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Export Control Proliferation: The Effects of United States Governmental Export Control Regulations on Small Businesses—Requisite Market Share Loss; A Remodeling Approach

Jared A. Borocz-Cohen

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Export Control Proliferation: The Effects of United States Governmental Export Control Regulations on Small Businesses—Requisite Market Share Loss; A Remodeling Approach

Jared A. Borocz-Cohen*

Made in the USA. This phrase, stamped on the bottom of many domestic items, is becoming increasingly difficult to find abroad. The United States government, of course, regulates almost every good manufactured in America. The obvious federal regulations encompass topics such as, but not limited to, consumer safety, durability, and warranty. However, perhaps the most important of these regulations are those aimed at national security. Federal regulations concerning national security is the junction at which export controls come into play. The central goal of export controls in the United States, and globally, is to promote security. The main issue this raises for businesses—especially smaller manufacturing businesses—is that, in the process of compliance with national security protocols, business productivity may be adversely affected.

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* J.D. Candidate, 2015, University of Miami School of Law. B.A. International Affairs, The University of Georgia.

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I. INTRODUCTION

The primary task of this Comment is to give an overview of the export control regime that affects most small businesses in the exporting industry. This Comment will highlight some of the most important challenges that small businesses are facing when striving to export those goods deemed “dual-use.” The term dual-use encompasses goods that can be used both for civilian and weapons purposes. While this may sound less than sinister for most small business, when delving deeper into the degree of federal regulation employed, the effects thereof can be widespread. Many items that most Americans use every day—such as computers, navigation devices, smartphones, and gaming consoles—are actually regulated by stringent export controls. The task for small businesses that produce items such as microchips, radio devices, computers, and navigation equipment, is one of navigation and expertise.

II. EXPORT CONTROLS IN GENERAL

Whether a shipment requires an export license depends on a multitude of factors: what is the actual item being shipped, where it is going, who is the end-user, and for what purposes will the end-user be utilizing the shipment.¹ The control lists, which will be discussed in the

¹ U.S. DEP’T OF COMMERCE, KNOW THE FACTS BEFORE YOU SHIP: A GUIDE TO EXPORTING LICENSING REQUIREMENTS 2.

proceeding section of this Comment, only encompass the items controlled. The item may, however, be controlled to certain destinations and not others.² An item is considered a “controlled” good when it requires a license to export from the United States to a foreign country.³

Items shipped to many embargoed countries are controlled, but those same items may be shipped without a license to a range of other, non-embargoed countries.⁴ For example, a corporation is required to apply for an export license from the Department of Commerce for goods deemed “EAR99” being shipped to embargoed countries,⁵ such as Iran,⁶ Cuba⁷ and Syria.⁸ “EAR99 items generally consist of low-technology⁹ consumer goods”¹⁰ that would not normally require a shipping license.¹¹ Additionally, any materials on the ITAR control list are prohibited from being shipped to multiple other restricted states around the world.¹² Various other items most likely require an export license as well, even for EAR99 goods,¹³ as these countries are embargoed countries.

In order to know if an item is controlled, each exporter must know the item’s Export Control Classification Number (ECCN).¹⁴ This

² *Id.* at 2-3.

³ U.S. DEP’T OF COMMERCE, INTRODUCTION TO COMMERCE DEPARTMENT EXPORT CONTROLS 2.

⁴ *Id.*

⁵ *See Commerce Control List*, BUREAU OF INDUS. & SEC., U.S. DEP’T OF COMMERCE, <https://www.bis.doc.gov/index.php/regulations/commerce-control-list-ccl> (last visited Oct. 1, 2014).

⁶ 31 C.F.R. Part 560.

⁷ 31 C.F.R. part 515.

⁸ 31 C.F.R. part 542; *see also* Jeffery A. Van Detta, *Politics and Legal Regulation in the International Business Environment: An FDI Case Study of Alstom, S.A., in Israel*, 21 U. MIAMI BUS. L. REV. 1, 92 (2013).

⁹ Low-technology consumer goods consist of general household goods, such as pencils, pens, jewelry, and pharmaceuticals.

¹⁰ Kimberly Orr & Betty Lee, *Demystifying Department of Commerce Export Controls for the Biosafety Professional* 14 Applied Biosafety 70 (2009).

¹¹ *Id.*

¹² Amendment to the International Traffic in Arms Regulations: Updates to Country Policies, and Other Changes, 76 Fed. Reg. 152 (August 8, 2011) (to be codified at 22 CFR part 126). Other embargoed countries include: Libya, Lebanon, Somalia, Belarus, Sudan, North Korea, Iraq, Yemen, Myanmar (formerly Burma), Liberia, Zimbabwe, Balkans, the Cote D’Ivoire (formerly Ivory Coast).

¹³ Export Administration Act of 1979, 50 U.S.C. §§ 2401-2420 (2006); *see also Export Controlled or Embargoed Countries, Entities and Persons*, STANFORD UNIVERSITY, DORESEARCH, <https://doresearch.stanford.edu/research-scholarship/export-controls/export-controlled-or-embargoed-countries-entities-and-persons> (last visited Oct. 6, 2014).

¹⁴ U.S. DEP’T OF COMMERCE, *supra* note 1, at 3.

identifier tells the exporter from which shipment destinations the item is prohibited and whether such shipments require a validated license.¹⁵

It is imperative that each export company understands the regulations in place. A better understanding of each regulation affecting one's business directly translates to a more efficient and competitive business. Large companies seemingly already dominate the export market for electronics and other technology products, which places smaller trade businesses at a disadvantage. Further, export controls add an additional layer of separation in the competition for market share as larger businesses, which designate teams of experts to work on compliance issues, are inherently better equipped to handle these export controls.¹⁶

In order for small businesses to have a fighting chance in this already barren market, understanding the existing regulations is key. Small businesses must prepare for and adapt their policies and procedures to any new regulations. Such compliance is perhaps their best chance at competing in the market as a better and quicker understanding of these regulations allows for more streamlined exports. This is not to say, however, that the regulations are easily understood and adaptable.

There are a vast amount of regulations on businesses of all sizes that are expensive and unnecessarily burdensome. This Comment strives to highlight the issues with regards to the United States' export control regime, eliminate the cons already in place, and make suggestions for future alterations to the regulatory regime.

