



Important Opportunity for Defense Electronics Manufacturers

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There is an important and timely opportunity for manufacturers of electronics products that are subject to export controls under the International Traffic In Arms Regulations (“ITAR”) and the Export Administration Regulations (“EAR”). The State Department (“State”) recently announced that it is reviewing the controls on products in U.S. Munitions List (“USML”) Category XI – Military Electronics. If a product meets certain criteria set forth in the announcement, including entering into “normal commercial use,” State will be authorized to remove the article from the USML and ITAR controls. State is also reviewing products in USML Category V (Explosives and Energetic Materials) and Category X (Personal Protective Equipment) under similar reviews. This is an important opportunity for manufacturers of these products used in the defense industry – for a short period of time companies can submit information about their products for consideration to have them removed from the USML and ITAR control. However there is a tight deadline – companies have until April 13, 2018 to file their submissions.

Under Export Control Reform, State and the Department of Defense (“DOD”) previously reviewed the USML to remove items that no longer warranted control as defense articles^[1] As part of this process, the agencies also set up a procedure to conduct subsequent reviews of USML items on a periodic basis. Under these reviews, the agencies will assess the USML to assure that items are clearly described on the list, account for technological developments and do not inadvertently control items in normal commercial use. If an item listed on the USML meets the criteria in the review, State has the authority to remove the item from the USML and it would no longer be subject to ITAR. The Commerce Department (“Commerce”) is undergoing a similar review of the same categories of products to determine where items that are removed from the USML should be classified on the Commerce Control List (“CCL”) and if the CCL should otherwise be amended.

State and Commerce have already conducted this review process for two other groups of USML categories: (i) Categories VIII and XIX; and (ii) Categories VI, VII, XIII and XX. Under these reviews, manufacturers submitted comments and data about their products along with arguments supporting why products identified on the USML should be removed. The agencies reviewed the submissions and based on such reviews amended the USML to remove a number of items or narrow the control criteria used to place the items on the USML.^[2]

On February 12, 2018 State issued a Notice of Inquiry (the “Notice”) stating that it was commencing a review of items in USML Category XI (Military Electronics), Category V (Explosives and Energetic Materials) and Category X (Personal Protective Equipment) (the “Notice”).^[3] State advised that the purpose of the review was to confirm that these USML categories are “clear, do not inadvertently control items in normal commercial use, account for technological developments, and properly implement the national security and foreign policy objectives of the United States.” In the Notice, State requested comments from the public on the following issues as they relate to Categories V, X and XI with a view to amending the USML for these categories:

1. Emerging and new technologies that are appropriately controlled by one of the referenced categories, but which are not currently described in subject categories or not described with sufficient clarity.
2. Defense articles that are described in subject categories, but which have entered into normal commercial use since the most recent revisions to the category at issue. For such comments, be sure to include documentation to support claims that defense articles have entered into normal commercial use (emphasis added).
3. Defense articles for which commercial use is proposed, intended, or anticipated in the next 5 years.
4. Drafting or other technical issues in the text of all of the referenced categories.
5. Comments regarding USML Category XI paragraph (b) modification.
6. Potential cost savings to private entities from shifting control of specific commercial items from USML to the Export Administration Regulations. To the extent possible, please quantify the cost of compliance with USML control of commercial items, to include the time saved, the reduction in paperwork, and any other cost savings for a particular change.

There is no definition of the term “entered into normal commercial use” provided by the Notice.

It is not a certainty that if a product meets one of the criteria listed in the Notice it will be removed from the USML. In the final rule published in the review for Category VIII/XIX, State indicated that while State will consider the criteria identified in its notices of inquiry for the various USML categories, the primary standard of review is the “critical military or intelligence advantage” standard set forth in ITAR §120.3(b).^[4] Consequently this is a discretionary decision by State and the Defense Technology Security Administration regarding whether the USML will be amended. However based on the results of the review of Category VIII/XIX, it appears that if the criteria in the Notice are met for a particular product, there is a strong possibility that the item can be removed from the USML or the control criteria amended to reduce the technical threshold at which the item will be listed on the USML.

As referenced above, Commerce also issued a Notice of Inquiry to conduct a concurrent review of items on the CCL that correspond to the categories being reviewed by State: energetic materials, armored and protective “equipment” and military electronics.^[5] The purpose of the Commerce review is to ensure that the descriptions of these items on the CCL are clear, items in normal commercial use are not inadvertently controlled as military items on the USML, that technological developments are accounted for on the control lists, and that the controls properly implement U.S. national security and foreign policy goals.^[6] Commerce will make changes to the CCL that it determines are necessary to complement revisions to the USML by State. In addition, Commerce is seeking comments on how to improve the implementation of the relevant “600 series” ECCNs on the CCL. If parties submit data to State to support removal of an item from the USML, they can also submit data to BIS regarding where on the CCL the items should be placed or if it should be classified as EAR99. Thus Commerce will be reviewing the same issues as under the Notice, but from the perspective of the EAR.

The deadline for filing submissions with State and Commerce is April 13, 2018. This is a short window of opportunity so companies should move quickly.

Note: This article contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not intended and should not be construed as legal advice.

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^[1] USML Category XI was amended effective December 30, 2014 to reflect these changes.

^[2] For Categories VIII/XIX, DDTC has completed its review and published the final amendments to the USML, but for Categories VI/VII/XIII/XX DDTC has received comments but not published its final results. For the State Department Final Rule setting forth the results of its review of Categories VIII and XIX (the “Final Rule”), See Federal Register Vol. 81, No. 224, November 21, 2016, p. 83126.

^[3] See Federal Register Vol. 83, No. 29 p.5970 – 5971, February 12, 2018.

^[4] Final Rule p. 83130.

^[5] See Federal Register Vol. 83, No. 29 p.5968 – 5970, February 12, 2018.

^[6] Specifically Commerce is soliciting comments on the clarity, usability and other matters on the Export Control Classification

Numbers (ECCNs) for the following specific “600 series” items: energetic materials (ECCNs 1B608, 1C608, 1D608 and 1E608); armored and protective “equipment” (ECCNs 1A613, 1B613, 1D613, 1E613); military electronics (ECCNs 3A611, 3B611, 3D611 and 3E611); and cryogenic and superconducting equipment (ECCNs 9A620, 9B620, 9D620 and 9E620).

Related People

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