

Proposed Rule May Add Confusion to Already Complex Export Control Regulations

BY SCOTT M. FLICKER, ELLEN WALZ HOLMES & DANA M. PARSONS

The United States has some of the most comprehensive and robust export controls on Earth, yet many are holdovers from the Cold War era that no longer adequately address the unique national security threats of the twenty-first century. In August 2010, President Obama launched an Export Control Reform Initiative to identify reforms to the current export control system that would better protect the United States against modern threats like the proliferation of weapons of mass destruction.

An interagency task force conducting the review determined that the current regime is overly complicated, redundant, and attempts to protect too much. To address these criticisms, the Department of Commerce Bureau of Industry and Security ("BIS") issued a Proposed Rule on July 15, 2011 to remove certain items from the United States Munitions List ("USML") – where they are administered under the stricter International Traffic in Arms Regulations ("ITAR") – and move them to the Commerce Control List ("CCL"), subject to the Export Administration Regulations ("EAR").¹ This proposal is a first step in a much bigger plan to harmonize both control regimes, to create a list based on "positive" technical specifications and performance and eventually to combine them into one list administered by a single agency. While the CCL has historically been less restrictive than the USML, the Proposed Rule would still impose enhanced restrictions for defense items and other articles with an inherent military nature. The goal is to provide a more flexible system of controls, providing restrictions where needed while allowing exports of defense articles to NATO and other partner nations.

Currently limited to USML Category VII, which governs tanks and military vehicles, the Proposed Rule provides a preview of what can be expected for the export control of other defense related articles. The challenge for exporters as these new rules take effect will be to determine how the revisions will alter their current export and licensing practices. As the USML and the CCL move to a "positive" list based on technical specifications and performance standards, items previously subject to the EAR may become subject to ITAR, although they were never designed, developed, configured, adapted or modified for military application, simply because they meet certain specifications or standards. Moreover, with ever changing technology, technical specifications and performance standards will need to be continuously evaluated and updated, meaning that classifications could frequently change. This may cause further confusion in an export control environment already seen as overly complicated. Exporters must remain on notice that significant changes are expected to take place as the agencies move toward a complete revamping of the U.S. export control system.

Overview of the Proposed Rule

Method for Migrating Items from USML to CCL

The Proposed Rule sets forth a method for moving items deemed less militarily significant from the USML to the CCL. These items will be controlled in the new "600 series" or Commerce Munitions List ("CML"). The CML would consist of distinct Export Classification Numbers ("ECCNs") identified in a "600 series" in each CCL category. The intent is to enhance the ability of exporters to find relevant ECCNs and to make it easier for the U.S. government to apply a consistent licensing policy. The last two characters of the "600 series" entries will correspond to the Wassenaar Arrangement Munitions List ("WAML") category, a series of defense related items already regulated under the EAR. International companies that must deal with both the USML system and the numbering system of other allied countries may find compliance and tracking of items somewhat easier under this scheme.

An item not specifically listed on the revised USML or in the new "600 series" that is within the scope of a preexisting ECCN would be classified under that ECCN. However, items that are not specifically listed in the new "600 series" or identified in a preexisting ECCN but that are "specially designed" for an item controlled in the CML or the USML will be controlled by the CML. These items would be placed in a miscellaneous category (*i.e.* 0A521, 0B521, 0C521, etc.) for one year, until BIS can place the item into an ECCN classification or determine that the classification of EAR99 is appropriate. BIS states that the migration of items to the CCL is not a step toward decontrol, but rather in tailoring controls to different types of items based on their level of military significance.

Although the Proposed Rule leaves the "600 series" primarily unpopulated, except for Category 0, as the review of the USML progresses, other "600 series" categories will also be populated.

