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Export Control Reform: A Law and Economics Perspective

Jared P Hollett, Brooklyn Law School

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Jared P. Hollett

“The chief foundations of all states, new as well as old or composite, are good laws and good arms; and as there cannot be good laws where the state is not well armed, it follows that where they are well armed they have good laws.” - NICOLÒ MACCHIAVELLI, THE PRINCE, Chap. XII, para. 2.

INTRODUCTION

A number of international agreements currently regulate nuclear, biological, and chemical weapons, but there is no legally binding multilateral agreement in the area of conventional weapons.¹ The responsibility to control the flow of conventional weapons, including the trade in battle tanks, combat aircraft and attack helicopters, large caliber artillery systems, missiles, missile launchers, satellites, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handguns to portable systems, missiles, and small arms ranging from handgun

anti-aircraft missile systems\(^2\) rests entirely on domestic control methods.\(^3\) The international community has agreed that conventional weapons transfers decrease regional stability\(^4\) in conflict areas and increase the likelihood of illicit arms deals.\(^5\) As these conventional weapons are a contributory factor to war, military aggression, population suppression, and regional instability the task of controlling their export is of extreme importance.\(^6\)

The defense trade industry is vital to the United States domestic economy in two major respects. It accounts for a significant amount of economic output and provides 3.6 million private sector jobs.\(^7\) The U.S. is the world’s largest producer and exporter of weapons, defense articles, services, technology, and defense licensing agreements for the production of weapons abroad.\(^8\) The defense trade and production of high-grade defense articles are an “important foreign policy tool” seen as closely tied to the U.S. right to sovereign self-defense.\(^9\) Key State sovereignty considerations have “largely insulated the arms transfer process, and the arms trade

\(^3\)See Anderson, supra note 1, at 775 (“no international conventional arms regulation regime, plan, or scheme exists”).
\(^4\)But see Edward A. Kolodziej, Transfers and International Politics, in ARMS TRANSFERS IN THE MODERN WORLD 11-12 (Stephanie Neuman & Robert E. Harkavy eds., 1979) (stating “[a]rms transfers are also used to promote regional security” but suggesting this use ineffective).
\(^5\)See Anderson, supra note 1, at 770 (“[T]he General Assembly…recognized that arms transfers have serious consequences due to their effects on areas of tension, on the process of peaceful social and economic development of States, and on the illicit trafficking of arms.”).
\(^7\)Matthew Kazmierczak & Michaela Platzer, Defense Trade: Keeping America Secure and Competitive 8 (2007).
in general, from international regulation,’” leaving the regulation of the arms trade to domestic
governments.

To align and balance these considerations the United States has enacted a sophisticated,
extensive, and controversial export control regime. The market for exporting U.S. defense
items is strongly supported by a bloc of corporations that wish to ease trade restrictions and
lower transaction costs. These companies view U.S. export control policy as overly burdensome
and support a free-market approach, less licensing requirements, and fewer export restrictions.

In August of 2009 President Obama initiated the Export Control Reform Initiative, a
“broad-based interagency review of the U.S. export control system” with four areas of reform:
move controlled items to a single list, administer export controls with a single licensing agency,
update the Information Technology system for export controls, and reform export control
enforcement. In December 2010, the Departments of State and Commerce published two
Advanced Notices of Proposed Rulemaking stating that they were, in conjunction with the
Department of Defense, working to revise the State Department’s U.S. Munitions List and the
Commerce Department’s Commerce Control List and solicited comments from private industry
on how best to revise the lists. In spring 2010, Secretary of Defense Robert Gates reviewed the
initial findings and concluded that “fundamental reform of the export control system, including

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10 See Chow & Schoenbaum, Export Controls, in INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND
MATERIALS 761 (2008).
11 See Chow & Schoenbaum, supra note 10, at 763; See Wei Luo, Research Guide to Export Control and WMD Non-
12 See generally Official Comment from Rockwell Automation, to Bureau of Industry and Security (Sep.12, 2011)
(on file with author), available at http://www.regulations.gov/#!documentDetail;D=BIS-2011-0015-0006;
13 President’s Export Control Reform Initiative, EXPORT.GOV., http://export.gov/ecr/index.asp (last visited Nov 8,
2011).
14 Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines
No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. at 41958 (proposed July
15, 2011).
its lists of controlled items, [is] necessary to enhance national security.”\textsuperscript{15} Since then, the Department of State and the Department of Commerce have both published Proposed Rules\textsuperscript{16} in line with the initiative, though not yet in line with each other.

On July 15 2011, the Department of Commerce, in a “significant step in the reform of U.S. export controls,”\textsuperscript{17} issued a Proposed Rule which lays out significant reforms to restructure the Commerce Control List in order to accommodate items from the U.S. Munitions List deemed to require International Traffic in Arms Regulations (ITAR) controls no longer.\textsuperscript{18} The President in the Proposed Rule states that “multiple types of items no longer warrant control on the USML” and should be migrated to the Commerce Control List.\textsuperscript{19} Additionally, the Proposed Rule would “create a new regulatory structure to address the movement of items from the USML.”\textsuperscript{20} The Commerce Department opened the proposition to public comment and received fourteen official comments from domestic industry, academia, and the bar.\textsuperscript{21} Corporate commentators ranged from Lockheed Martin and Rockwell Automation, to Rolls Royce and the Semiconductor Industry Association.\textsuperscript{22} Corporate commentators generously encouraged the efforts of the Department of Commerce but generally saw the Proposed Rules as falling short

\textsuperscript{15}Id.
\textsuperscript{18}Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. at 41958.
\textsuperscript{19}Id.
\textsuperscript{20}Id. at 41959.
\textsuperscript{21}See Docket Folder Summary: Export Administration Regulations Control of Items that No Longer Warrant Control on the United States Munitions List, WWW.REGULATIONS.GOV, http://www.regulations.gov/#/docketDetail?dct=FR%252BPR%252BN%252BO%252BSR%252BPS;rpp=10;po=0;D=BIS-2011-0015 (last visited Oct 21, 2011).
\textsuperscript{22}See id.
because they do little to simplify the export process or harmonize the labyrinth of multi-
Department regulation.23

For its part, the Department of State has issued a Proposed Rule on November 7, 2011
that would move certain aerospace items from the U.S. Munitions List and decrease the scope of
items covered by ITAR.24 A picture of the state of export control reform and its current direction
can be garnered when the Proposed Rules are analyzed in conjunction with each other and recent
legislative developments in the export field. The U.S. export control reform efforts, including the
proposed revisions, present difficult issues in addressing the optimal precision of administrative
rulemaking in this area but current proposed reforms show promising developments. In order to
assess the proposed regulatory changes the proposed rules are analyzed under a law and
economics framework with the goal of achieving optimal rule precision.

Part I of this note provides a description of the historical lack of international regulation
in this area and describes the domestic background of export control. Part II focuses on the
current form and function of the regulations, goals of the administration, and qualms from
industry. Part III describes the seven components25 of the proposed and recently adopted
regulations, while Part IV supplies an analytical framework based on a law and economics
approach to optimal rule precision. Finally, Part V analyzes the proposed and recently adopted
rules of the Departments of State and Commerce and applies the law and economics analytical
framework. This note finds that the majority of the proposed export reforms are positive, two are

23See generally, Remarks by Secretary Gates to the Business Executives for National Security on the U.S. Export
Control System, WWW.DEFENSE.GOV (2010) [hereinafter Remarks by Secretary Gates],
=4613 (last visited Nov 9, 2011).
24 Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category VIII, 76
25 The reforms are broken down into seven components for the purpose of analysis: the “600 series,” “0Y521
ECCN,” Department of Commerce definition of “specially designed,” Department of State definition of “specially
designed,” the de minimus exception, the Strategic Trade Authorization Exception, Content Changes.
questionable and deserve scrutiny from lawmakers, and one component is contrary to the objectives considered in this analysis.

