Export Control Reform and Revisions to Definitions under the Export Administration Regulations and International Traffic in Arms Regulations

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The U.S. Government may restrict the ability to export, reexport, or transfer (in-country) certain items for national security, foreign policy, non-proliferation, or other reasons.

Examples of items potentially subject to export controls:
- Sensitive military items and directly related technical data
  - Administered by the Department of State, Directorate of Defense Trade Controls – “DDTC”
  - International Traffic in Arms Regulations (“ITAR”) and U.S. Munitions List (“USML”)
- Less-sensitive military items, dual-use items, and commercial items (including related software and technology)
  - Administered by the Department of Commerce, Bureau of Industry and Security – “BIS”
  - Export Administration Regulations (“EAR”) and Commerce Control List (“CCL”)

Examples of transactions potentially subject to export controls
- Exports from the U.S.
- Reexports of U.S.-origin items (as well as some non-U.S. origin items) outside of the U.S.
- Releases of certain information to foreign persons inside the U.S.
In August 2009, President Obama directed the agencies involved in the U.S. export control system to conduct a broad-based review of export controls to identify additional ways to enhance U.S. national security.

The Obama Administration determined that the export control system needed to be reformed to:

- Increase interoperability with NATO and other close allies
- Reduce the current incentives for companies in non-embargoed countries to design out or avoid US-origin content
- Allow the Administration to focus its resources on the transactions of greater concern
- Provide for greater transparency and predictability
Export Control Reform (ECR)

To implement the objectives, the Administration needed to:

- Identify the specific sensitive and other items on a more positive USML that warrant individual license reviews even for ultimate end use by NATO and other regime allies; and
- Amend the EAR and the CCL to control all formerly USML items that would no longer be on the revised USML so that they still could be adequately controlled, but in a more flexible way regarding such allies.

ECR Framework

- Items providing a significant military or intelligence capability are listed on the USML, which is now a more “positive” list.
- Military items no longer listed on the USML are subject to the EAR’s “600 series.”
- Spacecraft items no longer on the USML are listed in the EAR’s 9x515 ECCNs.
- When items cannot be positively enumerated, they will be described using the defined term “specially designed.”
Definitions Rules in 2015 and 2016

- BIS and DDTC published proposed rules revising definitions to improve harmonization between the EAR and ITAR on June 3, 2015
  - BIS proposed rule: 80 FR 35586
  - DDTC proposed rule: 80 FR 31525

- BIS and DDTC published final rules on June 3, 2016, with an effective date of September 1, 2016
  - BIS final rule: 81 FR 35586
  - DDTC interim final rule: 81 FR 35611

- DDTC published a final rule further revising definitions in the ITAR on September 8, 2016 (81 FR 62004)

- BIS FAQs available at https://www.bis.doc.gov/index.php/2012-03-30-17-54-11/ecr-faqs
**EAR § 734.3(b)(3): Items Not Subject to the EAR**

- Items **not** subject to the EAR include information and “software” that:
  - Are published (§ 734.7);
  - Arise during, or result from, fundamental research (§ 734.8);
  - Are released by instruction in a catalog course or associated teaching laboratory of an academic institution;
  - Appear in patents or open (published) patent applications, unless covered by an invention secrecy order (§ 734.10);
  - Are non-proprietary system descriptions; or
  - Are telemetry data (defined in Note 2 to Category 9, Product Group E).

- **Questions and Answers from old Supplement No. 1 to Part 734 revised to be posted on BIS website**
ITAR: Items Not Subject to the ITAR

DDTC proposed revising the following in its 2015 proposed rule:
- § 120.6(b): exclusions from definition of “defense article”
- § 120.11: public domain

The proposed revisions to “public domain” included a new paragraph (b) that would require review and authorization, prior to release of information to the public, from DDTC, DoD’s Office of Security Review, or relevant USG entity with authority.