III. INTRODUCTION TO EXPORT CONTROLS (U.S.)

The production of hazardous materials for both civilian and military purposes has led the United States government to establish its own list of controls—for example the Department of Commerce's Implementation of the Wassenaar plenary agreements¹⁷—in order to curb the proliferation of potentially risky materials falling into the wrong hands,¹⁸ a relatively new concern in this age of international terrorism. Following the devastating attacks of September 11, 2001 on domestic soil, the U.S. Department of Commerce, Bureau of Industry and Security significantly

¹⁵ *Id.*

¹⁶ COAL. FOR SEC. & COMPETITIVENESS, RECOMMENDATIONS FOR A 21ST CENTURY TECHNOLOGY CONTROL REGIME (2010).

¹⁷ Department of Commerce, Wassenaar Arrangement 2013 Plenary Agreements Implementation: Commerce List, Definitions, and Reports; and Extension of Fly-by-Wire Technology and Software Controls, 79 Fed. Reg. 149 (August 4, 2014) (to be codified at 15 C.F.R. 734).

¹⁸ *Regulations*, BUREAU OF INDUS. & SEC., U.S. DEP'T OF COMMERCE, <http://www.bis.doc.gov/index.php/regulations> (last visited Oct. 1, 2014).

revamped its export control regime. The sections that were subsequently revamped apply to export licensing, control lists, brokering regimes, and sanctions.¹⁹

Currently, the United States government has three primary licensing departments with subsidiary agencies that work with companies exporting potentially sensitive armaments and dual-use items and technology outside of the U.S. borders: the Departments of Commerce, State, and Treasury.²⁰ The involvement of so many government entities can prove overwhelming and confusing for small businesses trying to export their goods. As a result, the U.S. government is pursuing alternative means to achieve a more streamlined and liberalized process of licensing, pushing for a Single Licensing Agency, which would act as a “one-stop shop” for businesses pursuing export licenses.²¹ Further, the U.S. government strives to achieve these goals through: enforcement, coordination, and end-use agreements.²²

A. *Regulations*

The problematic issue for small business lies in the vast amount of U.S. export control legislation and governing authorities.²³ The main law governing export controls is the Arms Export Control Act (AECA),²⁴ which set forth the International Traffic in Arms Regulations (ITAR) that have been implemented by the Department of State²⁵ The AECA deals primarily with defense-related goods. Thus, any business desiring the

¹⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-234, DEFENSE TRADE: ARMS EXPORT CONTROL SYSTEM IN THE POST-9/11 ENVIRONMENT (2005) (Report to the Chairman, Committee on International relations, House of Representatives) [hereinafter U.S. GAO].

²⁰ *Overview of U.S. Export Control System*, U.S. DEP'T OF STATE, <http://www.state.gov/strategictrade/overview/> (last visited Oct. 1, 2014) [hereinafter *U.S. Export Control*].

²¹ *Id.*

²² The U.S. government bases its export control regime on four outlying principles. First, the U.S. government has a broad national commitment to the regime. The U.S. follows each multilateral export control regime to the letter by incorporating each and every controlled item on those lists into the US list, and even adds more of its own regulations for added security. Second, the U.S. establishes authority to control dual-use goods through: comprehensive controls, enforcement, directives, and interagency coordination. Third, it establishes clear modes of authority and a control list. Fourth, the U.S. government focuses on preventative enforcement such as: end-use agreements, screening, and educating the market. *See Overview of U.S. Export Control System*, U.S. DEP'T OF STATE, <http://www.state.gov/strategictrade/overview/> (last visited Oct. 1, 2014) [hereinafter *U.S. Export Control*].

²³ *See infra* Section IV.

²⁴ Arms Export Control Act, 22 U.S.C. § 2780(d) (2013).

²⁵ *Id.*

manufacture and exportation of goods used for defense purposes will have to meet the Act's strict licensing criteria.²⁶

Many small businesses are also affected by the Export Administration Act of 1979 ("EAA"),²⁷ which established the Export Administration Regulations (EAR) coordinated by the Department of Commerce.²⁸ This Act controls software and other technology related dual-use items. The Treasury, mentioned briefly here for completeness but not in the scope of this Comment, deals mainly with sanctions relating to embargoed countries and fines for violations of export controls.²⁹

B. Control Lists

The U.S. government implements all of the multilateral export control regime regulations,³⁰ in addition to various unilateral measures for state security in the form of three main control lists. First, the Commerce Control List (CCL)³¹ includes each item on the Wassenaar Arrangement Dual-Use List,³² all items on the other three control lists, and then also various additional items that the United States deems as security risks.³³ The CCL is organized numerically, with each number, 0-9, corresponding to a different area of product control.³⁴ The larger the number, the more controlled the substance³⁵

The other two control lists are the U.S. Munitions List³⁶ and the Nuclear Regulatory Commission Controls.³⁷ Because these lists affect a smaller portion of the businesses discussed previously, this Comment will mainly focus on the previous lists, primarily the CCL.

²⁶ *Id.*

²⁷ Export Administration Act of 1979, Pub. L. No. 96-72, § 50 U.S.C. App. 2403(e).

²⁸ *Id.*

²⁹ U.S. DEP'T OF COMMERCE, *supra* note 1, at 2-3.

³⁰ Amendment to the International Traffic in Arms Regulations: Updates to Country Policies, and Other Changes, 76 Fed. Reg. 152 (August 8, 2011) (to be codified at 22 CFR part 126).

³¹ *Commerce Control List*, BUREAU OF INDUS. & SEC., U.S. DEP'T OF COMMERCE, <https://www.bis.doc.gov/index.php/regulations/commerce-control-list-ccl> (last visited Oct. 1, 2014).

³² *See infra* Section IV.

³³ *Wassenaar Arrangement Introduction*, WASSENAAR ARRANGEMENT, <http://www.wassenaar.org/introduction/index.html> (last visited Oct. 1, 2014).

³⁴ *Id.*; *see infra* Figure I.

³⁵ *Wassenaar Arrangement Introduction*, *supra* note 33.

³⁶ United States Munitions List, 22 CFR Ch. 1 (4-1-13 Edition).

³⁷ Nuclear Regulatory Commission, 10 CFR 37; *Security Orders and Requirements*, U.S. NRC, <http://www.nrc.gov/security/byproduct/orders.html> (last visited Oct. 1, 2014).

