

December 4, 2013



International Trade Compliance and Enforcement Team

Ross H. Garber
(860) 251-5901

rgarber@goodwin.com

T. Scott Cowperthwait
(860) 251-5134

scowperthwait@goodwin.com

Christopher R. Drury
(860) 251-5017

cdrury@goodwin.com

Sara J. Goldfarb
(860) 251-5626

sgoldfarb@goodwin.com

Alfredo G. Fernandez
(860) 251-5353

afernandez@goodwin.com

www.shipmangoodwin.com

Imminent Changes to the U.S. Munitions and Commerce Control Lists Require Attention

On January 6, 2014, the second tranche of rule changes under President Obama's Export Control Reform ("ECR") initiative will take effect.¹ ECR's purpose is to build "higher walls around fewer items" by transitioning relatively less sensitive articles from the United States Munitions List ("USML") in the International Traffic in Arms Regulations ("ITAR") to the Commerce Control List ("CCL") in the Export Administration Regulations ("EAR"), and maintaining strict controls on USML items. The January 6, 2014, changes relate primarily to military vehicles, naval vessels, and submersibles.

The changes discussed here are the second step in a multi-phase reform effort by the U.S. Department of State ("DoS"), Directorate of Defense Trade Controls ("DDTC") and the U.S. Department of Commerce ("DoC"), Bureau of Industry and Security ("BIS"). Principal changes include updated definitions in the DDTC-administered ITAR and BIS-administered EAR, changes to the USML and CCL, and the creation of a shared export licensing authority between DDTC and BIS. These amendments will have a significant impact on many defense industry manufacturers and exporters because they result in substantial changes to the jurisdiction and classification processes for a wide array of naval vessels, military vehicles, and miscellaneous equipment and materials.

Common Revisions to USML Category VI (Surface Vessels), Category VII (Ground Vehicles), Category XIII (Materials and Miscellaneous Articles) and Category XX (Submersible Vessels and Related Articles)

The changes implement the new definition of "specially designed," set forth at ITAR § 120.41, for USML Categories VI, VII, XIII, and XX. "Specially designed" has a two-part "catch and release" structure: Paragraph (a) "catches" a defense article as "specially designed" if it meets one of two criteria, and Paragraph (b) "releases" the defense article (i.e., the article is not "specially designed") if it qualifies for one of five enumerated exceptions. Determining if an article is "specially designed" requires a detailed analysis of both the article and the language of §120.41. Exporters must therefore consider Paragraphs (a) and (b) together and be mindful that in order to rely on certain exceptions in Paragraph (b), they must maintain the specific documentation described therein. To complement the ITAR, BIS introduced a similar definition for "specially designed," including a comparable "catch and release" structure and similar record keeping requirements, in EAR §772.1.

¹ For discussion of ITAR and EAR changes effective October 15, 2013, see <http://shipmangoodwin.com/aerospace-manufacturers-imminent-changes-to-the-us-munitions-and-commerce-control-lists-require-attention>

Revised USML Categories VI, VII and XX also contain “positive lists” of enumerated parts and components that remain subject to the ITAR under Category VI(f), Category VII(g) and Category XX(c), respectively.² All other equipment, parts, components, accessories, and attachments not specifically enumerated and that do not meet the definition of “specially designed” transition from the USML to the CCL’s new “600 Series” ECCNs for their respective CCL Categories. Licenses from BIS are generally required to export and re-export most 600 series articles worldwide, unless an EAR license exception is available.

Finally, revised USML Categories VI, VII, XIII and XX each include a new “(x) paragraph,” permitting DDTC licensing of CCL items under certain circumstances. Typically, exporters must apply to DDTC for export licenses for controlled items on the USML and to BIS for export licenses for controlled items on the CCL. However, the new “(x) paragraph” captures within each category the “[c]ommodities, software, and technical data subject to the EAR . . . used in or with the defense articles” controlled under the pertinent USML categories. The (x) paragraph allows exporters to apply for a license from DDTC for both USML- and CCL-controlled items for certain transactions, eliminating the burden of applying for licenses from both DDTC and BIS.

