January 7, 2012

To: DDTCResponseTeam@state.gov
Publiccomments@bis.doc.gov

From: Bill Root, waroot23@gmailcom, tel. 301 987 6418

Subject: ITAR Amendments - Category XX RIN 1400-AD01
EAR Revisions - Submersible Vessels RIN 0694-AF39

General Comments:

The following observations apply not only to ITAR Category XX and related EAR 600 series ECCNs but also to other Categories, including recent proposed rules for Categories VII, VIII, XIX, and VI and related EAR 600 series ECCNs.

"Military Use": Commendable progress has been made in substituting technical descriptions for "military use" and other similar words, such as "military applications", "military mission", or for "defense articles." Such expressions are inherently ambiguous, whether or not modified by "specially designed" or other non-technical terms, such as "specifically designed or modified" or "directly related." See below for specific recommendations to complete this process for Category XX and ECCNs 8x620.

"Specially Designed": The December 2010 and July 2011 proposed definitions of "specially designed" omit designer intent. The original intent of the designer is usually unknown and the designer's intent could change over time. However, designer intent is the usual meaning of "specially designed" and of other similar words, such as "specifically designed", "specially designed or modified", "designed or modified", "designed", "special", "specialized", or "specific." Moreover, no definition of "specially designed" (or of these other words) could cover all their diverse uses throughout the USML and CCL (*e.g.*, to identify the controlled portion of something or the uncontrolled portion of something; to limit controls to a stated end-use or end-user; or to identify which components of an end-item are controlled or which components of a component are controlled). It is, therefore, recommended that "specially designed" (and other similar words) be completely deleted from the USML, the CCL, and corresponding multilateral lists and, where applicable, be replaced with other more precise expressions.

Some USML end-items now proposed to be modified by "specially designed" are already otherwise sufficiently described that simple deletion of "specially designed" would be desirable. This would avoid unintended implications that there were non-specially designed versions which should not be controlled. If such an implication were intended, a few more technical words to exclude what should not be controlled would clarify that intention.

Specific recommendations below to replace "specially designed" with "required" assume that the EAR definition of "required" would be revised to cover commodities as well as technology and software and that the Wassenaar definition would be revised to cover

commodities and software in addition to technology. “Required” is more restrictive than the unique interpretation of “specially designed,” which appears in many U.S. and multilateral historical documents and in current missile technology controls. “Required” is a better term to describe the original purpose of “specially designed” components, namely, to avoid defeating the purpose of the embargo.

To control situations in which no components of a munitions production installation would be “required,” it is recommended that U.S. controls include the following from Wassenaar Munitions List (WML) 22.b.1:

> Technology “required” for the design of, the assembly of components into, and the operation, maintenance and repair of, complete production installations for items specified by the Munitions List or by 8A620, 8B620, or 8D620, even if the components of such production installations are not specified.

Parts: The July 2011 proposed definition of “specially designed” would exclude what ITAR 121.8(d) defines as a “part.” It is, therefore, recommended that all mention of parts in Category XX or ECCNs 8x620 be deleted.

“Accessories and Attachments”: The ITAR 121.8(c) definition of these words notes that they are “not necessary” for the operation of an end-item, component, or system. The examples given are separately controlled (riflescopes in I.f and special paints in XIII.g). Therefore, it is recommended that all mention of accessories, attachments, and associated equipment in Category XX and ECCNs 8x620 be deleted.

Technical data: Proposed Category XX (and existing and proposed Categories VII, VIII, XIX, and VI) ambiguously control technical data directly related to defense articles. Production software and technology should be controlled by the same agency which controls production equipment, *i.e*., Commerce. The definitions of “development” and “production” overlap. “Development” includes all stages prior to serial production; but “production” includes all production stages. Both terms include assembly and testing.

USML and CCL descriptions in other sections of ITAR: Category XX (and Categories VI, VII, and VIII) proposals would revive sections 121.14 (and 121.3, 121.4 and 121.15) to include definitions and other descriptions needed to understand the scope of USML or CCL controls. It is recommended that these sections be deleted and the substance be moved to the respective control lists.

Wassenaar: These proposed rules should not become final, or even interim final, until reviewed by related multilateral regimes to which the United States is committed. Historically, the United States has benefitted from considering differing allied technical views. The United States has also been reasonably criticized on those infrequent occasions when it has acted unilaterally in ways which others perceived to be benefitting U.S. exporters. Such might be the case by some substitutions of technical descriptions for specially designed.