I. The Framework

A. International Landscape

It is helpful to view the U.S. model of export regulation in light of international agreements, regional treaties, and current international developments. Failed international efforts to control the arms trade have placed the burden of regulating arms transfers squarely on domestic governments.\textsuperscript{26} As the world’s largest producer and exporter of defense items, services, and defense licensing contracts the United States plays a lead role in the global defense trade industry.\textsuperscript{27} From an international posture it is imperative that the export control regime promulgated by the United States is up to the challenge of controlling transfers out of the United States while setting an example for other countries.

The international community made attempts to control the traffic in arms before World War I. The Brussels Act of 1890 entered into force with the purpose of controlling arms trade, and though generally disregarded by European arms merchants, was arguably the first and only multilateral treaty to have legally binding effect in the area of arms transfer control.\textsuperscript{28}

After World War I, the League of Nations Covenant included a disarmament policy provision in Article 8, and in Article 23(d) “entrust[ed] the League with the general supervision of the trade in arms and ammunition with the countries in which the control of this traffic is

\textsuperscript{26} See Anderson, supra note 1, at 805 (concluding that international supervision over the arms trade has failed but that the United Nations may hold the key to international controls in the future).

\textsuperscript{27} STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, supra note 8 (illustrating that the U.S. is the world’s top arms exporter for the last five years).

\textsuperscript{28}Anderson, supra note 1, at 758.
necessary in the common interest.”

With this mandate the League commenced the St. Germain Convention (1919), which proposed a legal framework to coordinate “export licensing and national supervision” including annual arms export reports. The Convention failed due to a lack of U.S. support. In 1925 the members of the League attempted to garner U.S. support by removing oversight responsibility from the League and placing it back in the hands of participating States. Participating States failed to ratify the convention because it lacked the ability to regulate or publicize the arms production of signatories, a “contentious issue for non-arms producing States.”

The First World Disarmament Conference resumed the issue of arms transfer regulation in Geneva in 1932 and after Germany withdrew a year later the Conference pressed on with the U.S. offering the American Draft Articles which envisioned a “powerful international supervisory body” called the Permanent Disarmament Commission. The American Draft Articles also defined the categories of articles to be regulated, required domestic governments to license exports, and insisted on the publication of arms transactions. As the Conference prepared for the signing of a general convention to adopt the American Draft Articles, Italy invaded Ethiopia in 1935, quashing the discussion of arms transfer regulation.

The cold war, nuclear concerns, and the general profitability of the defense sector stifled post-World War II attempts to regulate arms transfers. England, France and the United States signed the 1950 Tripartite Declaration on Security in the Middle East, which tied arms transfers

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30 Anderson, supra note 1, at 760.
31 Id.
32 Id. at 761–62.
33 Id. at 762–64.
34 Id.
35 Id. at 764.
36 Anderson, supra note 1, at 765–66.
to a mutual non-aggression agreement. When the Soviet Union arranged an arms deal between Czechoslovakia and Egypt in 1965 the treaty unraveled.\textsuperscript{37} Additionally, eight Andean countries signed The Declaration of Ayacucho (1974), a regional agreement driven by the economic burden of a regional arms race in order to promote restraint in arms importation, but the talks broke down in 1976, only to be temporarily revived by Mexico in 1978 to no avail.\textsuperscript{38} The examples of the Tripartite Declaration and the Declaration of Ayacucho demonstrate the failure of even modest regional agreements to reach lasting consensus on arms export control and further emphasize the importance of domestic export controls.

In recent years, states have come together to form a number of regimes to coordinate their individual export controls in an effort to harmonize non-binding national standards.\textsuperscript{39} The Australia Group provides a forum for the domestic control of Chemical and Biological weapons while the Missile Technology Control Regime and the Nuclear Suppliers Group aim to provide sounding boards and forums as their names suggest.\textsuperscript{40} Forty states have formed The Wassenaar Arrangement in an effort to shed light on the transfer of conventional weapons and dual use items.\textsuperscript{41} Principally, the Arrangement has made headway by promoting “The List of Dual Use Goods and Munitions List” whereby participating states chose to uniformly implement classification systems in line with the Wassenaar Arrangement in order to promote harmonization in the classification of military and dual use items.\textsuperscript{42}

The United Nations did nothing to control conventional arms transfers until bipolar tensions receded and in 1993 the General Assembly passed Resolution 48/75 F which established

\textsuperscript{37} Id. at 766; see also Kołodziej, supra note 4, at 13.
\textsuperscript{38} Anderson, supra note 1, at 767.
\textsuperscript{40} Id. at 461–63.
\textsuperscript{42} See Westreich, supra note 8, at 477.
arms transfers as having negative effects on the illicit trafficking of arms, areas of regional tension, and the process of peaceful social and economic development of states.\textsuperscript{43} Subsequently, after a panel concluded the Arms Transfer Study, Resolution 46/63 L established the United Nations Register of Conventional Arms (effective 1993) that has successfully published and compiled arms transfer data since that time.\textsuperscript{44} Although the register is voluntary, subject to national security concerns, and does not operate under one consistent definition of “transfer” it has allowed for greater transparency in military trade.\textsuperscript{45}

\textbf{B. Historical Domestic Controls}

Prior to World War II the President of the United States had no legal mechanism for controlling peacetime military exports.\textsuperscript{46} The current export control regime of the United States grew out of a need to control military exports during World War II. Congress passed the Act to Expedite the Strengthening of the National Defense in 1940 at the outbreak of the war, which gave the President the authority to control militarily significant goods and services.\textsuperscript{47}

As the global political climate changed to a bi-polar system the United States viewed the Soviet Union and its allies as potential military adversaries (and competitors in military trade) and Congress passed the Export Control Act of 1949, the precursor to the modern U.S. export control statutes.\textsuperscript{48} The Act expanded the President’s power, allowed him to impose export

\begin{itemize}
\item \textsuperscript{45} UN-Register: The Global Reported Arms Trade: Background, supra note 2.
\item \textsuperscript{46} See Luo, supra note 11, at 448–49.
\item \textsuperscript{47} See id. at 449.
\item \textsuperscript{48} See id.; See generally Anderson, supra note 1, at 765 (discussing how the bi-polar political climate hampered international conventional arms trade regulation).
\end{itemize}
controls to further national security, foreign policy objectives, and preserve goods in short supply.\textsuperscript{49}

When the Export Control Act expired in 1969 the Export Administration Act (EAA) was ratified the same year. This provision gave consideration to the business side of U.S. military exports when the policy changed from a restrictive “strategic embargo” to a positive “qualified promotion of exports.”\textsuperscript{50} The 1979 version of the EAA,\textsuperscript{51} signed by President Carter, contained additional powers to create a list of controlled countries and assigned the Secretary of Commerce the job of populating and maintaining the Commerce Control List (CCL)\textsuperscript{52} which contained items subject to export restrictions.\textsuperscript{53} Importantly, from the inception of the EAA 1979, President Carter promoted a policy of neutrality in what is known as the “leprosy letter” sent to all U.S. Embassies, instructing them “not to assist defense firms in promoting sales of weapons.”\textsuperscript{54} During this period the Carter administration initiated conventional arms transfer talks\textsuperscript{55} with the Soviet Union and received an unexpectedly warm reception from the Soviet counterparties until a breakdown in US-Soviet relations in 1979 eventually led to its demise.\textsuperscript{56} President Carter’s strategic use of export policy illustrates the importance of the domestic implementation of export controls.

