

E-ALERT | International Trade Controls

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THE NEXT STEP IN EXPORT CONTROL REFORM: PROPOSED REVISIONS TO CONTROLS ON MILITARY AIRCRAFT UNVEILED

On November 7, 2011, the [Commerce Department's Bureau of Industry and Security](#) ("BIS") and the [State Department's Directorate of Defense Trade Controls](#) ("DDTC") issued proposed rules ("Proposed Rules") and requests for public comment concerning revisions to the two export control lists they administer – the Commerce Control List ("CCL") of the Export Administration Regulations ("EAR") and the U.S. Munitions List ("USML") of the International Traffic in Arms Regulations ("ITAR"). The Proposed Rules are part of the Administration's Export Control Reform ("ECR") initiative and focus on fundamental reform of controls over military aircraft and related parts and components. They also provide important insights into future changes to the controls on other types of items.

The framework for many of the proposed changes was set forth in a [July 15, 2011 proposed rule](#) in which BIS proposed creating a new part of the CCL that it termed a "600 series." This series would consist of new Export Control Classification Numbers ("ECCNs") to control items that would be moved from the USML to the CCL. This new series also would control certain other military-related items already controlled elsewhere on the CCL. The Proposed Rules use the framework from that earlier notice to shift from the USML to the CCL aircraft and related articles that the Administration determined no longer warrant control under USML Category VIII (Aircraft and Associated Equipment) and to realign controls on items currently controlled under other ECCNs.

Under the Proposed Rules, an article remains on the USML if it (i) is "inherently military and otherwise warrants control on the USML," or (ii) is common to civil aircraft applications but "possesses parameters or characteristics that provide a critical military or intelligence advantage to the United States and that are almost exclusively available from the United States." Military aircraft and articles that are specially designed for military aircraft but do not fit these descriptions would be controlled instead on the CCL, in five newly-created "600 series" ECCNs.

Significantly, the Proposed Rules also set forth certain information that is relevant to the ECR initiative beyond the controls on aircraft and that would impact future revisions to other areas of the USML and CCL. We highlight below these broader points before describing in more detail how the Proposed Rules would change controls over aircraft and related items.

Comments on the Proposed Rules are due by December 22, 2011. After reviewing all comments and revising their respective Proposed Rules, BIS and DDTC are required under Section 38(f) of the Arms Export Control Act to notify Congress of their intent to transfer items from the USML to the CCL. If Congress does not object, BIS and DDTC will publish their final respective rules.

INSIGHTS INTO EXPORT CONTROL REFORM PROVIDED BY THE PROPOSED RULES

Beyond proposing a realignment of controls over military aircraft and related items, the Proposed Rules also will have implications for export control reform more generally.

Rejection of Tiered Approach

In their [December 2010 Advanced Notices of Proposed Rulemaking \(“ANPRM”\)](#), BIS and DDTC described the Administration’s plan to make the USML and the CCL positive, tiered, and aligned so they could eventually be combined into a single control list. The notion was that both lists (but in particular the USML) should be more descriptive of the items they controlled, and the lists should correspond. The tiering concept was intended to segment the lists into parts or “tiers” that would be subject to different levels of control for exports and reexports, depending on the sensitivity of the items in the tiers. The Proposed Rules indicate that the Administration has decided, as an interim step, to revise the USML and CCL to make them more positive but to delay its plan to tier the export control lists until a later date. Accordingly, proposed revisions to Category VIII and other USML and CCL categories (including Category VII, the military vehicles category, which will now be further revised) will be based on positive lists but will not designate items as belonging to tiers.

Definition of “Specially Designed”

The Proposed Rules also indicate that a core definition in export controls – the definition of “specially designed,” which is used frequently to designate items such as parts and components that merit control because they were designed for a particular application or end item – remains in flux. In particular, the new Proposed Rules do not resolve different definitions proposed for this key term by BIS and DDTC in prior proposals, a matter which is still being studied with the help of an industry group. DDTC’s Proposed Rule states that its December 2010 proposed definition should be used to review its Proposed Rule, but BIS’s Proposed Rule indicates that it continues to rely on its July 15 proposal for this definition. Thus, reviewers of the Proposed Rules apparently will need to take both proposed definitions into account. In addition, BIS is no longer accepting comments of a general nature regarding the July 15 proposed definition of “specially designed” but will consider comments on the impact of the term as used in its new Proposed Rule.

Application of the EAR’s *De Minimis* Threshold Principle

As indicated in the July 15 proposed framework for revisions to the CCL, BIS’s Proposed Rule also would affect the determination of whether certain foreign-made items are subject to the Commerce Department’s export jurisdiction. At present, most foreign-made items are subject to the EAR if they contain more than 25 percent controlled U.S.-origin content and the items are not destined to a terrorist-supporting country. The BIS Proposed Rule would lower from 25 percent to 10 percent the EAR’s general *de minimis* threshold for exercising jurisdiction over the export and reexport of foreign-made items that incorporate 600 series items.

