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Subject: ITAR Amendments - Category VI RIN 1400-AC99
EAR Revisions - Control of Vessels of War and Related Articles RIN 0694-AF42

General Comments:

The following observations apply not only to ITAR Category VI and related EAR 600 series ECCNs but also to other Categories, including recent proposed rules for Categories VII, VIII, XIX, and XX 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 VI and ECCNs 8x609.

"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 are not controlled. If such an implication were intended, a few more technical words to exclude what is not 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, even if the components of such production installations are not specified.

Inclusion of trivial items in the list of "specially designed components" of USML end items in ECCN 8A609.y.1-13 indicates an intent that virtually all components of USML end items be controlled. Controlling individual components of little if any military significance would not be necessary to avoid defeating the purpose of the embargo. However, if there were no components "required" for a USML end-item, the purpose of the embargo could be defeated by exporting all the components and assembling them into the end-item. It is, therefore, recommended that only "required" components of USML end-items be controlled individually but that U.S. and Wassenaar controls include:

> Technology "required" for the assembly of components into USML end-items even if the components of such end-items are not specified.

"Defense services," as defined in 22 CFR 120.9(a)(1), include assembly of defense articles. If all components of defense article end-items are construed also to be defense articles, this definition of defense services would cover assembly of components into USML end-items. In that case, and assuming applicability of defense service controls to the EAR administration of 600 series components, there would be no need for the above recommended control on technology to assemble uncontrolled components into USML end-items. However, there would be a major needless cost in terms of controls on countless individual components of little if any significance.

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 VI or ECCNs 8x609 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 VI and ECCNs 8x609 be deleted.

Components of components: Controlling components of components is generally questionable.

Materials: There are currently no materials listed in USML Category VI (or Categories VII, VIII, or XX). Structural materials in XIII.f and ablative materials in IV.f are ambiguously controlled because of their relationship to defense articles, with no technical specifications. Existing ECCNs on the CCL control materials with technical detail based on potential military applications. It is, therefore, recommended that materials be controlled on the USML or in 600 series ECCNs only if manufactured to the point of being recognized as USML components (as described in proposed Note 1 to 8A609.x).

Technical data: Existing and/or proposed Category VI (and Categories VII, VIII, XIX, and XX) 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 VI (and Categories VII, VIII, and XX) proposals would revive sections 121.15 (and 121.3, 121.4 and 121.14) 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 and IAEA: These proposed rules should not become final, or even interim final, until reviewed by 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 VI and ECCNs 8x609

VI heading after "Vessels of War" insert "whether or not developmental, demilitarized, decomissioned, production, inventory, manned or unmanned, U.S.- or foreign origin"; before "naval equipment" delete "special"

VI.a change "(see Sec. 121.15 of this subchapter)" to "(battleships, aircraft carriers, destroyers, frigates, cruisers, corvettes, littoral combat ships, mine sweepers, mine hunters, mine countermeasure ships, dock landing ships, amphibious assault ships, or Coast Guard Cutters with U.S. designations WHEC, WMEC, WMSL, or WPB or equivalent)"

VI.b before "vessels" insert "surface"; change "(See Sec. 121.15 of this subehapter)' to ", as follows:

1. high-speed air cushion vessels for transporting cargo and personnel ship-to-shore and across a beach with a payload over 25 tons;
2 integrated with nuclear propulsion systems;

3. armed or serving as a platform to deliver munitions or otherwise destroy or incapacitate targets by firing lasers, launching torpedoes, rockets, or missiles, or firing munitions greater than .50 caliber;
4. Incorporating mission systems to provide electronic warfare, target designation, surveillance, target detection, or sensor capabilities."

In VI.c change "specially designed" to "developmental"; delete "parts,"; delete ", accessories and attachmnents"

In VI.e delete "special"

Revise VI.f heading to read: Components, as follows:

In VI.f.1 delete "specially designed"

In VI.f.4 delete , and parts and components "specially designed" therefor

In VI.f.5 delete , and parts and components "specially designed" therefor

In VI.f.7 change specifically developed, designed, or modified to "required"

In VI.f.8 delete components, parts, accessoreis, attachments, and; delete "specially designed"

In VI.f.9 delete active protective systems (i.e.,; delete ) and parts and components "specially designed" therefor

In VI.f.10 delete and parts and components "specially designed" therefor

In VI.f Note 1 delete Parts,; delete , accessories and attachments "specially designed"; change under ECCN 8A609 to or the NRC

In VI.f Note 2 delete also

Revise VI.g to read:

Software "required" for installation, operation, maintenance, repair, overhaul, or refurbishing of VI.a,b,c,e,f and software portion of .g; and
Technology "required" for installation, operation, maintenance, repair, overhaul, or refurbishing of VI.a,b,c,e,f, and software portion of .g.