C. *Licensing*

Companies desiring to export any item on the aforementioned lists must submit a license request with the qualifying agency. These license requests may ultimately be reviewed by five different agencies.³⁸ The process to determine whether to approve a license includes a review of the applicant, all parties to the transaction, and quantity and quality of export, including end-use agreements, national security concerns, and international concerns.³⁹ These government entities receive a vast amount of licensing requests, with the Office of Defense Trade Controls and the Department of Commerce receiving some 55,000 and 12,000, respectively, per year.⁴⁰

IV. INTRODUCTION TO MULTILATERAL EXPORT CONTROL REGIME

Multilateral Export Control Regimes (MECR) are international bodies that govern the export and licensing of potentially high risk and hazardous materials.⁴¹ While there are various types export control regimes, such as those for hazardous waste, there are four particular international regimes, governing the export of controlled materials, equipment, and technology for defense-related purposes, which are applicable herein: the Nuclear Suppliers Group, the Australia Group, the Missile Technology Control Regime, and the Wassenaar Arrangement.⁴²

a. The **Nuclear Suppliers Group** (NSG) is a multinational body consisting of 49 member states that controls the export of nuclear related technology.⁴³

b. The **Australia Group** (AG) is an informal collection of 42 member states that controls the export of chemical and biological technology that has the potential to be weaponized.⁴⁴

³⁸ *U.S. Export Control*, *supra* note 20.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *See Multilateral Export Control Regimes*, BUREAU OF INDUS. & SEC., U.S. DEP'T OF COMMERCE, <http://www.bis.doc.gov/index.php/policy-guidance/multilateral-export-control-regimes> (last visited Oct. 1, 2014).

⁴² *See id.*

⁴³ *Organisation*, NUCLEAR SUPPLIERS GROUP, <http://www.nuclearsuppliersgroup.org/en/organisation-information> (last visited Oct. 1, 2014).

⁴⁴ THE AUSTRALIA GROUP, <http://www.australiagroup.net/en/index.html> (last visited Oct. 1, 2014).

c. The **Missile Technology Control Regime** is likewise an informal collection of states that seeks to control rockets and other aerial vehicles capable of delivering weapons of mass destruction.⁴⁵

d. The **Wassenaar Arrangement** (WA) is a MECR consisting of 41 participating states designed to control the exportation of various dual-use goods and technologies.⁴⁶ This MECR will be the focus of this article, detailing the actual controlled items, and the effect on businesses with regards to exporting the respective item. (The WA is the crux of this Comment's purpose).

V. WASSENAAR AND DUAL-USE GOODS

The ultimate goal of the WA is "to contribute to regional and international security and stability, by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, thus preventing destabilizing accumulations."⁴⁷ The WA's primary purpose is to establish a control list for recommendation to all countries around the world.⁴⁸

A. Control List

The WA list of restricted items is broken into two categories: Dual-Use Goods and Technologies (Basic List), and the Munitions List.⁴⁹ This Comment does not concern the latter, focusing instead on the list of Dual-Use Goods and Technologies. The Basic List, which is nearly identical to the control list espoused by the U.S. government,⁵⁰ comprises of ten categories of goods, organized in increasing levels of sophistication.

⁴⁵ *The Missile Technology Control Regimes at a Glance*, ARMS CONTROL ASS'N, <http://www.armscontrol.org/factsheets/mtr> (last updated Dec. 2012).

⁴⁶ *Wassenaar Arrangement Introduction*, WASSENAAR ARRANGEMENT, <http://www.wassenaar.org/introduction/index.html> (last visited Oct. 1, 2014).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Control Lists – Current*, WASSENAAR ARRANGEMENT, <http://www.wassenaar.org/controllists/index.html> (last visited Oct. 1, 2014) [hereinafter *Wassenaar Arrangement Control Lists*].

⁵⁰ *See infra* Figure 1.

Figure I: Dual-Use Goods and Technologies⁵¹

Category 0	Special Materials and Related Equipment
Category 1	Materials Processing
Category 2	Electronics
Category 3	Computers
Category 4	Part 1 – Telecommunications
Category 5	Part 2 – “Information Security”
Category 6	Sensors and “Lasers”
Category 7	Navigation and Avionics
Category 8	Marine
Category 9	Aerospace and Propulsion

VI. INTERACTION OF DUAL-USE GOODS AND SMALL BUSINESS

The main issue that most small businesses face is one of understanding exactly which shipped items are covered by federal regulation. Small businesses in this field frequently lack the expertise necessary to thrive due to the pervasiveness of burdensome regulations and ⁵² control lists.⁵³ Due to governmental administrative inefficiencies, this Comment believes it logically follows that many companies have difficulties ascertaining which federal agency is regulating a certain product.⁵⁴ As a result of the vast overlap in dual-use and defense-related goods, many items may be subject to either ITAR or EAR,⁵⁵ depending on the item’s classification.⁵⁶ Examples of issues that have been subject to overlapping control include: public domain, defense services, fundamental research and technical data definitions.⁵⁷

A. Navigation Issues

As these lists are not streamlined, navigating them requires extreme specificity and knowledge of each individual product, down to its

⁵¹ *Id.*

⁵² NATIONAL SMALL BUSINESS ASSOCIATION, 2013 SMALL BUSINESS EXPORTING SURVEY 3 (2013).

⁵³ See 15 C.F.R. § 730.3 (2012) (stating that EAR is applicable to “dual-use” items); 22 C.F.R. § 120.1 (2011) (showing that ITAR is applicable to defense services and articles).

⁵⁴ *Consent Agreements*, U.S. DEP’T OF STATE, http://www.pmdtc.state.gov/compliance/consent_agreements.html (last updated June 18, 2014).

⁵⁵ Items may include technical data, diagrams, models, and engineering designs.

⁵⁶ 15 C.F.R. § 730.3.

⁵⁷ DIRECTORATE OF DEFENSE TRADE CONTROLS, NOV. 2012 PRIORITIES LIST, *available at* http://pmdtc.state.gov/dtag/documents/plenary_Nov2012_Priorities.pdf.

component makeup.⁵⁸ Many companies need to submit queries into exactly what components are regulated by which departments, and often are subjected to a significant time waiting period simply receive an answer—not to mention the wait period for being approved for the particular license.⁵⁹ With various agencies taking on the decision-making role and, sometimes representing competing interests, the tribulations for small businesses are quite clear.⁶⁰

These issues are further underscored when looking at the myriad of departments that regulate goods: Departments of Defense, State, Commerce, Homeland Security, the Treasury, Energy, and Justice. Coordination among these departments is lackluster to say the least.⁶¹

B. *Multi-Agency Interaction Delays*

The setbacks for small businesses are even more evident when comparing the interactions between the two main regulatory agencies, the Department of State, for weapons-related material⁶², and the Department of Commerce, for dual-use items.⁶³ In most instances, the Commerce list is much less restrictive than the list produced by State.⁶⁴ Thus, determining which items are controlled by each list is a fundamental concern for companies in the business of exporting. However, the departments have disagreed in the past, sometimes claiming jurisdiction of identical items.⁶⁵

This Comment posits that a competing business can seemingly choose which system to apply to—the State list or the Commerce list—based on which is the less restrictive list.⁶⁶ Herein lies the problem.⁶⁷ Small businesses with less experienced export track records will invariably be disadvantaged to the larger businesses that can exploit these systemic flaws—thus creating an uneven playing field for the small business producers.