Revision of USML Category VI (Surface Vessels)

Currently, warships, submarines and many of their respective parts and components are controlled under USML Category VI and require DDTC authorization for export. In addition to the common changes discussed above, the new rule amends the definition of “surface vessel” at ITAR § 121.15 to reduce its reach and to control fewer types of surface vessels of war. The new rule also moves submarines from USML Category VI to USML Category XX, and removes “harbor entrance detection devices” formerly controlled under USML Category VI(d). Items that are no longer controlled under USML Category VI transition to the new “600 series” controls in Category 8 of the CCL.

Revision of USML Category VII (Ground Vehicles)

DDTC provides a new, narrower definition of “ground vehicles” at ITAR § 121.4. Specifically, Category VII will capture only those vehicles “that warrant control under the requirements of the [Arms Export Control Act].” Most unarmored and unarmed vehicles, trucks, trailers and trains, and armored vehicles manufactured before 1956 are no longer controlled under the USML and transition to the new “600 series” controls in Category 0 of the CCL.

Revision of USML Category XIII (Materials and Miscellaneous Articles)

The definitions of many individual items listed in Category XIII are revised for clarity and to assist exporters by establishing “bright line” rules delineating whether items are controlled by the ITAR or the EAR. Further, many items are removed from the USML and categorized under various “600 series” ECCNs. It is likely that DDTC will continue to revise Category XIII to reflect the changing control of parts and equipment attendant with future anticipated revisions of the USML under the ECR initiative.

² Category XIII is comprised entirely of a list of miscellaneous items and does not have a separate enumeration.



Revision of USML Category XX (Submersible Vessels and Related Articles)

Category XX is revised to reflect the transfer of submarines and related articles from Category VI and will also control nuclear propulsion plants for submersibles. DDTC provides a revised definition of “Submersible vessels and related articles” at ITAR § 121.14. Parts removed from the USML pertaining to Category XX items are transitioned to the new “600 series” controls in Category 8 of the CCL.

Maintenance Levels

Finally, the January 6, 2014, revisions add a three-tier definition of “maintenance levels” under ITAR § 120.38. Repair, maintenance, and modification of defense articles are controlled as defense services, with a number of potentially applicable licensing exceptions depending on the type of repair, maintenance, or modification being performed. The new definition provides for “organizational-level” (§ 120.38(a)), “intermediate-level” (§ 120.38(b)), and “depot level” (§ 120.38(c)) maintenance, in order of increasing requisite skill. Any service that “enhance[s] the basic performance or capability” of the underlying defense article cannot be deemed “maintenance” and is therefore ineligible for the attendant licensing exceptions. The new definitions should provide clarity for maintenance, repair and overhaul providers.

Commodity Jurisdiction Requests

Although these rule changes will not be in full force and effect until January 6, 2014, commodity jurisdiction requests submitted to DDTC on or after November 14, 2013, will be reviewed under the revised scheme.

Conclusion

Rule changes going into effect January 6, 2014, continue to shift items from the USML to the CCL. The changes to USML Categories VI, VII, XIII and XX, and the shifting of items to CCL “600 series” ECCNs, will significantly impact companies with international operations involving military vehicles, naval vessels, and submersibles. For most companies, the jurisdiction and classification processes will change substantially, and in some instances, the appropriate export licensing authority may change completely. Companies should become familiar with the nuances of these new regulations well before the January 6, 2014, effective date, and conduct thorough internal analyses to determine the extent to which their products and services will be affected. Early evaluation will allow exporters to maximize the benefits ECR is intended to provide while minimizing the exposure to risks inherent in a changing regulatory regime.

Questions or Assistance?

If you have any questions regarding this alert, please contact Ross Garber at (202) 469-7750, (860) 251-5901 or rgarber@goodwin.com, or Scott Cowperthwait at (860) 251-5134 or scowperthwait@goodwin.com.

This communication is being circulated to Shipman & Goodwin LLP clients and friends and does not constitute an attorney client relationship. The contents are intended for informational purposes only and are not intended and should not be construed as legal advice. This may be deemed advertising under certain state laws. © 2013 Shipman & Goodwin LLP.

One Constitution Plaza
Hartford, CT 06103-1919
860-251-5000

300 Atlantic Street
Stamford, CT 06901-3522
203-324-8100

1133 Connecticut Avenue NW
Washington, DC 20036-4305
202-469-7750

289 Greenwich Avenue
Greenwich, CT 06830-6595
203-869-5600

12 Porter Street
Lakeville, CT 06039-1809
860-435-2539

www.shipmangoodwin.com



SHIPMAN & GOODWIN LLP®
COUNSELORS AT LAW