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Stanley J. Marcuss

Michael B. Zara

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A Better Way Through the Export Control Thicket

Stanley J. Marcuss¹
Michael B. Zara^{2, 3}

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1. Washington, DC office of Bryan Cave LLP.
 2. Santa Monica office of Bryan Cave LLP.
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Introduction

Export controls are important instruments of U.S. policy. They serve a wide variety of purposes but are mainly intended to protect the national security, prevent the spread of nuclear and other weapons and advance U.S. foreign policy interests. These are important objectives, and those charged with administering them bear important responsibilities.

The U.S. export control system is, however, terribly complex. It is administered by a wide variety of federal agencies, each of which exercises control over different things for different purposes. Sometimes their jurisdictions overlap.

The State Department, for example, has jurisdiction over defense-related exports.⁴

The Drug Enforcement Administration has jurisdiction over exports of drugs and chemicals.⁵

The Food and Drug Administration has jurisdiction over other kinds of drugs as well as medicines and medical devices.⁶

The Nuclear Regulatory Commission controls exports of nuclear materials and equipment.⁷

The Department of Energy regulates exports of nuclear technology.⁸

The Treasury Department's Office of Foreign Assets Control ("OFAC") regulates all kinds of transactions, including dealings in property interests and funds transfers, in administering U.S. economic sanctions.⁹

And the Commerce Department regulates exports of so-called "dual-use items," defined as any item "that has civil applications as well as terrorism and military or weapons of mass destruction . . . applications."¹⁰ "In essence," according to the Export Administration Regulations (variously, the "Regulations" or the "EAR"), the Commerce Department controls "any item warranting control that is not exclusively controlled for export, reexport, or transfer (in-country) by another agency of the U.S. Government."¹¹ Included, says the Commerce Department by way of a definition of the term "dual use" in the Regulations, are "[i]tems that have both commercial and military or proliferation applications."¹² The definition goes on to provide that,

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4. See 22 U.S.C. § 2778 (2012); Exec. Ord. No. 13,637, Sec. 1(n)(i), 78 Fed. Reg. 16,129, 16,130 (Mar. 13, 2013) (most recent delegation of presidential authority); see also 22 C.F.R. §§ 120–130 (2014); see also 15 C.F.R. § 730, (Supp. I), 734.3(b)(1)(i) (2014).
 5. See 21 C.F.R. §§ 1311–1313 (2014); see also 15 C.F.R. § 730 (Supp. I).
 6. See 21 C.F.R. §§ 310–499 (2014); see also 15 C.F.R. § 730 (Supp. I).
 7. See 10 C.F.R. § 110 (2014); see also 15 C.F.R. §§ 730 (Supp. I), 734.3(b)(1)(iii) (2014).
 8. See 10 C.F.R. § 810 (2014); see also 15 C.F.R. §§ 730 (Supp. I), 734.3(b)(1)(iv) (2014).
 9. See 31 C.F.R. §§ 500–590 (2014).
 10. See 15 C.F.R. § 730.3 (2014).
 11. *Id.*
 12. *Id.* § 772.1 (2014).

“[w]hile this term is used informally to describe items that are subject to the EAR, purely commercial items and certain munitions items listed on the Wassenaar Arrangement Munitions List (WAML) or the Missile Technology Control Regime Annex are also subject to the EAR (*see* 15 C.F.R. §734.2(a)).”¹³

What warrants control and what is exclusively controlled by another government agency are often difficult questions to answer. Indeed, Commerce itself acknowledges that a number of other government agencies along with Commerce control exports for national security and foreign policy purposes and that “such controls may overlap with the controls” contained in the Commerce Department’s Export Administration Regulations.¹⁴ While the Export Administration Regulations identify the other government agencies that may exercise exclusive control over the export of other items, they do not identify what those other items might be.¹⁵ They merely identify where those regulations can be found.¹⁶

The purpose of this article is to illustrate the need to simplify and rethink the Commerce Department’s export control regulations and to identify ways that their goals might be achieved more effectively. Simplification is vital because, as currently constituted, the regulations are difficult to understand and are filled with traps for the unwary. Worse, is the real possibility that their complexity undermines their mission, permitting compliance only by those who have the time and resources to hack through the thicket while all others simply misconstrue or ignore them and hope that enforcement will never be the wiser. Simplification also compels a rethinking of basic concepts and procedures because simplification based on the current structure is not possible.

Meaningful assessments of whether U.S. export controls are achieving their objectives are, of course, impossible to make. Information about what escapes the gatekeepers is simply not available. The Government Accountability Office reported in 2010, moreover, that government export control reform initiatives begun in that year involved no effort “to measure the effectiveness of the dual-use export control system in protecting U.S. interests.”¹⁷

It stands to reason, in any event, that complexity in export controls, like complexity in the Internal Revenue Code and other regulatory regimes, imposes burdens on the scrupulous not born by others and ultimately undermines what the regulatory regime can be expected to achieve. Complexity is the enemy of

13. *Id.*

14. *Id.* § 730 (Supp. III 2014).

15. *See id.* §§ 734.3(b)(1), 730 (Supp. III).

16. *Id.*

17. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-135R, EXPORT CONTROLS: AGENCY ACTIONS AND PROPOSED REFORM INITIATIVES MAY ADDRESS PREVIOUSLY IDENTIFIED WEAKNESSES, BUT CHALLENGES REMAIN 17 (2010).

effectiveness. Simplicity is its patron.

The nation would be better served if the limits on what export controls can accomplish were recognized and export controls concentrated on what is really important rather than attempting to control everything under the sun. Simpler export controls would be more easily administered and more likely to accomplish what export controls are intended to accomplish. The basic questions, therefore, are (i) what are dual-use export controls intended to accomplish, (ii) what should they try to accomplish, and (iii) why does what “warrants control” under the current regime actually warrant control.

Controlling the Uncontrollable

The days when exports of tangible items were the major concern are over. The days when U.S. exports were dominant and what they conveyed was unavailable elsewhere are long past. Much of what is available from the U.S. is available elsewhere.

Exports of tangible things, like steel, cars, coal and hardware, moreover, are relatively easy to control. Exports of technology, less so. Even less susceptible to meaningful control are exports of technology that occur with the push of a button or by giving someone access to an electronic database.

Control is even more difficult in a world where exchanges of information within multinational companies operating in different countries are common or where separate companies in different countries work collaboratively on the same project. Perhaps more difficult still is the control of foreign-made products containing U.S.-origin components or materials, foreign-developed software or technology incorporating software or technology that originated in the U.S., foreign direct products of U.S.-origin technology or software and foreign-made products of a plant or a major component thereof that is itself the product of U.S.-origin technology. All, under certain circumstances, are currently subject to U.S. export controls under the Export Administration Regulations.¹⁸

Export controls that attempt to control a potentially endless variety of hard to define and sometimes even harder to identify things may be little more than a chimera, appearing to protect the national security or appearing to advance U.S. foreign policy interests but in reality accomplishing little.

Effectiveness demands simplicity and adaptability. Export controls that are layered with a patchwork quilt of additions, additions to additions, exceptions, and exceptions to exceptions become ossified and risk incoherence. Export controls that

18. 15 C.F.R. §§ 734.3(a)(3–5), 736.2(b)(1–3) (2014) (respectively, “subject to the EAR” and General Prohibitions 1–3).

attempt to identify goods and technologies in the most minute detail and differentiate among them based on miniscule size, weight, thickness, performance and other characteristics risk missing the forest because of the trees. They will undoubtedly miss the seedlings.

Simplification of the export control regulations administered by other agencies is vital too, but the Commerce Department's regulations are a good place to start because of the vast sweep of the "dual-use" goods, technology and services they cover. Unless exclusively controlled by another agency, virtually nothing that is exported from the United States or reexported from abroad after leaving the United States escapes the Commerce Department's jurisdiction. Included as well, are things made or developed abroad if they have U.S. content that exceeds specified *de minimis* values.¹⁹

Some Background

U.S. export controls first emerged in 1807 when Congress sought, through the Embargo Act of 1807, to avoid involvement in the Napoleonic Wars between France and Great Britain by restricting virtually all U.S. involvement in foreign maritime commerce.²⁰

The Embargo Act was not successful in that goal, of course, and neither was the subsequent Non-Intercourse Act of 1809, which limited its embargo to dealings with Great Britain and France.²¹ The War of 1812 ensued, and with it came the Embargo Act of 1813.²²

These were all war measures.

Subsequent export controls also responded to war or rumors of war, including those contained in or authorized by the Trading With the Enemy Act of 1917, the three "Neutrality Acts" of the 1930s, and the Export Control Act of 1940.²³

19. 15 C.F.R. §§ 734.3(a)(3–5), 734.4, 736.2(b)(2) (2014).

20. Act of Dec. 22, 1807, ch. 5, 2 Stat. 451 (1807) (amended by Act of Jan. 9, 1808, ch. 8, 2 Stat. 453 (1808), and Act of Mar. 12, 1808, ch. 33, 2 Stat. 473 (1808)) ("An act laying an embargo on all ships and vessels in the ports and harbors of the United States").

21. Non-Intercourse Act of 1809, ch. 24, 2 Stat. 528 ("An Act to interdict the commercial intercourse between the United States and Great Britain and France, and their dependencies; and for other purposes").

22. Embargo Act of 1813, ch. 1, 3 Stat. 88 ("An Act laying an embargo on all ships and vessels in the ports and harbors of the United States").

23. Trading with the Enemy Act of 1917, ch. 106, 40 Stat. 411 (codified as amended in scattered sections of 50 U.S.C. App (2012)); Neutrality Act of 1935, 49 Stat. 1081 ("Providing for the prohibition of the export of arms, ammunition, and implements of war to belligerent countries . . ."); Neutrality Act of 1936, 49 Stat. 1152; Neutrality Act of 1937, 50 Stat. 121; Export Control Act of 1940, ch 508, § 6, 54 Stat. 714 (amended by Act of Jun. 30, 1942, ch. 461, 56 Stat. 463; Act of Jul. 1, 1944, ch. 360, 58 Stat. 671; Act of Jun. 30, 1945, ch. 205, 59 Stat. 270; Act of May 23, 1946, ch. 269, 60 Stat. 215; Act of Jun. 30, 1947, ch. 184, 61 Stat. 214; Second Decontrol Act of 1947, ch. 248, § 4, 61 Stat. 321, 323)

During the Second World War and earlier, export controls were administered primarily if not exclusively by the State Department.²⁴ With the Second Decontrol Act of 1947, Congress moved to the Commerce Department the administration of the wartime export controls that were to remain in effect on a temporary basis after the end of the War.²⁵ The Second Decontrol Act described the temporary continuation of some wartime export controls as being necessary to protect the country from shortages and to support U.S. foreign policy.²⁶ National security was not even mentioned.

The subsequently enacted Export Control Act of 1949 reflected the first post-World War II attempt to establish a permanent system of export controls. It was to a large extent prompted by the Cold War.²⁷ It identified “national security” for the first time as a basis for controlling dual-use exports.²⁸ War or the threat of war as a basis for export controls was thus subsumed under the broader, more amorphous and potentially infinitely elastic concept of national security.

The ‘49 Act was subsequently amended from time to time, renamed and replaced by the Export Administration Act of 1969, which, in turn, was replaced by the Export Administration Act of 1979.²⁹

The Export Administration Act of 1979 expired in 2001, more than thirteen years ago, and Congress has since failed to renew it.³⁰ Several attempts to rewrite or reauthorize the statute have occurred over the years but to no avail. According to the Congressional Research Service, “[t]he last comprehensive effort took place

(“An Act To expedite the strengthening of the national defense”).

24. *E.g.*, Neutrality Act of 1937, § 5, 50 Stat. 121, 124 (establishing a multi-agency National Munitions Control Board and vesting primary administrative authority in the State Department).
25. Second Decontrol Act §6.
26. *Id.* § 3.
27. *See* Export Control Act of 1949, § 2, Pub. L. No. 81-11, 63 Stat. 7; IAN F. FERGUSSON, CONG. RESEARCH SERV., RL 31832, THE EXPORT ADMINISTRATION ACT: EVOLUTION, PROVISIONS, AND DEBATE 1–2 (2009); Paul H. Silverstone, *The Export Control Act of 1949: Extraterritorial Enforcement*, 107 U. PA. L. REV. 331, 332 (1959).
28. Export Control Act, § 1(b), 63 Stat. 7; FERGUSSON, *supra* note 27, at 2; *see generally* Paul H. Silverstone, *The Export Control Act of 1949: Extraterritorial Enforcement*, 107 U. PA. L. REV. 331 (1959).
29. FERGUSSON, *supra* note 27, at 2 (“With little change in the perceived threat, the Export Control Act was renewed largely without amendment in 1951, 1953, 1956, 1958, 1960, 1962, and 1965”); Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841; Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (current version at 50 U.S.C. App. §§ 2401–2420 (2012)).
30. IAN F. FERGUSSON AND PAUL K. KERR, CONG. RESEARCH SERV., R41916, THE U.S. EXPORT CONTROL SYSTEM AND THE PRESIDENT’S REFORM INITIATIVE 3 (2014); Act of Oct. 1, 1983, Pub. L. No. 98–108, 97 Stat. 744; Act of Dec. 5, 1983, Pub. L. No. 98–207, 97 Stat. 1391; Act of Feb. 29, 1984, Pub. L. No. 98–222, 98 Stat. 36; Export Administration Amendments Act of 1985, Pub. L. No. 99-64, 99 Stat. 120; Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, 102 Stat. 1107; Act of Jul. 5, 1994, Pub. L. No. 103–277, 108 Stat. 1407; Act of Nov. 13, 2000, Pub. L. No. 106–508, 114 Stat. 2360 (amending Export Administration Act § 20 (50 U.S.C. App. § 2419 (2012)) to provide for termination of authority “on August 20, 2001”).

during the 107th Congress,” which ended in 2003.³¹

The statutory basis for dual-use export controls by way of the Export Administration Regulations is now the International Emergency Economic Powers Act (“IEEPA”).³² In its settlement agreements and related orders pertaining to alleged export control violations, the Commerce Department explains the use of IEEPA to support its actions under the Export Administration Regulations as follows:

Since August 21, 2001, the [Export Administration] Act has been in lapse and the President, through Executive Order 1322 of August 17, 2001 (3 C.F.R., 2001 Comp. 783 2002), which has been extended by successive Presidential Notices, the most recent being that of August 15, 2012 (77 Fed. Reg. 49699 (Aug. 16, 2012)), has continued the Regulations in effect under the International Emergency Powers Act (50 U.S.C. § 1701, *et seq.*) (2006 and Supp. IV 2010).³³

The Regulations themselves indicate that “[f]rom time to time, the President has exercised authority under the International Emergency Economic Powers Act with respect to the EAR,” that “[t]he EAA [Export Administration Act] is not permanent legislation, and when it has lapsed, Presidential executive orders under IEEPA have directed and authorized the continuation in force of the EAR.”³⁴

The International Emergency Economic Powers Act authorizes the President to “regulate, . . . prevent or prohibit, any . . . exportation of . . . any property in which any foreign country or a national thereof has any interest” in order “to deal with any unusual and extraordinary threat, *which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.*”³⁵ It is more than ironic that the President regards the failure of Congress to renew the Export Administration Act as constituting an unusual and extraordinary threat emanating in whole or substantial part “from outside the United States.” Despite how foreign it might seem to some, Capitol Hill is still part of the United States.