The Proposed Rule states that foreign-made items that incorporate any amount of 600 series items would be subject to the EAR if the foreign-made items contain more than 10 percent U.S.-origin controlled content by value. We understand from BIS, however, that this language does not reflect BIS’s intent. Instead, BIS has indicated that it means to subject to the EAR foreign-made items where the value of the 600 series content within those items (rather than the total value of the controlled U.S.-origin content in the item) exceeds 10 percent of the value of the foreign-made item. While the *de minimis* percentage of U.S.-origin content would be lower for foreign items containing this newly designated 600-series content, this would nevertheless be a liberalization of the current treatment of items that would be moved from the USML, since the ITAR has no *de minimis* threshold.

In other words, at present, a foreign-made item that contains any amount of ITAR-controlled content is treated as controlled by the ITAR.

Revisions to License Exceptions STA and GOV

BIS's Proposed Rule also would broaden the scope of License Exception STA (§ 740.20 of the EAR) as it applies to 600 series items. Under BIS's July 15 proposed rule, License Exception STA would authorize the export of 600 series (and other eligible) items if, at the time of export, reexport or transfer (in-country), the item is destined for ultimate end use by the armed forces, police, paramilitary, law enforcement, customs and border protection, correctional, fire, and search and rescue agencies of a government in one of 36 countries identified in STA.

The Proposed Rule would also make 600 series items eligible for License Exception STA when exported, reexported, or transferred for the "production" or "development" of an item for ultimate end use by any of those foreign government agencies in one of the STA-36 countries, by the U.S. government, or by any person in the United States. BIS has proposed this revision because the U.S. government recognizes that there would be a significant volume of desirable trade between and among private companies in the STA-36 countries regarding 600 series end items that would ultimately be for use by one of the foregoing government agencies of an STA-36 country, the U.S. government, and manufacturers in the United States.

BIS has noted, however, that certain 600 series software and technology should be more tightly controlled, and thus, that license exceptions should not be as freely available to authorize the export of these items. Accordingly, a new Supplement No. 4 to Part 740 of the EAR would identify 15 types of 600 series software and technology that may not be exported, reexported, or transferred pursuant to License Exceptions GOV or STA, other than shipments to U.S. government agencies for official use or U.S. government personnel for personal or official use.

Jurisdiction of Items Subject to Previous Commodity Jurisdiction Determinations

BIS's Proposed Rule provides that, in general, exporters and reexporters will be entitled to rely on the revised USML categories when making jurisdictional determinations (*i.e.*, when determining whether items are subject to the EAR or ITAR). This is true despite any prior commodity jurisdiction ("CJ") ruling from the State Department that an item was ITAR-controlled. Consequently, if the State Department had made a CJ determination that a particular item was subject to the jurisdiction of the ITAR, but that item does not appear on the revised USML category, a new CJ determination will not be required unless there is doubt about the application of the new USML category to the item.

In addition, the Proposed Rule indicates that if the State Department had made a CJ determination that a particular item was not subject to ITAR jurisdiction but the item was not described on the CCL, and is an aircraft-related commodity "specially designed" for a military application, the item would become controlled under the paragraph .y99 of the applicable ECCN and would be subject to Anti-Terrorism ("AT")-only controls. Under this approach, some items that exporters had been treating as EAR99 may now be considered as AT-controlled. This should have little practical impact, however, beyond limiting the ability of these items to be reexported to Iran or transferred to a military end-use in China.

CATEGORY VIII—REVISIONS TO THE USML

DDTC's Proposed Rule would narrow USML Category VIII to cover only those aircraft and related articles that the Administration has determined warrant control under the stringent requirements of

the Arms Export Control Act. Articles now subject to USML Category VIII that do not meet these requirements would become subject to the new 600 series controls in Category 9 of the CCL.

The revised USML Category VIII would generally control a positive list of parts, components, accessories, and attachments that continue to warrant control on the USML but would generally not control all parts, components, accessories, and attachments that are specifically designed or modified for military aircraft. One principal exception is that parts, components, accessories, and attachments would remain in Category VIII if they are specially designed for the B-1B, B-2, F-15SE, F/A18E/F/G, F-22, F-35 (and variants thereof), or F-117 aircraft, or for U.S. government technology demonstrators.

USML Category VIII would continue to control the following items:

- Certain aircraft, including bombers; fighters, fighter bombers, and fixed-wing attack aircraft; jet-powered trainers used to train pilots for fighter, attack, or bomber aircraft; attack helicopters; unarmed military unmanned aerial vehicles; armed unmanned aerial vehicles; military intelligence, surveillance, and reconnaissance aircraft; air refueling aircraft and strategic airlift aircraft; target drones; aircraft equipped with any mission systems controlled under the subchapter; and aircraft capable of being refueled in flight;
- Launching and recovery equipment specially designed for the aircraft described above;
- Developmental aircraft and specially designed parts, components, accessories, and attachments therefor developed under a contract with the U.S. Department of Defense;
- Technical data and defense services directly related to Category VIII defense articles;
- A lengthy list of specific aircraft components, parts, accessories, attachments, and associated equipment; and
- Any component, part, accessory, attachment, equipment, or system that (i) is classified; (ii) contains classified software; (iii) is manufactured using classified production data; or (iv) is being developed using classified information.

