

The Coalition for Security and Competitiveness

RECOMMENDATIONS FOR A 21ST CENTURY TECHNOLOGY CONTROL REGIME*

INTRODUCTION

The United States export control system has not been significantly revised in more than twenty years. The result is a system that no longer fully protects our national security, has not kept up with accelerating technological change, and does not function with the efficiency and transparency needed to keep the United States competitive in the global marketplace.

The Administration's export control review, as well as impending legislative proposals, provides an opportunity to strengthen our security and give business the clarity and guidance it needs to comply with the rules and remain competitive.

The Coalition for Security and Competitiveness (CSC) believes these goals can best be accomplished in the near term by structuring reform around the following five themes:

- 1) Draw clear lines of agency responsibility. Dual use items and munitions are properly controlled by different agencies subject to different criteria. But interagency conflict and the attendant confusion in the government and business community alike must be overcome. Much can be done to clarify the lines of authority and areas of responsibility.
- 2) Control lists should be revised and reduced. Failure to keep up with rapidly changing technology means that many items are controlled at inappropriate levels even though they are widely available world-wide and are no longer state of the art. In other cases, low-sensitivity but high commercial value technology only available from the United States is being held back by the export control system, thereby dulling U.S. companies' competitive edge and limiting their market share needlessly.
- 3) Complete the transition to an end user-based system. For fifteen years licensing decisions have increasingly hinged on the acceptability of specific end users. Procedures have been developed to determine the *bona fides* of end users and to monitor their use of technology after export. It is past time to complete that transition by developing more efficient procedures for trusted end users and exporters.
- 4) Enhance cooperation with allies. Security is maximized when countries work together toward common objectives and utilize common definitions and procedures for controlling exports. A network of multilateral arrangements already exists to this end, but the United States has given them insufficient attention.
- 5) Enhance cooperation with the business community. Small and medium-sized enterprises (SMEs) in particular need assistance with application procedures and development of robust compliance programs. In the absence of support and clarity in how the lines are drawn, SMEs are reluctant to export and assume an inordinate amount of risk and liability. All exporters periodically receive information from prospective buyers that could be of importance to U.S. enforcement and intelligence authorities. The adversarial nature of our system makes sharing that information difficult.

Following are specific recommendations that amplify on these themes. Some are applicable to both control systems, while others are more specifically tailored for one system or the other.

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*The recommendations provided in this document are near and medium-term reforms to create a modern export control system within the existing legislative authorizations.

Aerospace Industries Association
American Association of Exporters and Importers
American Chemistry Council
The American League for Exports and Security Assistance
AMT—The Association for Manufacturing Technology
Business Roundtable
Coalition for Employment through Exports
General Aviation Manufacturing Association
Industrial Fasteners Institute
Information Technology Industry Council
IPC — Association Connecting Electronics Industries
National Association of Manufacturers
National Defense Industrial Association
National Foreign Trade Council
Satellite Industry Association
Space Enterprise Council
Space Foundation
TechAmerica
U.S. Chamber of Commerce

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RECOMMENDATIONS APPLICABLE TO DUAL USE AND MUNITIONS CONTROL SYSTEMS

Recommendation #1: Establish Clear Lines of Responsibility in the Commodity Jurisdiction Process

In 2008, the National Security Council instructed the Departments of State, Defense, and Commerce to increase interagency coordination of the commodity jurisdiction (CJ) process and to submit a plan for moving forward. New guidelines were agreed to and issued by the NSC to the departments in mid-2009, but the process still faces interagency conflicts over jurisdictional claims and the precise classification of a given product, service or technology. This continues to result in chronic delays, confusion, and lost opportunities. The CSC recommends the government:

- 1) Affirm and solidify the NSC's role as the final arbitrator in resolving conflicting claims of agency jurisdiction.
- 2) Enhance transparency in interagency coordination, deepen expertise on new technologies, and consider collocation of technical experts.
- 3) Affirm that the ITAR 120.3 criteria for designating and determining defense articles/services are the primary policy guidance for CJ determinations.
- 4) Identify specific criteria, such as military/intelligence sensitivity, risk of diversion, and impact to civilian and defense production lines, as the basis for allowing continued treatment of USML items as Commerce-controlled if they are the subject of a pending CJ determination.
- 5) By July 1, 2010, move items that do not meet specific ITAR criteria or otherwise do not warrant control for specific military or intelligence capability from the USML to the Commerce Control List (CCL) at appropriate levels of control.
- 6) Provide detailed responses to CJ applicants outlining the national security and/or foreign policy rationale for retaining USML control, including an explanation of the critical military function, finding of a lack of commercial availability and the USML category number.
- 7) Implement a web site accessible to all parties that provides a master list of CJ outcomes (after removing any reference to proprietary information) so that jurisdictional determinations are no longer known only to the individual CJ applicant.
- 8) Work with participants in the Wassenaar Arrangement and other international regimes to harmonize approaches to classification and control of technology.
- 9) Urge Congress to adopt legislation restoring Executive Branch authority to determine licensing jurisdiction for commercial satellite components and technology. Once enacted into law, move expeditiously to identify and remove appropriate items from control on the USML to the CCL.