The Sheer Size of the Beast

Dual-use export controls in the modern era were initially implemented by

31. FERGUSSON & KERR, *supra* note 30, at 3.

32. Continuation of Export Control Regulations, 66 Fed. Reg. 44,025 (Aug. 22, 2001); Continuation of the National Emergency With Respect to Export Control Regulations, 79 Fed. Reg. 46,959 (Aug. 7, 2014); International Emergency Economic Powers Act, § 202(a), 50 U.S.C. § 1701(a) (2012); Export Administration Regulations, 15 C.F.R. §730.2 (2014).

33. *E.g., Order Relating to University of Massachusetts at Lowell* 1, fn. 2 (Mar. 15, 2013), available at http://efoia.bis.doc.gov/index.php/component/docman/doc_download/837-e-2306?Itemid=.

34. 15 C.F.R. § 730.2.

35. 50 U.S.C. § 1701(a) (emphasis added).

relatively simple rules. The regulations first promulgated under the Export Control Act of 1949, for example, occupied only fifty-nine Federal Register pages.³⁶ There were, of course, no frequently asked questions and the like on a Commerce Department website.

The Export Administration Regulations now occupy almost eight hundred pages in the Code of Federal Regulations and are supplemented by dozens of pages of advisory opinions, Frequently Asked Questions and other materials on the Commerce Department's website.³⁷

The Regulations need, moreover, to be read in conjunction with OFAC's economic sanctions regulations if the transaction involves a country or person subject to economic sanctions. As the Regulations explain with respect to Iran, for example, "The Treasury Department's Office of Foreign Assets Control (OFAC) administers a comprehensive trade and investment embargo against Iran ... [including] prohibitions on exports and certain reexport transactions involving Iran, including transactions dealing with items subject to the EAR."³⁸ Other references to OFAC sanctions regulations appear in several places in the Regulations as having potential applicability.³⁹

OFAC's economic sanctions regulations⁴⁰ occupy almost 600 pages in the Code of Federal Regulations and, like the Export Administration Regulations, are supplemented by dozens of pages of advisory opinions, frequently asked questions and other materials on OFAC's website.⁴¹

The State Department's International Traffic in Arms Regulations add another

36. Revision of Export Control Regulations, 14 Fed. Reg. 2,992 (Jun. 7, 1949) (the "Fourth General Revision of Export Regulations[.]" for the purpose of codifying "the regulations relating to the control of exports continued or issued under the authority of the Export Control Law of 1949").

37. Export Administration Regulations, 15 C.F.R. § 730 (2014); e.g., *FAQs*, U.S. COMMERCE DEPARTMENT, BUREAU OF INDUSTRY AND SECURITY, <http://www.bis.doc.gov/index.php/policy-guidance/faqs> (last visited Jan. 13, 2015); *Advisory Opinions*, U.S. COMMERCE DEPARTMENT, BUREAU OF INDUSTRY AND SECURITY, <http://www.bis.doc.gov/index.php/policy-guidance/advisory-opinions> (last visited Jan. 15, 2015).

38. 15 C.F.R. § 746.7 (2014).

39. E.g., *id.* §§ 730 (Supp. III) (generally), 734.3(b)(ii) (generally, regarding items not subject to the Export Administration Regulations), 740.19(a) (Cuba, License Exception Consumer Communications Devices), 744.8 (nonproliferation), 744.13 (terrorism), 744.22 (Burma) 746.1(a)(2) (Iran), 746.1(a)(1) (Cuba), 746.4(e) (North Korea), 746.7 (Iran), 772.1 (in several definitions).

40. 31 C.F.R. pt. 500.

41. E.g., *OFAC FAQs: Question Index*, U.S. TREASURY DEPARTMENT, OFFICE OF FOREIGN ASSETS CONTROL, http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/ques_index.aspx (last visited Jan. 13, 2015); *Interpretative Rulings on OFAC Policy*, U.S. TREASURY DEPARTMENT, OFFICE OF FOREIGN ASSETS CONTROL, <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/rulings-index.aspx> (last visited Jan. 15, 2015); *OFAC Information for Industry Groups*, U.S. TREASURY DEPARTMENT, OFFICE OF FOREIGN ASSETS CONTROL, <http://www.treasury.gov/resource-center/sanctions/Pages/regulations.aspx> (last visited Jan. 15, 2015).

one hundred and sixty or so C.F.R. pages to the mix and require the exporter to engage in what are often complex jurisdictional exercises to determine whether State Department or Commerce Department regulations apply.⁴²

Just as classical simplicity in architecture eventually emerges into the baroque and rococo, early simplicity in export controls has now been transfigured into baroque complexity with rococo embellishments that obscure the underlying edifice.

The Absence of English, Plain or Otherwise

The first requirement of any set of regulations is that the reader be able to grasp their essence on an initial read. If the matter involves a degree of complexity, a first reading should at least provide a sense of a regulatory provision's general thrust and direction.

Provisions in the Export Administration Regulations like the following fail that test:

(a) The introductory paragraph in section 740.17 of the Regulations pertaining to license exceptions for the export of encryption commodities, software or technology:

License Exception ENC authorizes export and reexport of systems, equipment, commodities and components therefor that are classified under ECCNs 5A002.a.1, .a.2, .a.5, .a.6, .a.9, or .b, systems, equipment and components therefor classified under ECCN 5B002, and equivalent or related software and technology classified under ECCNs 5D002 or 5E002. This License Exception ENC does not authorize export or reexport to, or provision of any service in any country listed in Country Group E:1 in Supplement No. 1 to part 740 of the EAR, or release of source code or technology to any national of a country listed in Country Group E:1. Reexports and transfers under License Exception ENC are subject to the criteria set forth in paragraph (c) of this section. Paragraphs (b) and (d) of this section set forth information about encryption registrations and classifications required by this section. Paragraph (e) sets forth reporting required by this section. For items exported under paragraphs (b)(1), (b)(3)(i), (b)(3)(ii) or (b)(3)(iv) of this section and therefore excluded from paragraph (e) reporting requirements, exporters are reminded of the recordkeeping requirements in part 762 of the EAR and that they may be required to make such records available upon request. All classification requests, registrations, and reports submitted to BIS pursuant to this section for encryption

42. International Traffic In Arms Regulations, 22 C.F.R. §§ 120-130.17 (2014); §§ 120.3 ("Policy on designating or determining defense articles and services on the U.S. Munitions List"), 120.4 (providing for submission of "Commodity jurisdiction" determination requests), 120.5 ("Relation to regulations of other agencies").

items will be reviewed by the ENC Encryption Request Coordinator, Ft. Meade, MD.⁴³

(b) Section 740.17 (b) of the Regulations pertaining to registration requirements relating to the export of encryption hardware, software or technology:

Exports and reexports authorized under paragraphs (b)(1), (b)(2) and (b)(3) of License Exception ENC require submission of an encryption registration in accordance with paragraph (d) of this section and the specific instructions of paragraph (r)(1) of Supplement No. 2 to part 748 of the EAR. For items self-classified under paragraph (b)(1) of this section from June 25, 2010 through August 24, 2010, and for requests for classification under paragraphs (b)(2) and (b)(3) of this section submitted from June 25, 2010 through August 24, 2010, exporters have until August 24, 2010 to submit their encryption registrations. In addition: for paragraph (b)(1) of this section a self-classification report in accordance with §742.15(c) of the EAR is also required from specified exporters and reexporters; for paragraphs (b)(2) and (b)(3) of this section, a thirty-day (30-day) classification request is required in accordance with paragraph (d) of this section. See paragraph (f) of this section for grandfathering provisions applicable to certain encryption items reviewed and classified by BIS under this license exception prior to June 25, 2010. Only License Exception ENC authorizations under this paragraph (b) to a company that has fulfilled the requirements of encryption registration (such as the producer of the item) authorize the export and reexport of the company's encryption items by all persons, wherever located, under this license exception. When an exporter or reexporter relies on the producer's self-classification (pursuant to the producer's encryption registration) or CCATS for an encryption item eligible for export or reexport under License Exception ENC under paragraph (b)(1), (b)(2), or (b)(3) of this section, it is not required to submit an encryption registration, classification request or self-classification report. Exporters are still required to comply with semi-annual sales reporting requirements under paragraph (e) of this section, even if relying on a CCATS issued to a producer for specified encryption items described in paragraphs (b)(2) and (b)(3)(iii) of this section.⁴⁴

(c) Section 742.1 (d) of the Regulations pertaining to anti-terrorism export controls:

Commerce maintains anti-terrorism controls on Cuba, Iran, North Korea, Syria and Sudan under section 6(a) of the Export Administration Act [even though expired!]. Items controlled under section 6(a) to Iran, Syria, Sudan, and North Korea are described in

43. 15 C.F.R. § 740.17 (2014).

44. *Id.* § 740.17(b).

§§ 742.8, 742.9, 742.10, and 742.19, respectively, and in Supplement No. 2 to part 742.⁴⁵

(d) Section 742.6 (a)(1) of the Regulations pertaining to regional stability export controls until recently amended:

As indicated in the CCL and in RS column 1 of the Commerce Country Chart ..., a license is required to all destinations, except Canada, for items described on the CCL under ECCNs 3A982; 3D982; 3E982; 6A002.a.1, a.2, a.3, .c or .e; 6A003.b.3, and b.4.a; 6A008.j.1; 6A998.b; 6D001 (only 'software' for the 'development' or 'production' of items in 6A002.a.1, a.2, a.3, .c; 6A003.b.3 and .b.4; or 6A008.j.1); 6D002 (only 'software' for the 'use' of items in 6A002.a.1, a.2, a.3, .c; 6A003.b.3 and .b.4; or 6A008.j.1); 6D003.c; 6D991 (only 'software' for the 'development,' 'production,' or 'use' of equipment controlled by 6A002.e or 6A998.b); 6E001 (only technology' for 'development' of items in 6A002.a.1, a.2, a.3 (except 6A002.a.3.d.2.a and 6A002.a.3.e for lead selenide focal plane arrays), and .c or .e, 6A003.e.3 and b.4, or 6A008.j.1); 6E002 (only 'technology' for 'production' of items in 6A002.a.1, a.2, a.3, .c, or .e, 6A003.b.3 or b.4, or 6A008.j.1); 6E991 (only 'technology' for the 'development,' 'production,' or 'use' of equipment controlled by 6A998.b); 6D994; 7A994 (only QRS11-00100-100/101 and QRS11-0050-443/569 Micromachined Angular Rate Sensors); 7D001 (only 'software' for 'development' or 'production' of items in 7A001, 7A002, or 7A003); 7E001 (only 'technology' for the 'development' of inertial navigation systems, inertial equipment, and specially designed components therefor for civil aircraft); 7E002 (only 'technology' for the 'production' of inertial navigation systems, inertial equipment, and specially designed components therefor for civil aircraft); 7E101 (only 'technology' for the 'use' of inertial navigation systems, inertial equipment, and specially designated components for civil aircraft).⁴⁶

(e) Section 742.6 (a)(1) of the Regulations as amended in 2013:

RS Column 1 license requirements in general. A license is required for exports and reexports to all destinations, except Canada, for all items in ECCNs on the CCL that include RS Column 1 in the Country Chart column of the "License Requirements" section. Transactions described in paragraphs (a)(2) or (3) of this section are subject to the RS Column 1 license requirements set forth in those paragraphs rather than the license requirements set forth in this paragraph (a)(1).⁴⁷

45. *Id.* § 742.1(d) (2014).

46. *Id.* § 742.6 (a)(1) (2013).

47. Revisions to the Export Administration Regulations: Initial Implementation of Export Control Reform, 78 Fed. Reg. 22,660, 22,721 (Apr. 16, 2013); 15 C.F.R. § 742.6 (a)(1) (2014).

(f) Section 742.6 (a)(7) of the Regulations, also pertaining to regional stability export controls:

(i) *Scope*. This paragraph (a)(7) supplements the information in the 0Y521 ECCNs and in Supplement No. 5 to part 774 (Items Classified Under ECCNs 0A521, 0B521, 0C521, 0D521 and 0E521). This paragraph alerts exporters, reexporters and transferors to the procedures that apply to items classified under the 0Y521 ECCNs.

(ii) *0Y521 Items*. Items subject to the EAR that are not listed elsewhere in the CCL, but which the Department of Commerce, with the concurrence of the Departments of Defense and State, has determined should be controlled for export because the items provide at least a significant military or intelligence advantage to the United States or for foreign policy reasons are classified under ECCNs 0A521, 0B521, 0C521, 0D521 and 0E521. These items are typically emerging technologies (including emerging commodities, software and technology) that are not yet included in the CCL, so such items are listed on the CCL in 0Y521 ECCNs while the U.S. Government determines whether classification under a revised or new ECCN, or an EAR 99 designation, is appropriate. The list of items classified under a 0Y521 ECCN is limited to those listed in Supplement No. 5 to part 774.

(iii) *Requirement to be classified under another ECCN within one calendar year of classification under ECCN 0Y521*. Items classified under an ECCN 0Y521 entry must be re-classified under another ECCN within one calendar year from the date they are listed in Supplement No. 5 to part 774 of the EAR. If such re-classification does not occur within that period, classification under an ECCN 0Y521 entry expires, and such items are designated as EAR99 items unless either the CCL is amended to impose a control on such items under another ECCN or the ECCN 0Y521 classification is extended. BIS may extend an item's ECCN 0Y521 classification for two one-year periods, provided that the U.S. Government has submitted a proposal to the relevant multilateral regime(s) to obtain multilateral controls over the item. Further extension beyond three years may occur only if the Under Secretary for Industry and Security makes a determination that such extension is in the national security or foreign policy interests of the United States. Any extension or re-extension of control of an ECCN 0Y521 item, including the determination by the Under Secretary, shall be published in the Federal Register.⁴⁸

(g) Section 746.7 (a)(1) of the Regulations pertaining to restrictions on exports and reexports to Iran:

48. 15 C.F.R. § 742.6(a)(7).