Delete 121.15

8A609 Unit delete parts,; delete ,accessories and attachments
8A609 Related Controls (1) delete special (twice); change "technical data (including software) and services directly related thereto" to "software and technology "required" for installation,

operation, maintenance, repair, overhaul, or refurbishing of such vessels and equipment or for such software”

8A609 Related Controls (4) before gas turbine engines delete military; before ECCN 9A619 insert USML Category XIX, ECCN 9A002, or; delete (as published on December 6, 2011, at 76 FR 76072, in a separate proposed rule that addresses gas turbine engines for military vehicles, vessels of war, and aircraft)

Revise 8A609.a to read Surface vessels of war, not enumerated in the USML, as follows:

1 underway replenishment ships;
2 surface vessel and submarine tender and repair ships;
3 non-submersible submarine rescue ships;
4 auxiliaries AGDS, AGF, AGOR, AGOS, AH, AP. ARL, AVB, AVM, and AVT;
5 armored, unarmed, amphibious craft;
6 unarmored, unarmed coastal, roadstead, and Coast Guard and other patrol craft with mounts or hard points for firearms of .50 caliber or less.

Delete 8A609.a Note

In 8A609.x delete “Parts,”; delete , “accessories and attachments”; change “specially designed” to “required”; change 8A609 to 8A609.a

In 8A609.x Note 2 first sentence delete “”Parts,”; delete , “accessories and attachments”; change VI(g) to VI(f)

Delete 8A609.x Note 2 second sentence

Delete 8A609.y, 8B609.y, 8C609, 8D609.y, and 8E609.y and all references elsewhere to these ECCNs

In 8B609 heading delete and related commodities; change “specially designed” to “required”; before , as follows insert and components “required” therefor

Revise 8B609 items to read The list of items controlled is contained in the ECCN heading.

Revise 8D609 heading to read:

Software “required” for development or production of VI.a,b,c,e,f and software portion of .g; and software “required” for development, production, installation, operation, maintenance, repair, overhaul, or refurbishing of 8A609, 8B609, or 8D609

In 8D609 Related Controls (1) change directly related to “required” for installation, operation, maintenance, repair, overhaul, or refurbishing of

Revise 8D609 items to read: The list of items controlled is contained in the ECCN heading.

Revise 8E609 heading to read: Technology for surface vessels of war, as follows:

In 8E609 Related Controls (1) change directly related to "required" for installation, operation, maintenance, repair, overhaul, or refurbishing of

Revise 8E609 items to read

a. technology "required" for development or production of VI.a,b,c,e,f and software portion of .g;

b technology "required" for development, production, installation, operation, maintenance, repair, overhaul, or refurbishing of 8A609, 8B609, or 8D609;

c technology "required" for the design of, the assembly of components into, and the operation, maintenance and repair of, complete production installations for VI.a,b,c,e,f and software portion of .g, 8A609, 8B609, or 8D609, even if the components of such production installations are not specified; and

d technology "required" for the assembly of components into VI.a,b,c,e,f and software portion of .g, 8A609, 8B609, or 8D609 end-items, even if the components of such end-items are not specified.

<u>Recommended Category VI portion of Wassenaar proposal</u>

Revise surface vessel portions of WML 9 to conform with proposed Category VI plus 8A609.a.5 and related portions of 8A609.x revised as recommended above (this assumes the improbability of multilateral agreement on recommended 8A609.a.1,2,3,4,6)

Revise WML 16 to conform with Note 1 to 8A609.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"
Add to WML 22.b:

6. Technology "required" for the assembly of components into WML end-items even if the components of such end-items are not specified.

Revise Wassenaar definition of "required" to include commodities and software as well as technology

<u>Recommended Category VI portion of IAEA Trigger List or Nuuclear Supplier Group proposal</u>

Changes to conform with proposed Category VI.e and f.7 revised per above recommendations.