

Prepared Text of Remarks of Assistant Secretary Kevin Wolf

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The United States under the Obama Administration is committed to implementing a robust export control system rooted in our commitments to multilateral obligations to combat proliferation, destabilizing military modernization activities, and terrorism. The President addressed U.S. exporters in late August on our plans to fundamentally reform what we control, how we control it, how we enforce those controls, and how we manage our controls. Today, I would like to outline the background and general structure of these plans and how these changes will affect the dual-use control system that my department administers.

I would also like to ask for input and ideas from our European and other allies regarding how to best implement aspects of the planned system that will affect the transfer of items subject to US export controls, such as controlled US-origin items originally exported from the United States, from close allies to third countries.

A. Guiding Principles

President Obama has directed that our export control reform efforts abide by the following core principles:

1. Controls should focus on a small core set of key items that can pose a serious national security threat to the United States. These include weapons of mass destruction, their delivery systems, and advanced conventional weapons.
2. Our controls should be fully coordinated with the multilateral export control regimes to be effective. The regimes' multilateral controls need to focus on key items that are available almost exclusively from the United States and its regime partners, or that give our partners and us a profound, quantifiable military advantage.
3. For those items that are not controlled multilaterally, they must address an existing legal or foreign policy objective, such as preventing human rights abuses.
4. Our control lists must clearly identify which items are controlled and be easily updated as technology emerges, matures, or becomes widely available.
5. Our regulations must be transparent, our processes must be predictable and timely, and our policies must be flexible to address new threats.

6. Our enforcement capabilities must be enhanced to address non-compliance and increase our capacity to interdict unapproved transfers.
7. Our controls must take into consideration counterterrorism policy and the need to export items that support homeland security priorities, such as enabling foreign countries' access to robust personal screening machines at airports.

As Secretary of Commerce Gary Locke recently stated, "We must have an export control system that can ensure both national security and economic prosperity. Yet, while we currently have one of the world's most stringent export control systems, it's not necessarily the world's most effective and efficient. Our current export control system has its roots in the Cold War-era, when it was in every Western country's security and economic interest to keep dual-use and military technologies away from a well-defined bloc of adversarial nations. But we no longer live in that bi-polar world."

B. National Security Objective

At the core of the overall effort is the implementation of an effective export control system, which has the singular objective of protecting U.S. national security. This means military security -- first and foremost -- and my colleagues Tony Aldwell and Bob Kovac will focus their remarks on how reforming our export control system is vital to our national security interests from a Department of Defense and a Department of State perspective. Mr. Kovac will also address several defense trade issues and defense-trade reform-specific issues in his remarks. But national security is not limited to military security.

As General James Jones, the President's then National Security Advisor, has said, "The future of the United States' national security in the 21st century is our competitiveness." And as our Secretary of Defense, Robert Gates, said in a speech on export control reform, our "system has the effect of discouraging exporters from approaching the process as intended. Multinational companies can move production offshore, eroding our defense industrial base [and] undermining our control regimes in the process. . . ." He went on to say that our current system "incentivize[s] more creative circumvention strategies -- on the part of the foreign companies, as well as countries that do not have our best interests at heart."

Our reform effort includes consideration of our close allies. Secretary Gates, for example, also stated that the "U.S. Government reviews tens of thousands of license applications for export to EU and NATO countries. In well over 95 percent of these cases, we say 'yes' to the export. Additionally, many parts and components of a major piece of defense equipment -- such as combat vehicles or aircraft -- require their own export licenses. It makes little sense to use the same lengthy process to control the export of every latch, wire, and lug nut for a piece of equipment like the F-16, when we have already approved the export of the whole aircraft. In short, the time for change is long overdue if the application of controls on key items and

technologies is to have any meaning, we need a system that dispenses with 95 percent of ‘easy’ cases and lets us concentrate our resources on the remaining 5 percent. By doing so, we will be better able to monitor and enforce controls on technology transfers with real security implications while helping to speed the provision of equipment to allies and partners who fight alongside us in coalition operations.”

By the way, copies of these speeches – as well as those of President Obama, Secretary of Commerce Gary Locke, Under Secretary Hirschhorn, and me – are on our website at www.bis.doc.gov. I encourage you to read them if you want more detail and information about the direction of the export control reform effort.

