

**Remarks of Eric L. Hirschhorn
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I. Introduction

Good afternoon. I want to thank Andy Shiles for his kind introduction. I'd also like to thank the American Association of Exporters and Importers for organizing today's conference, and for inviting me to speak here today. I want to congratulate all of you on this 90th anniversary of the AAIE's annual conference.

As a native New Yorker, I am pleased that New York City is the site of this conference, and that every year since 1921 manufacturers, distributors, retailers, and service providers have convened under AAIE's aegis to discuss the critical issues affecting international trade.

The Obama Administration's Export Control Reform initiative will have a substantial—and positive—effect on many of you.

In Barack Obama, we have as forceful a top-level advocate for export control reform as I've seen in my more than 30 years working in this field. At the President's request, Defense Secretary Gates, Secretary of State Clinton, and my boss, Secretary Gary Locke – who will soon become our Ambassador to China – have directed the effort to create an export control system that is responsive to the national security, technology, and commercial imperatives of the 21st Century.

Last spring, Secretary Gates set out the Administration's conclusion that fundamental reform is needed. "If the application of controls on key items and technologies is to have any meaning," he said, then,

“We need a system that dispenses with [the] 95 percent [that are] ‘easy’ cases and lets us concentrate our resources on the remaining 5 percent. By doing so, we will be better able to monitor and enforce controls on technology transfers with real security implications while helping to speed the provision of equipment to allies and partners who fight alongside us in coalition operations.”

Moreover, he added, the current system encourages multinational companies to move research, development, and production offshore, eroding our defense industrial base as well as undermining our control regimes.

From the perspective of one who has been involved in export controls for thirty years, things *are* getting better. In my first tour of duty at the Commerce Department back in 1980 and 1981, we

were issuing about 80,000 licenses a year. Many were for computers, electronics, and telecommunications items and most were for exports to countries with which we had excellent relations. Back then *all* encryption was considered military and accordingly was under the State Department's jurisdiction. Commerce's enforcement resources were almost nonexistent and our agents did not have full law enforcement authority.

I left Commerce in 1981 for private law practice. In the mid-1980s, I secured the first license permitting the export of computers using the Intel '286 chip to the Soviet Union. In the early '90s, encryption began moving from State to Commerce Department jurisdiction, though licenses were required for almost all exports of such items. In the mid-'90s, the United States concluded that most computers are not "choke point" technology and substantially lessened controls on such items.

Now, we are trying to get closer to perfecting our export control system. I have been involved with export controls for more than thirty years and this is by far the most ambitious—and most promising—reform effort that I’ve seen.

Making changes has been no easy task. But we are taking significant, concrete steps to make our export control system more efficient and transparent for exporters, and a more effective barrier against foreign entities that seek to harm our national interests.

This past August, the President, Secretary Locke and others announced that the end result of export control reform would be a *single* control list, administered by a *single* licensing agency, operating on a *single* information technology platform, and enforced by a *single* primary export enforcement coordination agency.

Some of these changes will require congressional action, and we will continue to closely consult with Congress to craft appropriate legislation.

II. Changes to the USML

One of the most important reforms that is already well under way is the simplification and streamlining of the Department of State's Munitions List and the Department of Commerce's Commerce Control List.

Given that you've just been treated to a two-hour panel discussion about positive lists and design intent, I will not repeat the substance of those presentations. Suffice to say that many low-level, widely available items will be transferred from the USML to the CCL, and Commerce jurisdiction will provide a more flexible control structure.

The need for these changes was illustrated last August by Secretary Locke at the Bureau of Industry and Security's annual Update Conference on Export Controls and Policy. Secretary Locke displayed two functionally equivalent pivot blocks that hold wheel axle assemblies together. One is for use in the axle of a fire truck and can be exported anywhere but Cuba, Iran, North Korea, Sudan, and Syria without a license. The other is designed for a military vehicle and is almost imperceptibly different, but export that one anywhere but Canada without a license and you could end up in jail. *Control for minor items whose function isn't inherently military results in needless burdens, particularly for small- and medium-sized businesses.* Lifting such burdens, which divert the time, energy, and resources of the Government as well as of exporters, is an *important aspect* of the reform effort.