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The Coalition for Security and Competitiveness

Recommendation #2: Promote Effective Compliance and Enforcement

Compliance with export control regulations is an integral part of the overall system. U.S. companies have developed extensive compliance programs to prevent the export of items or technologies contrary to the interest of the United States and continue to work with the government to make their programs best-in-class.

The CSC recommends the government:

- 1) Increase both domestic and global outreach to companies.
- 2) Improve the voluntary self disclosure (VSD) process by:
 - a) Dedicating additional staff to process VSDs.
 - b) Creating a reasonable timeline for resolution and closure of VSDs.
 - c) Establishing specific criteria for the issuance of VSD penalties.
 - d) Allowing for discretion in deciding to publicize VSD cases.
- 3) Establish a formal negotiation process for administrative penalty determinations using the Guidance On Charging And Penalty Determinations In Settlement Of Administrative Enforcement Cases Supplement 1 in Part 766 of the EAR in the case of dual use items and develop and publish equivalent guidance in the case of ITAR items.

Recommendation #3: Improve Outreach to and Resources for U.S. industry, particularly for Small and Medium-sized Enterprises

Small and medium-sized enterprises (SMEs) are disproportionately disadvantaged by the current export control system. SMEs cannot afford the infrastructure of a compliance staff typical of larger entities; moreover, most SMEs lack Washington offices and therefore often do not have direct access to the agencies with licensing authority. Lengthy license processing times and the lack of transparency especially affect SMEs' ability to compete in international markets.

For all exporters, particularly those meeting the Department of Commerce's SME definition, the Bureau of Industry and Security (BIS), Treasury's Office of Foreign Assets Control (OFAC), and State's Directorate for Defense Trade Controls (DDTC) should:

- 1) Establish an interagency task force to develop recommendations within 60 days on how BIS and DDTC can be made more accessible, responsive, and user-friendly for industry, particularly small and medium-sized business.
- 2) Provide dedicated counselors/license officers specialized in SME exporter issues.

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Recommendation #4: Promote Greater Multilateral Cooperation with Allies and Partners

National security requires effective multilateral cooperation that enables collaborative development and advancement of common strategic goals, policies, and practices. Multilateral cooperation levels the international playing field for U.S. exporters and makes the nation and the world more secure through increased coordination and harmonization of export controls. Such cooperation cannot be limited to agreement on control lists, but must also include expanded cooperation on appropriate exercise of licensing discretion. The CSC recommends the government:

- 1) Urge multilateral regimes to expand membership to countries that are trusted to enforce controls.
- 2) Encourage countries, including those that are not regime members, to enact the controls that multilateral regimes promulgate.
- 3) Create a new country group on the CCL for countries that are not able to join all of the multilateral control groups but have a proven record of compliance.
- 4) Engage in multilateral negotiations on appropriate treatment for new and cutting edge technologies, such as treatment on the Missile Technology Control Regime (MTCR) of Unmanned Aerial Systems (UAS) that are not designed for carrying weapons payloads.

RECOMMENDATIONS FOR IMPROVING DUAL-USE EXPORT CONTROLS

Recommendation #5: Improve the Licensing System and Increase Transparency

Changes must be made to the licensing protocols and the underlying policies if the United States is to protect national security, remain a leader in science and technology, promote interoperability with U.S. partners and allies, and strengthen global competitiveness. Increased transparency and access to information would benefit government and industry alike. The CSC recommends the government:

- 1) Approve and implement the intra-company transfer (ICT) proposal in a way that ensures the administrative requirements are calibrated to minimize the burden on industry without compromising national security.
- 2) Expand existing Commerce license exceptions to include more items and additional reasons for control beyond national security (NS), especially for multilateral regime members. Examples include but are not limited to:
 - a) Expanding license exception GBS (shipments to country group B) to include more Export Control Classification Numbers (ECCN) for both NS and unilateral reasons for control (such as crime control and regional stability).