⁵⁸ *Id.*

⁵⁹ U.S. GAO, *supra* note 19, at 2.

⁶⁰ *Id.*

⁶¹ *Id.* at 31.

⁶² *Id.* at 32.

⁶³ *Id.* at 36.

⁶⁴ *Id.* at 37.

⁶⁵ *Export Control List Review and Creating A Single Control List*, EXPORT.GOV, http://export.gov/ecr/eg_main_027617.asp, (Last visited on Oct. 6, 2014).

⁶⁶ Businesses can, in essence, choose the department that reviews their lists by submitting a request to the department or agency it wishes to use—this only applies when there is overlap in agency or department licensing.

⁶⁷ *Id.*

Licensing is another issue borne of these multi-agency and inter-agency deficiencies.⁶⁸ Licenses, prior to 2003, were usually granted within 13 days. As of 2006, the licensing time had doubled; pushing a 26-day turn-around.⁶⁹ These extra two weeks could easily cost businesses valuable opportunities as competitive businesses position their goods to be rapidly shipped across the global daily. Continuing in this vein, the turnaround time listed above does not even take into account backlogs in each department's review process.⁷⁰ In Fiscal Year 2006, the backlog of State Department license applications reached a peak of 10,000 cases.⁷¹

C. *New Changes as of October 15th, 2013*

On October 15th, 2013, the U.S. government began implementing new regulations and reforms on the export control arena that even further undermined business productivity.⁷² The U.S. government has begun to incorporate the new 600-series export control classification lists,⁷³ which are designed to distinguish those items that are "critical to maintaining a military or intelligence advantage to the United States" (i.e., military items) and those that necessitate a more flexible control program.⁷⁴ The

⁶⁸ *Id.*

⁶⁹ U.S. GAO, *supra* note 19, at 2.

⁷⁰ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-767T, EXPORT CONTROLS: FUNDAMENTAL REEXAMINATION OF SYSTEM IS NEEDED TO HELP PROTECT CRITICAL TECHNOLOGIES: TESTIMONY BEFORE THE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, COMM. ON ENERGY AND COMMERCE, HOUSE OF REPRESENTATIVES, STATEMENT OF ANNE-MARIE LASOWSKI, DIRECTOR ACQUISITION AND SOURCING MANAGEMENT 2-3 (2009); *see also* Nadine Tushe, *Export Controls: Do They Undermine the Competitiveness of U.S. Companies in the Transatlantic Defense Market*, 41 PUB. CONT. L.J. 57, 62 (2011).

⁷¹ *Id.*

⁷² CCL Based Controls, National Security 15 C.F.R. §742.4(b)(ii)(2014); *see also* Export Control Reform—New Order of Review and the "600 Series," BIS.GOV, *available at* http://www.bis.doc.gov/index.php/forms-documents/doc_view/789-600-series-and-ccl-order-of-review; Nicholas A. Rosenberg, *The 600 Series: As part of Export Control Reform, the U.S. government shifts former Munitions List items to a new category on the Commerce Control List*, Nixon Peabody, http://www.nixonpeabody.com/US_government_shifts_former_Munitions_List_items.

⁷³ *Id.*

⁷⁴ Eric L. Hirschorn, Remarks of Under Secretary Eric L. Hirschorn at the Export Control Reform Workshop, Colorado Springs, CO, Bureau of Industry and Security, U.S. Dep't of Commerce (May 19, 2014); *see also* Lindsay A. Meyer et al., *United States: October 15th Export Control Reform Changes Are Around the Corner: Take Time Now To Understand The Impact On Your Existing Licenses & Authorizations*, Mondaq (Dec. 5, 2013), <http://www.mondaq.com/unitedstates/x/262702/Export+controls+Trade+Investment+Sanctions/October+15th+Export+Control+Reform+Changes+Are+Around+the+Corner+Take+Time+Now+To+Understand+The+Impact+On+Your+Existing+Licenses+Authorizations>.

program claims its main goal is to facilitate and encourage exports to U.S. allies.⁷⁵ This Comment views these regulations as a double-edged sword, trying to help, but possibly hindering, the smaller and less-savvy exporters.

The new 600-series has altered the makeup of the existing control lists by transferring many items covered by ITAR and the Defense Department to the CLL, under the jurisdiction of the Department of Commerce.⁷⁶ As aforementioned, the Commerce list is less restrictive. Thus, these recent regulations can aid businesses that export the transferred goods.

The main issue for small-businesses, however, is implementation and industry understanding of the necessary license.⁷⁷ With these new regulations taking effect only months ago, businesses will still be applying for licenses under ITAR. The Defense Department must then return this request, forcing resubmission through Commerce—wasting time and valuable expenses on the company's part.⁷⁸ One saving grace of these regulations, however, allows for the existing license, within two years of the series' implementation, to be carried out until its expiration for the requisite department.⁷⁹

1. Subparagraph Provisions

The new regulations do not stop with the item transfers. One of the most important features of the new 600-series is the subparagraph provision, designed to alter the replaced regulations,⁸⁰ which basically brought certain items under the control of ITAR.⁸¹ Presently, the new rules designate a “catch and release” provision which, according to the series' creators, was adopted because the agencies found that it would be easier to explain what the term *did not* or *should not* encompass as opposed to what it actually includes.⁸² Businesses must thus examine and possibly reclassify certain exports to match this definition.⁸³

⁷⁵ Hirschorn, *supra* note 74.

⁷⁶ CCL Based Controls, *supra* note 72; *see e.g.*, Airworthiness Directives; Airbus Airplanes, 78 Fed. Reg. 22431, 22432 (April 16, 2013) (to be codified at 14 CFR Part 39).

⁷⁷ Meyer, *supra* note 74.

⁷⁸ Export Control Reform, *supra* note 72.

⁷⁹ U.S. DEPT. OF COMMERCE, BUREAU OF INDUSTRY AND SECURITY, EXPORT CONTROL REFORM—NEW ORDER OF REVIEW AND THE “600 SERIES,” http://www.bis.doc.gov/index.php/forms-documents/doc_view/789-600-series-and-ccl-order-of-review.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*; Meyer, *supra* note 74.

⁸³ *Id.*

The new program creates a catch and release program, with subparagraph “A” catching multiple goods, but subparagraph “B” releasing these goods.⁸⁴ Understanding these new provisions and classifying goods accordingly is a very important task for exporters. The problem with the catch and release program for small businesses lies in the ability to understand these new rules and designate the goods accordingly. This is a major step in becoming competitively viable in the larger export market. As of now, while the smaller businesses try to incorporate and understand the new provisions, larger, more sophisticated businesses may leave the smaller ones in the dust.

