

CHAPTER 8

Missile Technology (Sections 742.5 and 744.3)

Export Control Program Description And Licensing Policy

On April 16, 1987, the United States, Canada, France, Germany, Italy, Japan, and the United Kingdom created the Missile Technology Control Regime (MTCR) in order to limit the proliferation of missiles capable of delivering nuclear weapons. Expanded in 1993 to include missile delivery systems for all types of weapons of mass destruction, the MTCR now has 33 member countries. (See Appendix II for a complete list of MTCR member countries). In addition, there are several countries, including Israel and Romania, that have announced their unilateral adherence to the MTCR Guidelines.

The MTCR Guidelines and the Equipment and Technology Annex form the basis for U.S. missile technology controls. The MTCR Guidelines provide licensing policy, procedures, review factors, and standard assurances on missile technology exports. The Annex is the list of missile-related commodities (goods, technology/technological data, and software) subject to controls, and is divided into two categories. Category I items include missile systems and major subsystems, production facilities, and production equipment for missile systems capable of delivering a 500 kg payload to at least a 300 km range. Category II items include materials, components, and production and test equipment associated with Category I items, as well as missile subsystems, production facilities, and production equipment for missile systems with a 300 km range, regardless of payload.

BXA is responsible for administering controls on dual-use manufacturing equipment for Category I items, and all dual-use items in Category II. There are approximately 120 entries on the CCL that are subject to missile technology controls. Category I items carry a strong presumption of denial, and BXA rarely approves licenses for their export. Transfers of production facilities for Category I items are prohibited. BXA will approve the export of Category II items only after a case-by-case review. Additionally, the United States observes the multilateral commitment to honor other members' denials of licenses and to support such denials through a "no undercut" policy, enhancing global efforts to prevent missile proliferation and preventing unfair commercial advantage among regime members.

The member countries of the MTCR seek to foster the cooperation of non-member countries in limiting the spread of delivery systems for weapons of mass destruction and have focused those efforts in an MTCR-sponsored series of workshops and seminars, begun in 1996, in which MTCR members and invited non-MTCR countries explore different approaches to improve world-wide export controls and help prevent missile proliferation.

There are additional export controls on items that normally do not require a license, or are controlled for reasons other than missile technology, under the Enhanced Proliferation Control Initiative (EPCI). EPCI's intent is to preclude countries from obtaining U.S. goods and technologies for indigenous missile programs. Internationally, these types of controls are known as "catch-all" controls. An exporter must obtain a license, even if one is not otherwise needed, if the exporter knows or BXA informs him/her that the export is for use in nuclear, chemical or biological weapons, or missile programs. United States persons are also restricted from activities abroad in support of nuclear, chemical or biological weapons, or missile-related projects. EPCI regulations are designed to prevent exports that could make a material contribution to missile proliferation projects of concern, but are not intended to prohibit legitimate commercial trade.

EPCI license restrictions also apply to certain forms of "knowing" participation and support by U.S. persons, including foreign branches of U.S. companies in missile activities in countries listed in Country Group D:4, found in Supplement 1 to Part 740 of the Export Administration Regulations (EAR). Restrictions apply to the export, reexport, or transfer of any item, including foreign-origin items, by a U.S. person where the person knows the item will be used in the design, development, production or use of missiles in or by such countries. Support activities requiring a license include financing, freight forwarding, transportation and other comparable assistance through which a person facilitates an export, reexport, or transfer. In addition, no U.S. person may perform any contract, service, or employment knowing it will assist in missile activities in a country listed in Country Group D:4.

EPCI began as a unilateral control, but with U.S. leadership, a large majority of our nonproliferation regime partners have also incorporated "catch-all" export controls. The European Union and Australia implemented catch-all controls in 1995, Japan in 1996, Argentina in 1997, and Russia in 1999. At present, all but a few of the MTCR member countries have some form of catch-all controls, and the United States continues to encourage partners to implement and strengthen these controls.

Licensing Requirements and Policy

In summary, the licensing requirements and policy for missile technology controls described in Parts 742.5 and 744.3 of the EAR are as follows:

A. BXA requires a license for the export or reexport to all destinations (except Canada) of those dual-use items specifically identified on the CCL as controlled for missile technology reasons. The policy excluding exports and reexports of missile technology-controlled items destined for Canada from a license requirement is currently under review. An Advance Notice of Proposed Rulemaking was published on December 20, 2001, stating that BXA is reviewing the existing license exemption and asking for comments on how removal of the exemption would affect exporters. BXA is also meeting with the Canadian government to discuss the proposed policy change.