Specific Reommendations to Revise Proposed Category XX and ECCNs 8x620

Revise XX.a to read: Submersible and semi-submersible vessels, whether or not demilitarized or decommissioned, manned or unmanned, tethered or untethered, as follows:

Revise XX.a.1 to read armored submarines

Revise XX.a.4 to read armed or serve as a platform to deliver munitions or otherwise destroy or incapacitate targets by firing torpedoes, launching rockets, firing missiles, deploying mines, or deploying countermeasures;

In XX.a.5 delete specially designed

Revise XX.a.6 to read vessels equipped with mission systems to provide electronic warfare, target designation, surveillance, target detection, or sensor capabilities;

Add new XX.a.8 integrated with nuclear propulsion systems .

In XX.b delete special

In XX.c delete , parts, accessories, attachments, and associated equipment "specially designed"

In XX.c Note delete parts, and delete , accessories and attachments

Revise XX.d to read

> Software "required" for installation, operation, maintenance, repair, overhaul, or refurbishing of XX.a,b,c and software portion of .d; and
> Technology "required" for installation, operation, maintenance, repair, overhaul, or refurbishing of XIX.a,b,c and software portion of .d.

Delete 121.14

In 123.20(a) after Nuclear Regulatory Commission insert or the Department of Commerce (the Nuclear Non-Proleferation Act of 1978 requires Commerce control of items now on the CCL for NP reasons)

In 125.1(e) after Nuclear Regulatory Commission insert or the Department of Commerce (the Nuclear Non-Proleferation Act of 1978 requires Commerce control of software or technology items now on the CCL for NP reasons)

In 8A620 heading change "oceanographic and associated equipment" to "and related equipment"

In 8A620 Unit delete parts and delete accessories and attachments
Revise 8A620 Related Controls (1) to read Submersible vehicles and related articles, including

software and technology ”required” for installation, operation, maintenance, repair, overhaul, or refurbishing, described in 22 CFR part 121, Category XX are subject to the jurisdiction of the International Traffic in Arms Regulations (ITAR). Components for defense articles in USML Category XX are controlled under USML sub-category XX(c).

Revise 8A620 Related Controls (3) to read: For controls on submersible vehicles and related equipment not controlled by the USML see ECCNs 8A001, 8A002, and 8A992.

Revise 8A610.a to read: Deep Submergence Rescue Vehicles (DSRV) and Deep Submergence Vehicles (DSV)

Revise 8A610.b to read: Submersible and semi-submersible vessels for cargo transport.

In 8A620.d.1 and d.2 delete “specially designed”

In Note to 8A620.d after “Other propulsion systems” insert “not common to vessels on the EAR or” (for consistency with XX.c Note)

In 8A620.f delete “specially designed for military use and”; delete “specially designed”; and delete “to military use”

In 8A620.x, delete “Parts,”; delete “, accessories and attachments” and change “specially designed” to “required”

Delete 8A620.x Note 2

Delete 8A620.y, 8B620.y, 8D620.y,and 8E620.y and references elsewhere to these sub-items

In 8B620 heading change “specially designed” to “required”

In 8B620.a change “specially designed” to “required” (twice); delete “parts,”; delete “accessories and attachments”

In 8B620.b change “specially designed” to “required” (twice); delete “parts,”; delete “accessories and attachments”

Revise 8D620 heading to read: Software “required” for submersible vessels and related commodities and software, as follows (see List of Items controlled)

In 8D620 Related Controls (1) change “directly related to” to “required” for installation, operation, maintenance, repair, overhaul, or refurbishing of

In 8D620.a change “specially designed” to “required”; add installation, repair, overhaul, or refurbishing; in parenthetical except clause change or to and

In 8D620.b change “specially designed” to “required”; add installation, repair, overhaul, or refurbishing

Add new 8D620.c:
c. Software “required” for development or production of XX.a,b,c and software portion of d

Revise 8E620 heading to read: Technology “required” for submersible vessels and related commodities and software, as follows (see List of Items controlled)

In 8E620 Related Controls (1) change “directly related to” to “required” for installation, operation, maintenance, repair, overhaul, or refurbishing of

Add new 8E620.c and d:
c. Technology “required” for development or production of XX.a,b,c and software portion of d; and
d Technology “required” for the design of, the assembly of components into, and the operation, maintenance and repair of, complete production installations for XX.a,b,c and software portion of .d, even if the components of such production installations are not specified.

<u>Recommended Category XX portion of Wassenaar Proposal</u>

Revise underwater portions of WML 9 to correspond with proposed Category XX.a,b,c plus 8A620.a,c,d,e,f,x revised as recommended above (this assumes the improbability of multilateral agreement on 8A620,b)

Revise WML 16 to conform with Note 1 to 8A620.x
In WML 18.a change “specially designed or modified” to “required” and change “specially designed” to “required”
In WML 18.b change “specially designed” to “required” (twice)
In WML 21.a change “specially designed or modified” to “required”
Revise Wassenaar definition of “required” to include commodities and software as well as technology