# What next for US space export controls?

**US space export controls: Calls for change, but next steps unknown. By Edward Goetz and Jeff Snyder**

Space has been a hot topic in the news recently. On 20 December 2019, the United States Space Force ('USSF') was established becoming the newest US military service in 72 years. According to the USSF's official website, the new service was necessary because, 'Space has become essential to our security and prosperity – so much so that we need a branch of our military dedicated to its defense.' Then, on 30 May, a SpaceX Falcon 9 rocket launched Crew Dragon which successfully delivered two astronauts to the International Space Station. This was the first US-manned mission to space since the retirement of the Space Shuttle and it was followed on 2 August with a successful return to Earth for Crew Dragon.

There are also reports of a much higher launch rate in the years to come, bringing thousands more satellites into orbit. SpaceX's Starlink programme (designed to bring inexpensive, satellite-based internet access) already has about 800 satellites in low-Earth orbit out of a planned total of 12,000 the Federal Communications Commission has approved. Other companies such as Amazon and Telesat are planning similar ventures.

With such renewed interest in space and what appears to be a bright financial future for the industry, how will US companies fare? More to the point for our purposes, how successful will they be under the current US export control regime? Do these controls help or hinder US industry? One recent effort suggests the latter. On 4-7 May 2020, over 120 people from government, industry, and academia met for a virtual meeting called 'State of the US Space Industrial Base 2020 Conference and Workshop'. The conference was sponsored by USSF, the Defense Innovation Unit ('DIU'), and the US Air Force Research Laboratory ('AFRL'). The sponsors 'organised the workshop around the six areas vital to overall US national space power and the US space industrial base, and the areas most likely to be centers of gravity in great power competition.'[1] These included space policy and finance tools, space information services, space transportation and logistics, human presence in space, power for space systems, and space manufacturing and resource extraction.

**US COMPANIES' POTENTIAL MARKET SHARES HAVE BEEN ERODED BY THE RISE OF NON-ITAR COMPANIES IN EUROPE.**

In July 2020, a report was issued documenting the findings and recommendations of the conference. Export control laws were mentioned several times, none good. One of the key issues and challenges for space policy and finance tools was 'Export controls stifle US economic competitiveness'.[2] The International Traffic in Arms Regulations ('ITAR') was criticised as having 'unintentionally limited international collaboration, innovation and trade, preventing US space companies from being the suppliers of choice in a globally competitive economy. US companies' potential market shares have been eroded by the rise of non-ITAR companies in Europe.'[3] To help solve this problem, a recommendation was made to 'establish interagency export information sharing' in order to 'speed up existing Department of State and Commerce efforts to move technologies from the US Munitions List ('USML') to the Commerce Control List ('CCL').'[4]

Under space information services, a recommendation was made to 'Continue to lower multiple regulatory barriers and increase efficiency of regulatory processes for commercial enterprise specifically in regards to US interactions with allies. Revise export control laws for data products and development to remove historical barriers to international collaboration.'[5]

Given this criticism, what is the US government doing to address these issues? The interim final rule for Export Control Reform ('ECR') for Category XV, Spacecraft and Related Articles, went into effect on 10 November 2014. Category IV (Launch Vehicles…) was just ahead with an implementation date of 1 July 2014. Then, in early 2017, the Directorate of Defense Trade Controls ('DDTC') amended Category XV again to 'describe more precisely the articles warranting control' in this category.[6] Each of these notices, like all of the ECR changes, had a corresponding amendment to the CCL published the same day by the Bureau of Industry and Security ('BIS').

Nothing new was published on either category until 8 March 2019, when DDTC and BIS published advance notices of proposed rule making ('ANPRM') requesting comments on USML Categories IV and XV.[7] In addition to specific technical questions on certain items, both ANPRMs asked similar questions. Both agencies wanted to know if there were specific defence articles in either category that had entered into normal commercial use, if there were defence articles for which commercial use was intended, or anticipated, in the next five years, and what the cost savings would be to private entities from shifting control of items from the USML to the CCL.

DDTC and BIS also wanted to understand if NASA's future Lunar Gateway, which may be described in Category XV(a), moved to the CCL, and what the appropriate controls for items associated with it would be? DDTC also asked if there were any emerging technologies that could warrant USML control in either Categories IV or XV.

Comments for the ANPRMs were due on 22 April 2019. DDTC received 141 pages of responses from industry, while BIS received 117 pages. However, in the 18 months

since then, neither agency has publicly announced the next step in the process. Much of this is likely due to manpower shortages, other priorities, and the Covid-19 pandemic.

One other ANPRM warrants close attention because it can potentially drive export controls on space-related items. On 19 November 2018, BIS published a Federal Register Notice requesting industry comment on laying out 'criteria for identifying emerging technologies that are essential to national security.'[8] BIS identified 14 representative technology categories, including biotechnology, artificial intelligence, expert systems, and position, navigation, and timing technology. Much like the previous ANPRMs discussed, a final rule has not been proposed.

## Practical compliance considerations

Increased sourcing by companies to satisfy the skyrocketing demand will require suppliers to be even more vigilant in managing export compliance obligations. First, knowing your product and your customer, and where you are in the supply chain is critical. Pure raw material suppliers of commodity/off-the-shelf items will rarely encounter significant compliance obligations to deliver items in the United States. Second, for suppliers of further manufactured goods, and parts and components, compliance obligations are more likely to arise. For example, customising a part or component for a space-related application could implicate the ITAR and require registration with DDTC and other compliance obligations, including licensing. Third, whether EAR or ITAR, if you receive specifications from a customer, you must know the export control status of the drawings/specifications because that will tell you if the item could be ITAR-controlled, but even before you produce anything, there could be restrictions on sharing the information with subcontractors or with deemed exports. Knowing where you are in the supply chain is critical to understanding space-related export control compliance obligations.

## LINKS AND NOTES

1. Butow, S., Cooley, T., Felt, E., & Mozer, J. Summary Report from the State of the Space Industrial Base 2020 Virtual Solutions Workshop. AFRL. July 2020. https://cdn.afresearchlab.com/wp-content/uploads/2020/07/27223753/State-of-the-Space-Industrial-Base-2020-Report_July-2020_FINAL.pdf, page 2.
2. ibid, page 18
3. ibid, page 18
4. ibid, page 21
5. ibid, page 28
6. International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XV; 82 Fed. Reg. 2,889 (10 January 2017).
7. Request for Comments Regarding Review of United States Munitions List Categories IV and XV; 84 Fed. Reg. 8,486 (8 March 2019 and Request for Public Comments Regarding Review of Commerce Control List Items Transferred From the Unites States Munitions List Categories IV and XV; 84 Fed. Reg. 8,485 (8 March 2019).
8. Review of Controls for Certain Emerging Technologies; 83 Fed. Reg. 58,201 (19 November 2018).

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