BXA requires a license for any dual-use export or reexport subject to the EAR when the exporter knows that the item is either (1) destined for a missile project listed in the footnote to Country Group D:4 in Supplement 1 to Part 740 of the EAR, or (2) will be used in the design, development, production or use of missiles in or by a country listed in Country Group D:4. The same license requirement applies to activities by U.S. persons that would support a missile program in the designated countries.

BXA may inform the exporter that a license is required for any item because there is an unacceptable risk of use in or diversion to such activities anywhere in the world.

B. Applications for export licenses will be considered on a case-by-case basis to determine whether the export would make a material contribution to the proliferation of missiles.

Analysis of Control as Required by Section 6(f) of The Act

A. The Purpose of the Control

These controls curtail the availability of goods and technology that could contribute to missile proliferation. The U.S. regulation of exports of specific types of missile-related equipment and technology, in coordination with other supplier countries, helps limit the destabilizing spread of missile systems and related technology around the world. These controls complement U.S. and international nuclear, chemical and biological nonproliferation efforts by blocking the development of unmanned delivery systems for weapons of mass destruction.

These controls lend clear U.S. support to the collective effort of the other 32 member countries of the MTCR and underscore U.S. resolve to address the mounting international concern regarding missile proliferation.

B. Considerations and/or Determinations of the Secretary of Commerce

1. *Probability of Achieving the Intended Foreign Policy Purpose.* Although some controlled items are available from other countries, cooperation among the United States, its MTCR partners and other like-minded countries, many of which are major producers of the items under control, has hindered the efforts of proliferators to successfully develop or acquire militarily-effective missiles. The Secretary has determined that extending these controls is likely to limit the spread of missile delivery systems.

2. *Compatibility with Foreign Policy Objectives.* Halting the spread of missiles and related equipment and technology worldwide is a key U.S. national security and nonproliferation objective. Missile technology controls are consistent with, and contribute to, achievement of this objective. Moreover, U.S. membership in the MTCR, and rigorous application of the MTCR Guidelines and Annex, complement existing nuclear, chemical and biological nonproliferation control policies by working actively to curb the spread of missile technology and equipment for the delivery of such weapons.

3. *Reaction of Other Countries.* The Secretary has determined that the reaction of other countries to these controls will not render the controls ineffective or be counterproductive to U.S. policy. The United States is confident that other members of and adherents to the MTCR, many of whom are also the leading suppliers of missile technology, will continue to support and strengthen this control regime. The MTCR partners share information regarding denials of MTCR Annex items, and are committed to consult with each other before approving an essentially identical export denied to a specific end-user by another partner (the "no undercut policy.") The MTCR partners also share information about potential proliferation concern activities, and have cooperated to interdict certain transactions. In addition, the number of MTCR members and other countries willing to cooperate with the regime has increased over the past few years. Finally, the United States and its MTCR partners are actively engaged in an outreach program to encourage additional countries to adhere to the Guidelines and implement effective export controls on MTCR items.

4. *Economic Impact on U.S. Industry.* In extending these controls, the Secretary has determined that the economic impact does not outweigh the foreign policy benefit of the control. The MTCR affects only a confined list of commodities and has limited economic impact on the the majority of U.S. exports. Multilateral support for the MTCR Annex by other major suppliers of controlled technologies and products helps restrain the flow of missile-related goods and technologies to activities and projects of proliferation concern. MTCR members' commitment to the "no undercut policy" helps ensure that no member country obtains an unfair commercial advantage in the pursuit of foreign sales.

In FY 2001, BXA received 1,140 license applications, valued at \$1.7 billion, for the export or reexport of missile technology equipment. Of these, BXA approved 925 applications, denied 61 applications, and returned without action 125 applications, with 29 applications still in process at the end of FY 2001. The significant dollar volume is reflective of the large number of exports of expensive aircraft inertial navigation units.

The increase in the number of license applications received in FY 2001 (1,140) compared to the total received in FY 2000 (942) is attributed in part to the change in policy regarding exports to India and Pakistan. Exports and reexports of all items subject to the EAR to Indian and Pakistani entities listed in Supplement No. 4 to Part 744 of the EAR (the Entity List) require a license. On March 17, 2000, the license review policy for the export of items classified as EAR99 to these listed entities changed from a policy of denial to a presumption of approval. This action contributed to an increase in the volume of applications received. On October 1, 2001, the Department of Commerce published a regulation which lifted missile technology sanctions against India and Pakistan and reduced the number of Indian and Pakistani entities on the Entity List.