\section*{II. Current U.S. Export Controls}

\subsection*{A. Form and Function of the U.S. Export Controls}

\textsuperscript{49}\textit{See} Luo, \textit{supra} note 11, at 449.
\textsuperscript{50}\textit{Id.}
\textsuperscript{51}The EAA 1979 was extended in 1985 with minor changes and upon the Act’s expiration in 1990 it was extended by President George Bush by an executive order and re-authorized by Congress a month later on Oct. 23, 1990. Since that date Congress has not renewed it. To keep the Act in force successive Presidents have annually declared a national emergency pursuant to the International Emergency Economic Powers Act (IEEPA). \textit{See} Luo, \textit{supra} note 11, at 450.
\textsuperscript{52}15 C.F.R. § 774.
\textsuperscript{53}\textit{See} Luo, \textit{supra} note 11, at 448.
\textsuperscript{55}\textit{See} Husbands, \textit{supra} note 54.
\textsuperscript{56}\textit{See} Anderson, \textit{supra} note 1, at 768.
In order to understand the proposed reforms, a brief overview of the current United States export control system is necessary. The EAA authorizes and enables an extensive set of regulations known as the Export Administration Regulations (EAR)\(^{57}\) that contain the CCL and are administered by the Commerce Department’s Bureau of Industry and Security (BIS) which also promotes the Country Group designations and supplies the integral export licenses to exporters for “dual-use” items.\(^{58}\) The EAA gives the President the power to regulate “dual-use” items that may be used in both military and civilian contexts.\(^{59}\)

The regulation of defense items, defense services, and munitions fall under a separate umbrella authorized by the Arms Export Control Act of 1976 (AECA).\(^{60}\) The AECA authorizes the Department of State to regulate defense items and services and to this end they enacted the International Traffic in Arms Regulations (ITAR),\(^{61}\) administered by the Directorate of Defense Trade Controls (DDTC), which contain the United States Munitions List (USML).\(^{62}\)

An exporter must first properly classify what it is that they intend to export. Items and activities may both be subject to controls under the EAR and the ITAR.\(^{63}\) The term “export” includes the “release” of information to a foreign national within the United States – a “deemed export” – and technical assistance given to a foreign national in the U.S. or abroad that relates to an ITAR controlled item.\(^{64}\) Re-export of a controlled item may also require a license if the item is in its original form or constitutes more than a \textit{de minimus}\(^{65}\) amount of a foreign end-item.\(^{66}\)

\(^{57}\) 15 C.F.R. §§ 730–774.
\(^{58}\) See Luo, supra note 11, at 460.
\(^{59}\) See id. at 448.
\(^{60}\) See id. at 452.
\(^{61}\) 22 C.F.R. §§ 120–130.
\(^{62}\) See Luo, supra note 11, 460.
\(^{64}\) Id.
\(^{65}\) 15 C.F.R. § 734.4
\(^{66}\) See Hunt, supra note 63, at 98.
The exporter must first consult the Commerce Control List, which controls “a broad range of exports” unless the item is a defense service or article located on the U.S. Munitions List. After assessing the CCL the exporter will decide what Export Control Classification Number (ECCN) relates to their product. If the item cannot be located on any list or the military nature of the item is questionable the exporter may file a commodity jurisdiction request to determine whether the item is covered by the USML.

Each ECCN is controlled for one or more reasons (e.g. national security, nuclear proliferation, missile technology, regional stability, anti-terrorism) and the reasons for control correspond to the controls imposed by the U.S. Government on the destination country of the export. The exporter must consult the Commerce Country Chart (CCC) to determine whether any of the reasons for control of the ECCN are denoted for the destination country on the CCC. If the ECCN is controlled for a reason that is denoted on the CCC for the destination country, a license is required from the BIS unless a license exception is applicable.

An ECCN also determines which license exceptions are applicable to the potential export item for EAR controlled items. License exceptions may exclude the item from licensing requirements based on limited value, a civil end-user, the temporary nature of the export, etcetera.

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67 Id. at 94.
68 The item may additionally be classified as an “EAR99” item. EAR99 items are usually low technology items and consumer goods that are not generally controlled. The export of such an item to an embargoed country may still require a license.
71 See Chow & Schoenbaum, supra note 10, at 767–68.
72 15 C.F.R. § 740.3
73 15 C.F.R. § 740.5
74 15 C.F.R. § 740.9
Alternatively, if the export is located on the USML or otherwise controlled by the ITAR a license is almost always required from the DDTC. Further, persons that engage in the export or brokering of ITAR controlled items must register with the DDTC. In addition to the item-specific export controls of the EAR and ITAR, a Specially Designated Nationals list is maintained by the Department of the Treasury, Office of Foreign Asset Control which may require a license or prohibit economic activity with an individual or entity entirely.

To properly assess the congruency of the proposed reforms to U.S. export controls the reasons and purpose for the system must also be understood. The United States controls exports for a number of reasons, the most prominent of which are safety and security with economic competitiveness a close second. Congress enacted the AECA with a policy objective: “It shall be the policy of the United States to exert leadership in the world community to bring about arrangements for reducing the international trade in implements of war and to lessen the danger of outbreak of regional conflict and the burdens of armaments.” The statute acknowledges the need for arms transfers and “mutually beneficial defense relationships . . . because it is increasingly difficult and uneconomic for any country, particularly a developing country, to fill all of its legitimate defense requirements from its own design and production base.” The AECA discourages the promotion of U.S. weapons sales with limited exceptions to “foster the environment of international peace” and does not mention domestic economic considerations.

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75 Canada is the one notable exception. Hunt, supra note 63, at 96.
76 Id.
77 Chow & Schoenbaum, supra note 10, at 768.
78 Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. at 41958.
80 Id.
81 See id.
The policy is embodied in President Carter’s “leprosy letter” which prohibited the promotion of U.S. munitions sales by U.S. embassies.  

As early as 1990 Former Deputy Secretary of State Lawrence Eagleburger reversed the policy of restraint embodied in the “leprosy letter” by issuing classified memorandum in which he instructed U.S. embassies to assist with foreign weapons sales. Recent statements by President Obama seem to continue this imperative by placing economic concerns in the forefront: “by enhancing the competitiveness of our manufacturing and technology sectors, they’ll [export control reforms] help us not just increase exports and create jobs, but strengthen our national security as well.” On the most basic level, the U.S. administers a licensing and approval process for items on the U.S. Munitions List and “Dual-Use” items on the Commerce Control List in an attempt to prevent harm to the U.S., its citizens, and allies. Additionally, the U.S. exerts export and re-export controls on military items in which it has a specific comparative advantage in order to retain that technological advantage and halt, or at least retard, the proliferation of high-technology items.

The Congressionally enacted policy in the AECA to reduce arms transfers is seemingly at odds with the President’s pro-economic policy to increase exports. There is no perfect answer as to which policy should be used to address the congruency of the proposed reforms, other than to say that the reforms are the result of an executive Export Reform Initiative and there has been no vocal dissent from the legislature. It is fair to say that the congruency of the proposed regulations should be assessed according to the administration’s reform goals set forth below.