C. Reform Plan in General

The President has announced a four-part effort to address current deficiencies to enhance our national security. These four “singularities” involve the creation of a single control list administered by a single license agency using a single information technology platform that is enforced by a single export enforcement coordination agency. While Congressional action will be needed to create the structural elements of the four singularities, the fundamental reforms necessary to transition to this system can be achieved through executive action without legislation. In particular, this includes restructuring the U.S. Munitions List (USML) and Commerce Control List (CCL) to focus on the small core set of key items that can pose a serious national security threat to the United States and enhanced compliance initiatives associated with such controls. This is part of what Defense Secretary Gates has called putting up a “higher fence around a smaller yard.”

The first step the Administration has taken in this regard is to establish new criteria for determining which items need to be controlled. The control list criteria are based on transparent rules, which will reduce the uncertainty faced by our allies, U.S. industry, and its foreign partners, and will allow the government to more effectively target enforcement activities. Applying the criteria, the U.S. Munitions List and the Commerce Control List will each be split into three tiers:

1. Items in Tier 1 are those that provide a critical military or intelligence advantage to the United States and are available almost exclusively from the United States, or items that are a weapon of mass destruction.
2. Items in Tier 2 are those that provide a substantial military or intelligence advantage to the United States and are available almost exclusively from our multilateral partners and allies.
3. Items in Tier 3 are those that provide a significant military or intelligence advantage but are available more broadly.

This flexible construct will improve the nation’s national security and permit the government to adjust controls in a timely manner over a product’s life cycle in order to keep lists targeted and up-to-date based on the maturity and sensitivity of an item. Those items in the lowest tier will be ripe for review by multilateral regimes to ensure

that our international control lists keep pace with technological change and foreign availability.

Just as importantly, we will use our new criteria to identify unilaterally controlled items that warrant multilateral control. This is especially true with emerging technologies and we are creating “holding” export control classification numbers (ECCNs) on the CCL to ensure we can swiftly impose controls on new technologies that do not currently fit into an existing entry.

Before the lists can be tiered, however, they must be clear about what they control. The Commerce Control List generally controls items based on technical parameters. Items not meeting a specified threshold are not subject to control. There typically is no corresponding technical basis for determining when an item – particularly parts or components – is subject to the U.S. Munitions List. Instead, the USML relies heavily on the concept of “design intent,” even where the function of an item may not be uniquely or inherently military.

Our system will make clear when an item, regardless of the intent of its designers, is subject to control. Accordingly, we are restructuring the USML and, where necessary, the CCL, to create “positive lists” of controlled items. A “positive list” is a list that describes controlled items using objective criteria such as horsepower, microns, wavelength, speed, accuracy, hertz or other precise descriptions rather than broad, open-ended, subjective, catch-all, or design intent-based criteria.

What this means to exporters in the United States and reexporters outside the United States is that both the USML and CCL will be revised to more clearly identify which items are controlled where. Just as the Commerce regulations specify by performance standards whether an item is listed or not, the new positive USML in conjunction with the CCL will specify whether an item is subject to one set of regulations or the other. Where an item is listed in both sets of regulations, performance parameters will distinguish between the two.

The following is a brief description of the process.

1. The first step is to decide what items really require control under the International Traffic in Arms Regulations. In general terms, only those items that have exclusive or predominant government or military use and provide at least a significant military or intelligence advantage to the United States will be retained. For example, there is no civil use for depth charges or torpedoes; they will be retained on the USML. Alternatively, while some diesel engines clearly have a military utility, very few are predominantly or exclusively used by governments or militaries; as a result, most will move to the CCL.
2. Once these items are identified, experts will then establish objective, positive control lists consistent with the three-tiered criteria. This includes specifying the specific parts and components that are subject to ITAR control. The focus for parts and components will be on those that have significant, inherent military or intelligence applicability as

opposed to essentially civilian items whose form or fit have been altered to fit into a military end-item. Indeed, when revising the lists of defense articles, the review teams must abide by various guidelines, one of which is that revised USML categories must not contain any (a) catch-all controls for generic “parts,” “components,” “accessories,” “attachments,” or “end-items” or (b) other types of controls for specific types of defense articles because, for example, they were “specifically designed or modified” for a defense article.