EAR license requirements. A license is required under the EAR to export or reexport to Iran any item on the CCL containing a CB Column 1, CB Column 2, CB Column 3, NP Column 1, NP Column 2, NS Column 1, NS Column 2, MT Column 1, RS Column 1, RS Column 2, CC Column 1, CC Column 2, CC Column 3, AT Column 1 or AT Column 2 in the Country Chart Column of the License Requirements section of an ECCN or classified under ECCNs 0A980, 0A982, 0A983, 0A985, 0E982, 1C355, 1C395, 1C980, 1C981, 1C982, 1C983, 1C984, 2A994, 2D994, 2E994, 5A001.f.1, 5A980, 5D001 (for 5A001.f.1 or for 5E001.a (for 5A001.f.1, or for 5D001.a (for 5A001.f.1))), 5D980, 5E001.a (for 5A001.f.1, or for 5D001.a (for 5A001.f.1)) or 5E980.⁴⁹

(h) The definition of “Specially designed”:

When applying this definition, follow this sequential analysis set forth below. (For additional guidance on the order of review of “specially designed,” including how the review of the term relates to the larger CCL, see Supplement No. 4 to Part 774 of the EAR—Commerce Control List Order of Review.)

(a) Except for items described in (b), an “item” is “specially designed” if it:

(1) As a result of “development” has properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions in the relevant ECCN or U.S. Munitions List (USML) paragraph; or

(2) Is a “part,” “component,” “accessory,” “attachment,” or “software” for use in or with a commodity or defense article ‘enumerated’ or otherwise described on the CCL or the USML.

(b) A “part,” “component,” “accessory,” “attachment,” or “software” that would be controlled by paragraph (a) is not “specially designed” if it:

(1) Has been identified to be in an ECCN paragraph that does not contain “specially designed” as a control parameter or as an EAR99 item in a commodity jurisdiction (CJ) determination or interagency-cleared commodity classification (CCATS) pursuant to § 748.3(e);

(2) Is, regardless of ‘form’ or ‘fit,’ a fastener (e.g., screw, bolt, nut, nut plate, stud, insert, clip, rivet, pin), washer, spacer, insulator, grommet, bushing, spring, wire, solder;

(3) Has the same function, performance capabilities, and the same or ‘equivalent’ form and fit, as a commodity or software used in or with an item that:

(i) Is or was in “production” (i.e., not in “development”); and

49. *Id.* § 746.7 (a)(1).

(ii) Is either not 'enumerated' on the CCL or USML, or is described in an ECCN controlled only for Anti-Terrorism (AT) reasons;

(4) Was or is being developed with "knowledge" that it would be for use in or with commodities or software (i) described in an ECCN and (ii) also commodities or software either not 'enumerated' on the CCL or the USML (e.g., EAR99 commodities or software) or commodities or software described in an ECCN controlled only for Anti-Terrorism (AT) reasons;

(5) Was or is being developed as a general purpose commodity or software, i.e., with no "knowledge" for use in or with a particular commodity (e.g., an F/A-18 or HMMWV) or type of commodity (e.g., an aircraft or machine tool); or

(6) Was or is being developed with "knowledge" that it would be for use in or with commodities or software described (i) in an ECCN controlled for AT-only reasons and also EAR99 commodities or software; or (ii) exclusively for use in or with EAR99 commodities or software.

NOTE 1: 'Enumerated' refers to any item (i) on either the USML or CCL not controlled in a 'catch-all' paragraph and (ii) when on the CCL, controlled by an ECCN for more than Anti-Terrorism (AT) reasons only. An example of an 'enumerated' ECCN is 2A226, which controls valves with the following three characteristics: a "nominal size" of 5 mm or greater; having a bellows seal; and wholly made of or lined with aluminum, aluminum alloy, nickel, or nickel alloy containing more than 60% nickel by weight. The CCL also contains notes excluding from control "parts" and "components" "specially designed" for uncontrolled items. Such uncontrolled items are merely 'described' and are not 'enumerated.' Note 2 to ECCN 1A002 is an example of items excluded from control based on being "specially designed" for a 'described' item. Commodities or software in an ECCN controlled only for AT reasons are other examples of items 'described' on the CCL. ECCN 2B996, which controls dimensional inspection or measuring systems or equipment not controlled by 2B006, is an example of a commodity 'described' in an ECCN controlled only for AT reasons. For purposes of "specially designed," ECCNs 0B986, 0B999, 0D999, 1B999, 1C992, 1C995, 1C997, 1C999, 6A998 (except for .b), 7A994 (except for the QRS11) and 9A991 are treated as ECCNs controlled exclusively for AT reasons.

NOTE 2: A 'catch-all' paragraph is one that does not refer to specific types of "parts," "components," "accessories," or "attachments" but rather controls non-specific "parts," "components," "accessories," or "attachments" because they were "specially designed" for an enumerated item. For example, ECCN paragraph 9A610.x is a catch-all, because it controls "parts," "components," "accessories," and "attachments" "specially designed" for military aircraft, but

does not identify specific types of “parts,” “components,” “accessories,” or “attachments” within its control. Another example of a ‘catch-all’ is the heading of 7A102, which controls “specially designed” components for the gyros enumerated in 7A102, but does not identify the specific types of “components” within its control.

NOTE TO PARAGRAPH (A)(1): Items that as a result of “development” have properties peculiarly responsible for achieving or exceeding the performance levels, ‘functions’ or characteristics in a relevant ECCN paragraph may have properties shared by different products. For example, ECCN 1A007 controls equipment and devices, specially designed to initiate charges and devices containing energetic materials, by electrical means. An example of equipment not meeting the peculiarly responsible standard under paragraph (a)(1) is a garage door opener, that as a result of “development” has properties that enable the garage door opener to send an encoded signal to another piece of equipment to perform an action (i.e., the opening of a garage door). The garage door opener is not “specially designed” for purposes of 1A007 because although the garage door opener could be used to send a signal by electrical means to charges or devices containing energetic materials, the garage door opener does not have properties peculiarly responsible for achieving or exceeding the performance levels, ‘functions’ or characteristics in 1A007. For example, the garage door opener is designed to only perform at a limited range and the level of encoding is not as advanced as the encoding usually required in equipment and devices used to initiate charges and devices containing energetic materials, by electrical means. Conversely, another piece of equipment that, as a result of “development,” has the properties (e.g., sending a signal at a longer range, having signals with advanced encoding to prevent interference, and having signals that are specific to detonating blasting caps) needed for equipment used to initiate charges and devices containing energetic materials, would be peculiarly responsible because the equipment has a direct and proximate causal relationship that is central or special for achieving or exceeding the performance levels, ‘functions’ or characteristics identified in 1A007.

NOTE 1 TO PARAGRAPH (B)(3): Commodities in “production” that are subsequently subject to “development” activities, such as those that would result in enhancements or improvements only in the reliability or maintainability of the commodity (e.g., an increased mean time between failure (MTBF)), including those pertaining to quality improvements, cost reductions, or feature enhancements, remain in “production.” However, any new models or versions of such commodities developed from such efforts that change the basic performance or capability of the commodity are in “development” until and unless they enter into “production.”

NOTE 2 TO PARAGRAPH (B)(3): With respect to a commodity, 'equivalent' means that its form has been modified solely for 'fit' purposes.

NOTE 3 TO PARAGRAPH (B)(3): The 'form' of a commodity is defined by its configuration (including the geometrically measured configuration), material, and material properties that uniquely characterize it. The 'fit' of a commodity is defined by its ability to physically interface or interconnect with or become an integral part of another item. The 'function' of the item is the action or actions it is designed to perform. 'Performance capability' is the measure of a commodity's effectiveness to perform a designated function in a given environment (e.g., measured in terms of speed, durability, reliability, pressure, accuracy, efficiency). For software, 'form' means the design, logic flow, and algorithms. 'Fit' means the ability to interface or connect with an item subject to the EAR. The 'function' means the action or actions it performs directly to an item subject to the EAR or as a stand-alone application. 'Performance capability' means the measure of software's effectiveness to perform a designated function.

NOTE TO PARAGRAPHS (B)(3) AND (B)(4): ECCNs controlled for AT-only reasons that use "specially designed" are eligible for paragraphs (b)(3) and (b)(4). However, the criteria for release under (b)(3) or (b)(4) must be met by another ECCN controlled for AT-only reasons or an EAR99 item in addition to the AT-only ECCN being reviewed for release from "specially designed." For example, if a single gasket is used in ECCN 9A990 tractors (9A990 includes a control on "specially designed" "parts") and also pick-up trucks designated as EAR99 that are in "production", the single gasket would be released from "specially designed" on the basis of paragraph (b)(3). Or if the single gasket is or was used in 9A990 tractors and also 9A991.b aircraft (another AT-only controlled ECCN), that are in "production," the gasket would be released from "specially designed" on the basis of paragraph (b)(3). Alternatively, if the single gasket is or was only used in ECCN 9A990 tractors that are in "production," then paragraph (b)(3) would not be available. This same concept applies for paragraph (b)(4).

NOTE TO PARAGRAPHS (B)(4), (B)(5) AND (B)(6): For a commodity or software to be not "specially designed" on the basis of paragraphs (b)(4), (b)(5) or (b)(6), documents contemporaneous with its "development," in their totality, must establish the elements of paragraphs (b)(4), (b)(5) or (b)(6). Such documents may include concept design information, marketing plans, declarations in patent applications, or contracts. Absent such documents, the "commodity"

may not be excluded from being “specially designed” by paragraphs (b)(4), (b)(5) or (b)(6).⁵⁰

The definition of “specially designed” is especially troublesome because it is a key feature of a current export control reform initiative aimed in part at simplification.⁵¹ The length and complexity of the definition is in large part due to the method of “catch-and-release” that it employs, whereby a first set of criteria “catch” an item as “specially designed” unless the item is subsequently “released” by meeting one of a second set of criteria.⁵²

Provisions like these are impossible to understand simply by reading them given their complexity, their intricate numerical and cross-sectional references and the interplay in some instances with separate economic sanctions regulations administered by OFAC. Complicating matters are provisions in the Export Administration Regulations like those warning that “[t]he Country Chart does not apply to . . . Iran,”⁵³ despite the fact that the references to CB, NP, NS, MT RS, CC and AT columns in the provision pertaining to Iran quoted above are, according to the provision itself, references to columns in the EAR’s “Country Chart.”

Some exporters will simply ignore regulations like these as not being worth the effort required to understand them. Some will try to understand them but give up because of their difficulty or uncertainty about whether they have understood them properly or identified all the pieces of the puzzle. Some will hire outside experts to deal with the problem. Some experts will get them right. Some will not.

Some who ignore the Regulations will forge ahead with a desired transaction and simply keep their fingers crossed that they have done nothing wrong or, if they have done something wrong, will not get caught. Commerce Department enforcement personnel will never be able to detect all transgressions.

Some will innocently engage in prohibited transactions because their journey through the regulatory thicket has led them to the wrong conclusion or because they have resolved ambiguities in ways with which the Commerce Department ultimately disagrees.

Some will simply forgo permissible business opportunities because the journey through the thicket is too difficult or fraught with too much uncertainty.

And others will wade through the mind-boggling complexity because they have the wherewithal to pay outside experts and proceed with transactions if the experts give them the green light.

50. *Id.* § 772.1.

51. Revisions to the Export Administration Regulations: Initial Implementation of Export Control Reform, 78 Fed. Reg. 22,660, 22,728 (Apr. 13, 2013).

52. 15 C.F.R. § 772.1.

53. *Id.* § 732.3 (d)(4)(2014).

Random, unpredictable and idiosyncratic consequences like these do not advance U.S. interests. Business that could take place is lost. Business that should not take place goes on. Punishing transgressors does not undo the harm.

Repetition Over and Over Again

A second requirement of any regulatory regime is that it not attempt to deal with the same or similar issues in multiple places and using different words. “In other words,” in written material is often a sure sign that the first set of words have failed to communicate their meaning or intention clearly.

The Export Administration Regulations contain over three hundred definitions of terms in their “Definitions” section.⁵⁴ Many of the definitions, moreover, contain secondary definitions of additional terms used in the primary definitions, for example, the terms “Payload” and “Specially designed.”⁵⁵ These secondary definitions are located in Notes and Technical Notes under the primary definition, similar to the method employed in the Commerce Control List for terms that the Regulations deem worthy of definition for only one Commerce Control List entry and often only within that entry’s text.⁵⁶ They have no universal applicability.

Many of the terms defined in the Definitions section of the Regulations, moreover, are used in the Commerce Control List, a list of some 3000 specified goods, software and technologies⁵⁷ to which some five hundred Export Control Classification Numbers, ECCNs, are assigned, each identifying the ECCN’s export licensing requirements. Apart from definitions used in the Commerce Control List, few of the definitions in the Definitions section of the Regulations indicate where in the body of the Regulations the defined term is used.⁵⁸

The Regulations also define terms in the body of other, non-definitional sections of the Regulations.⁵⁹ These definitions are *sui generis* to the matter at hand and have

54. *Id.* § 772.1.

55. *Id.*

56. *E.g., id.* (“Payload’ . . . Technical Notes: a. Ballistic Missiles . . . 1. ‘Payload’ for systems with separating re-entry vehicles (RVs) includes: . . .[.]” “Specially designed’ . . . Note 3 to paragraph (b)(3): The ‘form’ of a commodity is defined by”); *see id.* § 774.1 (d)(2) (2014) and the discussion *infra* of the methods and quotation mark conventions used in the Export Administration Regulations to indicate the existence of defined terms.

57. *Alphabetical Index To The Commerce Control List*, U.S. COMMERCE DEPARTMENT, BUREAU OF INDUSTRY AND SECURITY, http://www.bis.doc.gov/index.php/forms-documents/doc_download/993-index-ccl (Jan. 6, 2015) (last visited Jan. 22, 2015).

58. *Id.*; 15 C.F.R. § 774 (Supp. I).

59. *E.g.*, 15 C.F.R. §§ 740.3 (“Order”), 740.9 (a)(12) (“U.S. person”), 740.14(b)(4)(i) (“U.S. person”), 740.10 (a–b) (“subassembly” and “servicing”), 740.11(b)(2)(ii), (e)(2) Note to paragraph (e)(2) (“contractor support personnel” and “short notice,” “complete documentation” and “hatch closure (final stowage),” respectively), 740.13(f)(3) (“regular employee”), 740.17(a)(1)(ii) Note to paragraph (a)(1)(ii) (“private-sector end-user”), 742.5(a)(2) (“missiles”—notwithstanding a definition in section

no universal application.

