



Initial Provisions of Export Control Reform Become Effective October 15th - Steps to Take to Prepare for Export Control Reform

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On October 15, 2013 the first major series of amendments under the Export Control Reform will go into effect. Every exporter should be aware of these amendments and have a plan to prepare for these changes.

Background. Under the Export Control Reform, the Obama Administration is revising portions of the International Traffic In Arms Regulations (“ITAR”) and the Export Administration Regulations (“EAR”) to streamline and rationalize the U.S. export laws. As part of this process, the Directorate of Defense Trade Controls (“DDTC”) is transferring certain less sensitive items from the U.S. Munitions List (“USML”) to the newly created “Series 600” on the Commerce Control List (“CCL”) maintained by the Bureau of Industry and Security (“BIS”), and the agencies are adopting a number of additional changes to the ITAR and EAR. The Administration has promulgated a series of proposed regulations over the past three years leading up to these amendments, including proposed revisions to the various Categories of the USML. It is planned that these proposed changes will be finalized and go into effect on a rolling basis over the next twelve months commencing on October 15, 2013.

On April 16, 2013, DDTC and BIS published two companion regulations which set forth the first final versions of the amendments of ITAR and EAR under the Export Control Reform^[1](collectively the “April 16th Regulations”). These amendments include the legal framework for the Export Control Reform and final versions of Categories VIII, XIX, XVII and XXI of the USML. The April 16th Regulations were issued with a deferred effective date of October 15, 2013 – on this date the changes set forth in the regulations will go into effect. It is expected that the Administration will be promulgating additional final versions of the remaining USML categories in the coming twelve months.

It is recommended that every company involved in export activities review these changes in detail and take steps to adjust their compliance processes as required under the new law. The amendments will

affect each company differently based on products or services provided, countries where business is conducted and other factors – the amendments will have particular impact on subcontractors and second- and third-tier suppliers. The following provides a summary of the provisions of the amendments that will go into effect on October 15, as well as a checklist of steps to review to prepare for these changes.

April 16, 2013 Final Rules. Under the April 16, 2013 final regulation issued by DDTC (the “DDTC Regulation”), the agency undertook the following actions which become effective on October 15, 2013:

- Amended various ITAR provisions to implement the Export Control Reform, including amendments to 22 CFR §120.2 (Designation of Defense Articles and Defense Services), §120.3 (Policy on Designating Defense Articles), §120.4 (Commodity Jurisdiction), §120.5 (Regulations of Other Agencies) and §120.10 (Definition of Technical Data.)
- Adopted the definition of the term “Specially Designed” in 22 CFR §120.41 and “Subject to the EAR” in 22 CFR §120.42;
- Issued revised, final versions of USML Category VIII (Aircraft and Related Articles), Category XIX (Gas Turbine Engines and Associated Equipment), Category XVII (Classified Articles, Technical Data, and Defense Services Not Otherwise Enumerated) and Category XXI (Articles, Technical Data and Defense Services Not Otherwise Enumerated);
- Created a new licensing procedure for the export of items subject to the EAR that are exported in conjunction with defense articles controlled on the USML; and
- Set forth the DDTC Transition Plan, which described procedures for export licenses, TAA’s and other agreements during the implementation period of the export control reform.

Under the companion April 16, 2013 BIS regulation (the “BIS Regulation”), BIS undertook the following actions which become effective on October 15, 2013:

- Added the Series 600 control structure to the CCL to regulate munitions items transferred from the USML to the CCL;
- Established a number of specific Series 600 Export Control Classification Numbers (“ECCN’s”) to control an initial group of items transferred from the USML for aircraft and gas turbine engines, related parts, components, accessories, attachments software and technology;
- Adopted various additional conforming amendments to the EAR to implement the export reform;
- Adopted a common definition of the term “Specially Designed” in conjunction with DDTC for the identification of certain parts, components, accessories and attachments on CCL Series 600 as set forth at 15 CFR §772.1; and
- Adopted a number of transition rules for exporters set forth in BIS General Order 5 for use during the period from April 16, 2013 until final implementation of the reform in 2014.

Definition of “Specially Designed.” While the reform effort was initially intended to reduce the regulation of parts, components, accessories and attachments related to controlled items, the revised USML and Series 600 ECCN’s still continue to regulate many of these items. As part of this process, DDTC and

BIS have adopted a unified definition of the term “Specially Designed” to designate parts, components, accessories and attachments that will be included on the USML and CCL; for certain items specifically enumerated on the USML and CCL, and parts, components, accessories and attachments that have been “Specially Designed” to be used with or in such items will also be covered under such controls. The definition of “Specially Designed” was the subject of extensive comments and numerous revisions until its final adoption by DDTC and BIS in the April 16th Regulations. The final version of the DDTC definition will be codified at 22 CFR §120.41, and the final BIS version (which contains minor technical differences from the DDTC version) will be codified at 15 CFR §772.1.

The DDTC definition of “Specially Designed” is illustrative. The definition consists of two parts – dubbed the “Catch” and “Release” provisions. Under the first part of the definition (the “Catch” provision^[2], a commodity or software is included as “Specially Designed” if it:

1. As a result of development, has properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics or functions described in the relevant USML paragraph; or
2. Is a part, component, accessory, attachment or software for use in or with a defense article.