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- b) Expanding license exception APR (additional permissive reexports) to include additional NS ECCNs as well as for non-NS controls where those APR- eligible destinations are also related regime members (e.g., the Australia Group and commodities controlled for chemical/biological (CB) reasons).
- 3) Implement the Commerce Department proposal for a fast-track licensing process for trusted countries with proven compliance by:
 - a) Reducing the wait time when applying to send samples to a customer.
 - b) Expediting repeat licensing allowing the exporter to reference the prior license approvals.
 - c) Extending license validity periods from 2 to 5 years.
- 4) Implement the Commerce Department proposal of a license free zone for exports and re-exports to or from key allies and other foreign countries that maintain high export control standards consistent with U.S. foreign policy and national security objectives.
- 5) Create an interface to the Simplified Network Application Process Redesign (SNAP-R) to allow industry to submit license applications electronically from their own licensing development and implementation systems.
- 6) Create a narrow list of controlled items and technologies for deemed exports and a new general authorization for those items and technologies subject to deemed exports.
- 7) Update the exception for informational materials, receipt and/or transmission of telecommunications services to scale of current technologies. Products including software downloads and technology made freely available without restriction, regardless of whether they contain encryption, should be exempt from controls.
- 8) Create an exception for safety of flight civil aircraft equipment for embargoed countries.
- 9) Increase the value of the LVS (limited value shipments) exception.
- 10) Expand the countries and items and technologies eligible for export under the Validated End User (VEU) program.
- 11) Use clear and specific language for license conditions and narrowly tailor them to limit the impact on the scope of the license, in a manner consistent with U.S. foreign policy and national security objectives.
- 12) Require agencies to demonstrate reasons for imposing specific license conditions and to draw a reasonable nexus between said conditions and the agency's mission, and allow an applicant review and appeal these assertions prior to issuance of the license.

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13) Improve Technical Advisory Committees (TAC) by:

- a) Increasing membership where current limitations are constricting.
- b) Opening more sessions to the public when prospective changes and new issues are discussed.
- c) Publishing more details on working groups and how interested parties can participate without being members of the TACs.

14) Impose condition that submission of CCATS for product or technology require approval from the original equipment manufacturer if the submission is not from the Original Equipment Manufacturer (OEM) unless the CCATS submission positively identifies why such a requirement cannot be met (e.g. OEM is out of business). BIS would be required to issue CCATS determinations to the applicant, as well as the OEM, if the OEM is not the applicant.

15) Review and revise EAR part 772 Definitions of Terms to provide further clarity (e.g., the definition of "specially designed").

Recommendation #6: Systematic Review of the Commerce Control List (CCL) with a Greater Focus on Foreign Availability

Lifecycles for many new technologies are now six months to a year. Yet many U.S. controls were implemented years, if not, decades ago. Many controlled technologies are no longer sensitive, while others are sensitive but not controlled. BIS has begun a process to systematically review the CCL, but a more robust process should be implemented. The review should be disciplined, regularly scheduled, and based on a presumption that a listed item will be removed from control unless a fully documented justification for maintaining it on the CCL is provided.

Foreign availability assessments should be part of a dynamic export control regime that is constantly reevaluating threats to the United States and identifying those technologies that are most critical to our national interest. Foreign availability assessments can provide the government with a greater understanding of other countries' capabilities and result in more efficient use of limited government resources. The CSC recommends the government:

- 1) Create a "sunset" rule under which controls on items on the CCL will be taken off at a specified time unless a justification can be presented for maintaining the *status quo*.
- 2) Improve foreign availability assessments by:
 - a) Re-establishing the Office of Foreign Availability.
 - b) Working with industry to develop the criteria, process, and data needed for an interagency team to make findings regarding foreign availability.
 - c) Articulating the evidentiary threshold for finding foreign availability. The petitioning company/industry should bear the burden of proof to establish foreign availability of an item or technology. After a presumption of foreign availability has been established, the government would have the burden to prove with clear and convincing evidence any lack of foreign availability.

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- d) Establishing timeframes for processing foreign availability requests.
- 3) Apply the improved foreign availability standard to all items and technologies on the CCL. Where foreign availability is found, the item should be removed from the list or be subject to a license exception absent a countervailing foreign policy or national security concern or requirement for other domestic and international public policy initiatives.
- 4) Assure that items controlled on the CCL are consistent with other domestic and international policy initiatives.
- 5) Create a system for publication of items that have been identified as available from foreign sources to eliminate multiple reviews for the same item/technology.
- 6) Removal of controls on items where there is foreign availability or indigenous production or where global production is so wide and diverse that unilateral controls do not effectively limit access to the item or technology, unless there are reasons to impose foreign policy controls (e.g., related to anti-terrorism, non-proliferation or missile technology control).