DDTC did not address those proposals in its interim final or final rule.
EAR § 734.7: Published

- Same scope but simpler structure than prior version

- Brief definition (“available to the public without restrictions upon its further dissemination”) with illustrative examples

- Encryption restrictions retained from prior version

- Final rule included information released to researchers
EAR § 734.8: Fundamental Research

- Final rule streamlined definition: “research in science, engineering, or mathematics, the results of which ordinarily are published and shared broadly within the research community, and for which the researchers have not accepted restrictions for proprietary or national security reasons”

- Final rule explicitly included “software”

- Inputs used to conduct fundamental research that will not be published remain subject to the EAR

- Final rule addressed and clarified impact of prepublication review and special national security controls on fundamental research
Proposed ITAR § 120.49: Fundamental Research

- DDTC proposed to move fundamental research from § 120.11(a)(8) and define “technical data that arises during or results from fundamental research” in new § 120.49

- Proposal expanded the scope of eligible research to include research that is funded, in whole or in part, by the U.S. Government

- DDTC did not adopt the proposal in its interim final or final rule and will address in future rulemakings
EAR § 734.10: Patents

- Information regarding patents remained in § 734.10

- Final rule similar to proposed rule
EAR § 734.13: Definition of “Export”

- Actual shipment or transmission from the U.S.

- “Deemed export” to foreign national in the U.S.

- Transferring by a person in the U.S. of registration, control, or ownership of spacecraft to:
  - Any destination or national if spacecraft not STA-eligible
  - Country Group D:5 for any other spacecraft subject to EAR

- See § 734.17 for separate definition of export of encryption source code and object code software
Deemed export is to the foreign national’s most recent country of citizenship or permanent residency

Export of an item that will transit through a country or countries to a destination identified in the EAR is deemed to be an export to that destination

Proposed definition included releasing decryption keys or other access information with “knowledge” that such provision will cause or permit the transfer of other “technology” in clear text or “software” to a foreign national in definition of export

- Final rule did not adopt that provision
- See instead “release” and new § 734.19 (Transfer of Access Information)
ITAR § 120.17: Definition of “Export”

- No changes to scope, but DDTC revised definition to align with EAR’s definition
  - Moved activities associated with movement or release of defense articles outside U.S. to definition of “reexport” in § 120.19 and retransfer in § 120.51

- Added clarification for deemed exports

- Includes transferring to foreign embassies in the U.S. and performing a defense service on behalf of, or for the benefit of, a foreign person
  - Differs from EAR, except EAR control encryption to foreign embassies (see EAR § 734.17)
EAR § 734.14: Definition of “Reexport”

- Shipment or transmission of items from one foreign country to another foreign country, and release of technology or source code to a foreign national “of another country” (deemed reexport)

- Definition parallels definition of export; actions take place outside the U.S.
ITAR § 120.19: Definition of “Reexport”

- No changes to scope, but DDTC revised definition to align with EAR's definition
EAR § 734.15: Definition of “Release”

- Visual or other inspection by a foreign national of items that reveals “technology” or “source code” subject to the EAR to a foreign national; or

- Oral or written exchanges with a foreign national of “technology” in the United States or abroad

- Any act causing the “release” of “technology” or “software,” through use of “access information” or otherwise, to yourself or another person requires an authorization to the same extent an authorization would be required to export or reexport such “technology” or “software” to that person
ITAR § 120.50: Definition of “Release”

- DDTC added definition to harmonize with the EAR
EAR § 734.15: Definition of “Transfer (in-country)”

- A change in end use or end user of an item within the same foreign country
ITAR § 120.51: Definition of “Retransfer”

- DDTC added separate definition in interim final rule to harmonize with the EAR

- DDTC further revised definition in final rule to clarify that temporary transfers to third parties and releases to same-country foreign persons are within the scope of § 120.51
Ear § 734.18: Activities that Are Not Exports, Reexports, or Transfers

- Launching a spacecraft, launch vehicle, payload, or other item into space

- Transmitting or otherwise transferring “technology” or “software” to a person in the United States, who is not a foreign person, from another person in the United States
  - See § 772.1 for definition of “foreign person”

- Transfer within a foreign country of “technology” or “software” between or among only persons who are not “foreign persons,” so long as a release to a foreign person or to a person prohibited from receiving the “technology” or “software” does not result

- Shipping, moving, or transferring items between or among the U.S., the District of Columbia, Puerto Rico, or the Northern Mariana Islands or any territory, dependency, or possession of the U.S.
EAR § 734.18: Activities that Are Not Exports, Reexports, or Transfers

- Sending, taking, or storing unclassified “technology” or “software” that is:
  - Secured using ‘end-to-end encryption’
  - Compliant with Federal Information Processing Standards Publication 140-2 (FIPS 140-2), supplemented by controls that are in accordance with U.S. National Institute for Standards and Technology guidance, or other equally or more effective cryptographic means
  - Not intentionally stored in a country listed in Country Group D:5 or in the Russian Federation
  - Data in-transit via the Internet is not deemed to be stored

*End-to-end encryption*: (i) data is not in unencrypted form between an originator (or the originator's in-country security boundary) and an intended recipient (or the recipient's in-country security boundary), and (ii) means of decryption are not provided to any third party. The originator and the recipient may be the same person.

