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Enforcing the New Export Control Regime

Venable's **International Trade and Customs Practice Group** is publishing a five-part series of Client Alerts to highlight the changes surrounding the ECR (Export Control Reform). Below is Part V of the series.

Part I: **State Department Publishes Long-Awaited Interim Final Rule Amending ITAR Brokering Provisions**

Part II: **October 15th Export Control Reform Changes Are Around the Corner: Take Time Now to Understand the Impact on Your Existing Licenses & Authorizations**

Part III: **License Exception Strategic Trade Authorization: Understanding How It May Work for You**

Part IV: **Rolling Out a New Export Control Regime During a Government Shutdown**

The first of the President's Export Control Reform (ECR) initiatives took effect October 15, 2013. U.S. exporters (and reexporters around the globe) are now able to pursue certain benefits of the new regime's streamlined classification, export authorization, and licensing provisions and requirements. At the same time, the Government has also begun monitoring and enforcing the new rules more strictly; accordingly, exporters and reexporters must understand that they may be held in violation of these changed regulations and subject to penalties. As such, it is important that companies fully understand, implement, and create internal awareness of the new rules. Updating compliance policies and procedures, and training personnel responsible for export functions, are important first steps to preventing noncompliance and associated complications for your business.

Timing

First and foremost, exporters should be aware of the various timelines for implementation and enforcement of ECR initiatives. Two key dates are:

- **October 15, 2013:** First series of significant changes effected by Final Rules from the Departments of Commerce (BIS) and State (DDTC). "600 Series" items were eligible for export, reexport, and in-country transfer without a license under the *revised* License Exception Strategic Trade Authorization (STA). At the BIS Update Conference (July 2013), Assistant Secretary for Export Enforcement David Mills warned that the increased applicability of STA will require increased enforcement and BIS will "expect exporters to have available the proper paperwork to adhere to the safeguards under this license exception."
- **January 6, 2014:** Additional categories of controlled items migrate from DDTC jurisdiction to the Commerce Control List (CCL). Therefore, it is critical that exporters *not* export items subject to migrating jurisdiction without a license prior to the effective date of the Final Rule. Notably, and consistent with the International Traffic in Arms Regulations (ITAR), the new 600 Series items are *not* eligible for any *de minimis* threshold for U.S. arms-embargoed destinations. For all other countries, the Export Administration Regulations' (EAR) 25% *de minimis* rule applies to 600 Series items.

Use BIS Published Tools as a Starting Point to Self-Classify Exports, if Available

As part of BIS's outreach efforts, the agency developed several webinars, teleconferences, and interactive tools to assist exports in transitioning compliance to the new regime, which are accessible on the **BIS website**. We highlight a few, as follows:

- Three web-based "decision trees" were developed to assist exporters tasked with classifying items consistent with the revised EAR. They trees focus on the most significant changes: (1) CCL Order of Review; (2) the definition of "specially designed;" and, (3) use of the STA License Exception. The

user responds to a series of yes or no questions that guide the pertinent analysis, such as whether a specific item is deemed to be "specially designed." Of course, the interactive tools are merely general guidance and exporters using the decision trees may still be exposed to liability stemming from misclassification.

- BIS weekly teleconference webinars are offered to educate exporters on the new regime, certain of which are published online. For example, BIS held a webinar on August 14, 2013 regarding license exceptions under the new regime, including a discussion on available exceptions for the new "600 Series" as well as steps to determine whether license exceptions are available for a particular export, reexport, or transfer. Other published webinars are sector-specific; for example, in its June 5, 2013 webinar, BIS focused on space-related export controls. Again, exporters should not rely on BIS publications alone to determine their specific licensing requirements.
- Lastly, BIS, DDTTC, and the Department of the Treasury coordinated efforts to establish a Consolidated Screening List to assist exporters in identifying "blocked" or "denied" parties. The List is [available here](#).

Voluntary Self-Disclosures

Exporters and reexporters subject to these regulations may be familiar with the policies and practical realities of the voluntary self-disclosure (VSD) process under the ITAR and the EAR, as well as associated VSDs under Office of Foreign Asset Controls (OFAC) regulations. While the general underlying principles remain, the ECR has resulted in certain critical changes to VSD processes and analysis.