600 SERIES CATEGORY 9 — REVISIONS TO THE CCL

[BIS's Proposed Rule](#) creates five new 600 series ECCNs in CCL Category 9 — 9A610, 9B610, 9C610, 9D610, and 9E610 — each of which will control military aircraft and related articles that were formerly controlled by USML Category VIII or other ECCNs of the CCL. In order to prevent any aircraft-related commodity specially designed for a military use that is not described in the proposed revisions to the USML from inadvertently dropping out of the U.S. government's export controls, the Proposed Rule uses the catch-all phrase "specially designed" in the new ECCNs to control aircraft-related commodities specially designed for a military application but not otherwise identified on the revised USML or elsewhere in the CCL. Consequently, if an item is specially designed for a military use, it is subject to a 600 series ECCN in the CCL unless specifically identified on the ITAR's USML.

The new ECCNs and their descriptions are as follows:

- ECCN 9A610: military aircraft and related commodities;
- ECCN 9B610: test, inspection, and production equipment and related commodities specially designed for the development or production of aircraft and related commodities and articles controlled by ECCN 9A610 or USML Category VIII;

- ECCN 9C610: materials specially designed for aircraft and related commodities controlled by 9A610 that are not specified elsewhere on the CCL, such as in CCL Category 1, or on the USML;
- ECCN 9D610: software specially designed for the development, production, operation, installation, maintenance, repair, overhaul, or refurbishing of military aircraft and related commodities in 9A610, 9B610, or 9C610. ECCN 9D610 would refer to the proposed Supplement No. 4. to Part 740, which would limit the use of License Exceptions GOV and STA for ECCN 9D610 software for the production or development of 15 types of parts and components; and
- ECCN 9E610: technology that is required for the development, production, operation, installation, maintenance, repair, overhaul or refurbishing of military aircraft and related commodities controlled by 9A610, 9B610, 9C610, or “software” controlled by 9D610. ECCN 9E610 would refer readers to the proposed Supplement No. 4. to part 740, which would limit the use of License Exceptions GOV and STA for ECCN 9E610 technology (other than “build-to-print technology”) for the production or development of 15 types of parts and components.

Consistent with the July 15 proposed rule, the Proposed Rule would also consolidate Wassenaar Arrangement Munitions List and former USML items into one series of ECCNs by moving items currently classified under ECCNs 9A018, 9D018, and 9E018 to the new ECCNs. These ECCNs control certain military trainer aircraft, ground transport vehicles, and equipment as well as related software and technology.

Reasons for Control and Licensing Policies

With some exceptions, items in the five new ECCNs would be subject to tight licensing policies. Because commodities classified under ECCNs 9A610, 9B610, 9C610 (except paragraphs .y of those ECCNs), and related software and technology classified under ECCNs 9D610 and 9E610 would be controlled for Regional Stability (“RS”) Column 1 destinations, they would be subject to a worldwide licensing requirement, except for export/reexport to Canada. In addition, the Proposed Rule would amend the RS Column 1 licensing policy to impose a general policy of denial for 600 series items if the destination is subject to a U.S. arms embargo and the items are specially designed or “required” for F-14 aircraft.

In contrast, however, paragraph .y of each new ECCN would consist of items that, though specially designed for a defense article in one of the new ECCNs or USML Category VIII, warrant less strict controls because they have little or no military significance. These items would be subject only to AT controls. As noted, these paragraphs would also cover items that would otherwise fall within the scope of one of the ECCNs but which (i) DDTC had previously determined to be subject to the EAR and (ii) were not listed on the CCL.

REQUEST FOR COMMENTS

Comments on the proposed rules must be received by the relevant agency no later than December 22, 2011. We are happy to assist companies in submitting comments or analyzing how these Proposed Rules, if adopted, would affect their export/reexport operations or compliance programs.

DDTC has specifically requested input on the following:

- Input as to whether DDTC’s proposed rules for Category VIII and BIS’s new Category 9 ECCNs when viewed together create any potential lack of coverage of Wassenaar Arrangement commitments; and

- Input on regulatory language that would use objective parameters to define aircraft controlled in paragraph (a) of Category VIII. Objective descriptions should control aircraft without precluding removal from the USML or inadvertently designating as “defense articles” aircraft currently subject to the EAR.

BIS has specifically requested input as follows:

- Input as to types of government agencies that would be eligible to ultimately receive items through the revisions to the STA License Exception. If, for example, there are types of agencies or persons that have been omitted from the list of eligible agencies but that commenters believe should be included, commenters should provide BIS with this information, including specific examples of such agencies or persons; and
- Input as to how this Proposed Rule affects any provision in the July 15 proposed rule; how the July 15 proposed rule's provisions affect this Proposed Rule; and how a definition of a term in the July 15 proposed rule is impacted by use in this Proposed Rule.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our international trade controls practice group:

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