82 See Westreich, supra note 8, at 489; See Husbands, supra note 54, 162.
83 Westreich, supra note 8, at 489.
84 President’s Export Control Reform Initiative, supra note 13 (quoting President Obama at the Department of Commerce Annual Export Controls Update Conference, August 30, 2010).
85 Westreich, supra note 8, at 470.
86 Remarks by Secretary Gates, supra note 23 (“I want to state from the outset how critically important it is to have a vigorous, comprehensive export control system that prevents adversaries from getting access to technology or equipment that could be used against us.”).
B. Administration Reform Goals

The administration, in its export control reform initiative, has cited key objectives that largely align with domestic industry goals. The current efforts are meant to: enhance national security, reduce confusion, improve the ability of the U.S. Government to monitor and enforce controls, and speed up the provision of equipment to partners and allies. In order to accomplish these goals regulators have been directed to make the CCL and the USML more “positive,” “aligned” and “tiered.”

Secretary of Defense Robert Gates, speaking to a group of “400 very patriotic business men and women” called Business Executives for National Security, explained that the system must be adapted to deal with twenty-first century problems including a terrorist group obtaining a weapon of mass destruction or a rogue state obtaining ballistic missile parts. He discussed a “bureaucratic apparatus” that amounts to a “byzantine amalgam of authorities” that the export reforms are meant to simplify and cited to key examples where the system has led to security breach and severe inefficiency. Secretary Gates pointed to an example where an individual intentionally exporting ITAR items without a license was not prosecuted because he had two conflicting commodity control determinations from two different federal agencies. In another example of the current inefficient system, a C-17 aircraft sat grounded in Australia solely because U.S. permission was required to repair it.

He also laid out the groundwork for the much needed reform effort. Stating the case for transparency and accessibility, Secretary Gates said that a single export control list is required so

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87 Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. at 41958.
88 Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. at 41958.
89 Remarks by Secretary Gates, supra note 23.
90 Id.
91 Id.
that U.S. companies can more easily find out what products require licenses. This single list, combined with a new single licensing agency, would allow the government to focus on “the crown jewels”—high-technology items, especially those that cannot currently be duplicated. A new Information Technology system and “punishment severe enough to deter law-breaking” are mentioned with less particularity.

The administration has offered promising rhetoric on the subject of export control reform but the current Proposed Revisions to the ITAR and the EAR have not yet achieved their goals.

C. Industry Qualms

Critics of the current export control system argue that the system is over-inclusive, inefficient and detrimental to the competitiveness of U.S. items on the world markets. They argue that the USML contains harmless items, components that are causing foreign manufacturers to produce “ITAR-free” devices, and items that can be purchased abroad without being subject to ITAR restrictions. Industry complains that the licensing process is arduous, unpredictable, and time-consuming. The U.S. domestic producer therefore has

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92 Id.
93 Id.
94 Id.
97 Remarks by Secretary Gates, supra note 23 (“The [export control] system has the effect of discouraging exporters from approaching the process as intended. Multinational companies can move production offshore, eroding our defense industrial base, undermining our control regimes in the process, and not to mention losing American jobs. Some European satellite manufacturers even market their products as not being subject to U.S. export controls, thus drawing overseas not only potential customers but some of the best scientists and engineers as well.”).
98 Damast, supra note 96, at 215 (“Judge Frank Easterbrook lambasted this [no publication] approach to determining jurisdiction as the sort of “secret law” found in tyrannies.”).
increased production costs and products that are subject to delay due to licensing lags, whereby U.S. competitiveness is decreased.100

A specific example is found in the U.S. space industry, producers of commercial satellites and satellite components, which attributes its decrease in global dominance largely to onerous export controls on all “space qualified” items.101 Congress enacted the Strom Thurmond National Defense Authorization Act of 1999 after sensitive information was exported to a Chinese party following a failed Chinese rocket launch with an American made satellite payload. As a result of the legislation Congress placed all satellite parts on the USML and no satellite item may be exported to China without Congressional approval.102 Since the addition of all satellite items to the USML in 1999, “from 2000 to 2008, the American share of satellite manufacturing declined from $6 billion out of a global industry of $11.5 billion to $3.1 billion out of $10.5 billion” and European manufacturers began marketing “ITAR-free” satellites.103

Members of Congress introduced legislation on November 2, 2011 that would allow the President to take commercial satellites off of the USML in an effort to reinvigorate the U.S. space industry.104 Congressmen Don Manzullo stated:

Before 1999, the U.S. share of global satellite manufacturing was 75 percent. But over the past 10 years, it has averaged 44 percent because of Congress’ overreaction in shifting commercial satellite export licensing decisions to the highly restrictive munitions list. That action provided a competitive advantage to foreign satellite makers at the expense of American manufacturers and American workers.105

100 Damast, supra note 96, at 231.
101 Id. at 218.
102 Id.
103 Id.
Industries that must comply with the current ITAR restrictions are heavily affected by the regulations and are pushing for reform that accomplishes a more transparent and accessible system, which the export control reforms hope to produce.

III. Proposed Reform

A. Proposed Revisions to EAR: Control of Items the President Determines No Longer Warrant Control on the USML

The Proposed Rule of July 15, 2011 is the most significant effort currently in place to reform the U.S. export control system. The Department of Commerce has designed the reform with the goals of the administration in mind and subsequently opened the Proposed Rule to public comment, receiving fourteen responses.106

1. Addition of “600 series” to Commerce Control List

The Department of Commerce has proposed the addition of a “600 series” Export Control Classification Number (ECCN) to each category of the CCL which would create a de facto “commerce munitions list” for items that the Department of State decides to migrate from the USML that do not fit under a current CCL classification.107 Additionally, the last two digits of the ECCN would reflect the corresponding Wassenaar Arrangement Munitions List classification because “dual-use” or military items are almost inevitably found on the international list.108 The “600 series” acts as a holster for the former munitions list items, requiring elevated protections.

Generally, “600 series” items would be controlled for National Security Column 1 reasons and require an export license for export to all countries but Canada barring a licensing

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106 See Docket Folder Summary: Export Administration Regulations Control of Items that No Longer Warrant Control on the United States Munitions List, supra note 21.
107 Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. at 41960.
108 Id.
exception. The Proposed Rule describes the “600 series” as a “necessary intermediate step” towards the single export control list envisioned by the President.

2. Replace USML Category XXI with ECCN 0Y521

Under the Proposed Rule the Department of Commerce would add a new ECCN “0Y521” to act as a temporary holding classification for emerging technology items. A combined departmental effort would determine the items to be controlled under the new ECCN and only the GOV licensing exception would be applicable. Under no situation would an ECCN item remain in this temporary category for more than three years.

3. Towards a Single Definition of “Specially Designed”

Industry commentators have lambasted the Department of Commerce’s lengthy definition of “specially designed.” The Official Comment from the Semiconductor Industry Association called the definition “fundamentally flawed,” “unnecessarily complicated” and “fall[ing] short of the Administration’s reform objectives.” Rockwell Automation stated that the definition was “unfortunately ambiguous” and urged serious revision while KEMET described it as “a challenge even for the export professional.”