In practice, here's how the changes to the Munitions List will affect exporters.

First, ITAR registration would be eliminated for many small and medium-sized exporters who sell minor elements of defense products that are currently subject to ITAR controls.

Second, the change in jurisdiction should eliminate many problems associated with the “see through” rule, which make items manufactured offshore subject to U.S. reexport control requirements if they incorporate U.S.-origin ITAR parts and components, *regardless* of value or importance.

Third, there should be fewer transactions requiring United States exporters to enter into and obtain complex Manufacturing License Agreements or Technical Assistance Agreements to share data and services.

And finally, there could be a significant reduction in the time required to determine the jurisdiction of parts and components.

III. Changes to the CCL

But changing the USML alone is not sufficient for us to achieve our reform objectives, and it's not the only focus of this Administration's efforts.

Changes are also coming to the Commerce Control List.

First, because so many items will be moving over from the Munitions List, we have begun making room on the CCL to accommodate these new additions. And, we have been preparing new controls for these items in a manner consistent with U.S. national security.

This summer, BIS will publish a proposed regulation regarding the transfer of items from the USML to the CCL.

Let me underscore that **no** Munitions List items that are "specially designed" for a military application will be decontrolled upon

transfer to the CCL. Some items may be eligible for license exception, though. As Mike Laychak of DOD noted during this morning's panel, eventual decontrol is possible as technology advances and becomes more widely dispersed.

And, exporters shouldn't expect to immediately send each of these newly transferred items anywhere in the world that they choose. However, we do expect the proposed regulation to include a process exporters can use to send these items to destinations that pose a relatively low risk of unauthorized uses.

We also expect that once these items are moved to the CCL, exporters will have an easier time exporting them.

Currently, the State Department receives about 30,000 licenses applications each year for items that will soon migrate to the CCL. Once these parts and components join the CCL, we expect significantly fewer of these items to require a Commerce

Department license, as opposed to a license exception, making it far easier for exporters to sell to overseas customers.

But, even as we make accommodation for items formally controlled on the USML, we're also taking steps to make every aspect of the CCL more accessible to exporters.

The existing CCL is largely a “positive” list that describes items using objective criteria – but it’s not wholly so. We are seeking to make the CCL sufficiently “positive,” clear, and precise, so that someone who isn’t an expert on U.S. export controls, but who understands the technical characteristics and capabilities of an item, can accurately determine an item’s jurisdictional status and classification.

IV. The Parallel-Tiered Control Lists

Another significant element of this reform exercise involves converting the reconfigured USML and CCL into parallel-

constructed, three-tiered lists that allow the U.S. Government to focus controls on the most sensitive items while establishing a construct for cascading controls on more mature and widely available items.

To implement this restructuring of both the USML and CCL, the U.S. Government has developed criteria for each of the three tiers. Brian Nilsson outlined the tiers in this morning's discussion, so I won't repeat his remarks here.

Once these tiers have been established, and once items on both lists have been properly placed into them, the government can apply licensing policies associated with each tier.

This new system will improve our national security *and* our competitiveness by permitting the government to adjust controls in a timely manner over a product's life cycle.

So, as technology that was once cutting edge becomes more commonplace and widespread, it can be controlled at a lower level.

Overall, this new structure will enable our export control system to keep pace with both changing technologies and evolving threats.

V. Licensing Policy

Even as we develop the criteria for this tiered system, we are rolling out new regulations that immediately achieve elements of export control reform.

Last winter, BIS published the proposed rule for License Exception Strategic Trade Authorization, or STA. We expect to publish the final STA rule within the next few weeks. STA will allow the export, reexport, and in-country transfer of specified items that will soon occupy Tier 2 of the CCL.

There are two key components of the STA proposal:

1. For exports of most items on the Commerce Control List that do not require a license for statutory reasons, exports will be authorized to about three dozen countries under the proposed license exception.
2. For certain other countries, Wassenaar Arrangement “Basic List” items will be eligible for export under this exception.