Recommendation #7: Encryption

Rapid technological advancement in and the ubiquitous nature of cryptography have rendered many U.S. controls obsolete, and their continuation will only decrease the competitiveness of many U.S. manufacturers. Encryption controls are overly complicated and difficult for U.S. exporters to understand and comply with. Many hardware and software products are increasingly being reclassified for export control purposes as “encryption items,” due to their rapidly growing incorporation of encryption capability as a commodity feature, albeit usually a minor one. This designation is intensifying export controls on many products by imposing highly disruptive licensing or mandatory product reviews, end user restrictions, and post-export reporting. The reclassification trend is producing a serious increase and backlog in encryption licensing cases at BIS. A thorough review of encryption rules should be conducted to ensure that they do not impose unnecessary restrictions and burdens that hamper US competitiveness, a key component of US national security. The CSC recommends the government:

- 1) Remove encryption controls on products that do not have cryptography as their core function.
- 2) Remove review requirements from mass-market and other commodity products and components, consistent with the practice of U.S. allies.
- 3) Ensure mass-market treatment for components that are designed for use in mass-market products or that are otherwise widely available.
- 4) Eliminate post-export reporting requirements.

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- 5) Lift unilateral controls in general, such as those on encryption used in connection with Open Cryptographic Interfaces.
- 6) Eliminate controls on products utilizing only publicly available software.

RECOMMENDATIONS FOR IMPROVING MUNITIONS EXPORT CONTROLS

Recommendation #8: Focus and Improve the U.S. Munitions List

Any discussion of “scrubbing the U.S. Munitions List” must start with addressing the structural elements that define the list in the first place and serve as the basis for “capturing” technology. The U.S. government must begin by clarifying what constitutes a defense item, specifying the items that qualify, and adopting a dynamic process to make adjustments to what is and is not placed on the USML over time.

- 1) Create an objective definition for defense articles/services/end items. The basis for a decision should focus on the questions of any core military functionality and on any commercial and foreign availability, reflecting a policy to designate only those items as USML controlled when they are multilaterally controlled as munitions items or support core military capabilities of the United States. To that end, affirm and adopt proposed revisions to Section 120.3 and 120.4 of the ITAR, as well as clarifications of ITAR terms, put forward by the Defense Trade Advisory Group (DTAG) after appropriate consultation with the entire trade community.
- 2) Improve the structure of the USML categories so that they are more specific. The sub-categories should identify expressly what is controlled, even if articulated in general terms, rather than referring to “derivative” controls.
- 3) Formalize industry consultative bodies at the Department of Defense to provide updates on global trends in defense hardware/technology, foreign availability, marketing, and related recommendations for changes to the USML. Such information should be factored into decisions regarding additions of new items, updates to technical parameters of controlled items, and regular reviews of the USML to determine appropriate removal of items which have little or no military or intelligence significance or dual-use items that could be adequately controlled by Commerce.

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The Coalition for Security and Competitiveness

Recommendation #9: Improve Export Licensing Caseload Management

While the Departments of State and Defense have made progress on license processing times, a steadily increasing caseload will put greater pressure on the system in the absence of new strategies to more efficiently review and approve export applications. In particular, the U.S. must streamline licensing to support international cooperation on key defense programs, reform the “see-through” rule, make better use of existing exemptions, update the congressional notification process, and adequately fund further modernization initiatives at the State Department. The CSC recommends the government:

1) Streamline Licensing to Support International Cooperation on Key Defense Programs

Develop a workable framework for technology sharing between the U.S. and its allies and partners who are cooperating on major defense and national security programs important to the U.S. Government. Such a program licensing framework should very significantly reduce licensing requirements on such programs by:

- a) Defining and tailoring protection requirements for specific categories of technologies, systems, components, and materials used in the program.
- b) Pre-qualifying companies in allied and partner nations to receive and share controlled defense articles and related technical data.
- c) Establishing a vetting process for dual and third country national personnel of pre-qualified companies.
- d) Apportioning responsibility for ITAR compliance appropriately among all participants, thus allowing multiple U.S. industry parties to participate in the same scope with the same foreign parties under a single authorization, thereby eliminating duplicative requests from applicants.