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109 “600 series” items may also fall into Regional Stability Column 1, Anti-Terrorism Column 1, and United Nations Embargo reasons for control, as required. Id.
110 Id.
111 “This License Exception authorizes exports and reexports for international nuclear safeguards; U.S. government agencies or personnel, and agencies of cooperating governments; international inspections under the Chemical Weapons Convention; and the International Space Station.” 15 C.F.R. § 740.1
112 Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. at 41967.
The Department of Commerce’s proposed definition is over three hundred words long, excluding the six official notes.\textsuperscript{115} The definition starts with a positive declaration that a specially designed item is one that is enumerated on the CCL and “as a result of ‘development,’” the item is imbued with properties “responsible for achieving or exceeding” the “performance levels, characteristics, or functions” of the referenced CCL item.\textsuperscript{116}

The word “development” is a broadly defined term that relates to all stages of the production process prior to serial production.\textsuperscript{117} If a CCL item is “developed” in a way that results in the item “achieving” the same performance levels as the referenced CCL item the item in question is “specially designed” unless an exception applies.

The definition then segues to a series of exclusions. An item is not specially designed if it is “(c) separately ‘enumerated’ in an USML category” or listed under a CCL ECCN that “does not have specially designed as a control criterion.”\textsuperscript{118} In order to be specially designed the item must be “enumerated” (look to the positive declaration) but if the item is not “separately enumerated” by being either an item in an USML category or an ECCN that does not invoke the specially designed criterion, there are four further exclusions. The first, a hardware exception, applies to “screws, bolts, nuts. . . fasteners. . . wire.”\textsuperscript{119} The second is for specifically positively excluded items.

The third exclusion is for parts or components that are used in an EAR99 end-item (not on the CCL or USML) that is in serial-production and the component part has not been modified.

\textsuperscript{115} Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. at 41980.
\textsuperscript{116} Id.
\textsuperscript{117} “Development. (General Technology Note)—‘Development’ is related to all stages prior to serial production, such as: design, design research, design analyses, design concepts, assembly and testing of prototypes, pilot production schemes, design data, process of transforming design data into a product, configuration design, integration design, layouts.” 15 C.F.R. § 772.1.
\textsuperscript{118} Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. at 41980.
\textsuperscript{119} Id. at 41981.
for use in a different enumerated (on the CCL or USML) end-item after serial production of the EAR99 end-item has begun. This third exception requires drawing a temporal distinction between the time before the EAR99/non-enumerated end-item goes into production and after. If the component was modified for an enumerated CCL or USML end-item after the EAR99/non-enumerated end-item went into production, the item is “specially designed” and not subject to the exclusion. Therefore, if the component was originally modified for an EAR99 item but subsequently modified for an enumerated (controlled on CCL or USML) end-item before the first end-item begins production the exclusion still does not apply and the item is “specially designed.”

The fourth exception is a “safe harbor” exception—a positive test that insures that a part or component is not “specially designed” for military purposes. If the component can be exchanged with an EAR99 item (or an item controlled only for AT purposes) and is functionally identical to the EAR99 item it is not specially designed.

The Department of State proposed a different definition in a December 2010 Advanced Notice of Proposed Rulemaking and referred back to the Advanced Notice definition in the November 7, 2011 Proposed Rule.

‘specially designed’ means that the end-item, equipment, accessory, attachment, system, component, or part (see ITAR § 121.8) has properties that (i) distinguish it for certain predetermined purposes, (ii) are directly related to the functioning of a defense article, and (iii) are used exclusively or predominantly in or with a defense article identified on the USML.

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120 Id. (“(3) A ‘part’ or ‘component’ used as a ‘part’ or ‘component’ of an end-item in ‘serial production’ and not ‘enumerated’ on the USML or CCL (i.e., the end item is an EAR99 item), and the part’s or component’s form, fit, and function have not been altered for use in another end item enumerated on the USML or CCL after ‘serial production’ of the end-item not enumerated on the USML or CCL has begun.”).

121 Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. at 41981.

The Department of State definition is meant to be as design independent as possible.\textsuperscript{123} A “specially designed” item “has properties” that distinguish it for purposes that relate to the functioning of a defense article and is used predominately in or with a defense article.

4. The De Minimus Debate

The Commerce Department has also proposed a ten percent \textit{de minimus} content rule for “600 series” items.\textsuperscript{124} Foreign producers that incorporate less than ten percent “600 series” components in their end products would not be subject to U.S. export controls.\textsuperscript{125} As items are migrated from the USML the exception will open up previously controlled components to license free export as long as the total percentage of U.S. controlled componentry used in the foreign end-item is less than ten percent.\textsuperscript{126}

Certain sectors of U.S. industry have strongly supported a \textit{de minimus} exception but how the exception would apply is still undecided.\textsuperscript{127} The satellite industry has been a proponent of excluding foreign-made satellites with \textit{de minimus} U.S. content from U.S. export controls but because all satellite components remain on the USML current proposed rules would do little to relieve the problem unless the items were migrated to the CCL (most likely to a “600 series” ECCN).\textsuperscript{128} Interestingly, members of congress proposed H.R. 3288 on November 1, 2011 that would allow the President to remove satellites from the USML.\textsuperscript{129} If Congress passes the bill and a substantial part of the proposed rules culminate in actual change, the \textit{de minimus} exception may play a key role in the future of the domestic satellite industry.

\begin{footnotesize}
\textsuperscript{123} Id. at 76935.
\textsuperscript{124} Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. at 41966.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 41965.
\textsuperscript{127} See Damast, \textit{supra} note 96, at 224.
\textsuperscript{128} See \textit{id.} at 229.
\end{footnotesize}
B. A Novel Export License Exception: Strategic Trade Authorization (STA)

Another component of the export reform initiative is the addition of a fresh licensing exemption to the statutory list of CCL license exceptions. The Department of Commerce originally proposed the Strategic Trade Authorization (STA) in December 2010 and it was also included in the Proposed Rule of July, 15, 2011 and made effective in September. Under the exception, the exporter designates on a license application that they would like the particular “600 series” ECCN end-item listed on the license to be considered for the STA exception. If inter-agency review reveals that “the item does not provide a critical military or intelligence advantage to the United States or is otherwise available in countries that are not regime partners or close allies” it will be approved for an STA exception and will not subsequently require a license by any exporter to the thirty-six STA countries. If denied STA status the license application continues normally. If accepted, the specified ECCN will be published on the BIS website, available to all exporters. Each STA exception that is approved functions as precedent for future exporters, establishing a sub-tier of items that do not require a license to thirty-six of the closest allies to the United States.

C. Content Changes: Migration from USML to CCL

The Department of State issued a proposed rule on November 7, 2011 that would reduce the number of items covered under Category VIII of the current USML by “narrow[ing] the...
types of aircraft and related items controlled on the USML.” The Department has made the list positive, in that it denotes specific items to be controlled, in every respect except when dealing with “specially designed” parts and components. Only parts and components specially designed for eight designated aircraft types would be subject to ITAR controls under the revised Category VII, all components specially designed for other types of aircraft would be migrated to the “600 series” on the CCL.

The Proposed Rule is a first step by the Department of State to move items from the USML to the CCL. The Department of State issued two additional proposed rules on December 27, 2011 which propose reducing the number of items “specially designed” for surface vessels as well as removing some vessels entirely, and consolidating the control of submersible vessels to category XX. The migration trend is likely to continue until the USML has been purged of all but the most dangerous content.

