

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) 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 32 member countries; the Czech Republic, Poland, and Ukraine joined in 1998. See Appendix II for a complete list of MTCR member countries. In addition, there are several countries, including Israel, Romania, and South Korea that have pronounced 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 Guidelines provide licensing policy, procedures, review factors, and standard assurances on missile technology exports. The Annex is the list of items (goods, technology/technological data and software) of missile-related commodities 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 within 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.

The Department of Commerce 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 Commerce Control List that are subject to missile technology controls. Category I items carry a strong presumption of denial and Commerce rarely approves licenses for their export. Transfers of production facilities for Category I items are also prohibited. The United States will approve the export of category II items only after a case-by-case review to determine if they are intended for use in an MTCR class missile or as a weapon of mass destruction delivery system. 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 are seeking to foster the cooperation of non-member countries in limiting the spread of delivery systems for weapons of mass destruction. Since 1996, the MTCR has sponsored a series of workshops and seminars, in which Commerce plays a major role, as an outreach program for both MTCR countries, and invited non-MTCR countries

to explore different approaches to improved world-wide export controls and to help prevent missile proliferation. In 1999, the MTCR sponsored one workshop on intangible technology transfers, an area that has gained momentum; all of the other non-proliferation regimes are also reviewing the issue.

There are additional missile technology controls on items that normally do not require licenses, or are controlled for other than missile technology reasons, under the Enhanced Proliferation Control Initiative (EPCI), which are intended 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 the Commerce Department informs him, that the export is for use in nuclear, chemical, or biological weapons or missile programs. U.S. 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 licensing 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 of concern, as specified in the 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 designated 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 of concern.

EPCI began as a unilateral control, but with U.S. leadership, a large majority of our non-proliferation 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 a form of catch-all controls.

On March 26, 1999, the United States published a notice in the *Federal Register* adding three Russian entities to the Entity List in Supplement 1 to Part 744 of the EAR; on May 28, 1999, six entities in the Peoples' Republic of China were added. All nine entities are suspected of export control violations involving weapons of mass destruction and missile technology. Exports and reexports of all items subject to the EAR to the three listed Russian entities and one of the six Chinese entities require licenses; the licensing policy is a presumption of denial. Exports and reexports of all items subject to the EAR and on the Commerce Control List to the remaining five Chinese entities will also be reviewed with a policy of denial.

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

A. The United States requires a license for the export or reexport to all destinations (except Canada) of those dual-use items specifically identified on the Commerce Control List as controlled for missile technology reasons.

The United States 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.

The Department of Commerce 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 United States' 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 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 have foreign availability, cooperation between 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 highly

accurate, militarily effective missiles. The Secretary has determined that the extended controls are likely to achieve the purpose of limiting 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 goal. Missile technology controls are consistent with, and contribute to, this important U.S. policy objective. Moreover, U.S. membership in the MTCR and rigorous application of the MTCR Guidelines and Annex complement the existing nuclear, chemical, and biological non-proliferation 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 Western 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 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, both the number of MTCR members and other countries willing to cooperate with the regime have increased over the past few years. Finally, the United States and its MTCR partners have 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. Multilateral cooperation from other MTCR members to honor members' export denials through a "no undercut policy" helps ensure that no member country obtains an unfair commercial advantage in the pursuit for foreign sales.

In Fiscal Year 1999, the Department of Commerce received 469 license applications, valued at \$873 million, for the export or reexport of missile technology equipment. Of these, the United States approved 430 applications, denied 7 applications, and returned without action 32 applications. The large dollar volume is reflective of the large number of expensive aircraft inertial measurement units, which BXA controls for missile technology reasons. There are very few denied licenses for missile technology controlled items because exporters do not generally seek to consummate transactions they know will be rejected. Thus, the licensing requirements

are both effective and provide an efficient way to control these sensitive missile-related items, greatly reducing the chances of items being diverted to an entity that might use them for proliferation concerns.

The sanctions on India and Pakistan have had a significant impact on the trade of low-technology commodities classified as “EAR99,” i.e., commonly available electronic parts and components not listed on the Commerce Control List. In Fiscal Year 1999, U.S. exporters submitted about the same number of license applications for items not requiring a license as items requiring a license for export to India or Pakistan due to the uncertainty in regard to licensing requirements in the aftermath of each country’s testing of nuclear devices in May 1998. U.S. companies have been placed at a competitive disadvantage due to the widespread availability of these low-technology parts and components from other international sources. In some cases, importers informed U.S. providers that they would suffer the loss of any future business as the result of the unreliability of U.S. origin shipments. Other low-technology items, i.e., those classified under unilateral U.S. controls, have suffered the same fate. Included in this area are items including volt-ohm meters and simple oscilloscopes for testing electronic equipment such as radios and televisions.

5. *Enforcement of Control* The presence of multilateral controls on missile technology provides a strong framework for cooperative enforcement efforts overseas. However, enforcement continues to have concerns related to control of dual use goods related to missile development. First, it is difficult to detect, investigate, and prosecute cases under the “knowing” standard set by the EPCI, a primary means of controlling dual-use goods procured for missile purposes but not covered by the MTCR and its annex. Second, many non-regime 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.

To meet the challenge of the effective enforcement of these controls, Commerce continues to focus on preventive enforcement. It maintains an extensive on-going outreach program to educate appropriate 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 Commerce's efforts to prevent companies from illegally exporting dual-use products or equipment that could be used to make missiles.

C. Consultation with Industry

The United States usually discusses changes or issues involving the MTCR Annex in the Transportation Technical Advisory Committee (TransTAC), the Commerce-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. Commerce participates in interagency working groups that review proposed changes to

the Annex and discusses the proposals with companies that have expertise in the area and could be affected by either relaxation or new controls. For example, in 1999, Commerce worked with industry to clarify controls on filament winding machines.

D. Consultation with Other Countries

Ongoing consultations with the other members of the MTCR are a fundamental element of U.S. missile technology controls. The membership of the MTCR continues prudently to expand, as other potential suppliers recognize the importance of the MTCR in restricting the proliferation of missile systems. Consultations with non-MTCR countries are also an essential element of 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 the export controls are coordinated multilaterally, national discretion remains the ultimate decision-making authority.

E. Alternative Means

To participate fully in the MTCR, the United States must be able to prevent exports of equipment and technologies relevant to the development of missiles. The missile technology control provisions of the National Defense Authorization Act of Fiscal Year 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. A 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 the 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 implement effective export controls on missile items.

F. Foreign Availability

The United States evaluates the foreign availability of missile systems and launch vehicles prior to the imposition of MTCR-based controls. Foreign capabilities outside the MTCR include, but were 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 has approached and will continue to approach other nations that produce the 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.

