce and State have published during the past year proposed regulations that would result in shifting jurisdiction over a variety of items from the ITAR to the EAR. The ultimate goal is to allow the more flexible rules of the EAR to apply to less sensitive items, while allowing the State Department to focus its resources on more sensitive items and eliminating ambiguity regarding the scope of each set of regulations.

The Administration is in the process of revising every category of the USML. Proposed rules have been issued for 12 of the 21 USML categories so far.¹

Because the aerospace sector has had the most high-profile problems with ITAR jurisdictional issues, the first categories of items chosen for Congressional notification and the issuance of final rules were those relating to aircraft, gas turbine engines, and related parts. The Departments of State and Commerce issued proposed rules with respect to these items in November and December 2011.² AECA Section 38(f) requires the President to report to Congress thirty days before any item is removed from ITAR jurisdiction. Notification for the aircraft and gas turbine categories was sent to the Speaker of the House, the Senate Foreign Relations Committee and the Senate Committee on Banking, Housing and Urban Affairs, on March 7. The AECA does not provide a formal mechanism for Congress to block the shift in jurisdiction, although it is possible that political pressure could be generated to delay the process.

The Administration's proposal to shift broad categories of items and technology, without describing each individual item in detail, is unprecedented. Some in Congress have expressed discomfort with the Administration's effort, but there does not appear to be organized opposition.

The Administration plans to publish final regulations shortly after the end of the thirty-day notice period. It is contemplated that the final regulations will become effective 180 days after publication, providing a transition period before the jurisdictional change, although licenses can be applied for and processed during that period. Exporters also will be allowed to continue to use existing ITAR licenses for a longer period of time.³

Executive Order of March 8, 2013

Although the Executive Order (EO) primarily re-delegates many of the same authorities present in earlier executive orders, the Administration made some delegation revisions that are intended to facilitate the export control reform efforts. Among these changes:

The EO delegates to the State Department the authority to license transactions associated with certain items subject to Department of Commerce jurisdiction. See EO § 5(b). This change is intended to allow the government to eliminate a potential "double licensing" requirement that could arise if the State Department issues a license for an end item that includes parts, components or other items subject to the EAR. Under the new procedures, the State Department license would also authorize exports of items subject to the EAR, which is not currently possible.

The EO directs the Commerce Department to establish Congressional notification procedures for exports of firearms subject to Department of Justice jurisdiction for permanent import, and exports of certain major defense equipment after the shift in jurisdiction to the Department of Commerce. This will ensure that all

¹ See 78 F.R. 6765 (Jan. 31, 2013) (Cat. IV); 78 F.R. 6269 (Jan. 30, 2013) (Cat. XVI); 77 F.R. 70958 (Nov. 28, 2012) (Cat. XI); 77 F.R. 35317 (June 13, 2012) (Cat. IX); 77 F.R. 33698 (June 7, 2012) (Cat. X); 77 F.R. 29575 (May 18, 2012) (Cat. XIII); 77 F.R. 25944 (May 2, 2012) (Cat. V); 76 F.R. 80302 (Dec. 23, 2011) (Cat. VI); 76 F.R. 80305 (Dec. 23, 2011) (Cat. XX); 76 F.R. 76100 (Dec. 6, 2011) (Cat. VII); 76 F.R. 76097 (Dec. 6, 2011) (Proposed Cat. XIX); 76 F.R. 68694 (Nov. 7, 2011) (Cat. VIII).

² Gas turbine engines are currently spread across three USML categories VI (Vessels of War and Special Naval Equipment, VII (Tanks and Military Vehicles), and VIII (Aircraft and Associated Equipment). The Administration has proposed Category XIX to consolidate gas turbine engines from those three categories to remain on the USML. See 76 F.R. 76097 (Dec. 6, 2011).

³ The Administration has sent to the Office of Management and Budget (OMB) for review proposed revisions to USML Categories VI, VII, XIII and XX. The Administration hopes to complete its review of all USML categories by the end of the year.

proposed sales of such equipment will remain subject to notification requirements analogous to those currently applicable to the State Department under the AECA. See EO § 5(b).

The EO consolidates with the Department of State all broker registration requirements, some of which had been shifted to the Department of Justice for permanent imports of defense articles. In conjunction, the Administration plans to publish a new interim final broker registration rule, which is currently subject to OMB review.

These recent steps demonstrate that the export control reform process is now actually underway, and is no longer only theoretical. Although the practical impact of the changes likely will not be felt until close to the end of 2013, companies with activities that are subject to the ITAR and EAR should evaluate how the reform process may affect their operations in the future.

The March 8, 2013 Executive Order and the White House fact sheet are available at:
<http://www.whitehouse.gov/the-press-office/2013/03/08/executive-order-export-control-reform>; and
<http://www.whitehouse.gov/the-press-office/2013/03/08/fact-sheet-implementation-export-control-reform>.

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