For the most part, moreover, there is no indication in the Regulations themselves that a term being used is a defined term, thus making it difficult to know without constantly checking the Export Administration Regulations' dictionary, whether a word or a phrase has a specialized meaning. The unifying function that definitions should provide in any body of regulations is, thus, essentially lacking.

The Regulations themselves essentially admit by their complicated use of single and double quotation marks that similar terms can have different meanings for different purposes.

According to the Regulations, for example,

[t]he use of double quotation marks on the CCL [Commerce Control List] is intended to be an aid to alert you to terms used on the CCL that are defined in part 772..., or for purposes of ECCNs [Export Control Commodity Numbers] where a definition is provided in the 'related definitions' paragraph in the License Requirements section of ECCNs or sometimes in Notes and Technical Notes for particular ECCNs and that definition is specific to that particular ECCN.... but a good compliance practice is to familiarize yourself with the defined terms in part 772, and when reviewing a control parameter on the CCL that uses a term that is not in quotes to be aware it may be defined in part 772.⁶⁰

Further say the Regulations, “[i]t is also a useful compliance practice to review the “Related Definitions” paragraph and Notes and Technical Notes to determine if the term is defined for purposes of a particular ECCN.”⁶¹

If that is not enough to give pause, the following can almost stop the reader in his tracks:

If a term on the CCL uses double quotes it means there is a defined term in part 772. However, *the absence of double quotes does not mean that a term used on the CCL is not defined in part 772.* Because the CCL includes many terms that are defined in part 772, BIS's practice is to use double quotes for certain key terms and to use double quotes when needed for consistency with multilateral export control regime based entries ... However, because of the large number of defined terms used on the CCL and a desire to avoid

772.1 that is virtually identical (other than in its omission of abbreviations of units of measurement)), 742.6(a)(2)(iii) and (v) (“civil end-user” and “authorized companies,” respectively), 744.3 (a) Note to paragraph (a) (“Rocket Systems” and “unmanned air vehicles”), 744.9 (d) (“military end-user”), 744.17 (d) and (e) (“military end use” and “military end user,” respectively), 744.21(f) and Note to paragraph (f) (“military end use” and “operation,” “installation,” “maintenance” and “deployment,” respectively), 746.3 (a) (“military end-use,” “military end-user” and “ballistic missile”) (2014).

60. 15 C.F.R. § 774.1(d).

61. *Id.*

hindering readability by placing quotes around too many words used in particular ECCNs, BIS's practice is to not add double quotes around certain terms, such as items and commodities. This convention also applies to the use of double quotes within the Definition of Terms section under part 772.⁶²

If still going, the reader will have to slog through the following:

The CCL also includes a convention regarding the use of single quotes. Single quotes on the CCL identify a term as a defined term in the context of a particular ECCN. This convention also applies to the use of single quotes within the Definition of Terms section under part 772.⁶³

The explanation that “[s]ingle quotes on the CCL [or in Part 772.1] identify a term as a defined term in the context of a particular ECCN” is especially confusing because many people understand the term “context” only in the general sense of “circumstances” and not in the literary and literal sense of “within the text of”—in this case, within the text of a specified ECCN or specified section of the Regulations.

The distinction between single and double quotation marks, moreover, is not mentioned in the Definitions section itself. The introductory paragraph to the Definitions section states only that “terms in quotation marks refer to terms used on the Commerce Control List.”⁶⁴ The Definitions section of the Regulations, however, also uses quotation marks for other reasons, such as to indicate that terms used within a definition are themselves elsewhere defined within that definition.

The term “Secret Parameter,” for example, appears in quotation marks in the definition of “Cryptography.”⁶⁵ “Secret Parameter” is then defined in a Technical Note to the “Cryptography” definition, but it does not appear on the Commerce Control List despite being within quotation marks. The definition of “Space-qualified,” as expanded in 2014, likewise, uses quotation marks to indicate that the terms “designed” and “manufactured” for these purposes are themselves defined terms, but they are not defined anywhere except within the “Space-qualified” definition itself as follows:

“Space-qualified”. (Cat 3, 6, and 7) Designed, manufactured, or qualified through successful testing, for operation at altitudes greater than 100 km above the surface of the Earth.

NOTE 1: A determination that a specific item is “space-qualified” by virtue of testing does not mean that other items in the same

62. *Id.* § 774.1(d)(1) (emphasis added).

63. *Id.* § 774.1(d).

64. *Id.* § 772.1.

65. *Id.*

production run or model series are “space-qualified” if not individually tested.

NOTE 2: The terms ‘designed’ and ‘manufactured’ in this definition are synonymous with “specially designed.” Thus, for example, an item that is “specially designed” for a spacecraft is deemed to be ‘designed’ and ‘manufactured’ for operation at altitudes greater than 100 km and an item that is not “specially designed” for a spacecraft is not deemed to have been so ‘designed’ or ‘manufactured.’⁶⁶

One can only wonder, parenthetically, why the terms “designed” and “manufactured” are used in defining “Space-qualified” if synonymous with “specially designed.” Single and double quotation marks and the use of multiple synonymous terms when only one will do punctuate, though not grammatically, the need to simplify.

Important regulatory terms, moreover, are often explained separately in several different ways and in many scattered sections of the Regulations. Sometimes this can occur even though the term itself is a defined term. One example can be seen in the important question of what is subject to the Export Administration Regulations in the first instance.

The term “Subject to the EAR [the Export Administration Regulations],” for example, is tautologically defined as “those commodities, software, technology, and activities over which the Bureau of Industry and Security (BIS) exercises regulatory jurisdiction under the EAR.”⁶⁷ The term is then explained, amplified, modified, delimited or otherwise dealt with in innumerable ways throughout the Regulations.

Examples abound:

Section 730.1 (“What these regulations cover”) (“The EAR are issued by the United States Department of Commerce, Bureau of Industry and Security (BIS) under laws relating to the control of certain exports, reexports, and activities . . .”);

Section 730.3 (“Dual use and other types of items subject to the EAR”) (“The precise description of what is “subject to the EAR” is in §734.3, which does not limit the EAR to controlling only dual-use items . . .”);

Section 730.5 (“Coverage of more than exports”);

Section 730.6 (“Control purposes”) (“Some controls are designed to restrict access to items subject to the EAR by countries or persons

66. Revisions to the Export Administration Regulations (EAR): Control of Spacecraft Systems and Related Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 79 Fed. Reg. 27,417, 27,437 (May 13, 2014) (to be codified at 15 C.F.R. pt. 772.1).

67. 15 C.F.R. § 772.1.

that might apply such items to uses inimical to U.S. interests The EAR also include some export controls to protect the United States from the adverse impact of the unrestricted export of commodities in short supply”);

Section 730.7 (“License requirements and exceptions”) (“A relatively small percentage of exports and reexports subject to the EAR require an application to BIS for a license”);

Section 730.8 (“How to proceed and where to get help”) (“(a) . . . (2) . . . Note that the definition of “items subject to the EAR” includes, but is not limited to, items listed on the Commerce Control List in part 774 of the EAR.”);

Section 732.1 (“Steps Overview”) (“(a)(1) . . . By cross-references to the relevant provisions of the EAR, this part describes the suggested steps for you to determine applicability of the following: (i) The scope of the EAR (part 734 of the EAR”);

Section 732.2 (“Steps regarding scope of the EAR”) (“Steps 1 through 6 are designed to aid you in determining the scope of the EAR”);

Section 732 Supp. 2 (“Subject to the EAR?”) (a flow chart of the steps of Part 732.2);

Section 734 (“Scope Of The Export Administration Regulations”);

Section 734.2 (“Important EAR terms and principles”) (briefly explaining “Subject to the EAR” and that “[c]onversely, items and activities that are not subject to the EAR are outside the regulatory jurisdiction of the EAR and are not affected by these regulations.”);

Section 734.3 (“Items subject to the EAR”);

Section 734.4 (“*De minimis* U.S. content) (“... (c) 10% De Minimis Rule. Except as provided [elsewhere in the section] and subject to [other provisions of the section], the following reexports are not subject to the EAR when made to any country in the world ... (d) 25% De Minimis Rule. Except as provided [elsewhere in the section] and subject to [other provisions of the section], the following reexports are not subject to the EAR when made to countries other than those listed in Country Group E:1 of Supplement No. 1 to part 740 of the EAR”);

Section 734.5 (“Activities of U.S. and foreign persons subject to the EAR”) (including “(a) Certain activities of U.S. persons related to the proliferation of nuclear explosive devices, chemical or biological weapons, missile technology as described in §744.6 of the EAR, and the proliferation of chemical weapons as described in part 745 of the EAR ...” and “(b) Activities of U.S. or foreign persons prohibited by any order issued under the EAR, including a Denial Order issued pursuant to part 766 of the EAR”);

Sections 734.8 and 734.9 (“fundamental research” and “educational information” not subject to the EAR);

Section 734 Supp. 1 (“Questions and Answers – Technology and software subject to the EAR,” providing “guidance” of some 4500 words that the Regulations say “is only illustrative, not comprehensive” regarding technology and software subject to the EAR”);

Section 772.1 (definitions of “Export,” “Reexport,” “Subject to the EAR,” “Subject to the ITAR,” “Specially Designed” and “Transfer” among other definitions critical to comprehending the scope of the EAR);

Section 774.1 (“CCL [Commerce Control List] Introduction”) (“those items ‘subject to the EAR’ but not identified on the CCL are identified by the designator ‘EAR99’”); and

Section 774 Supp. 4 (“Commerce Controls List Order of Review”) (“the EAR govern only items ‘subject to the EAR,’ e.g., items not subject to the exclusive jurisdiction of another agency. Thus, for example, if an item is described in the U.S. Munitions List then the item is a ‘defense article’ subject to the ITAR and there is no need to review the CCL with respect to whether it describes the item . . .”).

The terms “Technology” and “Software” are likewise defined terms,⁶⁸ but are explained, amplified or otherwise dealt with in the following sections of the Export Administration Regulations:

Sections 734.2 (“Important EAR Terms and Principles”) (discussing and defining, among other things, what constitutes an “export” and a “release” of technology or software);

Section 734.7 (“Published Information and Software”) (addressing, among other things, when software and information are considered “published”);

Section 734 Supp. 1 (“Technology and Software subject to the EAR”) (providing “explanatory questions and answers relating to technology and software that is subject to the EAR” and “intended to give the public guidance in understanding how BIS interprets” Part 734, “but is only illustrative, not comprehensive”);

Section 734 Supp. 2 (“Guidelines for *De Minimis* Rules”) (discussing how technology and software are to be valued);

Section 736.2 (“General Prohibitions”) (including General Prohibitions 2 and 3 addressing the reexport and export from abroad of certain foreign-made items incorporating and foreign-produced “direct product” of U.S.-origin technology and software);

68. *Id.*

Section 740.6 (License Exception “Technology and software under restriction (TSR)”) (authorizing the export and reexport of certain technology and software controlled for national security reasons);

Section 740.13 (License Exception “Technology and software—unrestricted (TSU)”) (authorizing the export and reexport of certain other technology and software);

Section 740.17 (License Exception “Encryption commodities, software and technology (ENC)”) (authorizing the export and reexport of certain encryption-related software and technology);

Section 774 Supp. 2 (“General Technology and Software Notes”) (addressing the scope of controls on and License Exceptions available for certain technology and software); and

Section 774 Supp. 3 (“Statements of Understanding”) (addressing the incorporation of software into certain medical equipment and the technology and software controls that apply to source code).

Also defined in section 772.1 of the Regulations are the terms “Encryption items,” “Encryption Component,” “Encryption software,” “Encryption object code” and “Encryption source code,”⁶⁹ but one or more of these terms are explained, amplified or otherwise dealt with in each of the following sections of the Export Administration Regulations:

Section 734 Supp. 1 (“Technology and Software subject to the EAR”);

Section 740.6 (License Exception TSR);

Section 740.9 (License Exception TMP);

Section 740.13 (License Exception TSU);

Section 740.17 (License Exception ENC);

Section 740 Supp. 3 (“License Exception ENC Favorable Treatment Countries”);

Section 742.15 (“Encryption items”);

Section 742 Supp. 5 (“Encryption Registration”);

Section 742 Supp. 6 (“Technical Questionnaire for Encryption items”);

Section 742 Supp. 8 (“Self-classification Report for Encryption Items”);

Section 748.3 (“Classification Requests, Advisory Opinions and Encryption Registration”);

Section 748.8 (“Unique application and submission requirements”);

Section 748.9 (“Support documents for license applications”);

69. *Id.*

Section 770.2 (“Item interpretations”);
Section 774.1 (“Introduction” (to the Commerce Control List));
Section 774 Supp. 2 (“General Technology and Software Note”);
Section 774 Supp. 3 (“Statements of Understanding”);
Section 774 Supp. 4 (“Commerce Control List Order of Review”);
Section 774 Supp. 1 (CCL Category 5, Part 2 “Information Security,” including Note 1, the N.B. to Note 1, Note 2, Note 3 (the “Cryptography Note”), the Note to the Cryptography Note 1, the N.B. to the Cryptography Note, Note 4, and numerous *notate bene* and Technical Notes within each ECCN); and
Section § 772.1 (containing definitions of numerous related terms (e.g., “Cryptanalytic items,” “Cryptographic activation,” “Cryptography,” “Encryption licensing arrangement,” “Non-standard cryptography,” “Object code,” “Open cryptographic interface,” “Software,” “Source Code,” “Stored program controlled,” “Symmetric algorithm,” and “User-accessible programmability”).

The list of similar terms or matters dealt with in multiple sections of the regulations is extensive. Several more examples should suffice to illustrate the point.

The first is in the concept of something being too insignificant to warrant it being subject to the Export Administration Regulations. The concept is embedded in the term “*de minimis*.” The term and the concept appear in sections 732.1 (“Steps overview”), 732.2 (“Steps regarding scope of EAR”), 734.4 (explaining what constitutes “*de minimis* US content”), 734.5 (“Activities of U.S. and foreign persons subject to the EAR”), 734 Supp. 2 (“Guidelines for *De Minimis* Rules”) 736.2 (“General prohibitions and determinations of applicability”), 740.20 (“License Exception Strategic Trade Authorization (STA)”) and separately in many of the ECCNs in the Commerce Control List.⁷⁰

The second is in the provisions dealing with exceptions to the need to obtain an export or reexport license. The term “License Exception” is a defined term,⁷¹ but is further explained, amplified or otherwise dealt with in sections 730.7 (“License requirements and exceptions”), 732.4 (“Important EAR terms and principles”), Part 740 (“License Exceptions” containing twenty sections and three supplements listing and explaining the exceptions), 748.1 (“General provisions for filing applications”), 748.3 (“Classification Requests, Advisory Opinions and Encryption Registration”), 748.7 (“Registering for electronic submission of license applications and related documents”) and each of the more than five hundred and growing ECCNs on the Commerce Control List.