There are comparatively few denied licenses for missile technology controlled items because (1) exporters do not generally pursue transactions they understand (based on informal discussions) will be rejected; and (2) many of the approved transactions are to countries that do not pose missile proliferation concerns (e.g., MTCR member-nations). Thus, the licensing requirements provide an effective and efficient way to control these sensitive missile related items, greatly reducing the chance that items will be diverted to an entity that might use them for proliferation activities.

5. *Enforcement of Control.* The presence of multilateral controls on missile technology provides a strong framework for cooperative enforcement efforts overseas, but there are challenges for the enforcement of controls on dual-use goods related to missile development. First, it is difficult to detect, investigate, and prosecute cases under the “know” standard set by the EPCI “catch-all” provision. Second, some countries do not yet have “catch-all” laws or have different standards for “catch-all,” complicating law enforcement cooperation. Third, identifying illegal exports and reexports of dual-use missile-related goods requires a significant resource commitment.

In order to enforce these controls effectively, BXA continues to focus on preventive enforcement. It maintains an extensive outreach program to educate companies about export controls and to increase their awareness of “red flags” that may indicate potentially risky transactions. This program is an important component of the BXA’s efforts to prevent companies from illegally exporting dual-use products or equipment that could be used to make missiles. Recognizing the importance of export enforcement, the MTCR held its first Enforcement Experts meeting at the MTCR Plenary in Ottawa, Canada in September 2001.

C. Consultation with Industry

The United States normally holds discussions with industry representatives on issues involving the MTCR Annex through the Transportation Technical Advisory Committee (TransTAC), a BXA-chartered committee of industry representatives. There are also regular consultations with other relevant TACs on missile-related issues, such as the EPCI clarification project and other current MTCR technical issues. BXA participates in interagency working groups that review proposed changes to the Annex and engages in discussions of the proposals with companies that have relevant expertise. For example, in FY 2001, BXA worked with industry to clarify controls on telemetry equipment.

On November 7, 2001, the Department of Commerce, via the *Federal Register* and the BXA Web page, solicited comments from industry on the effectiveness of foreign policy-based export controls. A more detailed review of the comments is available in Appendix I.

Sartomer advocated easing foreign policy-based controls on hydroxyl terminated polybutadiene resins (HTPB resins), which are classified under ECCN 1C111b.2. Sartomer stated that the controls “have an adverse economic impact on our export activities, especially inasmuch as these controls create an unfair commercial advantage for foreign producers.” To decrease delays in the licensing process, Sartomer recommended adopting a framework that would permit streamlined authorization for the exportation of HTPB resins. Suggestions include the creation of a license renewal process, license exception availability for samples, and granting BXA with delegation of authority in order to avoid “repetitive interagency referral.” Sartomer also recommends broadening the MTCR “no undercut” policy, stating that “disparities between the national regimes lead to inequities, especially in view of cumbersome U.S. regulatory requirements, which we believe undercut U.S. economic interests.”

D. Consultation with Other Countries

Ongoing consultations with the other members of the MTCR are a fundamental element of U.S. missile technology controls. Consultations with non-MTCR countries are also essential to U.S. missile nonproliferation policy. The U.S. Government shares information about activities of concern with other countries and seeks to prevent or stop certain transactions. The United States also shares denial information with its MTCR partners. Although export controls are coordinated multilaterally, national discretion remains the ultimate decision-making authority.

E. Alternative Means

The missile sanction provisions of the National Defense Authorization Act of FY 1991 provide for the imposition of export, import, and procurement sanctions on foreign entities engaged in certain kinds of activities relating to the transfer of MTCR Annex items to non-MTCR adherent countries. In the past, the United States has imposed sanctions on entities in China, India, North Korea, Pakistan, and Russia. One goal of the missile sanctions is to encourage the governments of the sanctioned entities to adopt responsible nonproliferation behavior.

Diplomatic efforts by the United States and MTCR partners to encourage additional countries, including other potential suppliers of missile technology, to abide by the MTCR Guidelines are ongoing. These efforts are aimed at encouraging non-MTCR members to adhere unilaterally to the MTCR Guidelines and to implement effective missile export controls.

F. Foreign Availability

The United States evaluates the foreign availability of missile systems and launch vehicles prior to the imposition of MTCR-based controls. Possible suppliers of missile technology who are not MTCR members include, but are not limited to, China (PRC), Egypt, India, Israel, and Taiwan. Some of these countries, such as Israel, abide by the MTCR Guidelines and apply MTCR-type controls. The United States continues to approach other nations that produce MTCR Annex-controlled items to urge vigilance in reviewing requests to export these items and to rigorously apply the MTCR Guidelines to help prevent missile proliferation worldwide.