STA’s reduced license requirements will be accompanied by safeguards—higher walls, if you will—to ensure that items are not reexported without U.S. authorization outside eligible countries.

The purpose of STA is to facilitate exports to trusted allies and partners but require licenses for reexports beyond this group. We think it makes eminent sense to promote trade and interoperability with our closest friends but to impose additional controls, through the elimination—for items that have been exported under STA—of

license exception Additional Permissive Reexports to destinations that are of greater concern.

License exception STA has the potential to eliminate approximately 3000 of the 22,000 individual licenses BIS issued last year.

And let me note that BIS appreciates the public comments that we received in response to the December 2010 STA proposal. We have taken the comments into account in the development of the final rule.

VI. Related Export Control Issues

I'd also like to touch upon several other changes we have made or plan to make. The new consolidated end-user screening list already has been covered. We are working on several other initiatives to produce a more streamlined, user-friendly system. This includes developing a single license application form that the

Departments of Commerce, State, and Treasury will use, and harmonizing definitions of key terms such as “technology” and “specially designed” across the spectrum of export control and sanctions regulations.

We expect to publish a proposed rule on “specially designed” as one of the next regulatory initiatives to come out of the ECR.

VII. Education

At the very least, we owe to those seeking to comply with our regulations a level playing field. By that I mean ensuring you’re your competitors, as well as you, are aware of our rules and the need to comply with them.

Within the confines of our limited resources, we will seek to expand our outreach wherever possible to ensure that the field indeed is level.

VIII. Compliance and Enforcement

I'd like to address one additional key component of export control reform. License efficiencies and outreach efforts are not the whole story. We also are creating higher walls to guard against a more focused group of entities that seek to harm our interests.

First, in November the President signed an executive order to enhance coordination among export control enforcement agencies. This is another subject that already has been covered, so I won't repeat what my colleagues have told you.

Second, BIS is adjusting how we penalize those who violate U.S. export controls. In the past, BIS typically has imposed penalties on *companies* involved in export violations. Going forward, where a violation is the *deliberate* action of an individual, we will consider seeking penalties against that individual—including heavy fines, imprisonment, and the denial of export privileges—as

well as against the company. The same will be true for supervisors who are complicit in *deliberate* violations by their subordinates.

At the same time, we recognize that even companies that have good intentions can make mistakes. We promote the submission of voluntary self-disclosures (VSDs) in these and other instances. We view VSDs, along with robust internal compliance programs, as important mitigating factors. Given the volume of exports and reexports that are subject to the EAR, the ITAR, and the Treasury Department's embargo regulations, we rely on those of you in industry for the bulk of compliance. *Your* knowledge of *your* products, their end uses, and *your* customers makes *you* the front line troops in this important effort. The value you bring as compliance managers in supporting secure trade cannot be overstated.

I ask that you carry this message back to your senior management and those who market your products: We are working to create a

more efficient export control system and to ensure that those subject to it are aware of that fact. Also, where appropriate, we will seek to minimize penalties for companies that have good internal compliance programs and make demonstrably unintentional errors. But—and this is an important “but”—we are planning increased efforts against individuals who flout the rules and against companies whose inadequate internal compliance programs tell us that they are indifferent to whether they follow the rules. The work you do makes a difference and your participation in this conference is indicative of your commitment.

IX. Conclusion

I want to point out the importance of the *regulatory* changes we are making, as well as the fact that they flow naturally into Phase III—the structural changes that we are asking Congress to enact—and that I hope they *will* enact.

My remarks today underscore the deep commitment of the Obama Administration to Export Control Reform. This commitment, combined with our strong and open dialogue, will help ensure what I call the “three Es”—greater *efficiencies* in focusing controls on the most important items, increasing *education* to help all exporters understand their compliance responsibilities, and enhancing *enforcement* so that exporters comply with our regulations.

We will continue to seek public involvement and input through outreach conferences like this one, the publication of proposed rules, and our advisory committees.

Thank you again. I look forward to hearing your feedback and ideas.

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