3. Those items not meeting the munitions list standard will be transferred to the Department of Commerce after appropriate congressional notification to determine which, if any, controls need to be applied. If a control does need to be maintained, a similar objective standard will be established on the Commerce Control List. If no existing export control classification number exists, we will use our “holding ECCN” concept to control an item until a new one is developed so that no formerly USML items being transferred to the CCL inadvertently are decontrolled.
4. To test this methodology, we are turning Category VII of the USML into a positive list of tanks, military vehicles, and elements of such goods that warrant control as defense articles. The results, as the White House has reported, have been excellent. Of the 12,000 Category VII items licensed by the Department of State last year, roughly 74% will likely eventually become subject to the Commerce Department’s export control regulations – the Export Administration Regulations (EAR), which are often referred to as the “dual-use” regulations. We’re still working on which will be identified on the EAR’s Commerce Control List at some level of control and which will drop down to EAR99 status. We are now moving onto other categories, starting with those pertaining to spacecraft.

So to sum up, agencies will revise the USML and the CCL so that they:

1. Are “tiered” consistent with the three-tiered criteria the U.S. Government has established to distinguish the types of items that should be controlled at different levels for different types of destinations, end-uses, and end-users;
2. Create a “bright line” between the two lists to clarify jurisdictional determinations and reduce government and industry uncertainty about whether particular items are subject to the jurisdiction of the ITAR or the EAR; and
3. Are structurally “aligned” so that they later can be combined into a single list of controlled items when the single licensing agency is created.

With respect to the “bright line” comment, I want to reiterate that the U.S. Government is committed to creating a clear jurisdictional “bright line” because exporters, U.S. Government officials, and foreign parties cannot always easily and consistently determine whether many types of commodities, technologies, and software – and directly related services – are subject to the ITAR or the EAR. This has huge practical impacts on the licensing obligations associated with any particular export – or reexport from one third country to another.

The creation of an aligned, positive, “bright line” is also a vital interim step in the U.S. Government’s plan to have, by the end of Phase III, the single list of controlled items that is divided into three tiers and administered by a single licensing agency under a single set of export control regulations. The interim “bright line” is necessary because the structures of the USML and the CCL are significantly different, as I noted earlier.

This task of translating subjective judgments into objective criteria is the key to the success of the entire tiered, positive list review and revision effort.

Once this process is complete, a corresponding licensing policy will be assigned to it to focus agency reviews on the most sensitive items. A license will generally be required for items in the highest tier to all destinations. Many of the items in the second tier will be authorized for export to multilateral partners and allies under license exemptions or general authorizations. For less sensitive items, a license will not be required more broadly.

The U.S. Government also will continue our sanctions programs directed toward specific countries, particularly Iran, most of Sudan, Cuba, North Korea, and Syria. The U.S. Government also has no plans to change its prohibitions on the export of munitions list items to China or certain dual-use items for military end-use in China.

The Department of Commerce will implement the new licensing policies in the EAR by creating a new License Exception that will authorize the export and re-export of EAR-controlled items to specified destinations without an individual validated license. The details of precisely which countries will be fixed to which of the tiers are still being worked out.

The primary reason for adopting a License Exception as the method for implementing the new licensing policies is that the use of License Exceptions in the EAR can easily be made conditional. That is, if an exporter wants to export an item without a license under the scope of a License Exception, there are additional steps and obligations pertaining to the export. The new License Exception will thus be a vehicle for implementing some of the “higher fences” aspects of export control reform. Specifically, we will expect more of foreign companies that benefit from these streamlined licensing policies. The more sensitive the item, the more intensive should be the controls.

First and foremost, we will require, for example, a company in a country that is a close ally that receives an item without a license to obtain a license to reexport that item to a destination not eligible for license-free treatment. We also intend to impose new tracking requirements on such shipments so that importers are aware that they are dealing with a controlled item and must inform follow-on customers of the requirements. We believe this will assist foreign companies in complying with our export regulations.

Other "higher fences" may include more frequent end-use checks and audits, and may, in some instances, require identifying markings on items subject to reexport controls. We will do this in conjunction with U.S. exporters and their customers overseas, and I am committed to conducting robust domestic and international outreach to explain our new regulatory requirements.

Let me underscore that foreign government and industry involvement in the process is critical and I invite your comments on these proposals and how we can facilitate trade in controlled items in a secure manner with our allies.