- BIS-issued guidance on cloud-related issues remains on website
Proposed ITAR § 120.52: Activities that Are Not Exports, Reexports, or Retransfers

- DDTC proposed to add § 120.52 to parallel EAR § 734.18
  - Proposal included carveout for end-to-end encryption

- DDTC did not adopt the proposal in its interim final or final rule and will address in future rulemakings
Ear §734.19: Transfer of Access Information

- To the extent an authorization would be required to transfer “technology” or “software,” a comparable authorization is required to transfer access information if done with “knowledge” that such transfer would result in the release of such “technology” or “software” without a required authorization.

- See §772.1 for new definition of “access information”.

- DDTC did not address this in its interim final or final rule since it did not adopt other revisions in its proposed rule.
EAR § 734.20: Activities that Are Not Deemed Reexports

- Codifies prior BIS website guidance and reflects §§ 124.16 and 126.18 of the ITAR
  - Note: DDTC moved old § 124.16 to § 126.18(d) in the interim final rule

- Release not a deemed reexport if:
  - Entity is authorized to receive the “technology” or “source code” at issue, whether by a license, license exception, or NLR, and
  - Entity has “knowledge” foreign national’s most recent country of citizenship or permanent residency is that of a country to which export from the U.S. of the “technology” or “source code” at issue would be authorized by the EAR either under a license exception, or NLR
Release to A:5 nationals not a deemed reexport if:

- Entity is authorized to receive the “technology” or “source code” at issue
- Foreign national is a bona fide regular and permanent employee, not a proscribed person, directly employed by the entity
- Employee is a national exclusively of a country in Country Group A:5, and
- Release takes place entirely within the physical territory of any such country, or the U.S.
EAR § 734.20: Activities that Are Not Deemed Reexports

- Release to non-A:5 nationals not a deemed reexport if:
  - Entity is authorized to receive the “technology” or “source code” at issue
  - Foreign national is a bona fide regular and permanent employee, not a proscribed person, directly employed by the entity
  - Release takes place entirely within the physical territory of the country where the entity is located, conducts official business, or operates, or within the U.S.
  - Entity has effective procedures to prevent diversion to destinations, entities, end users, and end uses contrary to the EAR; and
    - (1) Foreign national has a security clearance approved by the host nation government
    - (2) Entity outside the U.S. obtains non-disclosure agreement, screens for D:5 contacts, has a technology security or clearance plan, and keeps records of screenings to be made available to BIS upon request
    - (3) Entity is a UK entity implementing § 126.18 of the ITAR pursuant to the US-UK Exchange of Notes regarding § 126.18 of the ITAR for which the UK has provided appropriate implementation guidance
    - (4) Entity is a Canadian entity implementing §126.18 of the ITAR pursuant to the US-Canadian Exchange of Letters regarding § 126.18 of the ITAR for which Canada has provided appropriate implementation guidance
    - (5) Entity is an Australian entity implementing the exemption at paragraph 3.7b of the ITAR Agreements Guidelines; or
    - (6) Entity is a Dutch entity implementing the exemption at paragraph 3.7c of the ITAR Agreements Guidelines
EAR § 734.20: Activities that Are Not Deemed Reexports

- “Substantive contacts” and “permanent and regular employee” defined in § 734.20

- “Proscribed person” defined in § 772.1
License Exception TMP (§ 740.9)

- BIS final rule revised temporary export of technology provisions but did not change the scope
- Final rule clarified that “U.S. employer” and “U.S. persons or their employees” using TMP are not foreign subsidiaries
- Final rule used the term “foreign persons”
In interim final rule, DDTC revised exemption in § 125.4(b)(9) for the export of technical data to or for U.S. persons abroad

- Foreign persons authorized to receive technical data in the U.S. will be eligible to receive that same technical data abroad, when on temporary assignment on behalf of their employer
- Exemption also authorizes reexport or retransfer
- Person travelling abroad may use exemption to export technical data for his or her own use
- Technical data must be secured while abroad to prevent unauthorized release
EAR § 750.7: Scope of License

- Conforms EAR to prior website guidance, “boilerplate” on licenses

- Unless limited by a condition, the license authorizes what is described in the license application and any letters of explanation