70. *Id.* §§ 738.2(d), 774 (Supp. I) (e.g., ECCNs 0A919, 7A994, 9A610, 9A619).

71. *Id.* § 772.1.

The Regulations do not explain why there are differences in definitions and usage that common sense and regulatory consistency suggest should not exist. The definition of “military commodity” in section 772.1 of the Regulations, for example, expressly excludes items listed in ECCNs ending in 018 and the “600 series” from the definition.⁷² The definition of “military end-use” in section 744.17 (d) of the Regulations, however, expressly *includes* ECCNs ending in A018 and the whole of the “600 series” of ECCNs.⁷³

Likewise, while Part 772.1 provides the notoriously long general definition of the term “specially designed,” Supplement No. 3 to Part 774 provides a completely different and much shorter definition for the same term in reference to certain items for medical end-uses that incorporate certain commodities or software on the CCL.⁷⁴ For those medical end-use items, “[s]pecially designed” is defined as “designed for medical treatment or the practice of medicine (does not include medical research).”⁷⁵ Although this definition is far less complex than the general definition of “specially designed,” it is not simple. The “Statement of Understanding” with respect to “medical equipment” includes references to five other sections of the EAR and a definition of the term “incorporated” as used in the Statement of Understanding.⁷⁶

A regulatory scheme burdened with complex, overlapping and seemingly inconsistent provisions like these or provisions containing unexplained differences among similar or identical terms or concepts is one that creates opportunities for mistake, misunderstanding, contradiction and inconsistency. The regulated can easily overlook relevant requirements. The regulator can easily fail to avoid, spot or resolve contradiction and inconsistency. The traps for the wary and unwary alike are fully baited.

Burying the Lead

Important terms, meanwhile, are either undefined, or defined only by contrasting the terms by implication or otherwise with other terms in the Regulations that are often difficult to find.

The Regulations, for example, do not define the word “civil,” which is used with respect to aircraft and dual-use items. They instead provide in an introductory section on “Dual use’ and other types of items subject to the EAR” that items subject to the EAR “include purely civilian items, items with both civil and military, terrorism or potential WMD-related applications, and items that are exclusively

72. *Id.*

73. *Id.* § 744.17(d) (2014).

74. *Id.* §§ 772.1, 774 (Supp. III(a)) (defining “specially designed”).

75. *Id.* § 774 (Supp. III(a)) Notes to paragraph (a)(1).

76. *Id.*

used for military applications but that do not warrant control under the International Traffic in Arms Regulations”⁷⁷

The term is not even defined in section 740.5, which provides a license exception denominated “Civil end-users (CIV),” except impliedly, by contrasting it with military end-users and end-uses for which the civil end-use license exception may not be used.⁷⁸ The undefined term, nonetheless, appears not only in Part 730 and section 740.5, but also in other license exceptions for which the civil end-use license exception may not be used.⁷⁹ The undefined term, nonetheless, appears not only in Part 730 and section 740.5, but also in other license exceptions in Part 740, in Parts 734, 736, 742, 744, 746, 747, 748, 752, 764, 772 and the Commerce Control List.

The Regulations do occasionally provide some indication of what the term “civil end-user” means but only impliedly by way of a contrast to military end-users. In a paragraph concerning the license requirements for specified cameras, for example, section 742.6 (a)(2)(iii) of the Regulations provides that

*In this paragraph, the term “civil end-user” means any entity that is not a national armed service (army, navy, marine, air force, or coast guard), national guard, national police, government intelligence organization or government reconnaissance organization, or any person or entity whose actions or functions are intended to support “military end-uses” as defined in 744.17(d).*⁸⁰

The term “civil” may or may not be synonymous with the term civilian, but the term “military,” with which the term “civil” is contrasted, is also not defined except by implication. The term “military commodity,” for example, is described as “an article, material, or supply that is described on the U.S. Munitions List . . . or on the Munitions List that is published by the Wassenaar Arrangement . . . but does not include software, technology and any item listed in any [xx018 or ‘600 series’ ECCN...].”⁸¹

Something “military” must, therefore, come within the class of things that appear on the U.S. or Wassenaar Arrangement munitions lists. The term “civil” would, accordingly, apply to everything else. The boundaries of what appears on the U.S. or Wassenaar Arrangement munitions lists, however, are far from clear. From the definitions and examples of “military end-use” and “military end-user” in sections 744.9, 744.17, newly added 744.21, 744 Supp. 1, and 744 Supp. 2 of the Regulations, similar inferences can be drawn, but again the boundaries are not clear.

The definitions of “military end-user” in Part 744 of the Regulations are

77. *Id.* § 730.3.

78. *Id.* § 740.5 (2014).

79. *Id.* § 742.6(a)(2)(iii) (2014) (emphasis added).

80. *E.g.*, *Id.* § 748.15 (Authorization Validated End-User).

81. *Id.* § 772.1.

sometimes more precise but, nonetheless, leave their boundaries unclear because functionality is used as a catch-all. Part 744 defines the term “military end-user,” for example, as meaning “the national armed services (army, navy, marine, air force, or coast guard), as well as the national guard and national police, government intelligence or reconnaissance organizations, *or any person or entity whose actions or functions are intended to support ‘military end-uses’ as defined in §744.17(d).*”⁸²

Pursuit down the section 744.17 (d) rabbit hole leads to that section’s definition of “military end-use” as “incorporation into: a military item described on the U.S. Munitions List ... or the Wassenaar Arrangement Munitions List ...; commodities classified under [ECCNs ending in 018 or ‘600 series’ ECCNs]; or any commodity that is designed for the ‘use,’ ‘development,’ ‘production,’ or deployment of military items described on” those lists or classified in those ECCNs, with a reference to “examples” in Supplement No. 1 of Part 744.⁸³

Neither Part 772.1 nor Part 774.1 of the Regulations indicates that there are additional references to military end-users” scattered throughout the Regulations.⁸⁴

Nor do the Regulations make clear that the multiple definitions and implied definitions of such an important term and concept may not always be consistent with each other or create easily understood delineations. Several of the definitions, for example, seem to conflate police and intelligence end-users with traditional military services, such as armies, navies, marines, air forces, coast guards and national guards, for export controls purposes.⁸⁵ The resulting conflict with common usage and common sense is not cured by the use of limiting phrases such as “in this section.”

The confusion is amplified by other sections of the Regulations that suggest different, less broad definitions of the concept of “military.” Section 742 Supp. 2 of the Regulations, for example, seems to treat police and intelligence functions as distinct from military functions, distinguishing among “military, police, intelligence or other sensitive end-users.”⁸⁶ Supplement No. 1 to Part 744 likewise seems to treat intelligence and reconnaissance functions as separate from military functions, referring to “[i]ntelligence, reconnaissance, or surveillance systems *suitable for supporting military operations.*”⁸⁷ Supplement No. 2 to Part 742 of the Regulations defines “military-related items” as “items controlled by CCL entries ending with the

82. *Id.* § 744.9(d) (emphasis added).

83. *Id.* § 744.17(d).

84. E.g., *Id.* §§ 744.17(e), 744.9 (d), 746.3(a)(4)(ii), Russian Sanctions: Addition of Persons to the Entity List and Restrictions on Certain Military End Uses and Military End Users, 79 Fed. Reg. 55,608, 55,612 (Sep. 7, 2014) (to be codified at 15 C.F.R. § 744.21 (g)).

85. *Id.*

86. 15 C.F.R. § 742 (Supp. II(b)(1) 2014).

87. *Id.* § 744.17 (Supp. I) (emphasis added).

number '18'.”⁸⁸

The Commerce Control List

The Commerce Control List identifies the export and reexport licensing requirements of the hardware, software, materials, equipment and technology items that the Commerce Department has been able to identify with specificity and organizes them as indicated into more than 500 Export Control Commodity Numbers, or ECCNs.⁸⁹ Each has its own alpha-numeric designation.⁹⁰ Everything else listed is included under a basket “EAR99” category.⁹¹ The list spans the alphabet, ranging from “Ablative liners for thrust or combustion chambers” to “[Z]oonotic pathogens and ‘toxins’”.⁹²

The level of detail is stupefying and unintelligible for the most part to anyone but those with a sophisticated understanding of technical terms and functions. A purely random selection of just two of the CCL entries illustrates the nature of the challenge.

ECCN 1A001, for example, covers “Parts’ and ‘components made from fluorinated compounds.”⁹³ The items covered by this category consist of

- a. Seals, gaskets, sealants or fuel bladders, “specially designed” for “aircraft” or aerospace use, made from more than 50% by weight of any of the materials controlled by [ECCNs] 1C009.b or 1C009.c;
- b. Piezoelectric polymers and copolymers, made from vinylidene fluoride (CAS 75-38-7) materials, controlled by [ECCN] 1C009a, having all of the following:
 - b.1. In sheet or film form;
 - b.2. With a thickness exceeding 200 µm;
- c. Seals, gaskets, valve seats, bladders or diaphragms, having all of the following:
 - c.1. Made from fluoroelastomers containing at least one vinyl ether group as a constitutional limit; and
 - c.2. ‘Specially designed’ for ‘aircraft’, aerospace or missile use.”⁹⁴

The technically qualified may understand some of the words. Others will have difficulty in explaining even to the technically qualified how to deal with the phrase,

88. *Id.* § 742 (Supp. II).

89. *See generally id.* § 774 (Supp. I).

90. *Id.* § 738.2(d).

91. *Id.* § 734.3(c).

92. *Id.* § 774 (Supp. I) (quoting ECCN 9A106.a and 1C351 respectively).

93. *Id.* § 744 (Supp. I) (quoting ECCN 1A001).

94. *Id.* (quoting ECCN 1A001 under subsection *Items*).

polymers “having all of the following . . . in sheet or film form . . . with a [certain] thickness.” They may also have difficulty in explaining to the technically qualified how to deal with the phrase, “seals, gaskets, valve seats, bladders or diaphragms *having all of the following . . . made from* fluoroelastomers” (emphasis added).⁹⁵ “Having all of” suggests characteristics. “Made from” suggests origin. Grammar and technology are at war.

The reference to “specially designed,” moreover, plunges ECCN 1A001.c.2 into the almost 1600 word definition of that term appearing elsewhere in the Regulations.⁹⁶ The definition of “specially designed” itself, in addition, uses at least another seventeen terms that are further defined either elsewhere in the Regulations or in the “specially designed” definition itself.⁹⁷ These include the terms “accessory,” “attachment,” “catch-all,” “component,” “development,” “enumerated,” “equivalent,” “form,” “fit,” “function,” “item,” “knowledge,” “nominal size,” “part,” “performance capability,” “production,” and “software”.⁹⁸ Complexity is compounded exponentially.

ECCN 3A001, to take another example, describes controlled “[e]lectronic components and ‘specially designed’ components’ therefor” in the following manner:

a. General purpose integrated circuits, as follows:

Note 1: The control status of wafers (finished or unfinished), in which the function has been determined, is to be evaluated against the parameters of 3A0001.a.

Note 2: Integrated circuits include the following types:

- “Monolithic integrated circuits”
- “Hybrid integrated circuits”
- “Multichip integrated circuits”
- “Film type integrated circuits”, including silicon-on-sapphire integrated circuits
- “Optical integrated circuits”.

a.1. Integrated circuits designed or rated as radiation hardened to withstand any of the following:

a.1.a. A total dose of 5×10^3 Gy (Si), or higher;

a.1.b. A dose rate upset of 5×10^6 Gy (Si)/s, or higher; or

95. *Id.* (quoting ECCN 1A001 under subsection *Items*).

96. *Id.* § 772.1.

97. *Id.*

98. *Id.*

a.1.c. A fluence (integrated flux) of neutrons (1 MeV equivalent) of 5×10^{13} n/cm [squared] or higher on silicon, or its equivalent for other materials;

Note: 3A001.a.1.c does not apply to Metal Insulator Semiconductors (MIS).

a.2. “Microprocessor microcircuits”, “microcomputer microcircuits”, microcontroller microcircuits, storage integrated circuits manufactured from a compound semiconductor, analog-to-digital convertors, digital-to-analog converters, electro-optical or “optical integrated circuits” designed for “signal processing”, field programmable logic devices, custom integrated circuits for which either the function is unknown or the control status of the equipment in which the integrated circuit will be used is unknown, Fast Fourier Transform (FFT) processors, electrical erasable programmable read-only memories (EEPROMs), flash memories or static random-access memories (SRAMs), having [sic] any of the following:

a.2.a. Rated for operation at an ambient temperature above 398 K (125 [degrees] C);

a.2.b. Rated for operation at an ambient temperature below 218 K (-55 [degrees] C); or

a.2.c. Rated for operation over the entire ambient temperature range from 218 K (-55 [degrees] C) to 398 K (125 [degrees] C);

Note: 3A001.a.2 does not apply to integrated circuits for civil automobile or railway train applications.

a.3. “Microprocessor microcircuits”, “microcomputer microcircuits”, and microcontroller microcircuits, manufactured from a compound semiconductor and operating at a clock frequency exceeding 40 MHz;

Note: 3A001 a.3 includes digital signal processors, digital array processors and digital coprocessors.

a.4. [RESERVED]

a.5 Analog-to-Digital Converter (ADC) and Digital-to-Analog Converter (DAC) integrated circuits, as follows:

a.5.a. ADCs having any of the following:

...⁹⁹

And so it goes.

99. *Id.* § 744 (Supp. I) (quoting ECCN 3A001 under subsection *Items*).

Never Mind

Gilda Radner as Emily Litella on *Saturday Night Live* many years ago played a news commentator who often confused things she was trying to explain. After trying ineffectively to get her point across and recognizing her confusion, she would give up and say “Never mind.”

Commerce says this too despite the prohibitions, exceptions, and permissions spelled out in exhausting detail throughout the Regulations.

So-called General Prohibition Five under the Regulations in an Emily Litella moment, for example, says that “[y]ou [you know who you are] may not, without a license, knowingly export or reexport any item subject to the EAR to an end-user or end-use that is prohibited by Part 744 of the EAR.”¹⁰⁰ Never mind the CCL classification.

