



Export Control Amendments Proposed for Commercial Firearms, Ammunition and Related Products

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On May 24, 2018 the State and Commerce Departments issued proposed regulations regarding the transfer of export jurisdiction for commercial firearms and ammunition from the International Traffic In Arms Regulations (“ITAR”) to the Export Administration Regulations (“EAR”)[1] Specifically, the proposals would amend Categories I, II and III of the U.S. Munitions List (“USML”) to remove certain commercial firearms products, ammunition, and certain parts, components, accessories and attachments and transfer these items to the Commerce Control List (“CCL”) under the EAR. This is the first step in the long-awaited process under export control reform to transfer firearms products that no longer warrant control as military products from ITAR to the less restrictive EAR. This is welcome news to our clients and many in the firearms and firearms accessory market. The following is a summary of a number of the proposed changes and the impact on companies dealing in these products.

At the outset, it should be recognized that these are proposed amendments – they are not the final versions of the regulations. State and Commerce have provided these in proposed form and are requesting comments from interested parties during a 45-day comment period. Upon the receipt of comments, the agencies may make further modifications to the proposals and must still issue final regulations. Consequently, companies should be alert to any additional changes and not act on the proposed regulations until they become final. Nevertheless, companies can become engaged in the process now by submitting comments with recommendations for further revisions and begin planning for the transition to the new regulatory program. Many industry groups and advocacy organizations are encouraging their members to offer comments in support of the proposed regulations.

Amendments Under ITAR. Under the proposed State Department rule, USML Category I, covering firearms and related articles, will be amended to remove non-automatic and semi-automatic firearms up to caliber .50 (12.7 mm) inclusive and certain parts, components, accessories and attachments “specially designed” for such articles. The goal of such amendments is to remove common items like modern sporting rifles while continuing to control under ITAR “only defense articles that are inherently military or that are not otherwise widely available for commercial sale.”[2] Such products would be transferred to be controlled under the EAR (discussed further below). Certain products, however, would continue to remain on USML Category I and subject to ITAR that fit within the above parameters, including the following:

- Firearms that fire caseless ammunition;
- Fully automatic firearms to caliber .50 inclusive;

- Firearms specially designed to integrate fire control, automatic tracking and automatic firing systems;
- Fully automatic shotguns;
- Silencers, mufflers, sound suppressors, and specially designed parts and components;
- Barrels, receivers (frames), bolts, bolt carriers, slides, and sears, specially designed for the firearms in Category I;
- High capacity (greater than 50 rounds) magazines, and parts and components to convert a semi-automatic firearm into a fully automatic firearm; and
- Accessories and attachments specially designed to automatically stabilize aim (other than gun rests) or for automatic targeting.

Category II, covering guns and armaments, would be amended to specifically list the items subject to controls and to establish a “bright line” between the USML and the CCL for the control of these items. Items removed and transferred to the CCL include engines for self-propelled guns and howitzers^[3] tooling and equipment for the production of articles controlled in USML Category I^[4] and certain test and evaluation equipment.^[5] Items specifically remaining on the USML and subject to ITAR would include certain apparatus and devices for launching or delivering ordnance^[6] certain autoloading systems currently controlled under USML Category II paragraph (i), developmental guns and armaments funded by the Department of Defense^[7] and specially designed parts and components of such developmental products.

Category III, covering ammunition and ordinance, would be amended to be consistent with Category I, including the removal of ammunition for small arms that were transferred out of Category I. Category III would also be amended to remove the broad “catch-alls” previously covered and to specifically enumerate the remaining items to be controlled.

New Controls Under the EAR. Items removed from the USML as described above would be transferred to be controlled under the EAR which is administered by the Bureau of Industry and Security (“BIS”) within the Commerce Department. As part of this transfer, BIS has established 17 new export control classification numbers (“ECCN’s”) on the CCL to control items that were removed from the USML.