- A license authorizing the release of technology to an entity also authorizes the release of the same technology to the entity’s foreign persons who are permanent and regular employees (and who are not proscribed persons) of the entity’s facility or facilities authorized on the license, except to the extent a license condition limits or prohibits the release of the technology to foreign persons of specific countries or country groups
ITAR §§ 123.28, 124.1(e): Scope of License or Agreement

DDTC added similar language to the ITAR for the scope of a license or agreement

- In the absence of a proviso on a license or condition in an agreement, authorization granted based on information provided by applicant in the application, letter of explanation, and other submitted documents
EAR § 772.1: Definition of “Access Information”

- Information that allows access to encrypted technology or encrypted software in an unencrypted form

- Examples include decryption keys, network access codes, and passwords

- DDTC did not address the term “access information” in its interim final or final rule
EAR § 772.1: Definition of “Foreign Person”

- Natural person who is not a lawful permanent resident of the U.S., citizen of the U.S., or any other protected individual as defined by 8 U.S.C. 1324b(a)(3)

- Corporation, business association, partnership, trust, society or any other entity or group that is not incorporated in the U.S. or organized to do business in the U.S., as well as international organizations, foreign governments

- Same as “foreign national” (EAR) and “foreign person” (ITAR)

- Does not apply to part 760 of the EAR (Restrictive Trade Practices or Boycotts)
EAR § 772.1: Definition of “Proscribed Person”

- Person who is prohibited from receiving the items at issue or participating in a transaction that is subject to the EAR without authorization under the EAR, such as persons on the Entity List or denied persons

- DDTC did not propose or adopt this term for the ITAR
EAR § 772.1: Definition of “Required”

- References to specific categories removed

- New Note 1: ITAR and the EAR often divide within each set of regulations or between each set of regulations:
  - Controls on parts, components, accessories, attachments, and software; and
  - Controls on the end items, systems, equipment, or other items into which those parts, components, accessories, attachments, and software are to be installed or incorporated

- New Note 2 clarifies that references to “characteristics” and “functions” of an item are not limited to ECCNs with technical parameters

- New Note 3: Unclassified technology not specifically enumerated on the USML is “subject to the EAR” if it is “required” for the “development,” “production,” “use,” operation, installation, maintenance, repair, overhaul, or refurbishing (or other terms specified in ECCNs on the CCL that control “technology”) of a commodity or software that is subject to the EAR
Proposed ITAR § 120.46: Definition of “Required”

- ITAR definition of “technical data” includes the term “required”

- DDTC proposed to adopt the definition used in the EAR

- DDTC did not adopt the proposed definition in its interim final or final rule and will address in future rulemakings
EAR § 772.1: Definition of “Technology”

- Consistent with Wassenaar Arrangement definition

- Information necessary for the “development,” “production,” “use,” operation, installation, maintenance, repair, overhaul, or refurbishing (or other terms specified in ECCNs on the CCL that control “technology”) of an item

- N.B.: Controlled "technology" is defined in the General Technology Note and in the CCL
EAR § 772.1: Definition of “Technology”

- Note 1: “Technology” may be in any tangible or intangible form, such as written or oral communications, blueprints, drawings, photographs, plans, diagrams, models, formulae, tables, engineering designs and specifications, computer-aided design files, manuals or documentation, electronic media or information revealed through visual inspection.

- Note 2: Modification of the design of an existing item creates a new item and technology for the modified design is technology for the development or production of the new item.

- Proposed inclusion of access information not adopted in the final rule.

- Proposed carve-outs from definition in “Items Not Subject to the EAR”.

- Note that “technology” may or may not be subject to the EAR, while “technical data” is by definition subject to the ITAR.
Proposed ITAR § 120.10: Definition of “Technical Data”

Proposed definition:
- Updated paragraph (a)(1) to harmonize with EAR’s definition of “technology”
- Included new paragraph (a)(5) to address decryption keys, network access codes, or passwords allowing access to other technical data in clear text or software
- Updated paragraph (b) to move examples of information that are not technical data to proposed § 120.6(b) and to add non-proprietary general system descriptions, information on basic function or purpose of an item, and telemetry data from Note 3 to Category XV(f)

DDTC also proposed to add new § 120.47 for definition of “development” and new § 120.48 for definition of “production”

DDTC did not adopt these proposed changes in its interim final or final rule and will address in future rulemakings
Proposed ITAR § 120.9: Definition of “Defense Service”

- DDTC proposed a third version of the definition of “defense service” and addressed public comments received for the second version.

- DDTC did not adopt the proposed definition in its interim final or final rule and will address in future rulemakings.