While it may be a little hard on a first read to decipher the meaning of an “end-user . . . prohibited by part 744 of the EAR,” the only possible meaning by process of elimination is that it refers to the persons identified in Part 744. What’s a little drafting problem among friends!

In any event, General Prohibition Five trumps everything else.

The Commerce Control List? Other provisions in the Regulations? Forget about them. Bad guys are bad guys. They may have neither tooth brushes nor shaving cream, though their availability is unlikely to affect national security or their unavailability, their behavior.

Among those “prohibited by Part 744” are those on the Entity List.¹⁰¹ The Entity List imposes export license requirements “to the extent specified on the Entity List, to export, reexport, or transfer (in-country) any item subject to the EAR to an *entity* that is listed on the Entity List in an entry that contains a reference to [section 744.11 of the Regulations].”¹⁰²

The first entry on the Entity List that contains a reference to section 744 of the Regulations, nonetheless, is “Abdul Satar Ghoura, 501, 5th Floor, Amanullah Sancharaki Market Opp Chaman E Huzuri, Kabul, Afghanistan; and Flat No. 41 Block No. 24 Macroyan 3, Kabul, Afghanistan. (See alternate addresses under Pakistan).”¹⁰³ Someone who might otherwise be thought of as a natural person is, unnaturally, an entity!

Whether an entity or an individual, it is relatively easy to apply General Prohibition Five’s prohibition on exports or reexports to those on the Entity List

100. *Id.* § 736.2(b)(5).

101. *Id.* §§ 736.2(b)(5), 744.11, 744 (Supp. IV).

102. *Id.* § 744.11(a) (emphasis added).

103. *Id.* § 744 (Supp. IV).

because nothing else in the Regulations other than whether an item is subject to the Regulations need be considered so long as you know who “you” are.

The definition of “you” is almost as painfully complex as many of the other definitions in the Regulations because “you” is defined as “[a]ny person, including a natural person, including a citizen of the United States or any foreign country; any firm; any government, government agency, government department, or government commission; any labor union; any fraternal or social organization; and any other association or organization whether or not organized for profit.”¹⁰⁴ You, after all, may not be you if you are not included among the categories specified.

More difficult is Prohibition Five’s prohibition on exporting or reexporting to someone for a prohibited end-use, a prohibition that also forbids in-country transfers to those to whom exports or reexports are prohibited.¹⁰⁵

Among the activities that trigger an export, reexport or in-country transfer prohibition under General Prohibition Five regardless of how an item is classified on the Commerce Control List are:

1. Activities relating to certain nuclear end-uses.¹⁰⁶

These include “[N]uclear explosive activities, including research on or development, design, manufacture, construction, testing or maintenance of any nuclear explosive device, or subcomponents or subsystems of such a device”; “[a]ctivities including research on, or development, design, manufacture, construction, operation, or maintenance of any nuclear reactor, critical facility, facility for the fabrication of nuclear fuel, facility for the conversion of nuclear material from one chemical form to another, or separate storage installation, where there is no obligation to accept International Atomic Energy Agency (IAEA) safeguards at the relevant facility or installation when it contains any source or special fissionable material (regardless of whether or not it contains such material at the time of export), or where any such obligation is not met”; and “[s]afeguarded and unsafeguarded nuclear fuel cycle activities, including research on or development, design, manufacture, construction, operation or maintenance of any of [a number of listed] facilities, or components for such facilities.”¹⁰⁷

2. Activities relating to rocket systems and other unmanned air vehicles, including drones.¹⁰⁸

These include “the design, development, production or use of rocket systems or unmanned air vehicles capable of a range of at least 300

104. *Id.* § 772.1.

105. 15 C.F.R. § 744.1(a).

106. *Id.* § 744.2.

107. *Id.* § 744.2(a)(1)–(3).

108. *Id.* § 744.3.

kilometers in or by a country listed in Country Group D:4 of Supplement No. 1 to part 740 of the EAR,” the use “anywhere in the world except by governmental programs for nuclear weapons delivery of NPT Nuclear Weapons States that are also member[s] of NATO, in the design, development, production or use of rocket systems or unmanned air vehicles, regardless of range capabilities, for the delivery of chemical, biological, or nuclear weapons”; and “any rocket systems or unmanned air vehicles in or by a country listed in Country Group D:4 [even if] you [you know who you are] are unable to determine [with respect to any rocket system or unmanned air vehicle] (i) The characteristics (*i.e.*, range capabilities) of the rocket systems or unmanned air vehicles, or (ii) Whether the rocket systems or unmanned air vehicles, regardless of range capabilities, will be used in a manner prohibited under paragraph (a)(2) of [section 744.3 of the Regulations].”¹⁰⁹

3. Activities relating to chemical or biological weapons.¹¹⁰

These consist of “the design, development, production, stockpiling, or use of chemical or biological weapons in or by any country or destination, worldwide.”¹¹¹

4. Activities relating to maritime nuclear propulsion.¹¹²

The prohibition here is on exporting, reexporting or transferring for “use in connection with a foreign maritime nuclear propulsion project” and “applies to any technology relating to maritime nuclear propulsion plants, their land prototypes, and special facilities for their construction, support, or maintenance, including any machinery, devices, components, or equipment specifically developed or designed for use in such plants or facilities.”¹¹³

General Prohibition Five, naturally, is followed by General Prohibition Six. It applies to exports, reexports and in-country transfers relating to countries subject to U.S. economic sanctions regardless, for the most part, of the item’s Commerce Control List classification.¹¹⁴

The countries subject to general economic sanctions under General Prohibition Six are Cuba, Iraq, North Korea, Iran, Syria and Russia with respect to certain of Russia’s economic sectors.¹¹⁵ Also subject to General Prohibition Six are countries subject to U.N. arms embargoes like the Central African Republic, Cote d’Ivoire (Ivory Coast), Democratic Republic of the Congo, Eritrea, Iran, Iraq, Lebanon,

109. *Id.* § 744.3(a)(1)–(3).

110. *Id.* § 744.4.

111. *Id.* § 744.4(a).

112. *Id.* § 744.5.

113. *Id.* § 744.5(a).

114. *Id.* § 736.2(b)(6).

115. *Id.* §§ 746.2, 746.3, 746.4, 746.7, 746.9; Russian Oil Industry Sanctions and Addition of Person to the Entity List, 79 Fed. Reg. 45,675, 45,680 (Aug. 6, 2014) (to be codified at 15 C.F.R. § 746.5).

Liberia, Libya, North Korea, Somalia, and Sudan,¹¹⁶ but General Prohibition Six does not explicitly acknowledge those sanctions.

Maddening and unnecessarily complicated is the interplay between the Export Administration Regulations and the Treasury Department's restrictions on dealings with countries and others subject to economic sanctions. Restrictions in the Export Administration Regulations pertaining to dealings with Iran, Syria and Cuba, among others, illustrate this point.

According to the Export Administration Regulations, "[t]he Treasury Department's Office of Foreign Assets Control (OFAC) administers a comprehensive trade and investment embargo against Iran."¹¹⁷ "This embargo, according to the Regulations, includes prohibitions on exports and certain reexport transactions involving Iran, including transactions dealing with items subject to the EAR."¹¹⁸ The Regulations, nonetheless, provide, despite Treasury's "comprehensive embargo," that "[a] license is required under the EAR to export or reexport to Iran any item" on the Commerce Control List identifying the item as being controlled for chemical and biological, nuclear proliferation, missile technology, chemical weapons, crime control, regional stability or anti-terrorism purposes or classified under certain ECCNs.¹¹⁹

The U.S. Treasury Department's economic sanctions regulations pertaining to Iran, on the other hand, make no distinction among the kinds of exports being made. All are prohibited.¹²⁰ If "any" means all, as surely it does, it is difficult to understand a regulatory regime that relegates jurisdiction over certain kinds of exports to Iran to the Export Administration Regulations when all are prohibited under Treasury's economic sanctions regulations.

Treasury's regulations, moreover, distinguish between exports from the United States or by a U.S. person, and reexports of U.S.-origin items by non-U.S. persons.¹²¹ They also distinguish between reexports by non-U.S. persons that are foreign subsidiaries of U.S. persons, on the one hand, and foreign companies that are independent of a U.S. entity, on the other. Foreign subsidiaries of U.S. companies, however, are subject to the same prohibitions under the Treasury's regulations pertaining to Iran as their U.S. parent even though they are non-U.S. persons for

116. 15 C.F.R. § 746.1(b)(2) (2014).

117. *Id.* § 746.7.

118. *Id.*

119. *Id.* § 746.7(a)(1).

120. 31 C.F.R. § 560.204 (2014) ("the exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located, of *any* goods, technology, or services to Iran or the Government of Iran is prohibited") (emphasis added).

121. *Compare* 31 C.F.R. § 560.204, *with* 31 C.F.R. § 560.205 (2014).

purposes of those regulations.¹²²

While all foreign subsidiaries of U.S. companies are, thus, non-U.S. persons for Treasury's economic sanctions purposes, in the case of the sanctions against Iran, they are treated as if they were U.S. persons. Some foreign subsidiaries under Treasury's regulations are evidently more equal than others.

For foreign entities that are not subsidiaries of U.S. entities, Treasury's regulations provide that "the reexportation from a third country, directly or indirectly, by a person other than a United States person, of any goods, technology, or services that have been exported from the United States is prohibited, [only] if . . . [t]he exportation of such goods, technology, or services from the United States to Iran was subject to export license application requirements under any United States regulations . . . imposed independently of [Treasury's regulations]" and only if the goods or technology subject to such licensing requirements were not "substantially transformed into a foreign-made product outside the United States" or "[i]ncorporated into a foreign-made product outside the United States" and constitute as so incorporated "less than 10 percent of the value of the foreign-made product."¹²³

For foreign entities not affiliated with U.S. entities, the Export Administration Regulations, not Treasury's sanctions regulations, are, thus, in effect, in the driver's seat. Figuring out how one set of regulations affects another set of regulations is seldom an easy task. The absence of any guidance on the meaning of "substantially transformed" for these purposes does not help.

Prohibitions in the Export Administration Regulations pertaining to Syria apply to all exports and reexports with certain specified exceptions.¹²⁴ According to the Regulations, "[a] license is required for the export or reexport to Syria of all items subject to the EAR, except food and medicine classified as EAR99."¹²⁵ Included are "deemed export[s]' and 'deemed reexport[s]' . . . of any technology or source code on the Commerce Control List."¹²⁶ "[D]eemed exports' and 'deemed reexports' to Syrian nationals involving technology or source code subject to the EAR but not listed on the CCL," however, "do not require a license."¹²⁷ Also excluded are certain items under license exceptions TMP, GOV, TSU, BAG, AVS and "informational materials

122. 31 C.F.R. § 560.215 ("Except as otherwise authorized pursuant to the part, an entity that is owned or controlled by a United States person and established or maintained outside the United States is prohibited from knowingly engaging in any transaction, directly or indirectly, with the Government of Iran or any person subject to the jurisdiction of the Government of Iran that would be prohibited pursuant to this part if engaged in by a United States person or in the United States.").

123. *Id.* § 560.205 (a)(2), (b)(1), (b)(2).

124. 15 C.F.R. § 746.9 (2014).

125. *Id.* § 746.9(a).

126. *Id.*

127. *Id.*

in the form of books and other media; publicly available software and technology; and technology exported in the form of a patent application or an amendment, modification, or supplement thereto or a division thereof.”¹²⁸

Treasury sanctions with respect to Syria do not contain anywhere near this level of complexity. They simply provide with a short list of exemptions that “[a]ll property and interests in property that are in the United States, that come within the United States, or that are or come within the possession or control of any United States person, including any foreign branch, of the Government of Syria and of . . . [named persons] . . . are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.”¹²⁹ The exceptions pertain to certain personal communications, information and informational materials, and official U.S. government business, when the exports do not involve certain persons on the Treasury Department’s Specially Designated National List.¹³⁰

Prohibitions in the Export Administration Regulations pertaining to Cuba,¹³¹ are riddled with exceptions. The exceptions pertain to such things as temporary exports and reexports, “[o]peration technology and software, “[s]ales technology,” “software updates,” replacement parts, baggage, governments and international organizations, gift parcels and “humanitarian donations,” items in transit, aircraft and vessels, agricultural commodities and certain consumer communications devices.¹³²

Treasury regulations relating to Cuba are riddled with exceptions too, and matching or correlating them with the exceptions in the Export Administration Regulations is a formidable task.¹³³

Figuring out which regulatory provisions trump which under separate but intertwined regulatory schemes imposing economic sanctions is no easy task. The exercise would not be required if the Export Administration Regulations and the Treasury Department’s economic sanctions regulations stuck to their own knitting instead of playing in each other’s backyard.

Complicated General Prohibitions in the Export Administration Regulations and complicated exceptions to General Prohibitions in the Regulations, by the same token, would not be required if the General Prohibitions were of truly general applicability. They are not. They are only made to seem so. In reality, they are

128. *Id.* §§ 746.9(a), 746.9(b)(3).

129. 31 C.F.R. §§ 542.201(a), 542.211 (2014).

130. *Id.* § 542.211.

131. 15 C.F.R. § 746.2.

132. *Id.* § 746.2(a)(1).

133. *Compare* 31 C.F.R. §§ 515.501–515.579 (2014) (the list of Treasury’s general licenses and authorizations), *with* 15 C.F.R. § 746.2 (a)(1) (2014) (list of license exceptions applicable to Cuba under the Export Administration Regulations).

merely gateways into immensely complicated regulations.

So

What is to be done?

The starting point is to see that something is wrong. A command that says exports are permitted if subject to section A except as modified by section B (2)(c)(iv) unless section C as the terms therein are defined under Part II as modified by subsections (e), (m) or (t)(2)(c)(iii) unless regulated under another set of regulations is inherently wrong. It is inherently wrong because it is virtually impossible to or requires an enormous effort to understand, is easy to misinterpret, discourages compliance and gives the appearance but likely not the reality of being able to accomplish its objectives. Regulations like these provide no foundation for an intuitive grasp of what is involved.

The next step is to appreciate that tinkering with existing problems is likely to be of no avail because the foundation itself is so complex and in so many places either incoherent or incapable of being discerned. Construction companies rightly refuse to tell clients what the rehabilitation of an old building involves or will cost when they cannot see behind the walls or into the foundation. Tinkering under circumstances like these is most likely to result in more complexity, add further instability to an already unstable structure and merely postpone the day when the need for starting over with complete reconstruction becomes inescapable, as with a building that must be bulldozed because it cannot be rehabilitated when its core elements are too creaky or obsolete.