Items covered by these ECCN’s will continue to be subject to significant export restrictions. For example, these items will require export licenses for exports, reexports and in-country transfers. In addition, certain “technology” related to the transferred firearms, ammunition and related products will be controlled on the CCL - in many cases licenses will be required for the transfer of controlled technology out of the U.S. and the transfer or disclosure of controlled technology to foreign persons in the U.S. Certain license exceptions would also be available for the transferred items (although the license exceptions under the EAR frequently differ from the license exemptions under ITAR). As with ITAR licenses issued by DDTC, items exported under a license would only be authorized for the end user and end use specified on the license – any reexports or in-country transfers of such items beyond such authority will require specific additional license authorization from BIS.

Continued ITAR Controls On Brokering of Commercial Firearms Notwithstanding the changes described above, commercial firearms and ammunition would continue to be covered under the ITAR brokering requirements. Specifically, the State Department proposed rule states that products listed on the U.S. Munitions Import List (used by the Bureau of Alcohol, Tobacco, Firearms and Explosives for administering controls on the permanent import of firearms products) will continue to be subject to the ITAR brokering requirements set forth in 22 CFR Part 129. Category I(a) of the USMIL includes nonautomatic and semiautomatic firearms, to caliber .50 inclusive, and USMIL Category III(a) includes ammunition for such products. Thus, despite the broad changes to USML Categories I and III under the proposed amendments, parties will still be subject to ITAR regulation for brokering and “facilitation” in the sale of commercial firearms products, including requirements for registration, obtaining advanced authorizations for certain transactions, reporting, recordkeeping and restrictions on brokering

transactions involving the “proscribed” countries identified in 22 CFR §126.1.

Impact On Firearms Companies. The proposed changes will most likely affect many companies in the firearms industry in a number of ways including:

- *Export Classifications.* Companies will review the export jurisdiction and classification of their products to determine if they have been transferred to BIS jurisdiction and, if so, to determine the correct ECCN's for their products. This will apply to firearms, ammunition, parts, components, accessories and attachments.
- *Licenses For Products, Technology and Software.* As referenced above, companies will still be required to obtain export licenses for exports, reexports and in-country transfers for controlled products, technologies and software. However, in many cases these will be from a different licensing agency under different licensing procedures. Consequently, many companies will be amending their export compliance procedures to conform to these new requirements.
- *Registration.* There is no requirement for companies to register under the EAR, as exists under ITAR. Of course, if companies still engage in activities regulated under ITAR (such as brokering commercial firearms products or the sale of items remaining in USML Categories I, II and III), they will be required to maintain their DDTC registration.
- *Defense Services.* There are reduced controls on performing services under the EAR as compared with those under ITAR.^[8]
- *Temporary Imports.* The EAR does not contain controls on the temporary import of items subject to the EAR as required under ITAR.
- *Reports for Payments of Fees, Commissions and Political Contributions.* The EAR does not require exporters to file reports on the payment of political contributions, fees and commissions as under ITAR Part 130.
- *Items Still Regulated Under ITAR.* For items that remain listed on the USML after the amendments, such items will still be subject to ITAR and the requirements thereunder.

Status of Amendments. As stated above, the amendments described in this alert are proposed changes only and not final amendments. Parties have until July 9, 2018 to submit comments to State and Commerce on the proposed regulations. Companies are encouraged to review the proposals carefully to assess how they will apply to their businesses as there is still opportunity to propose further amendments. Officials at DDTC and BIS typically review the comments carefully and often adopt changes recommended by commenters.

While the transfer of commercial firearms products from ITAR to EAR controls is not yet concluded, the process has begun. This is the time for companies to become engaged - in reviewing, commenting on and planning ahead for these changes.

[1] The proposed State Department rule is available [here](#), and the proposed Commerce Department rule is available [here](#).

[2] See State proposed rule p. 24,198.

[3] To be transferred to the CCL under ECCN 0A606.

[4] To be transferred to the CCL under ECCN 0B602

[5] To be transferred to the CCL under ECCN 0B602.

[6] To be included in a new USML paragraph (a)(4).

[7] To be included in new USML paragraph (a)(5).

[8] The performance of services is addressed in the EAR in 15 CFR §744.6(a)(1)(ii) and §744.6(a)(2). In addition, the BIS proposed rule states as follows regarding defense services: “The EAR does not include a concept of “defense services,” and the “technology” related controls are more narrowly focused and apply in limited contexts as compared to the ITAR.” See BIS proposed rule at p. 24,167.

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