During the closing days of the 2012 presidential campaign, President Obama declared that “our work is not done yet.”¹ One policy initiative of significant importance to U.S. companies that President Obama commenced in August 2009 to which this adage continues to apply is the Export Control Reform Initiative (ECRI).² While considerable progress on the ECRI has been made, it is critical for companies and their counsel to realize that there are, and will continue to be, stringent export controls that must be complied with, and that failure to do so can result in significant civil and criminal penalties.

Overview of Current U.S. Export Controls
To comprehend why the ECRI was launched, it is important to understand the breadth and complexity of existing U.S. export controls. Currently, there are seven primary federal departments that are involved in U.S. export controls: the departments of Commerce, Defense, Energy, Homeland Security, Justice, State, and Treasury.³ Their involvement pertains mainly to two sets of export control regulations: the International Traffic in Arms Regulations (ITAR); and the Export Administration Regulations (EAR).⁴

ITAR—Administered and enforced primarily by the U.S. Department of State's Directorate of Defense Trade Controls (DDTC), the ITAR govern temporary and permanent exports of defense articles and defense services, as well as temporary imports of such items.⁵ Under the ITAR, a “defense article” is defined to include any item designated on the United States Munitions List (USML).⁶ The USML includes the following categories:

<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>I</td>
<td>Firearms, Close Assault Weapons, and Combat Shotguns</td>
</tr>
<tr>
<td>II</td>
<td>Guns and Armament</td>
</tr>
<tr>
<td>III</td>
<td>Ammunition/Ordnance</td>
</tr>
<tr>
<td>IV</td>
<td>Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs, and Mines</td>
</tr>
<tr>
<td>V</td>
<td>Explosives and Energetic Materials, Propellants, Incendiary Agents, and Their Constituents</td>
</tr>
<tr>
<td>VI</td>
<td>Vessels of War and Special Naval Equipment</td>
</tr>
<tr>
<td>VII</td>
<td>Tanks and Military Vehicles</td>
</tr>
<tr>
<td>VIII</td>
<td>Aircraft and Associated Equipment</td>
</tr>
<tr>
<td>IX</td>
<td>Military Training Equipment</td>
</tr>
<tr>
<td>X</td>
<td>Protective Personnel Equipment</td>
</tr>
<tr>
<td>XI</td>
<td>Military Electronics</td>
</tr>
<tr>
<td>XII</td>
<td>Fire Control, Range Finder, Optical and Guidance and Control Equipment</td>
</tr>
<tr>
<td>XIII</td>
<td>Auxiliary Military Equipment</td>
</tr>
<tr>
<td>XIV</td>
<td>Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment</td>
</tr>
</tbody>
</table>

¹ By Geoffrey M. Goodale

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⁸ Geoffrey M. Goodale
Category XV: Spacecraft Systems and Associated Equipment

Category XVI: Nuclear Weapons, Design and Testing Related Items

Category XVII: Classified Articles, Technical Data and Defense Services Not Otherwise Enumerated

Category XVIII: Directed Energy Weapons

Category XIX: [Reserved]

Category XX: Submersible Vessels, Oceanographic and Associated Equipment

Category XXI: Miscellaneous Articles

DDTC can add items to the USML. In making such decisions, DDTC will determine that something should be designated as a defense article or a defense service if it:

• is specifically designed, developed, configured, adapted, or modified for a military application; and

• does not have predominant civil applications; and

• does not have performance equivalent (defined by form, fit and function) to those of an article or service used for civil application.

DDTC also will determine that an item is ITAR-controlled if it is specifically designed for a military application and has significant military or intelligence applicability.

A defense article is defined to include technical data specified on the USML. Technical data includes information that is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modification of defense articles and may take the form of blueprints, plans, diagrams, engineering designs, drawings, photographs, and instructions. However, technical data does not include information concerning: general scientific, mathematical or engineering principles commonly taught in schools; basic marketing information on function or purposes or general system descriptions of defense articles; or information in the public domain.

Exports of defense services also are controlled under the ITAR. A defense service is defined as “[t]he furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles.” In addition, a defense service includes the furnishing to foreign persons of any ITAR-controlled technical data, as well as military training of foreign units and forces.

Under the ITAR, the term export is defined to include:

• sending or taking a defense article out of the United States;

• disclosing (either orally or visually) or transferring in the United States any defense article to any agency or subdivision of a foreign government;

• disclosing (orally or visually) or transferring technical data to a foreign person, whether in the United States or abroad, or

• performing a defense service on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad.

This broad definition means that technical data provided to a foreign person in the United States constitutes an export.

The ITAR also control the brokering of defense articles and defense services. Under the ITAR, a broker is “any person who acts as an agent for others in negotiating or arranging contracts, purchases, sales or transfers of defense articles or defense services in return for a fee, commission, or other consideration.”

Subject to few exceptions, any person who engages in the United States in the business of either manufacturing or exporting of defense articles or furnishing of defense services must register with DDTC, and any person subject to U.S. juris-
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diction in any location that is engaged in brokering activities also is required to register with DDTC. Registrants must renew its registration with DDTC on an annual basis.