The final step is to x-ray the structure, identify its core functions and ask whether the intended functions can be accomplished in a better way.

Certain questions demand answers:

- What are the basic goals and objectives?
- Does an export control system have to be rooted in minutia to be effective?
- Are two separate regulatory regimes, the Export Administration Regulations and those administered by Treasury's Office of Foreign Assets Control, required to accomplish overlapping goals?
- If two regulatory regimes are necessary because of differing goals and objectives, can their goals and objectives be separated so they do not overlap?
- Can the U.S. government realistically keep ahead of a product and technology curve that changes with blinding speed so as to keep up-to-date lists of goods, technology and

software that should be subject to export licensing requirements?

- Can a greater degree of responsibility for achieving the export control system's national security goals be shifted from the U.S. government to the producers or sellers of the products themselves?
- What is the point of economic sanctions that hurt the innocent but are unlikely to change the behavior of those whose policies and actions the U.S. government opposes?

Understanding and Conceptualizing the Goals

The basic goals of the Export Administration Regulations are articulated in the Regulations themselves as the protection of national security and the advancement of U.S. foreign policy.¹³⁴

Protecting the country against shortages is also a goal.¹³⁵ According to the Regulations, “[t]he EAR also include some export controls to protect the United States from the adverse impact of the unrestricted export of commodities in short supply.”¹³⁶ Authority to impose short-supply controls, however, is rarely used.

The last high-profile period in which the Regulations were invoked to protect the country against shortages was in the 1970s when limits were placed on exports of ferrous scrap.¹³⁷ “Short supply” is identified as a reason for control, moreover, in only seven of the more than 500 ECCNs on the CCL (covering, among other things, crude oil, certain other petroleum products, and certain wood products).¹³⁸ Short supply controls are elaborated in only thirteen of the EAR's 800 pages.¹³⁹ In what the Congressional Research Service refers to as “the last comprehensive effort” in 2001 to “rewrite or reauthorize” the Export Administration Act, no provision for short supply export controls was even made.¹⁴⁰

Protecting national security and advancing foreign policy interests are, thus, the principal purposes of the export regulatory scheme. They reflect somewhat overlapping goals. Each can help achieve the other, but they are conceptually quite different.

National security export controls are aimed at depriving an adversary of things

134. 15 C.F.R. § 730.6 (2014) (“The export control provisions of the EAR are intended to serve the national security, foreign policy, nonproliferation of weapons of mass destruction, and other interests of the United States . . .”).

135. *Id.*

136. *Id.*

137. *Id.* §§ 377.4, 377.4(a), 377 (Supp. I 1974); see David L. Denny & Daniel D. Stein, *Recent Developments in Trade Between the U.S. and the P.R.C.: A Legal and Economic Perspective*, 38 *LAW & CONTEMP. PROBS.* 260, 270 (1973).

138. 15 C.F.R. §§ 774.1, 774 (Supp. I) (ECCNs 0A980, 1C981, 1C890, 1C982, 1C983, 1C984, 1C988).

139. *Id.* §§ 754.1–754.7, 754 (Supp. I–III 2014).

140. FERGUSSON & KERR, *supra* note 30, at 3; FERGUSSON, *supra* note 27, at 10.

that have both military and civilian uses that can be used to harm the United States. Examples are things that can be used to make or deliver or enhance the delivery of weapons to a target. They are “dual-use” because they are not themselves weapons but can be used to make or deliver weapons. Because they are dual-use, they are not subject to the International Traffic in Arms Regulations.

Foreign policy export controls are aimed at changing the behavior of a foreign country or one or more individuals or groups in a foreign country. Examples are efforts in years past to end South Africa’s system of apartheid,¹⁴¹ stop repression in Nicaragua¹⁴² or thwart Libyan dictator Muamar Quadafi’s terrorist activities.¹⁴³ Other efforts include attempts to impede Russia’s invasion of Afghanistan or Iraq’s invasion of Kuwait, prevent human rights abuses in Syria, reverse Russia’s annexation of Crimea, eliminate Russia’s interference in Ukrainian affairs and change Cuban foreign adventures and domestic repression.¹⁴⁴

In many but not all instances, a mixture of export controls administered by the Commerce Department and assets freezes and export controls administered by the Treasury Department were and are used in the pursuit of these goals.

Conceptual confusion or at least the presence of conflicting goals is evident in the Export Administration Act itself. The first of that statute’s fourteen declarations of policy uses neither the term “national security” nor the term “foreign policy.” Instead, reference is made to the protection of the “national interest” as one of the statute’s goals while citing the need to minimize uncertainty and encourage foreign trade as among what are obviously conflicting the goals.¹⁴⁵

The presence of competing concepts and goals is perhaps unwittingly revealed in the Export Administration Act’s tenth policy declaration when it says “that export

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141. *E.g.*, Exec. Order No. 12,532, 50 Fed. Reg. 36,861 (Sept. 10, 1985) (“Prohibiting trade and certain other transactions involving South Africa”); Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (1986) (codified at 22 U.S.C. § 2151, 2346(d), 5001-5116 (Supp. IV. 1986)).
142. *E.g.*, Exec. Order No. 12,513, 50 Fed. Reg. 18,629 (May 2, 1985) (“Prohibiting Trade and Certain Other Transactions Involving Nicaragua”); see William M. Leogrande, *Making the economy scream: US economic sanctions against Sandinista Nicaragua*, 17 THIRD WORLD Q. 329 (1996).
143. *E.g.*, Exec. Order No. 12,543, 51 Fed. Reg. 875 (Jan. 9, 1986) (“Prohibiting Trade and Certain Transactions Involving Libya”); Exec. Order No. 12,544, 51 Fed. Reg. 1,235 (Jan. 10, 1986) (“Blocking Libyan Government Property in the United States or Held By U.S. Persons”); see John F. Cooke, *The United States’ 1986 Emergency Economic Sanctions Against Libya - Have They Worked?*, 14 MD. J. INT’L L. 195 (1990).
144. *See, e.g.*, 15 C.F.R. § 746.9 (2014); 31 C.F.R. pt. 542 (2014) (Syria); Russian Oil Industry Sanctions and Addition of Person to the Entity List, 79 Fed. Reg. 45,675 - 45,682 (Aug. 6, 2014) (to be codified at 15 C.F.R. §§ 746.5 and 746 (Supp. II 2014)) (Russia/Ukraine); 31 C.F.R. pt. 589 (2014) (Russia/Ukraine); 15 C.F.R. § 746.2 (2014); 31 C.F.R. pt. 515 (2014) (Cuba).
145. Export Administration Act of 1979, *as amended*, 50 U.S.C. app. § 2402(1) (2012) (“to minimize uncertainties in export control policy and to encourage trade with all countries with which the United States has diplomatic or trading relations, except those countries with which such trade has been determined by the President to be against the national interest.”).

trade by United States citizens [should] be given a high priority and not be controlled except when such controls (A) are necessary to further fundamental national security, foreign policy, or short supply objectives, (B) will clearly further such objectives, and (C) are administered consistent with basic standards of due process.”¹⁴⁶

The conflation of goals and concepts, the dual use, as it were, of one system to accomplish conflicting objectives, seems rooted in the third of the Congressional findings in the Export Administration Act of 1979, stating that “[i]t is important for the national interest of the United States that both the private sector and the Federal Government place a high priority on exports, consistent with the economic, security, and foreign policy objectives of the United States.”¹⁴⁷ Caught between the competing goals of promoting and restricting exports simultaneously, it is perhaps little wonder that the current eight-hundred page export control regime has emerged from the Commerce Department’s attempt to satisfy vastly different constituencies.

Congress, moreover, has refused for the last thirteen years to attempt to sort things out. It has, as indicated, been content to let the statutory basis for export controls expire and instead permit export controls to rest on declarations of national emergency emanating from its own failures.

The establishment in 2010 of yet another governmental unit, the Export Enforcement Coordination Enforcement Center, run by the Department of Homeland Security, to coordinate the export control enforcement activities of Commerce, Treasury, State and other governmental agencies is a further illustration if one were needed of the perpetuation of a system that lacks conceptual clarity in the goals it is trying to achieve and needs yet another agency to sort out competing priorities.¹⁴⁸ It also illustrates the willingness of Congress to yield responsibility to the Executive Branch despite complaints about an imperial presidency.

Be that as it may, most U.S. export controls starting with the Embargo Act of 1807 were promulgated in a wartime environment. The Embargo Act of 1807, as indicated, was aimed at avoiding entanglement in the Napoleonic Wars, stopping both British and French threats to U.S. shipping and keeping the British from impressing U.S. seamen to secure manpower for its warships.¹⁴⁹ Bradley Hays, an assistant professor of political science at Union College contends that the public response to French and British actions was a call for war, that President Jefferson

146. *Id.* § 2402(10).

147. *Id.* § 2401(3).

148. See Exec. Order No. 13,558, 75 Fed. Reg. 69,573 (Nov. 15, 2010).

149. Bradley D. Hays, *A Place for Interposition? What John Taylor of Caroline and the Embargo Crisis Have to Offer Regarding Resistance to the Bush Constitution*, 67 MD. L. REV. 200, 209-10 (2007).

recognized that the United States would lose against either foe, that Jefferson steered a course intended to keep the United States out of actual warfare and that he believed the embargo would be a new type of economic warfare.¹⁵⁰

The Neutrality Acts of the 1930s, to take another example, were aimed at avoiding U.S. involvement in a variety of actual or impending European wars, including the Spanish Civil War, by limiting the supply of arms to belligerents and potential belligerents. One of the measures, provided that, “[w]henver the President shall find that there exists a state of war between, or among, two or more foreign states, the President shall proclaim such fact, and it shall thereafter be unlawful to export . . . arms, ammunition, or implements of war from any place in the United States to any belligerent state named in such proclamation.”¹⁵¹ Similar measures were made applicable with respect to “civil strife” in a foreign state.¹⁵²

A sea-change came with the enactment of the Export Control Act of 1949. The principal purpose of that statute was to deprive the Soviet Union and its Warsaw Pact allies of goods and technology that could be used to make or enhance the Soviet Union’s ability to make or use things that could be used in the performance of military functions.¹⁵³ The context was the Cold War, not an actual war but a war nonetheless.¹⁵⁴ As Ian Fergusson of the Congressional Research Service has explained, “[t]he start of the cold war led to a major refocusing of export control policy on the Soviet-Bloc countries [with] [e]nactment of the Export Control Act of 1949 . . . a formal recognition of the new security threat and of the need for an extensive peacetime export control system [in which] [n]ational security controls were to be used to restrict the export of goods and technology, including nuclear non-proliferation items, that would make a significant contribution to the military capability of any country that posed a threat to the national security of the United States.”¹⁵⁵

Thwarting Soviet abilities to make and use weapons by cutting off access to U.S. goods and technology required a sophisticated knowledge of Soviet weapons production and delivery capabilities and a delicate balancing of U.S. commercial and security interests. Businessmen wanted access to Soviet and Warsaw Pact markets. The U.S. Defense Department wanted the Soviets and their allies to have nothing that would enhance their military capabilities. Those who administered the export control regulations, therefore, had to have a highly sophisticated knowledge of Soviet

150. *Id.*

151. Joint Resolution of May 1, 1937, Pub. Res. 37-27, § 1(a), 50 Stat. 121 (1937).

152. *Id.* § 1(c), 50 Stat. 121, 122.

153. FERGUSSON, *supra* note 27, at 2.

154. *Id.*

155. *Id.*

capabilities and the ways in which what business wanted to sell would relate to or enhance those capabilities. They also had to have a sensitivity to U.S. commercial interests.

The result inevitably had to be the construction of a highly complex system for identifying and regulating goods and technology in the early days and software later on as computers came on the scene so as to carry out what were often inherently conflicting missions, namely catering to commercial interests but not so much as to impair the national security. U.S. participation in multilateral export control regimes with similar conflicting missions added to the complexity.

The first multilateral effort was reflected in the regime established by the Coordinating Committee for Multilateral Export Controls, CoCom, which was formed in 1949 with members of NATO.¹⁵⁶ CoCom was dissolved in 1994 and succeeded in 1997 by the current Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies.¹⁵⁷

Complexity was compounded as export control targets increasingly came to encompass not just the Soviet Union and its allies but other potential adversaries, including non-state actors engaged in acts of terrorism or the creation of weapons of mass destruction.

It is hardly a wonder we have the system we have. It is, however, no excuse for its perpetuation given problems of the kind outlined above if there is a better way.

The What If Question

Thinking about whether there is a better way suggests a number of What If questions.

What if the Export Administration Regulations were divided into two clearly separate but equal components and administered in two conceptually different ways?

One component would be the national security side of the house. The other would be the foreign policy side of the house.

Principal responsibility for achieving the national security goals of the Regulations would rest with the private sector. Principal responsibility for achieving the foreign policy goals of the Regulations would rest with the government.

On the national security side of the house, the private sector would be permitted to export or reexport all non-military, dual-use items unless it knew or had reason

156. *Id.*

157. *Id.*; Gregory W. Bowman, *E-mails, Servers, and Software: U.S. Export Controls for the Modern Era*, 35 GEO. J. INT'L L. 319, 346 (2004) (citing Carol George et al., *International Trade Aspects of Information Technology*, in *ENCYCLOPEDIA OF INFO. TECH.* L. 4023 (Stephen Saxby ed., 1990–2003)).

to know that the export would be used in the conduct of military operations or terrorist activities or the production of missiles or nuclear, chemical, biological or other kinds of weapons. There would be no Commerce Control List of things requiring an export license simply because of their characteristics or capabilities. There would also be no list of persons, like an Entity List, to whom all exports were absolutely prohibited.

The scheme would, in essence, rest on the idea that it is the use to which an item is to be put rather than its inherent characteristics or capabilities that dictate whether its sale poses a national security threat. That is the idea on which General Prohibition Five already rests when it trumps all other provisions of the Regulations by prohibiting exports of anything subject to the EAR if it is to be used for prohibited purposes regardless of whether it is on the Commerce Control List. It could grow into an analogue of what Gregory Bowman, a professor of law at West Virginia University College of Law, called an “‘account-based’ approach” to export controls by focusing on the exporter’s overall export activities, rather than the individual export transaction, allowing end-use and end-user vetting without treating each export as a separate transaction.¹⁵⁸ The “account” would be the end-user’s account.