IV. Economic Analytical Framework

This note will attempt to assess the proposed export reforms through an economic analysis of optimal rule precision, informed by an economic analysis of legal rulemaking and the “rules versus standards” debate. In Part V the framework is applied to seven components of the proposed reform and while most components are found to be favorable, two are questionable and one is disfavored. The objective is to discuss the degree of precision with

137 Id. at 68695.
which the legal command, in this case the proposed export control regulations, is expressed as a
determinant of the efficiency of the legal process (i.e. export control generally). The
continuum between highly specific and more general legal commands is often conceptualized as
a balance between “rules” on one end and “standards” on the other. For our purposes, a rule
represents a legal command that is given content \textit{ex ante}, where the determination of what
conduct is permissible is decided in advance, leaving only a factual determination to the
adjudicator. A standard, however, allows for content to be given to the legal command \textit{ex post},
by application of the standard to the given facts. A simple \textit{ex ante} rule formation may prohibit
“driving in excess of 55 miles per hour” while the \textit{ex post} formulation of a standard may prohibit
“driving at excessive speeds.” The difference between the rule and the standard “is a matter of
degree—the degree of precision.”

Precision is better understood in this context of administrative rulemaking according to
three useful qualities: transparency, accessibility, and congruency. Transparency represents
“the use of words with well-defined and universally accepted meanings within the relevant
community” while an accessible rule is one “applicable to concrete situations without excessive
difficulty or effort.” In a congruent rule “the substantive content of the message communicated
produces the desired behavior,” thus the rule aligns with the policy objective.

Rules and Standards have costs and benefits in their respective ability to portray legal
commands and promote efficiency. For instance, rules are more costly to promulgate then
standards, it takes more effort and time on the part of the rulemaker to give content to the law or

\textsuperscript{143} See Ehrlich & Posner, supra note 141.
\textsuperscript{144} See Kaplow, supra note 142, at 560.
\textsuperscript{145} See id.
\textsuperscript{146} See id.
\textsuperscript{147} Ehrlich & Posner, supra note 141, at 258.
\textsuperscript{148} See Diver, supra note 140, at 67.
\textsuperscript{149} See id.
\textsuperscript{150} Id.
regulation *ex ante*;\(^{151}\) this is sometimes referred to as the “cost of rulemaking.”\(^{152}\) Alternatively, standards cost more to enforce because the adjudicator must determine the content to the law *ex post*,\(^{153}\) referred to as the “cost of applying the rule.”\(^{154}\)

Two other considerations are important for our analysis: over/under-inclusiveness and the rate of compliance.\(^{155}\) Rules are typically criticized for being both over-inclusive and under-inclusive\(^{156}\) in application—a variance emerges “between the intended and actual outcomes” of the legal command in practice.\(^{157}\) The rulemaker cannot anticipate every case in which the legal command ideally applies, thus cases are omitted that should be covered.\(^{158}\) Likewise, a hard-and-fast rule may engulf certain cases that are ideally not subject to the legal command.\(^{159}\) The unwanted effects of under-inclusiveness are often dealt with by “backing up the rule with a standard,” where a legal command prohibits predefined conduct (driving in excess of 55 miles per hour) while additionally prohibiting “unreasonable” or “excessive” conduct to be determined *ex post*.\(^{160}\) Over-inclusiveness is addressed by allowing discretion at the time of enforcement (a police officer may waive a speeding ticket for good cause) or by incorporating exceptions into the rule (list of activities expressly not prohibited by the rule).\(^{161}\) Tools for mitigating the effects of over and under-inclusiveness of precise rules tend to sacrifice transparency or accessibility to make the rule more congruent to the actual goals of the rulemaker.\(^{162}\)

\(^{151}\) Kaplow, *supra* note 142, at 569.

\(^{152}\) See Diver, *supra* note 140, at 73–74.


\(^{154}\) See Diver, *supra* note 140, at 73–74.

\(^{155}\) See id., at 73.

\(^{156}\) See Kaplow, *supra* note 142, at 586.

\(^{157}\) See Diver, *supra* note 140, at 73.

\(^{158}\) See id.

\(^{159}\) See id.


\(^{161}\) See id.

\(^{162}\) See Diver, *supra* note 140, at 73–74; see also, Ehrlich & Posner, *supra* note 141, at 268.
Further, rule precision has a positive impact on both the rate of compliance and the cost of legal advice. The rate of compliance with a given the legal command generally increases with greater rule precision and is especially important when considering legal commands that prohibit socially harmful conduct.\textsuperscript{163} The export licensing of military items arguably falls into this category of potentially socially harmful conduct (though not as directly as the regulation of nuclear waste) and so highly accessible and transparent legal commands must be balanced against the need for a similarly high degree of congruency. Rulemakers should also consider the cost of (legal) advice when formulating a rule.\textsuperscript{164} The advice cost decreases as the precision of the rule increases and when a standard becomes a \textit{de facto} rule through a widely applicable precedent.\textsuperscript{165}

Perhaps the most important consideration relevant to the analysis of administrative rulemaking and export licensing in particular is the frequency with which the legal command is applied.\textsuperscript{166} Generally, rules tend to be more efficient concerning legal commands that apply at a high volume (e.g. a transactional basis) because the cost of promulgating the command occurs only once and may be applied to recurring cases.\textsuperscript{167} In high frequency applications enforcement costs are decreased using precise rules as they may result in an increased rate of compliance and decreased costs in legal advice.\textsuperscript{168} Exporters throughout the country apply the export control regulations of the ITAR and EAR at a high volume on a daily basis. Exporters must be able to assess the need for a license in a timely manner consistent with the volume of transactions, hence

\begin{footnotes}
\footnote{163 See Diver, \textit{supra} note 140, at 73–74; \textit{see also} Kaplow, \textit{supra} note 142, at 564.}
\footnote{164 See Kaplow, \textit{supra} note 142, at 571.}
\footnote{165 \textit{Id.} at 577.}
\footnote{166 \textit{Id.}}
\footnote{167 \textit{Id.}}
\footnote{168 \textit{Id.}}
\end{footnotes}
it is no surprise that the Departments of State and Commerce endeavor to enact highly precise rules (in their current form and proposed) for the licensing of potentially dangerous items.

Yet the licensing of exports differs from many other types of licensing because it occurs on a transactional basis with potentially high social significance. A license to broadcast over public airwaves or the “entry of a new competitor into an existing market” applies seldom enough to be “relatively infrequent”\textsuperscript{169} but the social costs are relatively high. Alternatively, occupational licensing and the licensing of motor vehicle operators occur in large volume with little social significance per license.\textsuperscript{170} Professor Colin S. Diver has suggested that drafters of licensure regulations should give more weight to congruency and less to transparency and accessibility than drafters of prohibitory rules, but that transparency should be increased in high-volume applications with low social significance.\textsuperscript{171} The case of export licensing involves a high volume of licensure (transactional basis) with a high potential social cost (dangerous items left uncontrolled), which leads to an indeterminate result as to what combination of transparency, accessibility, and congruency is germane to the optimal precision of export control regulations.

In order to accurately analyze the optimal precision of the proposed export rules the components will be addressed separately with regard to transparency, accessibility and congruency in relation to the relevant costs and benefits and with regard to the high frequency of application.

\textbf{V. Economic Analysis of the Proposed Rules}

The “600 series” component of the Proposed Rule notably emphasizes accessibility and transparency. The proposed regulations are more accessible because an exporter need only check the USML for a smaller set of items –the CCL will potentially cover many more controlled items.

\begin{footnotesize}
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\item \textsuperscript{169} See Diver, \textit{supra} note 140, at 79.
\item \textsuperscript{170} See id.
\item \textsuperscript{171} Id.
\end{itemize}
\end{footnotesize}
items. If a single list of controlled items is eventually achieved the regulations will come closer to optimal accessibility. The “600 series” aims for transparency by employing “universally accepted” classification codes from the Wassenaar Arrangement that are relevant in the export community. The “600 series” also moves towards congruency with the administration’s aims by providing a more positive, centralized location for controlled items but is not yet tiered by way of a hierarchical control structure.

