

E-ALERT | International Trade Controls

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U.S. STATE AND COMMERCE DEPARTMENTS ISSUE FINAL RULES AMENDING EXPORT CONTROLS APPLICABLE TO MILITARY ELECTRONICS

On July 1, 2014, the U.S. Department of State, Directorate of Defense Trade Controls (“DDTC”) and the U.S. Department of Commerce, Bureau of Industry and Security (“BIS”) issued a pair of significant and long-awaited final rules that will transfer various military electronics items from the control of the International Traffic in Arms Regulations (“ITAR”) to the Export Administration Regulations (“EAR”). These changes include a [substantial revision](#) of Category XI of the ITAR’s U.S. Munitions List (“USML”) and the creation of [new controls](#) on the EAR’s Commerce Control List (“CCL”). The changes are effective on December 30, 2014.

The final rules are part of the President’s Export Control Reform (“ECR”) initiative, which strives to make the USML a more specific, positive list in order to focus defense trade controls on sensitive military technologies that are essential to U.S. national security interests. Items that are “specially designed” for a military application, but that are not “inherently military” or “critical” to U.S. military or intelligence such that they merit control under the ITAR are now controlled under new “600 series” Export Control Classification Numbers (“ECCNs”) on the CCL. With the issuance of these final rules, the agencies have overhauled all but six categories of the USML – those that control firearms; artillery; ammunition; fire control, sensors, and night vision items; toxicological agents; and directed energy weapons.

The final rules issued last week also make a number of other changes, including revising the controls on certain aircraft wing folding systems and adding CCL controls for certain superconducting and cryogenic equipment. DDTC’s revisions related to controls on wing folding systems will be effective on August 15, 2014, and BIS’s related changes with respect to wing folding system technology and software took effect on July 1, 2014.

Revisions to USML Category XI (Military Electronics)

This final rules amending USML Category XI and making corresponding changes to the EAR have been long awaited by the defense and aerospace industries, and represent a significant, collaborative effort by the Departments of Defense, State, and Commerce. The final rules follow two prior pairs of proposed rules published by DDTC and BIS on military electronics: the first pair was published on November 28, 2012, and the second pair was published on July 25, 2013.

DDTC’s revisions to USML Category XI are extensive. In particular, where USML Category XI(a) currently broadly controls “Electronic equipment not included in Category XII of the U.S. Munitions List which is specifically designed, modified or configured for military application[,]” followed by a non-exhaustive list of controlled items, the revised Category XI(a) will control only the listed items. The list includes specified types of electronic equipment and systems, including various types of underwater hardware; underwater acoustic countermeasure or counter-countermeasure systems and equipment; radar systems; electronic combat/warfare systems; command, control, and communications (“C3”) systems and command, control, communications, and computers (“C4”) and

C4ISR systems; and other items, as well as specified parts and components and technical data/defense services related to the controlled items.

The preamble to DDTC's final rule includes a number of interesting comments about the scope of the current and new controls. For example, DDTC noted the following in response to public comments:

- One commenting party suggested that Cat. XI(a)(1)(i) be revised to ensure that all multi-element sensing systems, especially Ultra Short Baseline systems, are not inadvertently captured because this would preclude commercial development of collision avoidance for unmanned surface and subsurface vehicles. DDTC rejected this suggestion because "the Department's objective is to specifically describe and control such articles on the USML."
- One commenting party suggested that the capabilities in air surveillance radar control (USML Cat. XI(a)(1)(vii)) already exist in the legacy National Airspace System, and recommended that these criteria be removed. DDTC rejected this suggestion because "radar with this capability are still highly capable for defense purposes and warrant ITAR control."
- Several commenting parties expressed concern that radar systems "that have historically been controlled on the CCL" would now be controlled under Cat. XI(a)(3). DDTC responded that "[w]hile it may appear that various radar technologies are being newly controlled on the USML, they have in fact always been controlled by the ITAR[,] although any previous Commodity Jurisdiction ("CJ") determination that a particular radar system or component is subject to the EAR remains valid.
- In response to recommendations and concerns by commenting parties, DDTC provided separate subparagraphs for printed circuit boards and multichip modules, and noted that "jurisdiction of a printed circuit board or patterned multichip module should follow the jurisdiction of the specific item for which it is designed, as opposed to the jurisdiction of the overall system into which the article one layer up from the printed circuit is ultimately incorporated."
- Cat. XI(b) will control electronic systems or equipment, not elsewhere enumerated, "specially designed for intelligence purposes that collect, survey, monitor, or exploit the electromagnetic spectrum (regardless of transmission medium), or for counteracting such activities." In response to comments, DDTC removed a note it had published in the last proposed rule, and invited parties to request a CJ determination if further clarification is needed to determine whether an item qualifies as controlled under these parameters.
- Several commenting parties expressed concern that Cat. XI(a)(7) ("Developmental electronic equipment or systems funded by the Department of Defense via contract or other funding authorization") did not sufficiently clarify when a developmental item would be ITAR-controlled. DDTC responded that Notes 1-3 to Cat. XI(a)(7) obviate any concern about ambiguity. In particular, DDTC noted that "paragraph (a)(7) does not apply to electronic systems or equipment where the Department of Defense acts solely as a servicing agency for a contract on behalf of another agency of the U.S. Government, but does not itself contribute funding."