Under the second part of the definition (the “Release” provision), a part, component, accessory, attachment, or software that is included in the first part of the definition is not controlled by the relevant USML “catch-all” or technical data control paragraph if it:

1. Is subject to the EAR pursuant to a commodity jurisdiction determination;
2. Is, regardless of form or fit, a fastener (e.g., screws, bolts, nuts, nut plates, studs, inserts, clips, rivets, pins), washer, spacer, insulator, grommet, bushing, spring, wire, or solder;
3. Has the same function, performance capabilities, and the same or “equivalent” form and fit as a commodity or software used in or with a commodity that: (i) is or was in production (i.e., not in development); and (ii) is not enumerated on the USML;
4. Was or is being developed with knowledge that it is or would be for use in or with both defense articles enumerated on the USML and also commodities not on the USML; or
5. Was or is being developed as a general purpose commodity or software, i.e., with no knowledge for use in or with a particular commodity (e.g., a F/A-18 or HMMWV) or type of commodity (e.g., an aircraft or machine tool).

Thus, despite initial intentions of regulators to move away from “design intent” in determining USML jurisdiction, many exporters will still be required to go through a detailed process of analyzing design history to determine if their parts, components, accessories and software are included in USML and CCL classifications. Parties reviewing the definition of “Specially Designed” are also advised to review the Notes provided in the implementing regulations and the explanatory text set forth in the Federal Register Notices in which each of the regulations was issued.

Under the ITAR Regulation, DDTC reminds exporters of their obligation to maintain records of their considerations in making classification determinations: “Consistent with the recordkeeping requirements of the ITAR and the EAR, licensees and foreign persons subject to licenses must maintain records reflecting their assessments of the proper regulatory jurisdiction over their items. License holders

unable to ascertain the proper jurisdiction of their items may request a CJ determination from DDTC through the established procedure." [\[3\]](#) (Emphasis added.)

Transition Procedures. BIS and DDTC have each adopted transition rules governing the issuance and use of licenses, agreements and other authorizations during the period in which the reform amendments will be implemented. The BIS transition procedures are set forth in a newly issued General Order 5 and the DDTC procedures are set forth in the DDTC Transition Plan. Under the DDTC Transition Plan:

- There will be a 180 day transition period for each USML Category from the date the final Category is published until the effective date of the newly published Category to allow exporters to review and prepare for the new license requirements.
- For licenses or authorizations where all of the items listed on a license or authorization have transitioned to the export jurisdiction of BIS, licenses issued by DDTC prior to the effective date of the relevant USML Category will remain valid until expired, returned by the license holder, or for a period of two years from the effective date of the final rule for the relevant Category – whichever occurs first (unless otherwise revoked, suspended or terminated).
- For licenses or authorizations where some items covered on such license have been transferred to BIS and some remain under the jurisdiction of DDTC, the license or authorization will remain valid until expired or returned by the license holder (unless otherwise revoked, suspended or terminated).
- Technical assistance agreements and other agreements containing transitioning and non-transitioning items issued prior to the effective date of the relevant USML Category will remain valid until they have expired (unless they require an amendment) or for a two year period from the effective date of the relevant USML Category, whichever occurs first (unless otherwise revoked, suspended or terminated).
- Agreements containing solely transitioning items issued prior to the effective date for the relevant USML Category will remain valid for two years from the effective date of the relevant USML Category (unless revoked, suspended or terminated). After this two year period all activities must be conducted under BIS authorization.
- DSP-61 and DSP-73 temporary licenses issued prior to the effective date of the relevant USML Category will remain valid until expired or returned by the license holder (unless otherwise revoked, suspended or terminated).
- Previously issued Commodity Jurisdiction Determinations for items determined to be subject to the EAR shall remain valid. Previously issued Commodity Jurisdiction Determinations for items that have been transitioned to the CCL will be superseded by the newly revised USML Categories.
- Any limitation, proviso or other requirement previously existing will remain in effect.
- USML categories will have an (x) paragraph which will allow for ITAR licensing for commodities, software and technical data subject to the EAR, provided that these items will be used in or with defense articles controlled under the USML.

Under the BIS General Order 5, BIS will be accepting license applications for transferred Series 600 items prior to the effective date of the relevant CCL ECCN (called “pre-positioning”), but licenses for such items will not be issued by BIS until the effective date of the ECCN.

Steps To Prepare For Reform Amendments. October 15 is not far away, and companies should begin preparation now for the upcoming amendments. We recommend that companies prepare a plan to manage their export reform changes over the next twelve months – steps to be included in the plan are as follows:

- Review the classifications of your company’s products, software and services to determine if the jurisdiction and classifications of such items have changed; this includes reviewing both the new USML Categories and companion CCL Series 600 entries;
- For parts, components, accessories and attachments, apply the “Specially Designed” test for relevant products, if required;
- If the jurisdiction and/or classification of items are unclear based upon the language of the amended regulations, apply for commodity jurisdiction determinations from DDTC or commodity classification requests from BIS;
- If the jurisdiction/classifications of your products have changed, determine changes in your company’s licensing requirements related to such items, including:
 - Use of Strategic Trade Authorization or other BIS license exceptions?
 - Use of the BIS de minimis rule?
 - Reduced controls on the performance of services and use of TAA’s?
 - Impact on DDTC registration status?
- Plan licenses, TAA’s and other authorizations during the transition period in accordance with the DDTC Transition Plan and BIS General Order No. 5, including considering taking advantage of the two-year authorization periods and/or “pre-positioning” license applications with BIS;
- Amend your company’s export compliance procedures to reflect changes in the law and changes in your company’s export requirements;
- Conduct training of relevant company employees on changes in your company’s export obligations; and
- Coordinate with subcontractors, suppliers and other program partners on licensing requirements and export procedures to assure smooth transitions in your supply chain.

[1] The DDTC regulation can be found at:

<http://www.pmddtc.state.gov/FR/2013/78FR22740.pdf> and the BIS

regulation can be found at:

http://www.bis.doc.gov/federal_register/rules/2013/Commerce%20Rule.pdf

[\[2\]](#) Using the ITAR version of the definition set forth in the DDTC Regulation and codified at 22 CFR §120.41.

[\[3\]](#) See DDTC Regulation p. 22750.

Related People

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