Other initiatives that will lead to a more streamlined system will include (1) harmonizing definitions across all the export control regulations, (2) developing a single license application form that the Departments of Commerce, State, and Treasury will use, and (3) developing a single list of the entities and persons subject to sanctions by the Departments of Commerce, State, and Treasury.

The encryption rule that Commerce published in June exemplifies the second initiative -- rationalization. Its goal is to give us useful data about encryption products while providing a more efficient review process. This regulation demonstrates that it's possible to enhance national security while increasing the competitiveness of U.S. companies.

D. Outreach

Attendance at today's conference demonstrates the international community's abiding interest in compliance with U.S. export control rules. In addition to outreach publications, seminars, and one-on-one counseling, the Bureau in recent years has expanded its effort to include such cutting edge strategies as on-line training and webinars. Yet we need to spread the word even further -- particularly to those who may not even realize they're subject to controls.

Every exporter must classify its exports and should screen its customers against such lists as the Denied Persons List and the Entity List. Commerce has a responsibility to assist exporters and reexporters. To that end, we are mining Automated Export System data to identify exporters and foreign transaction parties of interest. We are working with other bureaus and agencies, and with such private sector entities as freight forwarders, to educate exporters. We are employing such outreach techniques as foreign language seminars and CommerceConnect.

Moreover, we continue to work with the Census Bureau and Customs and Border Protection on new electronic tools to help exporters make timely and accurate submissions to our Automated Export System, which is the electronic clearinghouse for all exports from the United States. This will expedite the clearance of exports and facilitate our compliance reviews.

E. Enforcement

Concurrently with licensing efficiencies and education efforts, enforcement will become an even higher priority. I already have discussed some actions we are taking to erect higher fences. Let me mention several additional enforcement initiatives.

The new Comprehensive Iran Sanctions, Accountability, and Divestment Act confers permanent law enforcement authorities on our export enforcement agents for the first time. This enhances our ability to deter and prosecute violators of the EAR.

To ensure coordination with other enforcement agencies, we participate in the National Export Enforcement Coordination Network. Working with colleagues from the Federal Bureau of Investigation, military security agencies, Immigration and Customs Enforcement, and the Intelligence Community, we are sharing information and leveraging resources. The President will soon issue an executive order making this coordination center permanent. The order mandates participation by all relevant law enforcement agencies and the intelligence community.

At the same time, we recognize that even companies who have good intentions, domestic and abroad, can make mistakes. We long have promoted the submission of voluntary self-disclosures (VSDs) in these and other instances. We view VSDs, along with internal compliance programs, as important mitigating factors. Given the volume of exports and reexports that are subject to the EAR, we must rely upon industry for the bulk of compliance. You are the front-line troops in that effort. You and your co-workers know your products, their end-uses, and your customer base.

These are the most critical aspects of export control reform in the short and medium term. We have a plan in place to upgrade our internal IT systems to make them more user-friendly for exporters and leverage the resources and information of agencies across the U.S. Government.

In addition, the Administration is preparing legislation that would combine the administrative enforcement and licensing activities of my Bureau of Industry and Security, the State Department's Directorate of Defense Trade Controls, and the Treasury Department's Office of Foreign Assets Control into an independent licensing agency. We will seek action on this legislation in the near future. It would also combine the enforcement functions of Commerce with those of Immigration and Customs Enforcement. We look forward to working with Congress on these important structural issues.

F. Conclusion

As we have asked American companies, so I ask you to carry a message back to your senior management and those who market your products: We are working to create a more efficient export control system and to ensure that those subject to it are aware of that fact. Also, where appropriate, we will seek to minimize penalties for companies that have good internal compliance programs and make demonstrably unintentional errors. But -- and this is an important but -- we are planning increased efforts against individuals who flout the rules and against companies whose inadequate internal compliance programs tell us that they are indifferent to whether they follow the rules. This includes those that do not comply with our reexport rules on items subject to U.S. jurisdiction.

President Obama is committed to export control reform. We and our colleagues in sister agencies are committed, too. These actions will increase our national security, enhance U.S. competitiveness, and facilitate multi-lateral cooperation and trade among allies. We will accomplish these reforms through more efficient regulatory processes, enhanced outreach to exporters and reexporters, and better focused compliance and enforcement activities.

I look forward to your feedback and ideas.