Registration with DDTC does not confer a right to export. It is, however, a necessary first step, since DDTC will reject any export authorization requests prior to registration, and all available license exemptions enumerated in the ITAR require that the entity seeking to utilize the exemption be registered with DDTC.

In the absence of a specified ITAR exemption, it is necessary to obtain authorization from DDTC in order to export ITAR-controlled hardware and technical data. Unauthorized exports of ITAR-controlled items can have severe consequences. Penalties for ITAR violations can include: administrative debarment that prohibits entities from participating directly or indirectly in the export of defense articles or defense services for which approval is required; civil penalties of up to $500,000 per violation; and/or criminal penalties of up to $1,000,000 for each violation, imprisonment for up to ten years, or both.

EAR—Administered and enforced primarily by the U.S. Department of Commerce’s Bureau of Industry and Security (BIS), the EAR apply to: exports of commercial and dual-use U.S.-origin commodities and technology; re-exports from one foreign country to another of commercial and dual-use U.S.-origin commodities and technology; and foreign-made commodities and technology produced outside the U.S. that include more than de minimis content of U.S.-origin parts, components or technology. Whether a license from BIS is required depends on the item’s technical characteristics, destination, end-user, and end-use.

Under the EAR, an export can occur in physical shipment, electronic access or e-mail, fax transmission, phone call, and in-person conversation. An export of technology is deemed to take place when it is released to a foreign national within the United States.

To determine whether an export license may be required, review the Commerce Control List (CCL). The CCL is divided into ten numbered categories, which range from Nuclear Materials, Facilities, and Equipment (Category 0) to Propulsion Systems, Space Vehicles and Related Equipment (Category 9). Items that do not fall under any of the CCL categories are classified as EAR99 and ordinarily do not require an export license, unless they are to be exported to an embargoed country or to a prohibited user or destination or are subject to BIS denial orders.

After determining an item’s classification, license requirements can be ascertained by referring to the Commerce Country Chart (Country Chart) contained in Supplement No. 1 to Part 738 of the EAR. The first column of the Country Chart lists all countries. The subsequent columns identify the various Reasons for Control. Under each Reason for Control header are diagonal column identifiers consisting of the two letter Reason for Control (e.g., “CB” for Chemical and Biological Weapons) and a column number (e.g., “CB Column 1”). The symbol X marked in a cell indicates that there are licensing requirements for an item subject to the given Reason for Control to the country in question.

It may be possible that a license exception specified under Part 740 of the EAR can be used so that a license would be unnecessary. However, there are often numerous conditions that must be satisfied before a license exception can be used.

Part 736 of the EAR lists ten General Prohibitions that apply to any transaction subject to the EAR. The General Prohibitions are as follows:

• Export or re-export of controlled items without a required license or License Exception;

• Re-export and export from abroad of foreign-made items incorporating more than a de minimis amount of controlled U.S. content without a required license or license exception;

• Re-export and export from abroad of the foreign-produced direct product of U.S. technology and software without a required license or License Exception;

• Engaging in actions prohibited by a denial order issued by BIS;

• Export or re-export to end-uses or end-users that are prohibited by Part 744 of the EAR;

• Export or re-export to embargoed destinations as set forth in Part 746 of the EAR without a required license;

• Support of proliferation activities, such as certain financing, contracting, service, support, transportation, freight forwarding, or employment activities by a U.S. person where the U.S. person knows the activity will assist in the pro-
The proliferation of weapons of mass destruction set forth in Section 744.6(c) of the EAR;

• Certain in-transit shipments: For items being exported or re-exported via a route that requires the items to be unladen from vessels or aircraft in any of a list of countries, a separate license must be obtained as if the country of unlading were the ultimate destination;

• Violation of any order, terms, or conditions of a license; and

• Proceeding with transactions with knowledge that a violation has occurred or is about to occur.23

Violations of the General Prohibitions are subject to possible enforcement actions and penalties, which can include: administrative debarment that prohibits entities from participating directly or indirectly in the export of commodities and technology for which a license or approval is required; civil penalties of up to the greater of $250,000 or twice the value of the transaction; and/or criminal penalties of up to $1,000,000 for each violation, imprisonment for up to twenty years, or both.24

The Genesis and Current Status of the ECRI
In August 2009, President Obama instituted a wide ranging review of the U.S. export control system.25 Conducted by an interagency task force, the review found that the current system did not sufficiently reduce national security risk because its structure was overly complicated, contained too many redundancies, and tried to protect too much.26 Consequently, the Obama Administration determined that it would be beneficial to establish a system that had four fundamental elements: a single control list; a single information technology system; a single licensing agency; and a single primary enforcement coordination agency.27