Specifically, we mention the following changes to BIS' handling of VSDs under the EAR. Historically, BIS has assessed administrative penalties in only a small percentage of cases originating as VSDs (generally from 3 to 6%). Only one VSD has resulted in the imposition of criminal sanctions – against an employee, not the company submitting the VSD. BIS is currently evaluating its methodology in the context of ECR, with the aim of more closely aligning its penalty process with parallel processes of the Departments of Treasury and State. BIS is considering updating its [Enforcement Penalty Guidelines](#) to align more closely with the [Economic Sanctions Enforcement Guidelines](#) published by OFAC in 2009. If BIS moves forward with this initiative, the details will be flushed out in a Proposed Rule.

Currently, as items migrate from ITAR control to CCL control, BIS' Office of Export Enforcement (OEE) will consult DDTTC to confirm the compliance history of registrants and consider such information in determining whether to assess penalties.

BIS has also amended EAR Section 764.5, which sets forth the procedure for voluntary disclosure under the EAR, with respect to perfecting such disclosures. As of September 9, 2013, BIS' Final Rule became effective. This [Final Rule](#) requires that in addition to the initial disclosure, the exporter submit, within 180 days, a completed narrative account of the potential violations. Previously, BIS did not have a deadline for submission of perfected narratives. OEE has discretion to extend the deadline if government interests would be served or upon submission by the disclosing party setting forth that more time is necessary to finalize the VSD. This 180-day perfection requirement is consistent with the practices of DDTTC under the ITAR.

Administrative Enforcement Proceedings

The BIS Final Rule also revised procedures governing enforcement proceedings by BIS for suspected or charged violations. (EAR, Part 766). The Rule provides that as an authorized method of notification, a copy of a Proposed Charging Letter may be sent to Respondent's last known address by express mail or commercial courier in order to facilitate notification of parties located in countries without reliable postal service, and to enhance BIS tracking of such notifications. Respondents must answer a Charging Letter within 30 days of being served with notice of its issuance.

Interagency Cooperation and the "E2C2"

Migration of items from ITAR control to CCL control has often been characterized as "decontrol" when, in fact, the changes may actually increase enforcement by adding another agency to the list of regulators with eyes on what were previously "defense trade" exports and reexports. Now, not only will the Federal Bureau of Investigation (FBI) and Department of Homeland Security (DHS) have authority over CCL items, but Commerce will also assess compliance and conduct investigations. Executive Order 13558 formalized interagency cooperation on export control enforcement by establishing the Enforcement Coordination Center (E2C2), housed within DHS. In addition, BIS' Office of Enforcement Analysis established the interagency Information Triage Unit (ITU), responsible for disseminating

information on export transactions subject to licensing authority.

Internal Compliance and Prevention

In its 2012 annual report to Congress, the Government Accountability Office (GAO) identified several compliance activities and three enforcement activities that comprise the Government's export control strategy. The ECR is a priority. Compliance activities are meant to provide information for exporters, licensing officials, and enforcement agencies to assess the validity of particular transactions, identify potential violations, or prevent violations before they occur. Enforcement activities strive to deter the illegal export or transshipment of defense and dual-use items.

This model can serve as a starting point for exporters. In order to mitigate the risk of expending resources in response to enforcement activities, exporters should consider education and compliance as cost-saving operations. Successful internal company compliance policies and procedures can be modeled on those the Government has identified, such as: (1) License Applications; (2) Vetting Parties to the Transaction; (3) End-Use Monitoring; (4) Shipping Declarations; (5) List Maintenance (Entities, Inventory); and, (6) Outreach and Training.

The ECR changes that took effect on October 15, 2013 are sweeping and multi-faceted, thereby presenting a formidable compliance challenge. The intent and hope of these changes to export control policy are to facilitate trade with trusted U.S. partners in controlled articles and items, and thereby benefit U.S. exporters. As such, it is critical to fully understand these changes and assess how they might be used to benefit your global operations.

*Venable is well positioned to guide your company through the rule changes and all aspects of the ongoing Export Control Reform. Please contact any attorneys in our **International Trade and Customs Practice Group** for assistance.*