2. Benefits

This is not to say, however, that the new regulations are completely detrimental to small business owners. There are many benefits to such individuals of the new regulations, which should inform the existing regulations on export controls. If the present regulations could incorporate the positive features of these new 600-series regulations, the result would be a more streamlined and user-friendly approach for small businesses.

First, the migration feature permits goods that were previously controlled by ITAR and now controlled by CCL, to operate under a single license requirement⁸⁵ by amending the existing rules to eliminate the need for multiple licenses.⁸⁶

Second, the new provisions also aid companies desiring to concurrently ship multiple items that are controlled by different departments.⁸⁷ The company must simply apply for licenses for all of the goods to the requisite agency.⁸⁸ For example, if a company needs to ship items controlled by both ITAR and CCL, they may ship both goods together under one license.

VII. OVERLAP ANALYSIS (DUAL-USE AND SMALL BUSINESS)

The interaction between dual-use regulations and business competitiveness seem to have become increasingly interwoven in recent

⁸⁴ *Id.*; see also Skadden, *Export Control Reform Initiative: The Obama Administration Proposes New Transition Rules For Companies Affected By Recently-Proposed Changes to the Current Export Control System*, (Dec. 5, 2013), http://www.skadden.com/newsletters/Export_Control_Reform_Initiative.pdf.

⁸⁵ CCL Based Controls 15 C.F.R. § 742.1(f)(20140); Meyer, *supra* note 74.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

decades. Businesses are frequently at the mercy of the licensing departments when waiting for licenses to be processed.⁸⁹ Many domestic businesses lament that these regulations hinder their competitive advantages in the global market.⁹⁰ For example, K & F Electronics, a small circuit board producer based out of Detroit, had professed a serious loss of profits due to confusion in the licensing market.⁹¹ It has seen multiple requests for identical items rejected at times and at other times granted.⁹² The uneven application of controls is clearly hurting small businesses like K & F, which also expressed difficulty in identifying which parts of its circuits require which licenses—Commerce or State.⁹³ Further, because of the fact that circuit boards may actually be regulated by the State Department, K & F must obtain explicit authorization to export products falling under ITAR.⁹⁴ Considering identical items have been stamped ITAR and non-ITAR upon license request, the problems confounding small businesses alike are evident.⁹⁵

A. U.S. Market Share Issues

Many foreign companies actually avoid U.S. companies when searching for products due to the increasingly strict export regulations.⁹⁶ One such domestic company described issues with French and British customers, stating that those customers “will always buy a non-U.S. sourced part even for substantially more money to avoid [the] EAR and especially ITAR.”⁹⁷ Some multinational companies, most notably Thales Alenia Space,⁹⁸ have also adopted this buying philosophy by adopting an “ITAR-Free” unofficial trade practice.⁹⁹

⁸⁹ Jason Harrison, *For Small Exporters, Security-Related Regulations Can Be A Thicket*, THE WASHINGTON POST (Jan. 4, 2013), available at http://www.washingtonpost.com/business/for-small-exporters-security-related-regulations-can-be-a-thicket/2013/01/04/f9eedf34-5448-11e2-a613-ec8d394535c6_story.html.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*; see also 15 C.F.R. § 734.2(b)(2)(ii) (2009).

⁹⁵ Items stamped ITAR or non-ITAR refers to goods that have been designated to be controlled by the ITAR list or similarly, not on the ITAR list.

⁹⁶ Tushe, *supra* note 70, at 69.

⁹⁷ Nadine Tushe, *Export Controls: Do They Undermine the Competitiveness of U.S. Companies in the Transatlantic Defense Market*, 41 PUB. CONT. L.J. 57, 70 (2011).

⁹⁸ Peter Selding, *Thales Athenia Space: U.S. Suppliers at Fault in “ITAR-free” Misnomer*, SPACENEWS, <http://www.spacenews.com/article/military-space/36706thales-alenia-space-us-suppliers-at-fault-in-%E2%80%9Citar-free%E2%80%9D-misnomer>, (last visited October 28, 2014).

⁹⁹ U.S. GAO, *supra* note 19; see also JEFFERY P. BIALOS ET AL., *FORTRESSES AND ICEBERGS: THE EVOLUTION OF THE TRANSATLANTIC DEFENSE MARKET AND THE*

Further, in a 2006 accompanying report to a UK survey to evaluate British-based companies' attitudes towards controlled American electronics and technologies, British companies were found to be increasingly adopting "an unofficial and unstated 'Buy American Last' policy due to unsatisfactory experiences with U.S. export control bureaucracy."¹⁰⁰

American-based companies are clearly suffering a competitive disadvantage as a result of these issues. Larger American businesses are able to traverse these issues by purchasing products on a larger scale,¹⁰¹ which can be more appealing to foreign customers as only one license must be procured for the same product, thusly offsetting the underlying export control disadvantages.¹⁰² Further, these larger companies' expertise in the field also aids in their global dominance and sales.¹⁰³

Smaller companies, however, are unable to compete with their larger counterparts' ability to lower prices by mass production. In the end, however, the export and technology industry will suffer as such lower-tier companies are often the "source of much innovation [and are] normally the most engaged in the global market place in the aerospace/defense sector."¹⁰⁴

B. Competitive Market Loss

The problem highlighted above is compounded by the fact that these countries can find the goods elsewhere with little export control hassle.¹⁰⁵ Even if U.S. exporters have the ability and requisite licenses to ship items abroad, the time and hassle of waiting for an export license may drive many buyers to seek alternative sources, with much fewer limitations on the exact items.¹⁰⁶

IMPLICATIONS FOR U.S. NATIONAL SECURITY POLICY 693 (2009) (citing the GAO's criticism of the system for over a decade and the existence of over 60 reports by private and government groups on export controls from 1997 to 2007).

¹⁰⁰ Response of Brinley Salzman to Request for Public Comments on the Effects of Export Controls on Decisions to Use or Not Use U.S.-Origin Parts and Components in Commercial Products and the Effects of Such Decisions, 74 Fed. Reg. 263, 263-264 (Jan. 5, 2009), available at http://efoia.bis.doc.gov/pubcomm/records-of-comments/record_of_comments_index_for_design_out_of_us_controlled_parts.pdf.

¹⁰¹ Bialos, *supra* note 99.

¹⁰² *Id.*

¹⁰³ COAL. FOR SEC. & COMPETITIVENESS, *supra* note 16.