The Rules v. Standards debate suggests that increased precision by way of transparency has a positive effect on compliance by increasing evasion or concealment costs and increasing the ease of enforcement. Mainly, clear and familiar rules are easier to follow for law-abiding exporters. Additionally, transparent and accessible rules like the “600 series” component are familiar to the export community and easier to enforce, thus there is an increased likelihood of violators being caught and evasion becomes increasingly costly. The “600 series” looks to be an improvement on the current export control system by way of consolidation and ease-of-use.

The “0Y521” ECCN component is necessarily imprecise under an economic analysis, as it is essentially a miscellaneous holding classification “for situations in which an item that warrants control is not controlled yet” (e.g. high technology items). It is in some senses lacking in both transparency and accessibility. The “0Y521” is not particularly transparent because there is no way of knowing precisely what items are subject to the miscellaneous grouping ex ante and inaccessible in the sense that it offers no concrete affirmative answers to anticipate whether an item is on the list. The ECCN “0Y521” presents an over-inclusive list of items that may or may not deserve control, but because of unavoidable incongruence between the

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172 See id. at 73.
173 See Diver, supra note 140, at 73.
174 See id.
175 Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. at 41966.
emergence of technology on the market and the administrative ability to classify the new items it is a necessary bit of imprecision.

Some degree of over-inclusivity in the export licensing context is an efficient way to promote the national security objective. The exporter is not denied export by way of these regulations, they regulate only whether a license is necessary and over ninety-five percent of license applications are approved. Over-including potentially dangerous products in ECCN “0Y521” increases transaction costs (but does not prohibit the transaction) and must be weighed against security and national competitiveness concerns. Ultimately, the holding classification has incorporated enough safeguards to prevent dramatic over-inclusivity in order to promote a reasonable balance.

The definition of “specially designed” is important because it serves as a catch-all clause that engulfs even harmless items, slightly modified for military customers or end-items. For example, a bolt designed for the installation of an aircraft-mounted camera or a tiny integrated capacitor made to a military specification may fall into the current definition, which subjects the component to licensing controls. The Wassenaar Arrangement Munitions List and the Missile Technology Control Regime, upon which the CCL are based, also use the term “specially designed” (undefined and defined), which arguably make it indispensable to domestic control regimes. Additionally, the definition has formerly been riddled with other indefinite phrases like “form, fit, or function” which are viewed as highly subjective and imprecise. The use of

176 Remarks by Secretary Gates, supra note 23.
177 For instance, an item is added to the list for one year and its status may be renewed only three times before a final inter-departmental decision is made. Publication of “0Y521” items in the Federal Register will also counteract overuse through transparency. See Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. at 41966–67.
178 Id. at 41967.
179 Holland & Knight, supra note 99, at 4.
undefined or broadly defined language in a regulation reaching for precision greatly reduces the transparency and accessibility of the rule while reducing efficiency.180

A single definition of “specially designed” would add transparency, accessibility, and congruency with the export reform initiative, and increase the precision of the export regulations as a whole. It is therefore favored from the perspective of optimal rule precision. A uniform definition would increase understandability by allowing exporters to apply the same definition to all export control cases, accessibility by reducing the places an exporter must look in order to determine the applicability of a given item, and congruency by conforming with the policy of the Export Reform Initiative.181 Currently, the Department of Commerce’s definition starkly contrasts with the Department of State’s definition of “specially designed.”

To start off, the initial positive part of the Department of Commerce formulation retains the problems of the current definition, echoed by the administration and industry, while arguably adding to them. The use of the overbroad term “development”182 hinders transparency; if the purpose is to envelope a substantial range of changes to the item then the administration’s goal of creating a positive and precise list is severely hindered and congruency suffers. The definition of “development” is too broad for precise drafting in this context and decreases the accessibility of the regulation by decreasing concrete applicability.

The use of multiple exceptions in the formulation of the rule tends to reduce the transparency and accessibility of the rule by confusing the language and making the regulation difficult to apply.183 Specifically, the third exclusion184 requires the altered component to be

180 See Diver, supra note 140, at 67.
182 See supra note 117.
183 See Ehrlich & Posner, supra note 141, at 268.
serially produced and incorporated into a non-enumerated end-item, if the component is altered for use in an enumerated end-item after the non-enumerated end-item goes into serial production it fails a major purpose of the exclusion: *to wit,* serially produced production components of non-enumerated end-items should not require licenses but they cannot be altered for enumerated items after the serial production begins.\textsuperscript{185} Not only is the Department of Commerce definition horribly opaque but it also requires difficult distinctions involving the time of production and judgments concerning secondary modifications. Exception three may be useful in some cases but it is tremendously inaccessible regarding the precision of the regulation and therefore disfavored.

The fourth, “safe harbor,” exception\textsuperscript{186} is precise with regard to transparency but lacks accessibility because it requires comparing the item in question to an EAR99 item instead of a more concrete positive determination related to objective characteristics. It may also lack congruency because it does not align with the administration’s priority for a more positive list.

The Department of Commerce may have come closer to its objective of strictly defining “specially designed” then it has been given credit. Unfortunately, the use of exceptions to formulate the rule reduces transparency and accessibility by confusing the language and making the regulation difficult to apply.\textsuperscript{187} The definition from Commerce reads as a complex standard with a number of exceptions while the definition from State is a simpler standard where three considerations (distinguished for predetermined purposes, directly relating to a defense article, and used at least predominately with a defense article) give the standard content.\textsuperscript{188} While a rule formulation would give content to the regulation *ex ante,* a pure rule-typical formulation cannot

\textsuperscript{184} See supra note 120.
\textsuperscript{185} See Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. at 41981.
\textsuperscript{186} Id.
\textsuperscript{188} See Kaplow, *supra* note 142, at 566–67.
meet the burden of classifying every item uniquely designed unless all possible permutations are positively identified. Deciding on the complexity of the more standard-side definition is therefore critical to promoting sound regulation. Though the Department of Commerce definition tries to more stringently control what items fit within the definition, it may effectively reduce the rate of compliance due to over-complexity, inaccessibility, and a lack of transparency.¹⁸⁹ The Department of State definition is therefore preferred from an economic perspective even though it is less complex than the Department of Commerce definition.

The ten-percent *de minimus* content component of the proposed rule is favored from an economic perspective mainly because it is transparent: the concept is currently applied to a twenty-five percent *de minimus* exception for non-“600 series” CCL items and can be understood and applied within the relevant export community.¹⁹⁰ The proposed rule does not clarify how the *de minimus* threshold of ten percent for “600 series” items interacts with the current twenty-five percent threshold for non-“600 series” items.¹⁹¹ This reduces the accessibility of the regulation, at least until the issue is clarified. Further, the *de minimus* component is ostensibly congruent with guidance from the administration’s Export Reform Initiative as it promotes the export of “600 series” items by reducing the licensing requirements for such items without seriously undermining national security or domestic competitiveness.

