June 10, 2012

To: DDTCResponseTeam@state.gov
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Subject: ITAR Amendment - Category X RIN 1400-AD16 and
EAR Revision - Personal Protection and Shelters RIN 0694-AF58

What follows includes responses to the State requests that the public identify:

(1) any potential lack of coverage in the June 7 State and Commerce rules compared with Wassenaar Munitions List (WML) Item 13 (or WML 21 or WDUL 1.A.5); and

(2) specific examples of materials and miscellaneous articles whose jurisdiction would be in doubt based on this revision (this includes examples of double coverage).

What follows also identifies:

(3) proposed coverage not now included in the WML.

Proposed U.S. omission of WML13 coverage should not continue or, if new, now be put into effect without Wassenaar concurrence. Proposed continued or new U.S. unilateral coverage would be more effective if included on the WML. <u>It is recommended that the United States seek Wassenaar agreement along the lines of the proposed rules before putting them into effect in U.S. regulations.</u>

(1) <u>The two proposed rules would omit the following WML 13, WML 21, or WDUL 1.A.5 coverage:</u>

13.a Armored plate with a military standard or specification or suitable for military use not "specially designed" for military use, per 1A613.a,

to the extent not covered by the May 18, 2012 proposal for Category XIII.e; the December 23, 2011 proposal for ECCN 8C609.a; or the December 6, 2011 proposals for Category VI.g.1,3,4,5,6 or ECCNs 0A606.x or 0C606.a.

But, rather than conform with WML 13, the U.S. should seek changes in WML 13 along the lines of the June 7 proposed rules, in order to further the "bright line" objective.

13.b Constructions to provide ballistic protection for military systems

to the extent that "constructions" may be construed not to be "shelters," per 1A613.b.1

13.c Specially designed components for helmets (i.e., helmet shell, liner, and comfort pads) to military standards equal to or greater than NIJ Type IV

to the extent not covered by the November 2, 2011 proposals for Category VIII.h.15 or ECCN 9A610.x as it relates to 9A610.g.

The cross reference to Category XII in proposed Category X.a.5 may include some such components; but no reference to helmets was found in existing Category XII and no proposal to revise Category XII has yet been published. Deletion of "specially designed"

and explicitly controlling only the three specified components would be a brighter line.

13.d Protective garments manufactured according to military standards
to the extent not covered by proposed Category X.a.2 or ECCN 1A613.d.1.
But X.a.2 and 1A613.d.1 commendably further the "bright line" objective.

13.d Specially designed components for body armor or protective garments, NIJ Type IV or greater manufactured to military standards
But "specially designed" is not "bright line."

21 Software for software

21 Software modified for 1A613 or 1B613

1.A.5.a Soft body armor regardless of NIJ level.

(2) <u>Examples of doubtful jurisdiction</u>

X.a.2 Protective clothing meeting both X.a.2 and 1A613.d.1 specifications would be controlled by both.

Note 1 to X.a.7 refers to XIII.j for controls on related materials. Technical specifications in XIII.j.1, 2, and 3 may make use of the ambiguous terms "specially designed" or "specially" in those sub-items unnecessary.

X.a.8 It is illogical to control parts, components, accessories, and attachments which are not developed under a DoD contract just because they are related to something which is developed under such a contract. Moreover, export restrictions related to something developed under a DoD contract should be specified in that contract, rather than in export control regulations. Export controls could, and in this case would, differ from the contract conditions.

X.d.3 Jurisdiction for classified items is unknown to exporters who have not been informed that the items are classified. If they have been informed, then regulations for classified items, rather than different export control regulations, should apply.

X.e Differing definitions of "technical data" and no definition of "directly related" give rise to significant doubts concerning jurisdiction.

0A018, 0A988, 1A005, 1A613.c, 0A613.d.1: "Less than NIJ Type IV (or Type III)" describes what is not controlled but does not describe what is controlled. The following quotation from the third column on page 33699 of the June 7 FR proposal could be read as indicating an intent to control only Type III:

"Type III body armor would be controlled on the CCL in proposed ECCN 1A613."
If Types other than Type III are intended, listing of those other Types would be helpful.

1A005 Proposed heading (from WDUL 1.A.5) states:
"Body armor and components therefor, as follows"
but no components follow.

1A613.a Armored plate "specially designed" for military use and not controlled by the USML
The exporter is left in doubt as to what is covered. WML 13.a is not much better; but it at least avoids the ambiguous phrase "specially designed."

1A613.b "Specially designed" as a modifier for shelters may serve no useful purpose, given the characteristics described in b.1 and b.2.

1A613.c includes 1A613.y.1

1A613.d.1 controls protective garments equal to or less than NIJ level III; whereas X.a.2 does not control protective clothing other than body armor NIJ level IV or higher.

The Note to 1A613.d states:
"See ECCN 1A005 for controls on soft body armor and protective garments not manufactured to military standards."
However, 1A005 does not cover protective garments, being limited to body armor.

1A613.e Other personal protective "equipment" "specially designed" for military applications ...
Although "equipment" is in quotation marks, there is no accompanying definition. The words "specially designed" and "for military applications" are ambiguous.

1A613.x includes 1A613.y heading

1A613.y is limited to parts, components, accessories, and attachments; but 1A613.y.99 is not so limited and 1A613.y.1 helmets are not parts, components, accessories, or attachments.

1B613 is included in 2B018

1D613 for 1B613 is included in 2D018

1D613 heading includes software for installation, repair, overhaul, or refurbishing of 1A613 or 1B613; but nothing which follows includes such software

1E913 for 1B613 and for 1D613 for 1B613 is included in 2E018

(3) <u>Proposed coverage not now included in the WML or WDUL 1.A.5</u>

X.a.1,2	Body armor and protective clothing with proposed specifications which are not manufactured according to military standards or specifications
X.a.2	Personal protective equipment or face paints
X.a.5,6	Helmets with proposed specifications which are not manufactured according to military standards or specifications
X.a.7 & d.2	Goggles, spectacles, or visors and lenses therefor
X.a.8	Developmental personal protective equipment and shelters and components therefor developed under a DoD contract
X.d.1	Ceramic or composite plates providing protection equal to or greater than NIV Type IV if not manufactured to comply with a military standard or specification or suitable for military use.
X.d.3	Classified items
X.e	Technical data for portions of X.a.1,2,3,5,6,7,8 and d.1,2.3 described above
1A613.b.2	Shelters specially designed to protect against nuclear, biological, or chemical contamination.
1A613.e	Other personal protective equipment specially designed for military applications.
1A613.x & y	Parts, accessories, and attachments
1A613.x	Components for 1A613.a, 1A613.b.2, or 1A613.e
1A613.x for 1A613.c or 1A613.y	components for helmets except for helmet shell, liner and comfort pads
1B613	for development
1B613.a	for production of portions of X.a.1,2,5,6,7,8, d.1,2,3, and e and 1A613.b.2, e,x,y described above
1B613.y.99	
1D613.a	software for portions of 1A613.b.2, e,x,y and 1B613 described above
1E613.a	technology for portions of 1A613.b.2, e,x,y, 1B613, and 1D613 described above