2) Under the “see-through” rule, the ITAR are interpreted to apply to all exports and re-exports of USML items when incorporated into other items, even when the USML item has low sensitivity and/or is incorporated into a much larger end-item. This policy has frequently disrupted commercial and military supply chains without any commensurate national security benefit. The government should develop new control mechanisms for items that are ITAR-controlled, but whose export or re-export after incorporation into another item does not raise policy concerns.

3) Support Greater Use of ITAR Exemptions. ITAR exemptions, when coupled with appropriate record-keeping and notifications, can be used instead of submitting licenses. Unfortunately, the ability to use many of these measures effectively is compromised by their regulatory language/structure and the conservative implementation by U.S. agencies, which should be appropriately clarified.

Examples of current exemptions which could be clarified include:

- a) 126.4(c)(3) – No license required if an export supports the U.S. Government. A company must prove that “the appropriate export license or Bill of Lading could not have been obtained in a timely manner,” a virtually impossible hurdle leading companies to forego this exemption.

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- b) 123.16(b)(2) – The exemption for items valued below \$500 is of limited use since few components qualify. The threshold should be \$10,000 for most components.
 - c) 123.4(a)(1) – An exemption for replacement/repair of items previously approved for export. When such parts are returned to the U.S. without proper citation on import documents, U.S. companies submit voluntary disclosures and apply for licenses to re-export the item.
- 4) Update Congressional Notification Processes.
State and Congress should develop better procedures for review of licenses and agreements for Foreign Military Sales (FMS) and Direct Commercial Sales (DCS) requiring Congressional Notification, including a documented procedure for out-of-session notifications.
- 5) Funding for State’s export control function should come from standard appropriations versus higher registration fees. As long as these increased fees continue to be collected, the State Department should:
- a) Ensure funds are exclusively designated for modernizing Directorate of Defense Trade Control (DDTC) operations, and report annually on how the funds are being used.
 - b) Develop an automated electronic registration system, including electronic funds transfer for payments and electronic issuance of registration confirmation.
 - c) Include policy coordination and review and other quality control management tools in future upgrades of the e-licensing system to provide more uniform and transparent application of licensing guidelines and provisos.

Recommendation #10: Provide for DoD Acquisition, technology & Logistics (AT&L) Role in Export Controls

The Defense Technology Security Administration (DTSA) is the appropriate lead agency for DOD’s participation in the export control policy and implementation. The Office of the Undersecretary for Acquisition, Technology and Logistics (AT&L) participates in some facets of the export control process, most notably in foreign disclosure processes concerning technology transfer. In addition to the foreign disclosure processes, we urge DoD to ensure that DTSA decision making is informed by AT&L assessments such as those that examine the health of critical capabilities and skill sets within the defense industrial base.

Recommendation #11: Developing Transparent and Disciplined Processes for the Department of Defense’s Disclosure Decisions

A number of Defense Department committees review initial requests for release of classified or sensitive U.S.-origin defense articles and services. This review occurs even before an export license application can be filed, and it must become more predictable, efficient, and transparent to ensure modernization at the export license level. The CSC recommends the government:

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- 1) Recognize that foreign competitors to U.S. industry are capable of manufacturing products that are “good enough” to win international orders, thereby threatening U.S. opportunities for security and economic partnerships.
- 2) Examine the mission, processes, resource requirements and timelines for each existing Defense Department review committee, with an eye toward eliminating redundancies and improving efficiency.
- 3) Conduct committee reviews concurrently rather than consecutively, and take into consideration comprehensive and balanced policy and technical inputs.
- 4) Enforce rigorous policies and timelines for each committee as regards entry, deliberation (including dedicated “blue teams” where appropriate), escalation, and exit procedures.
- 5) Establish a time-bound debrief and appeals process for DOD/industry proponents of cases, as well as a process for reconciling divergent outputs at the SecDef level.
- 6) Ensure appropriate oversight and accountability for timeliness and quality of committees’ advice at the Under Secretary and equivalent Military Department levels prior to SecDef or DepSecDef decisions on precedent-setting foreign release matters.
- 7) Create an ongoing consultative process with industry to develop appropriate USD/DOD technology thresholds for U.S. exports.
- 8) Inform relevant contractors upon completion of each committee’s review.
- 9) Incorporate defense procurement and industrial base considerations into deliberations by accounting for program impacts, supporting direct commercial sale (DCS) and hybrid DCS/Foreign Military Sales (FMS) cases, sponsoring technology disclosure cases for systems not in U.S. inventory, and ensuring consistency in export license evaluations by the Defense Technology Security Administration (DTSA).
- 10) Issue DOD Instructions within 90 days of policy decisions, including the results of specific reviews that establish foreign release policy precedents.

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