¹⁰⁴ Ctr. For Strategic & Int'l Studies, Briefing of the Working Group on the Health of the U.S. Space Industrial Base and the Impact of Export Controls 10 (2008).

¹⁰⁵ See IAN F. FERGUSSON, CONG. RESEARCH SERV., CRS-2, THE EXPORT ADMINISTRATION ACT: EVOLUTION, PROVISIONS, AND DEBATE (2003).

¹⁰⁶ U.S. GAO, *supra* note 19, at 2.

This idea is illustrated by a recent market loss example in which a U.S. company lost business and market share as a result to unnecessary export controls.¹⁰⁷ The shipment of krypton electric switches (used by doctors to breakup kidney stones, but also listed as dual-use on the CCL because the part can be used as a component of a nuclear launcher) is prohibited for sale in varying countries in the Middle East, including Iraq.¹⁰⁸ Siemens Corporation, a German company, filled in the gaps and provided these goods to various Iraqi hospitals.¹⁰⁹

This Comment proposes that it may seem troublesome to many Americans to sell anything to Iraq, let alone items capable of aiding in the development of a nuclear launcher considering the instability of the region. But, taking a step back, it becomes clear that these regulations do not harm the targeted countries but rather the U.S. companies who might otherwise export goods to sanctioned nations. Germany, a leading power in the international economic market, seemingly does think the dangers outweigh the benefits with regards to shipping such goods to Iraq; France has equally engaged in this balancing test and deemed it appropriate to shipping like goods to Iraq.¹¹⁰ In fact, following the U.S.'s successful toppling of Saddam Hussein's regime in Iraq, American forces found a multitude of goods, restricted for sale on the U.S. control list, in Iraq that were supplied by German and French companies in compliance with European export control laws.¹¹¹

These hospitals had valid licenses and end-user agreements¹¹²; however, because of over-inclusive U.S. export controls that precluded American firms from conducting business with these hospitals, U.S. companies lost business opportunities and, more importantly, global market share. It may seem that with an increased proliferation of such materials, the likelihood of said materials falling into the wrong hands increases. However, what stops German or French companies from simply sending more of these items? What stops German companies from producing a few extra switches a year that might otherwise be supplied by American companies, if the U.S.'s stringent export controls were to be loosened? The threat of proliferation already exists as a result of the actions taken by other companies. Hence, concerning items that

¹⁰⁷ William Safire, Op-Ed., *Selling Our Secrets*, N.Y. TIMES, Sept. 30, 2002, at A6.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at A25. This Comment has not discussed, for the sake of brevity, the idea of whether any other country lists the specific part as controlled.

¹¹⁰ Nathan T.H. Lloyd, Note, *Rebuilding a Broken Regime: Restructuring the Export Administration Act*, 37 VAND. J. TRANSNAT'L L. 299, 305 (2004).

¹¹¹ *Id.*

¹¹² *Id.*

are less than sinister, these unwieldy regulations on domestic firms necessitate change.

The Secretary of State is permitted to make a discretionary decision to approve all licenses for good that meet licensing requirements¹¹³ where he or she can determine that an export control is ineffective due to the availability of the same item in non-U.S. markets.¹¹⁴ Additionally, the Secretary may remove the items from the CLL if he or she deems it to be the appropriate action.¹¹⁵

It seems, at least intuitively, to be a perfect and foolproof system. If the United States sees other goods being exported by foreign companies in compliance with the host country's requisite export laws, then the U.S. should not fear exporting those items as, theoretically, such controlled items are already available in the world market. It logically follows that these items—controlled, of course, by the WAWA—are relatively safe for exportation,¹¹⁶ and may be consequentially removed from the export control list. Therefore, any item that remains on the U.S. control list is deemed hazardous and not exported by any other countries.¹¹⁷ This premise, in theory, seems ideal. The logical question that follows, however, is what is the point of the U.S. having a CCL or a regulatory list of its own at all? Why not just use the Wassenaar List in its entirety?

The “ideal” scenario presented above is far from present in the U.S. control regime. There are numerous specifications on the U.S. control lists not on the Wassenaar List, and thus not on many of the leading exporting countries' lists, either.¹¹⁸ The U.S. prohibits exports of controlled items to certain countries altogether, regardless of export licenses.¹¹⁹ This demonstrates that the U.S. export controls are vastly over-inclusive: these regulations encompass any variety of items that are either not controlled or are nominally controlled by a multitude of countries, and hampers the sale of those items abroad. In the end, U.S. small businesses are at the losing end of the over-inclusive regulations—losing market share and profits in the process.

A simple solution to this problem lies in cooperative information sharing and licensing procedures. U.S. companies ought to be allowed to submit requests proving that certain items are uncontrolled by various other countries around the world. The Secretary of State should then respond by having the State Department obtain agreement within a short

¹¹³ Export Administration Act of 1979, 50 U.S.C. §§ 2401-2420(4)(e) (2006).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Wassenaar Arrangement Control Lists*, *supra* note 49.

¹¹⁷ *Id.*

¹¹⁸ *Commerce Control List*, *supra* note 5.

¹¹⁹ *Id.*

period from the other countries to control the items they are exporting to countries of concern, by removing the item from the CCL, or by creating a special licensing system for these items that is much easier than the normal export license system.

C. *ITAR Control Effects*

In conjunction with the varying degrees of difficulty that the CCL poses for small businesses desiring to export abroad, ITAR poses an even stronger limitation, sometimes tying up business for months at a time.¹²⁰ Once again, the United States is in the minority when it comes to munitions and governmental use controls.¹²¹

Unlike nearly every other nation, the U.S. imposes a requirement that it approve re-exports of U.S.-origin items.¹²² This re-export regulation restricts the sale of ITAR-restricted goods, even after they leave the United States.¹²³ Most countries implement export protocols that place the onus on the recipient country to control the item once the item has been shipped.¹²⁴ In this situation, the United States finds itself, once again, in the minority because ITAR and the U.S. government requires these controlled goods to be under U.S. jurisdiction for the lifetime of any good—termed post-shipment verification.¹²⁵ This requirement applies to shipments or re-exports of the item from the recipient country to another and even in-country shipments.¹²⁶

Every time the owner of an American-exported good seeks to move that good across another country's border, he or she must first seek permission from the U.S. Department of State.¹²⁷ This regulation can be extremely cumbersome for purchasers who desire to re-export or transfer the product to another destination, as many companies' business model revolves around middle-man type work.

¹²⁰ Export Control Reform, *supra* note 72.

¹²¹ *Id.*; see also Howard Loewen, *ITAR Export Control Laws: What Every UAV Member Needs to Know About USML Products and ITAR Regulations*, MicroPilot (Jan. 21, 2014), <http://www.micropilot.com/pdf/itar-export-control-laws.pdf>.