Items Captured Under the 600 Series

Each of the new "600 series" entries would capture WAML and formerly USML end items that are not identified in either the revised USML or another existing ECCN controlled for more than Anti-Terrorism only reasons. "Parts," "components," "accessories" and "attachments" would be controlled in a similar structure in each "600 series." A paragraph "x" would be added and would contain "parts," "components," "accessories" and "attachments" that are "specially designed" for a commodity subject to control in that ECCN or a defense article in the corresponding USML category. Paragraph "y" would control specific "parts," "components," "accessories" and "attachments" "specially designed" for a commodity subject to control in that ECCN or a defense article in the corresponding USML category but which have little or no military significance.

New Definitions

The Proposed Rule provides additional definitions for certain terms – some of which were previously undefined in the CCL. Most noteworthy is the much anticipated definition of "specially designed." Although a core element of the USML review is to avoid using design intent - based control parameters for generic items, the Administration determined that it cannot completely eliminate "specially designed" as a control parameter. In general, an item is "specially designed" when it is an item that is enumerated on the CCL and as a result of "development" has properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics or functions of the referenced item identified in the CCL. The term does not apply to a single unassembled part used in multiple types of civil items; parts or components in mass production that have not been altered for use in another end item with an ECCN; or parts or components that can be exchanged one-for-one with a non-controlled part or component without impairing the function of the part or component. The

Proposed Rule notes that the definition of “specially designed” does not extend control to items simply because they could, in theory, be used with the listed items [or a listed item] on the USML or CCL. The definition of “specially designed” was intended to clarify the scope of items under the particular provisions of the CCL. It is unclear whether the definition will satisfy this goal, or whether its complexity may lead to further confusion in the industry.

Exceptions

Several licensing exceptions will apply to articles in the “600 series” as well. End-items and parts, components, accessories and attachments, and items “specially designed” for defense articles exported pursuant to a “600 series” classification will be eligible for the following exceptions: TMP (temporary exports); RPL (replacement parts); LVS (limited value shipments); and GOV (government end-users on the Strategic Trade Authorization-36 list (“STA-36”). Exporters of end-items hoping to take advantage of the STA-36 exception will need to seek authorization in writing from BIS for the specific item. If an agreement is reached by the Departments of Commerce, Defense and State, BIS may designate the item for export under the STA-36 exception.

While these exceptions will allow for greater ease in the export of defense related items to many countries, the Commerce Department will adopt a general policy of denial of all applications for export or reexport of items on the CML to any country subject to a U.S. arms embargo.

De Minimis

The Proposed Rule seeks to apply a more restrictive *de minimis* threshold for items in the “600 series.” Most reexports of foreign-made commodities subject to the EAR are subject to a 25 percent *de minimis* rule that imposes U.S. export controls on foreign-made commodities containing more than 25 percent U.S.-origin content or technology. However, the Proposed Rule would subject “600 series” items to a lower threshold – a 10 percent *de minimis* rule for U.S.-origin content, a level currently reserved only for exports of foreign-made articles to terrorist-supporting nations. Accordingly, U.S. export controls would apply to foreign-made “600 series” items when merely 10 percent is U.S.-origin content.

Conclusion

Exporters of tanks and military use vehicles under USML Category VII and currently regulated by ITAR will likely be the first group of exporters affected by the changes to the U.S. export control system. The impact on these exporters as they learn the significance of new export classifications, definitions and license requirements will be but a preview of what is to come for the remainder of the export community as a more complete reorganization of our current system takes effect.

◇ ◇ ◇

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Washington, D.C. lawyers:

Scott M. Flicker
1.202.551.1726
scottflicker@paulhastings.com

Ellen Walz Holmes
1.202.551.1834
ellenwalz@paulhastings.com

Hamilton Loeb
1.202.551.1711
hamiltonloeb@paulhastings.com

Dana M. Parsons
1.202.551.1879
danaparsons@paulhastings.com

Charles Patrizia
1.202.551.1710
charlespatrizia@paulhastings.com

¹ Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML), 76 Fed. Reg. 136, 41958 (July 15, 2011) (to be codified at 15 C.F.R. pts. 730-774).