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Subject: ITAR Amendments - Category VII RIN 1400 AC77
EAR Revisions - Control of Military Vehicles and Related Items RIN 0694-AF17

General Comments:

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

"Military Use": Commendable progress has been made in substituting technical descriptions for "military use" and other similar words, such as "military application", "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 VII and ECCNs 0x606.

"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 his/her 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 EAR part 744 end use controls be revised to 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 0A606.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 another end-use control along the following lines be added to part 744:

> 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 addition to part 744. 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." Given this intent, the specific recommendations below delete all mention of parts.

"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, specific recommendations below delete all mention of accessories and attachments.

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

Materials: There are currently no materials listed in USML Category VII (or Categories VIII, VI, or XX). Armor, currently enumerated in Category XIII.e, is reasonably treated as a component in proposed VII.g. 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 0A606.x).

Technical data: Existing and proposed Category VII (and Categories VIII, VI, 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. Therefore, it is recommended that:

VII.h be revised to control:

software "required" for installation, operation, maintenance, repair, overhaul, or refurbishing of VII.a,b,c,e,g, and software portion of .h; and

technology "required" for installation, operation, maintenance, repair, overhaul, or refurbishing of VII.a,b,c,e,g, and software portion of .h.

0D606 be revised to control:

software "required" for development or production of VII.a,b,c,e,g, and software portion of .h; and software "required" for development, production, installation, operation, maintenance, repair, overhaul, or refurbishing of 0A606, 0B606, or 0D606.

0E606 be revised to control:

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

technology "required" for development, production, installation, operation, maintenance, repair, overhaul, or refurbishing of 0A606, 0B606, or 0D606;

technology "required" for the design of, the assembly of components into, and the operation, maintenance and repair of, complete production installations for VII.a,b,c,e,g, and software portion of .h, 0A606, 0B606, or 0D606, even if the components of such production installations are not specified; and

technology "required" for the assembly of components into VII.a,b,c,e,g, and software portion of .h, 0A606, 0B606, or 0D606 end-items, even if the components of such end-items are not specified.

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

Wassenaar, MTCR, and NSG: 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 substituting technical descriptions for specially designed.

Specific Reommendations to Revise Proposed Category VII and ECCNs 0x606

Delete "specially designed" in VII.b firing or launch platform and in 121.4.a.1

Add "and trailers" to VII.e and delete "specially designed" in 121.4.a.2

In 121.4.a.3 definition of "Mission Systems," delete "specific military functions, such as by providing military communication" so definition would read: "defense articles that perform target designation, surveillance, target detection, or sensor capabilities."

Delete "specially designed" in:

VII.g.3 composite armor (perhaps with additional technical detail, such as appeared in the 12/10/10 proposal)
VII.g.4 spaced armor and slat armor
VII.g.10.i rotary shock absorbers
VII.g.10.ii torsion bars
VII.g.11 kits to convert to unmanned or driver-optional vehicle

Delete "and components specially designed therefor" in VII.g.6 and VII.g.8;

Revise 0A606.a to read:
Ground vehicles as follows:

1 Tanks and armored vehicles manufactured prior to 1956 that do not contain a functional weapon or a weapon capable of becoming functional through repair, unmodified since 1955 except modifications to incorporate safety features required by law, are cosmetic (e.g., different paint, repositioning of bolt holes), or to add parts or components otherwise available prior to 1956;.
2 Armored railway trains except those that are armed or that launch missiles; or
3 Unarmored, unarmed vehicles with mounts or hard points for firearms of .50 caliber or less.

Delete Note to 0A606.a

Delete "specially designed" in 0A606.b.1 Note 2 (none of the definitions under consideration for "specially designed" make sense when applied to a decontrol)
Delete "special" in 0A606.b.1 Note 3

Delete "specially designed" in:

0A606.e deep water fording kits

0A606.f self-launching bridge components

Change “specially designed” to “required” in:
0A606.x
0B606 heading, 0B606.a (twice). 0B606.b (twice)
0D606 heading, 0D606.a

Remove applicability of 0A606.x to 0A606.c,d,e,f

Delete 0A606.y, 0B606.y, 0C606, 0D606.y, 0E606.y

Delete “parts” in”
VII.g heading, VII.g.3,4,5,6,8, and VII.g Note
0A606 Unit, 0A606.b.2, 0A606.x, 0A606.x Note 2, (twice), and 0B606.a.

Delete accessories, attachments, and associated equipment in:
VII.g heading and VII.g Note
0A606 Unit, 0A606.x, 0A606.x Note 2 (twice), 0B606.a.

<u>Recommended Wassenaar Proposal</u>

Revise WML 6 to conform with proposed Category VII, 0A606.c,d,e,f, and x revised as recommended above plus railway trains that are armed, are armored, or launch missiles.

Revise WML 13.a,b to conform with proposed VII.g and 121.4.a Note
Revise WML 16 to conform with Note 1 to 0A606.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:
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.