Implementation of the scheme would require nothing more than a rigorous and enhanced adherence to the existing Know-Your-Customer rule and Prohibition Ten’s prohibition on proceeding with a transaction with knowledge that a violation has occurred or is about to occur. It would also require rigorous and close attention to red flags: who is the customer, how does he intend to use what is sold to him, is there a risk that the item will be diverted to an improper use and is there anything suspicious about the information being conveyed.¹⁵⁹

If the exporter were unsure about end-use or the risk of diversion, it could apply to the Commerce Department for a license. If it did not, it would be liable for any misuse or diversion to a harmful use except in the case of outright deception or fraud by the customer. There might also be allowances for mitigation based on the passage of time or the exporter’s good faith efforts to prevent misuse or diversion. If the exporter did apply for and secure a license, it would be protected from liability so long as it had truthfully supplied the Commerce Department with all the information the Department required relating to use and the risk of diversion and other aspects of the transaction.

The maker of a boiler that would otherwise be on the Commerce Control List and, therefore, require a license for export to France and Turkey under the current scheme because it is capable of being used in the production of chemical weapons,

158. BOWMAN, *supra* note 156 at 326-27.

159. See 15 C.F.R. §§ 732 (Supp. III), 736.2(b)(10) (2014).

for example, would be permitted to sell the boiler to milk producers in those countries without a license provided he was sure the boiler would be used for milk production and not resold or otherwise transferred to someone who might use it in the production of chemical weapons.

Assurances could come from a U.S. parent company's control over a foreign subsidiary customer, contractual arrangements with the customer, knowledge of the customer's business needs, a history of past dealings with the customer, the prospect of on-going relationships with the customer that would be jeopardized if diversion were to occur, rights to inspect the facility in which the boiler is to be used, maintenance of control over replacement parts or repairs and the like. The safe harbor of a Commerce Department license would be available if the exporter had any doubts. The freedom to proceed without a license could be coupled with a reporting requirement akin to that which the Census Bureau already requires identifying the recipient of the export and the nature of what is being exported. If handled properly, the reporting system might give enforcement authorities a better database than currently exists for monitoring U.S. exports and dealing with diversions.

On the foreign policy side of the house, the U.S. government would prohibit specified exports to a list of foreign governments and others whose policies or actions it seeks to change. The exports so specified would consist of those the government can demonstrate with a reasonable degree of certainty are so important to the putative recipient that lack of access to them stands a good, quantifiable and measurable chance of changing the target's policies or actions.

Nothing would be on the list of impermissible exports for foreign policy purposes unless the government reasonably believed that a prohibition on the export would (i) deprive the putative recipient of access to the item and not simply be available from other sources and (ii) likely change the putative recipient's objectionable behavior. Needless to say, the government would have to have a system for measuring and demonstrating effectiveness. The only exceptions would be where the United States was required to prohibit exports because of UN obligations or other multilateral commitments. Proof of effectiveness would not be a condition precedent unless permitted under the relevant multilateral regime. Reporting to Congress and the public on effectiveness would, however, be required.

This approach would be in lieu of general across-the-board embargoes or supposedly limited but, nonetheless, sweeping restrictions that tend to harm innocent, ordinary citizens who are incapable of changing government policy or the behavior of bad actors. Across-the-board embargoes often do little more than enrich foreign government officials, smugglers and the like who can often easily find ways to circumvent restrictions and profit from limitations in available supplies.

Effectiveness rather than symbolism would be the goal.

Objections to Fundamental Change

It is easy to think of possible objections to a national security export control scheme that places responsibility on business to determine whether what it makes available abroad is going to be used in military operations or terrorist activities or the production of missiles or weapons.

Business itself might object to having that responsibility. To which the answer is that it already has that responsibility under the Know Your Customer rule and General Prohibitions Five and Ten.¹⁶⁰

The Know-Your-Customer rule prohibits exports to someone the exporter knows or has reason to believe will use the export for a prohibited purpose, including resale or transfer to someone to whom resales or transfers are prohibited or to someone who will use the item in a prohibited use.¹⁶¹ It is reinforced by other provisions in the Regulations such as the rule that “you may not export, reexport, or transfer (in-country) to any destination, other than countries in Supplement No. 3 to this part, an item subject to the EAR without a license if, at the time . . . you know that the item will be used directly or indirectly in any” of certain nuclear-related activities.”¹⁶² It is further reinforced by the rule that “you may not export, reexport, or transfer (in-country) an item subject to the EAR without a license if, at the time . . . you know that the item . . . [w]ill be used in” certain rocket system-related activities.¹⁶³ The existing supervening prohibitions in the Regulations on making an export where the exporter knows that an export will be used for an improper purpose or that a violation of the Regulations has occurred or is about to occur¹⁶⁴ reinforce the Know Your Customer rule still further.

Knowledge for these purposes under the Regulations covers variants of the word “know” and the term “reason to know” and includes “not only positive knowledge that a circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence.”¹⁶⁵ Awareness, moreover, may be “inferred from evidence of the conscious disregard of facts known to a person and . . . also . . . from a person's willful avoidance of facts.”¹⁶⁶

The optional safe harbor of a Commerce Department export license, moreover,

160. *Id.* §§ 736.2(b)(10); 732 (Supp. III) (the Know Your Customer Rule).

161. *Id.* § 732 (Supp. II).

162. *Id.* § 744.2.

163. *Id.* § 744.3.

164. *Id.* § 736.2(b)(10) (2014).

165. *Id.* § 772.1 (definition of “knowledge”).

166. *Id.*

would mean that business would not be forced to accept the risk of acting on its own if it did not want to. The Commerce Department, using U.S. government knowledge and intelligence and other resources available to it, would fill in the interstices of business knowledge were an exporter to seek a license rather than act on its own. The Commerce Department would then decide whether the risks of misuse or diversion are sufficient to warrant a license application denial.

If a license were issued, the U.S. government would in essence assume the burden of the exporter's uncertainty. But the exporter would have a choice, and the Commerce Department would not have the impossible burden of constantly trying to keep ahead of the new and rapid evolutions of existing products U.S. industry is capable of producing in order to devise a list of things whose export may require a license because of the harmful uses to which they could be put if they fall into the wrong hands.

The U.S. government might object on the ground that it is the inherent performance and other characteristics of exported items that create national security concerns regardless of use and that for that reason alone exports of specified items should be restricted. An objection of that sort would rest on the premise that, even though the intended use is benign, the risk of diversion from an intended benign use to one that is malign justifies the exercise of control.

End-use and risk of diversion, however, are the drivers of export licensing requirements under the current scheme. Were end-use not the concern, there would be no need for controls. If diversion risk was not part of the equation, no licenses for items listed on the Commerce Control List would ever be issued. There would be an absolute prohibition on exports of things having certain characteristics or capabilities regardless of destination or recipient.

Yet risk of diversion is essentially ignored when goods or technology having characteristics or capabilities of inherent concern can, nonetheless, be exported to some destinations.¹⁶⁷ The Commerce Country Chart itself, for example, lists numerous countries to which exports may be made without a license even though the export is controlled for chemical and biological weapons, nuclear non-proliferation, national security, missile technology, regional stability, firearms convention, crime control and anti-terrorism purposes if made to other countries.¹⁶⁸ The implicit premise is that the risk of diversion to impermissible uses is an

167. *Id.* § 774 (Supp. I) (ECCN 9A110 certain composite structures or laminates; license not required for exports to Australia, Austria, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Japan, South Korea, Latvia, Liechtenstein, Luxembourg, Netherlands, New Zealand, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey and United Kingdom (controlled only for NS Col. 2, NP Col. 1 and AT Col. 1).

168. *Id.* § 738 (Supp. I).

acceptable risk when the export is to certain countries but not others.

An important part of the licensing exercise, moreover, is an evaluation of the risks of diversion. The issuance of a license necessarily involves a judgment that the diversion risks are acceptable because there can seldom, if ever, be a situation where the risks of diversion are non-existent.

Hence, whether a diversion assessment is performed by the exporter in the exercise of its Know Your Customer responsibilities or by the Commerce Department as part of the export licensing process, assessments about the risks of diversion to harmful uses undergirds the export control process. Fertilizer sold to a farmer in France might just as easily be diverted to a bomb maker in that country as fertilizer sold to a farmer in Ukraine might be diverted to a bomb maker in Russia.

Whether fertilizer identified on the Commerce Control List may be sold to a farmer in France or a farmer in Ukraine, however, depends on the risks of diversion. If end-use and diversion risk analysis did not underpin the decision-making process, all fertilizer exports would be prohibited. Diversion analysis and the existence of diversion indicators are, thus, keys to a system that attempts to control but not absolutely prohibit the export of dual-use goods, technology or software.

The government, moreover, has limited tools for preventing a risk of diversion from materializing despite restrictions imposed on paper as part of the licensing process. It is not in a position to monitor the use of all items exported pursuant to a license and not always in a position to take effective action against a diverter should diversion occur. It may place a diverter on the Entity List, to be sure, but any such action would occur after a diversion occurs. It would constitute punishment but not prevention. An export license is no guarantee that diversion will not occur.

The exporter, on the other hand, has a powerful incentive to prevent a customer's diversion in order to avoid charges the exporter violated the Know Your Customer rule or General Prohibitions Five or Ten in the first place. The exporter also has a powerful incentive in many instances to prevent a customer's diversion so as to be capable of having a continuing relationship with the customer. While there can be no guarantee that incentives like these will prevent diversion from actually materializing, they might well result in better due diligence, better contractual agreements pertaining to diversion or closer ongoing relationships between exporters and customers that are at least as good if not better than the constraints the licensing process alone is able to impose on the recipient.

Equally important, perhaps, in thinking about an export control system that makes the inherent characteristics of an item a central element in decision-making is that the Commerce Control List is only as good as the information the government has about the thousands upon thousands of products produced and the technologies and software developed in the United States on an almost daily basis. Use of the

Commerce Control List as a means of control rests on the premise that the Commerce Control List is always up-to-date and is capable of reflecting on a real-time basis everything that is capable of being exported from the United States.

In a dynamic economy driven by rapidly changing technology where product life-cycles are becoming shorter and shorter, that premise is not likely to withstand scrutiny. If a millimeter of variance in wall thickness, a molecule of variance in metal composition or a nano-second's difference in speed of execution makes the difference between whether something is on the Commerce Control List or not, it seems foolhardy to assume that any list of controlled goods, software or technology is capable of capturing changes in characteristics like these before, let alone as soon as, they occur. An outdated blacklist leaves many shades of grey outside its purview. The addition under the Export Control Reform Initiative of special ECCNs to control "emerging technologies" while the government ponders whether they should actually be controlled seems unlikely to solve the problem.¹⁶⁹ It seems more likely to further uncertainty.

The U.S. government might object to the proposed approach to foreign policy controls that are confined to exports that have a realistic chance of changing policy or behavior on the ground that doing so would require a high degree of fine-tuning of which it is simply not capable. The irony of that sort of objection is that the Export Administration Regulations already attempt fine-tuning to a fare-thee-well via the Commerce Control List, the Commerce Country Chart and the other detailed provisions in the Regulations. The Regulations extend those fine-tuning efforts, moreover, to their intricate delineations of responsibility between the Commerce Department and the Treasury Department in the imposition of sanctions in the interest of advancing U.S. foreign policy.

More important, perhaps, is the question of why the U.S. government would ever, except as required by multilateral commitments, maintain across-the-board export controls aimed at changing policy or behavior if it is incapable of identifying the controls that are likely to actually change foreign government policy to which it objects or prevent other activities it seeks to thwart. Across-the-board export controls whose effectiveness cannot be predicted but hurt the powerless and innocent are not only cruel but ultimately likely to generate resentments the United States should not encourage.

What Is the Alternative

It is beyond the scope of this article to flesh out further the details of the suggested alternatives to the Export Administration Regulations as they currently exist or,

169. *Id.* § 742.6(a)(7). These are referred to as the "0Y521" ECCNs.

indeed, deal with the myriad details of the execution of or a transition to any such alternatives. Its purpose instead is to demonstrate that there is something wrong with the system currently in place and to suggest the outlines of a better way. The premise of this article is that there has to be a better way given the byzantine nature of the current thicket and its failure to follow premises, whether explicit or implicit, to their logical conclusion. The burden is on those who say there is not.

The U.S. government has recently acknowledged the need for reform. It is reflected, in part, in the Export Control Reform Initiative announced by the President in 2010.¹⁷⁰ According to a recent amendment to the Export Administration Regulations, the Commerce Department has “increasingly focused on end uses and end users.”¹⁷¹ In doing so, however, it continues to work within the current cumbersome system.

A focus on end-uses is, of course, the right focus. A focus on end-users, however, confuses the perspective because end-user controls reflect mainly foreign policy concerns. Perpetuation of a list of goods, software and technology as the bedrock of control, moreover, makes the system almost unmanageable. The fundamental problem with reform efforts as currently constituted is that they involve tinkering around the edges. They accept the current export control structure as essentially sound. For all the reasons outlined above, it is not.

A simplified dual-use export control system aimed at protecting the national security would ditch the Commerce Control List, ditch the Country Chart and ditch the Entity List. It instead would ask only two fundamental questions: Is the item to be exported to be used to produce or deliver weapons? Is there any risk that the intended recipient will use it or permit others to use it for such purposes?

A simplified export control system aimed at achieving foreign policy objectives would ask only whether depriving someone of access to U.S. goods, technology or software is likely to change the potential recipient’s behavior.

The development of alternatives along the lines suggested would not be easy. It would undoubtedly be harder than it at first blush seems and might need qualifications or exceptions here and there or an expanded list of end-use categories deemed to be harmful. But persisting with a system as complex and often incomprehensible as the current one without exploring alternatives seems irresponsible. Persistence is likely only to postpone a day of reckoning when the

170. THE WHITE HOUSE, OFFICE OF THE PRESS SEC., FACT SHEET ON THE PRESIDENT'S EXPORT CONTROL REFORM INITIATIVE (2010), <http://www.whitehouse.gov/the-press-office/fact-sheet-presidents-export-control-reform-initiative> (last visited Jan 12, 2015).

171. Expansion of the Microprocessor Military End-Use and End-User Control, 79 FR 75044-01 (Dec. 17, 2014); *see* Revision of Export Controls for General Purpose Microprocessors, 68 FR 1796-01 (Jan. 14, 2003) (establishing end-use and end-user controls in EAR Part 744).

Regulations can no longer bear the burden of rules upon rules, cross-references upon cross-references, exceptions upon exceptions and exceptions to exceptions that occupy hundreds of pages of regulations that almost defy comprehension. When that day comes, the system may collapse of its own weight.