Proposed Changes to the USML and the CCL — In December 2010, DDTC and BIS began publishing proposed rules seeking to clarify and simplify U.S. export controls. Pursuant to one of the first notices, DDTC proposed to revise USML Category VII (Tanks and Other Military Vehicles) such that the number of items requiring export licenses would be reduced.28

In July 2011, BIS issued a proposed rule that would create a regulatory structure for harmonizing the USML and the CCL that would, among other things, standardize certain key definitions enumerated under the two regulatory systems.29

Under the proposed rule, many parts and components currently controlled under the ITAR would be migrated to the CCL but would be subject to control and would generally require a license or be eligible for a license exception.30

Subsequently, BIS promulgated a series of proposed rules that would amend the EAR and add many additional items currently subject to the ITAR to the CCL.31 In connection with these BIS proposed rules, DDTC also issued a series of corresponding proposed rules that would amend the ITAR and reduce the number of items controlled under the USML.32

In 2012, BIS published a proposed rule that would amend the EAR by establishing a new ECCN series, 0Y521, and making corresponding changes to the EAR. The ECCN 0Y521 series covers items that warrant control on the CCL but are not yet identified in an existing ECCN.33

As of the time of this writing, no final rules have yet been published to codify any of the proposed amendments to the USML and CCL.

However, it is expected that such final rules may be published by May 2013.

Establishment of the E2C2 — To establish a single primary export enforcement agency, President Obama created the Export Enforcement Coordination Center (E2C2) through Executive Order 13558 of November 9, 2010 (EO 13558).34 Pursuant to EO 13558, the secretary of Homeland Security was directed to establish within the Department of Homeland Security (DHS), for administrative purposes, a center that would be composed of representatives from the following U.S. Government departments and agencies: DHS; the Commerce Department; the Defense Department; the Energy Department; the Justice Department; the State Department; the Treasury Department; and the Office of the Director of National Intelligence.35 In addition, EO 13558 specified that the president can designate additional entities to participate in the activities of the E2C2, and this authority was used to make the U.S. Postal Service a participating entity in mid-2012.36

The E2C2 exists to perform five main functions: serve as the primary forum within the federal government for executive departments and agencies to coordinate and enhance their export enforcement efforts; promote the sharing of information and best practices; administer the emergency export control system; and act as a focal point for the government’s initiatives to ensure the effective implementation of export control laws and regulations.

As of the time of this writing, the E2C2 has begun to implement its initiatives, including the establishment of a national export control forum, the development of a national export control strategy, and the coordination of efforts to improve the implementation of export controls.

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control enforcement efforts; be a conduit between federal law enforcement agencies and the U.S. intelligence community for the exchange of information related to potential U.S. export control violations; function as a primary point of contact between enforcement authorities and agencies engaged in export licensing; coordinate law enforcement public outreach activities related to U.S. export controls; and perform government-wide statistical tracking capabilities for U.S. criminal and administrative export control enforcement activities.32

Conclusion
U.S. export controls are in a state of flux as a result of the ECRI. Irrespective of the changes resulting from the ECRI, however, companies must comply with U.S. export controls to minimize their potential exposure to penalties.

Endnotes:
4 Id. In addition to the International Traffic in Arms Regulations (ITAR), which are codified at 22 C.F.R. Parts 120-130, and the Export Administration Regulations (EAR), which are codified at 15 C.F.R. Parts 730-774, U.S. companies also must be cognizant of, and comply with, the regulations administered by the U.S. Department of Treasury’s Office of Foreign Assets Control (OFAC Regulations), which are codified at 31 C.F.R. Parts 500–599. While the OFAC Regulations are beyond the scope of this article since they are not a primary focus of the ECRI, more information about them can be found on OFAC’s website, available at http://www.treasury .gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx.
5 22 C.F.R. Part 120.
6 22 C.F.R. § 120.6.
7 22 C.F.R. § 121.1.
8 22 C.F.R. § 120.3.
9 Id.
10 22 C.F.R. § 120.6.
11 22 C.F.R. § 120.10.
12 Id.
13 22 C.F.R. § 120.9.
14 Id.
15 22 C.F.R. § 120.17.
16 22 C.F.R. § 129.2(a).
17 22 C.F.R. § 122.1; 22 C.F.R. § 129.3.
18 22 C.F.R. §§ 120.1(c), 122.1(c), and 126.10(b).
20 15 C.F.R. § 734.3. In general, foreign-made commodities and technology that incorporate U.S.-origin content that is valued at 10 percent or less of the foreign-made commodity or technology for purposes of reexports to countries that are subject to U.S. economic sanctions (i.e., Cuba, Iran, North Korea, Sudan, or Syria) or 25 percent or less of the foreign-made commodity or technology for purposes of reexports to other countries are deemed to possess de minimis U.S.-origin content. See 15 C.F.R. § 734.4.
21 15 C.F.R. § 734.2.
22 15 C.F.R. Part 774.
23 15 C.F.R. § 736.2(b).
27 Id.
30 Id.
35 Id., § 2(b).
36 Id., § 2(b)(ix).
37 Id., §§ 3(a)-(e).