Revisions to USML Category VIII (Aircraft and Related Articles)

DDTC issued a final rule revising USML Category VIII (controlling aircraft) – the first USML category to be revised – effective October 15, 2013. The final rule issued last week made a further change to the new aircraft controls – in particular, by revising Category VIII(h)(4) "to ensure that wing folding systems for commercial aircraft are not controlled as defense articles." This change responded to industry concerns that such wing folding systems are increasingly incorporated in commercial aircraft given gate sizes at U.S. airports.

Revisions to the EAR's Commerce Control List

In parallel with the revisions to USML Category XI, the BIS final rule adds controls to the EAR's CCL covering military electronics, as well as controls on certain superconducting and cryogenic equipment. In particular, BIS's final rule includes the following amendments:

New military electronics ECCNs: BIS has added to the CCL four new "600 series" ECCNs – 3A611, 3B611, 3D611, and 3E611 – to control military electronics and related test, inspection, and production equipment and software and technology currently controlled under USML Cat. XI.

These ECCNs also will control computers, telecommunications equipment, radar, and avionics "specially designed" for military use; parts, components, accessories, and attachments "specially designed" therefor; and related software and technology, to the extent these items are not enumerated in the new USML Cat. XI. BIS included cross references in other CCL categories to alert exporters that these new CCL Category 3 ECCNs may control such items.

In addition, the new ECCN 3A611.y calls out three dozen specific types of parts, components, accessories, and attachments that are "specially designed" for 600-series ECCNs (not just ECCN 3A611) or a defense article and not elsewhere specified on the CCL or USML. These items require licenses if going to countries designated as state sponsors of terrorism (and thus subject to antiterrorism controls) or the People's Republic of China. BIS described this entry as having the status of a "universal .y list" given that it is not limited to items specially designed only for military electronic applications.

EAR controls on cryogenic and superconducting equipment: In addition to the new military electronics ECCNs, BIS also added four new 600 series ECCNs – 9A620, 9B620, 9D620, and 9E620 – to control cryogenic and superconducting equipment described on the Wassenaar Arrangement Munitions List ("WAML"), as well as related test, inspection, and production equipment, and software and technology. BIS explained that the WAML "covers cryogenic and superconducting equipment that is 'specially designed' to be installed in a vehicle for military ground, marine, airborne, or space applications[.]" and BIS "believes that such equipment is used in experimental or developmental vehicle propulsion systems." The items being moved to these new ECCNs are currently covered by "catch all" controls in four different USML categories.

EAR controls on wing folding system technology: BIS also added controls on software and technology for the development of certain wing folding systems for aircraft with gas turbine engines in Supplement No. 5 to EAR Part 774, thereby controlling these items under ECCNs 0D521 and 0E521, respectively, for one year unless this period is extended or the items are reclassified under a different ECCN. The final rule indicates that while such technology and software is not currently subject to multilateral export controls, BIS intends to submit a proposal that such technology be controlled on the Wassenaar Arrangement Dual-Use List, as "software and technology required to develop a robust civil system would confer insights that would be useful to the development of a military wing folding system."

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We are well-positioned to advise clients regarding the impact that these final rules will have on their operations, and to otherwise help clients navigate the changes of ECR.

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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