The U.S. Government does not allow a *de minimus* exception for munitions items while positioned on the USML. This exception makes for a substantial departure from the historical trend to license all munitions items as it changes the licensing dynamic for items that migrate to

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¹⁸⁹ See Kaplow, *supra* note 142, at n. 126.
¹⁹¹ Official Comment from the National Defense Industrial Association, to The Bureau of Industry and Security 2 (Sep.13, 2011) (on file with author), available at http://www.regulations.gov/#/documentDetail;D=BIS-2011-0015-0005 (“[I]n a situation where a foreign end item contains 1% 600 series items and 12% non-600 series. We are uncertain . . . if this article would be eligible for the 25% threshold currently in the EAR.”).
the CCL “600 series.” By proposing the *de minimus* rule for “600 series” items the U.S. Government hopes to quell the “designing-out” of U.S. controlled components (e.g. foreign-produced satellites). The wisdom of giving potentially dangerous and previously controlled items a *de minimus* content exception must be weighed against the pressure to relax export licensing regulation and reduce the transaction costs of related exports. Care must be taken to insure that a *de minimus* exception can be appropriately applied to “600 series” items, and if doubts arise proliferation concerns win the day. Ultimately, the significant positive economic impact of the *de minimus* component outweighs the potential harm to national security involved in waiving the licensing requirements of some “600 series” componentry.

The Strategic Trade Authorization exception is a novel attempt to promote a dynamic list of controlled items. The list of STA applicable items is subject to constant change and revision and the STA exception will provide exporters with the ability to streamline exports to critical U.S. allies and regime partners.

When assessing the congruency of the STA exception from an economic perspective, the benefits of a dynamic list should be weighed against the agenda for a positive list that would function as a more predictable way for exporters to determine licensing requirements. If the item does not require a license after an STA request, the item should arguably not require an export license to regime partners in the first place. A more positive list could be implemented by allowing a licensing exception to all “Group A” countries on the CCC instead of requiring an

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192 *Id.*
193 Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. at 41966.
195 This is essentially the approach of the current GBS license exception. The Department of Commerce must be looking for more control over the process. This control comes at the cost of added administrative costs required to apply the new STA exception. See 15 C.F.R. § 740.4.
application and agency review. By including a grab-bag of items randomly selected by exporters, the STA is not in line with the “tiered” objective of the Export Reform Initiative\textsuperscript{196} and the congruency of the regulations is thereby decreased. The exception may further complicate a system that is purportedly evolving into a single streamlined and predictable list.\textsuperscript{197}

Interestingly, the STA introduces an element of precedent into the export control regime that positively affects the efficiency of the system.\textsuperscript{198} Once an exporter goes through the effort of applying for an STA exception, if approved, the application acts as a precedent for future cases and the license requirement is waived.\textsuperscript{199} The effort to apply for the STA exception is nominal yet the future decreased cost of complying with the licensing regulations and acquiring legal advice on how to proceed with an export licensing transaction is reduced substantially if the application is approved. The transaction costs are reduced for the exporter who applied for the STA (and may be in position to benefit directly by exporting the same item again) and other exporters in similar position.\textsuperscript{200} The application of the precedent to other export licensing transactions may also increase certainty and predictability in relation to the licensing approval of a particular item.\textsuperscript{201} This may in turn increase competition in the trade of a specific item among U.S. exporters, potentially reducing costs to the buyer. Although the STA exception may forfeit elements of congruency it adds positively to the efficiency of the system though reduced costs.

The process of revising the actual content of the lists is sure to be slow and incremental but even the changes proposed by the Department of State on November 7, 2011 would affect

\textsuperscript{196} Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. at 41958.

\textsuperscript{197} See Diver, supra note 140, at 70–71 (discussing the problem of tradeoffs).

\textsuperscript{198} See Diver, supra note 140, at 95–96 (discussing a similar administrative use of precedent in INS change-of-status cases where only certain cases are selected for publication).

\textsuperscript{199} See Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. at 41964.

\textsuperscript{200} See id.

\textsuperscript{201} See Ehrlich & Posner, supra note 141, at 278.
the related sectors significantly. While exporters once had to acquire licenses for all parts or components that were adapted or machined for a military aircraft, under the Department of State proposed rule exporters would only be required to acquire export licenses from the DDTC for a small subset of U.S. made aircraft. U.S. suppliers would be able to more easily export parts and components for foreign militaries or foreign military aircraft under the proposed rule.\textsuperscript{202}

The transparency of the Department of State proposed rules for the migration of items is commendable, the rules are clear and the Department of State definition of “specially designed” remains more straightforward than the Department of Commerce definition.\textsuperscript{203} Formerly, most items “specially designed” for defense items were subject to ITAR controls\textsuperscript{204} —a simple rule to apply. The accessibility of the rule has been somewhat muddled in order to promote congruency and reduce the amount of “specially designed” items controlled by the USML. The Proposed Rule more precisely defines the criteria for what “specially designed” items are controlled (e.g. designed for warships and developmental vessels)\textsuperscript{205} thereby decreasing accessibility through a more complex rule but aligning the regulation more closely with the objectives of the administration.

\textbf{CONCLUSION}

Under the economic framework of optimal rule precision employed in this note, most of the proposed export reforms are positive, two are questionable and deserve scrutiny from lawmakers, and one component is antithetical to the objectives considered in this analysis.

Among the significant positive components are the “600 series,” the \textit{de minimus} exception, the

\textsuperscript{202} The Department of State proposed rule limits the scope of “specially designed” parts governed by the ITAR to only eight U.S.-origin aircraft, all parts “specially designed” for other aircraft are migrated to the “600 series” on the CCL. \textit{See} Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category VIII, 76 Fed. Reg. at 68695.

\textsuperscript{203} \textit{See} Revisions to the United States Munitions List, 75 Fed. Reg. at 76939.

\textsuperscript{204} \textit{Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category VI, 76 Fed. Reg. at 80303 (proposed Dec. 27, 2011).}

\textsuperscript{205} \textit{Id. at} 80305.
STA exception, and the Department of State definition of “specially designed.” These favored components are largely transparent and accessible while comporting with the President’s Export Reform Initiative. Questionable proposed reforms include the temporary “0Y521 ECCN” classification and changes to the content of the USML and the CCL. The “0Y521 ECCN” runs the risk of becoming a “black hole” for emerging technology items although better alternatives are not forthcoming. The content changes should be scrutinized because of the dangers to safety and national security inherent in classifying potentially dangerous items. Lastly, the Department of Commerce’s definition of “specially designed” is disfavored because the complexity threatens compliance and the definition lacks transparency and accessibility.

While numerous reforms are underway, other goals have not been implemented at this time. Uniformity between the lists and definitions of the Departments of State and Commerce present challenges that must be overcome in the effort to promulgate a single tiered list of controlled items. The information technology requirements of cohesive reform and whether or not action will be taken to amend the punishments for export offenders have yet to be fully addressed. Ultimately, the process of reforming export regulation is under way and there are promising developments that pay heed to the significant risk of non-compliance. While strict rule-type regulation is sometimes infeasible, precise regulation will bring exporters into the fold by decreasing the transaction costs of compliance and increasing the ease of government enforcement and risks of non-compliance.

The export control system in the United States is responsible for, and has the heavy burden of regulating the weapons that leave the United States, some of which have been used against U.S. troops and innocents abroad. It is our responsibility to ensure that export reform

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206 The definitions of “specially designed” and the complications arising from them are a prime example.
207 See Anderson, supra note 1, at 752
does not stray too far from the purpose of national security and safety in order to accommodate domestic manufacturers and economic stimulus.

There will always be a degree of over-inclusivity in the licensing of controlled exports. Regulators and exporters alike should remember that the regulations discussed herein do not prohibit exportation, they only necessitate licensing. Optimally precise regulations in this area should air on the side of licensure and if proper consideration is given to the risks of exporting dangerous items there should be a “thumb on the scale” in favor of over-inclusive rules for licensing regulation. The added transaction costs are the costs of doing business in the transfer of items controlled by the U.S. Government, including weapons.