¹²² *Deemed Reexport Guidance*, BUREAU OF INDUSTRY AND SECURITY, <http://www.bis.doc.gov/index.php/policy-guidance/deemed-exports/deemed-reexport-guidance> (last visited October 27, 2014).

¹²³ Proliferation of Chemical and Biological Weapons, 15 C.F.R § 742.1(b) (2014).

¹²⁴ Report to Senator Jon Kyl, U.S. Senate, *Export Controls Post-Shipment Verification Provides Limited Assurance That Dual-Use Items Are Being Properly Used*, UNITED STATES GENERAL ACCOUNTING OFFICE, available at <http://www.gao.gov/new.items/d04357.pdf>.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

The problem is self-evident. Even if a foreign company decides to wait for the lengthy process of U.S. export licensing, it still must comply with various U.S. controls. Every time it desires to sell this product, it must apply for a re-transport license from the U.S. government and inform its future purchaser that it, too, must apply for a license, if he or she wished to resell the item.¹²⁸ Rhetorically, with various simpler alternatives at their fingertips, why on earth would a consumer buy a U.S. ITAR-controlled good? Here? Here, small businesses once again lose valuable market share and business profits abroad as a direct result of cumbersome U.S. regulations.

Equally problematic for U.S. businesses with ITAR-controlled goods is the temporal factor. The time it takes¹²⁹ to apply for an ITAR-controlled good is vastly more than that of a CCL-controlled good.¹³⁰ Similarly, many goods may be simply placed on the ITAR-controlled list because one of the company's customers happens to be the U.S. government.¹³¹ Anytime the U.S. government is a customer of an item, that particular item must be controlled by ITAR.¹³² Companies may lobby to remove their goods from ITAR, but the process can take months.¹³³ Compounded with the inter-agency problems described above, ITAR classifications pose serious financial problems for small businesses exporting abroad.¹³⁴

D. Green Technology Challenges

Alarming, another industry that may be harmed by the proliferation of export controls in the United States is that of green technology.¹³⁵ Green technology, which has become an emerging and fast growing industry in recent decades, aids countries in the fight against the harmful effects of carbon emissions and global climate change.¹³⁶

¹²⁸ *Id.*

¹²⁹ See *infra* p.13 and note 68.

¹³⁰ DEPARTMENT OF HOMELAND SECURITY, *Telecon Recap: Export Controls Requirements on Form I-129: A Conversation with the Commerce Department* (last visited Oct. 13, 2014).

¹³¹ Arms Export Control Act, Pub. L. 90-629, 90 Stat. 744; see also Howard Loewen, *supra* note 122.

¹³² Arms Export Control Act, *supra* note 132.

¹³³ *Id.*

¹³⁴ U.S. GAO, *supra* note 19.

¹³⁵ JENNIFER WATTS & KYLE BAGIN, BUREAU OF INDUS. & SEC., CRITICAL TECHNOLOGY ASSESSMENT: IMPACT OF U.S. EXPORT CONTROLS ON GREEN TECHNOLOGY ITEMS 1 (2010).

¹³⁶ Jim Norman, *Where There's Never an Oil Shortage*, N.Y. TIMES, May 13, 2007, at J6.

Of the total U.S. exports (\$1,300.5 billion) in 2008, 5.8 percent (\$75 billion) were green related technologies, and only 0.9 percent (\$697.4 million) of these required an export license.¹³⁷ The final calculated percentage of total exports represented by licensed green technologies may be nominal (0.05 percent) but this figure constituted 22.5 percent of total licensed exports.¹³⁸ These figures demonstrate how regulated green technologies actually are—representing a hair more than one-twentieth of *total* exports but well over a fifth of total *licensed* exports.

Many items used for alternative and green technology require export licenses such as: wind turbines, solar panels, alternative fuel resources for alternatively fueled vehicles, water purification devices, and energy efficiency devices.¹³⁹

What does the above say for small businesses trying to compete in the green technology market? Many businesses are hindered by the vast amount of U.S. export controls on these types of technologies. At the same time, while these businesses are filing for export licenses—especially for ITAR-controlled products categorized as such because of existing governmental contracts for those goods or simply inter-agency administrative hurdles—they are losing out to their foreign counterparts, who are supplying the same products without the hassle of export or re-export licensing procedures.

E. Sanctions

There are three main government entities that focus on the enforcement of U.S. government export controls, including: Directorate of Defense Trade Controls (DDTC), Bureau of Industry and Security (BIS), and the Department of Treasury.¹⁴⁰ The Department of Homeland Security via Customs and Border Protection, and the Coast Guard, also play a large role in the enforcement of export controls by screening processes regarding containers and other modes cross-border shipment.¹⁴¹ Starting in 2007, the U.S. government drastically increased its civil penalties for export control violations by 500% on corporations and individuals, from \$50,000 to an astounding \$250,000.¹⁴²

¹³⁷ WATTS & BAGIN, *supra* note 136, at 5.

¹³⁸ *Id.*

¹³⁹ *Id.* at 6.

¹⁴⁰ The Research Foundation for the State University of New York, *Export Control Penalties and Sanctions*, SUNY RF (Dec. 5, 2013), https://portal.rfsuny.org/portal/page/portal/The%20Research%20Foundation%20of%20SUNY/home/export_controls/Export%20Control%20Penalties.

¹⁴¹ *Id.*

¹⁴² International Emergency Economic Powers (IEEPA) of 2007, PUB. L. NO. 110-96, 121 STAT. 1011; *see* Jamie A. Joiner & Mark C. Joye, *Complying with U.S. Export*

This Comment contends that the most staggering change is that these penalties may be applied retroactively to incidents that occurred before 2007.¹⁴³ Some of the more notable sanctions and penalties include: \$680,000 against Cabela's Sporting Goods for shipping rifle scopes in violation of EAR regulations, \$4 million against Lockheed Martin for exporting technical data relating to missile defense, and \$3 million against Boeing for administrative violations.¹⁴⁴ It can be argued that for a company like Lockheed, which realized 2012 net sales of over \$47 billion, this penalty is a drop in the bucket.¹⁴⁵ However, this again highlights the main issues affecting small companies while larger companies, benefitted also by the ability to better understand the licensing process, are also much better financially positioned to handle any potential sanctions or penalties. The effects on small businesses could be drastic considering the monetary compensation that these companies were required to pay.

F. *The Cold Hard Facts*

In a 2013 comprehensive survey by the National Small Business Association,¹⁴⁶ a large majority of the 500 businesses surveyed can truly be deemed as small businesses: fifty-two percent of respondents employed nine employees or fewer and seventy percent reported spending less than \$500,000 on payroll each fiscal year.¹⁴⁷ Further, forty-six percent of the businesses claimed the main barrier to entry to export goods arises in that they "don't know much about it and [are] not sure where to start,"¹⁴⁸ which logically follows from the fact that fifty-four percent of respondents have been exporting for ten or fewer years.

The most telling numbers, however, were on the import fronts. The survey clearly showed that the largest impediments to small businesses are domestic export controls, rather than foreign import controls; fully sixty-nine percent of companies claimed they had no trouble exporting as a result of foreign import regulations.¹⁴⁹

Controls: Practical Considerations and Guidelines for Businesses, 17 CURRENTS: INT'L TRADE L.J. 59, 64 (2008).

¹⁴³ *Id.*

¹⁴⁴ Joiner, *supra* note 143.

¹⁴⁵ Lockheed Martin, Annual Report (Form 10-K) (Feb. 28, 2013).

¹⁴⁶ NATIONAL SMALL BUSINESS ASSOCIATION, *supra* note 52, at 2. The National Small Business Association conducted a 2013 survey of over 500 small business owners competing in the export market—evaluating various facets of the current export control regulations and the effects on each business.

¹⁴⁷ *Id.* at 3.

¹⁴⁸ *Id.* at 5.

¹⁴⁹ *Id.* at 9.

Lastly, the survey reports that three-quarters of the responding businesses reported export control complexity issues, another three-quarters reported difficulties with time-consumption regarding navigating these controls, and fifty-three percent described difficulties as a result of dealing with multiple agencies.¹⁵⁰

G. *Other Considerations*

Some other potentially damaging and unapparent issues include transfers to foreign employees and suppliers' classification.¹⁵¹ The importance of suppliers' classifications cannot be overstated. Any American company that receives goods from overseas and subsequently ships fully constructed items incorporating those goods can be liable under supplier's classification failures. In order to ship any product, it must be classified on the CCL.¹⁵² However, many foreign companies that supply goods are not familiar with U.S. export controls, and this unfamiliarity may led to grievous errors, such as failure to receive proper classifications of the component parts that a company may desire to re-export.¹⁵³

A second damaging issue involves foreign employees. If a company supplies information (controlled material) to a foreign employee who is a noncitizen or permanent resident of the U.S., that information can be deemed an export and, thus, in violation of export controls.¹⁵⁴ Each business should be familiar with this regulation entitled the "Deemed Export Rule."¹⁵⁵

H. *Recommendations*

Because of the issues that vendors and buyers may have with regards to classifications, a helpful law could incorporate various export and import requirements on the side of the foreign supplier. Given vendors' tendencies to include liability clauses that exclude liability for export controls, the supplier or vendor should be required to provide export classifications, thus sharing the burden on all the parties involved.¹⁵⁶ This would also aid and protect small businesses that are relatively new to the market and unfamiliar with the vendors' liability limitation practices.

¹⁵⁰ *Id.* at 13.

¹⁵¹ Suppliers' classification refers to the selling party's description and designation of the good. *Id.*

¹⁵² NATIONAL SMALL BUSINESS ASSOCIATION, *supra* note 52, at 5.

¹⁵³ *Id.*

¹⁵⁴ 15 C.F.R. § 734.2(b)(2)(ii) (2009).

¹⁵⁵ *Id.*

¹⁵⁶ Joiner, *supra* note 143.

This requirement would ensure that suppliers would not only share a portion of the liability, but also a quicker and easier license classification determination because component suppliers are surely more aware of various export controls on their products than final product manufacturers, who have less of a gauge on what specific components of a total product are regulated.

The second proposed regulation deals with the Deemed Export Rule. Through continued global trade, businesses have employees all over the globe. Businesses should not be limited on the information they can provide employees solely because said employee is a non-U.S. citizen. A possible way around these potential export control violations is an employee vetting system. Each company that deals in controlled goods should be allowed to submit a list of foreign employees to whom it would like to afford access to various controlled material. Similar to an export control, the employees could be vetted in a single-streamed process, thus reducing the need for multiple and overlapping export controls every time a company wishes to provide controlled material to a foreign employee.

VIII. TAKEAWAY

So what is the takeaway after looking at all of the daunting tasks that small businesses are facing? Is there any way that businesses can survive in such a regulation-ridden world? The answer is “of course,” and those businesses will continue to survive, if not thrive. The key to success, which can make a world of difference, is one of knowing and understanding the new regulations before they take effect, in addition to the old ones currently in place.

The critical point that small businesses need to understand is how each regulation affects their individual business. Trying to understand the overall export control framework may be a challenge, but if a company can understand their niche, they stand a better chance at compliance.

That is not to say, however, that the onus is solely on the part of the small businesses. As discussed above, agency overlap is a huge problem in export control compliance today. Each individual agency should understand the areas it is designated to control. Any overlaps should be defaulted to the Department of Commerce, considering its relatively superior temporal ability in license turnaround with respect to other executive departments. Although this may raise security concerns, goods on which multiple government entities overlap will likely be items the

Department of Defense¹⁵⁷ has no need to control in the first place—as any weapons material and ITAR-controlled items will automatically go to the Defense Department.

The U.S. government should also incorporate more regulations like those implemented on October 15, 2013—using a catch and release subparagraph scheme that businesses can easily understand. Regulation navigation is also a key concern that should be addressed by future legislation. Supplementing the plethora of regulations focused on minor specifications with common goods that use each component could make a huge difference. Further, requiring foreign exporting companies (companies importing components into the United States) to provide licensing information to U.S. re-export companies can further reduce the burden on small business manufacturers that might otherwise be unaware of the particular export restrictions.

The U.S. government also needs to do modify its re-export license requirement for ITAR-controlled goods. This requirement not only creates delays in shipping, but also seriously injures businesses selling items abroad, as the purchaser in many instances is most likely not the end-consumer. The federal government might also reach agreements with various trusted countries and allow these countries to control the re-exportation of certain goods originating from the United States. This would allow the U.S. to continue regulating goods to potentially dangerous, high-risk countries, without requiring every single item to need a re-export license. These agreements with trusted countries would also ensure that the original licensing requirements are not affected.

If each group, small businesses, importers, agencies, and the U.S. government, were to work in tandem and make a concentrated effort to do their individual parts, the U.S. and small domestic businesses will undoubtedly win back their market share on the world-exportation front.

¹⁵⁷ This Comment proposes that the Department of Defense should not be involved in the regulation of certain goods that can be regulated by the Commerce Department because the latter, as evidenced by this comment, usually regulates non-military items, thus not under the munitions list's jurisdiction.