

International Trade Alert

January 24, 2017

Key Points

- DDTC and BIS are requesting additional comments from companies affected by the recent Category XII ECR changes that went into effect on December 31, 2016.
- The notices of inquiry generally apply to companies that deal in sensors, lasers, infrared detection items or guidance equipment.
- DDTC and BIS are seeking comments on specific proposals that could lead to stricter controls if implemented in future rulemakings.
- Public comments are due to the departments by March 14, 2017



DDTC and BIS Request Comments on Additional Proposals for Category XII and Infrared Detection Items

On January 13, 2017, the departments of State and Commerce published notices of inquiry (NOI) requesting comments on additional proposals for U.S. Munitions List (USML) Category XII and related controls for items subject to the Export Administration Regulations (EAR).¹ The requests are particularly relevant for companies that deal with sensors, lasers, infrared detection items and guidance equipment. The agencies published these NOIs within two weeks of corresponding Export Control Reform (ECR) changes that went into effect on December 31, 2016, for these items.² Public comments are due by March 14, 2017.

DDTC Notice of Inquiry

The Department of State's Directorate of Defense Controls (DDTC) requests comments on three main issues: (i) alternatives to the term "specially designed for a military end user," (ii) potential positive control parameters for items primarily in XII(c) and (e) that are controlled when specially designed for another defense article and (iii) the scope of control for items controlled under XII(b)(1).

Alternatives to "Specially Designed for a Military End User"

To avoid the use of design-intent controls and to further the use of objective technical criteria as control parameters, DDTC is seeking comments on alternative control parameters for items that are now controlled when "specially designed for a military end user" (i.e., items in XII(b)(6), (c)(1), (c)(3), (c)(4), (c)(5), (c)(6) and (c)(7)). These items include certain light detection and ranging (LIDAR) or laser

¹ [DDTC Notice of Inquiry](#), 82 FR 4226 (Jan. 13, 2017); [BIS Notice of Inquiry](#), 82 FR 4287 (Jan. 13, 2017)

² [DDTC Final Rule](#), 81 FR 70340 (Oct. 12, 2016); [BIS Final Rule](#), 81 FR 70320 (Oct. 12, 2016)

detection and ranging (LADAR) systems, binoculars, bioculars, monoculars, goggles, electro-optical systems, infrared search and track (IRST) systems, distributed aperture systems, infrared imaging systems and terahertz imaging systems.

The revised Category XII is the only part of the USML that uses the term “specially designed for a military end user” as a control parameter. DDTC decided to use this term for certain items that did not lend themselves to positive control parameters or the normal use of “specially designed” (i.e., specially designed for a defense article). For items described in those Category XII entries, the scope of control can be exceptionally broad without contemporaneous documentation showing that the item was developed for both military and nonmilitary end users or developed for no particular end user. Thus, companies that make, use or export these items should comment on ways to establish a brighter line between military and commercial versions of them.

Potential Positive Control Parameters for Category XII(c) and (e) Items

The newly effective entries in Category XII(c) and (e) control many items if they are specially designed for another defense article. These items include certain binoculars, bioculars, monoculars, goggles, head-mounted imaging systems, weapon sights, infrared imaging systems, image intensifier tubes, infrared focal plane arrays, dewar assemblies, microbolometer focal plane arrays, digital low-light sensors and readout integrated circuits. DDTC noted that positive control parameters could not be found to adequately distinguish military from commercial items for many of these items, especially for those providing infrared detection capability.

DDTC is now seeking public input on a number of specific, positive control parameters for these items. The proposed parameters warrant critical attention by industry because they affect building-block components for both commercial and military imaging systems. Moreover, DDTC’s proposals contradict its previous finding that the use of “specially designed” is the best option to avoid controlling items in normal commercial use. Companies involved with imaging systems should review these proposals closely and consider the following questions:

- Are the parameters understandable and clear to apply to potentially affected items?
- Do the parameters capture any commercial items currently in production or any items for which commercial or civil use is anticipated in the next five years?
- Are the parameters specific to military capability or use, or are the parameters also important to commercial items and development?
- Is the pace of development and commercialization of items potentially affected so rapid that “specially designed” is the best way to account for changes in technological development?
- Will the use of the positive control parameters instead of “specially designed” contribute to a competitive disadvantage for U.S. companies?

Scope of Controls for Items Controlled Under Category XII(b)(1)

Finally, DDTC is also seeking comments on its new entry in Category XII(b)(1), which controls “[l]aser target designators or coded target markers, that mediate the delivery of ordnance to a target.” DDTC is seeking comments on the scope and applicability of this control, but has not elaborated further on why this entry was singled out for review.

As with DDTC’s prior actions on Category XII, public comments that provide detailed, quantitative information on each of the issues described above will be critical in shaping how the controls evolve following the ECR changes that already went into effect on December 31, 2016.

BIS Notice of Inquiry

The Department of Commerce’s Bureau of Industry and Security (BIS) requests comments on five specific proposals that would increase controls for dual-use infrared detection items primarily controlled under Export Control Classification Numbers (ECCNs) 6A002, 6A003, 6A990 and 6A993: (i) the use of *de minimis* for 0A919 items that incorporate certain infrared detection items, (ii) the use of License Exception Strategic Trade Authorization (STA) for certain night vision equipment, (iii) the increase of license requirements for 9 Hz cameras described in 6A993, (iv) the increase of license requirements for certain materials and technology in Commerce Control List (CCL) Category 3, and (v) the increase of license requirements for certain infrared detection technology in CCL Category 6.

De minimis for Certain 0A919 Commodities

BIS is seeking comments on whether destinations subject to 0 percent *de minimis* treatment should be expanded to all countries, except Canada, for military commodities in ECCN 0A919 that incorporate certain image intensifier tubes or infrared focal plane arrays in 6A002 or related readout integrated circuits in 6A990. Currently, foreign military commodities controlled under 0A919 that incorporate infrared detection items in 6A002, 6A003, 6A990 or 6A993.a are subject to 0 percent *de minimis* treatment only when reexported to countries in Country Group D:5.

BIS has proposed this stricter *de minimis* treatment to have greater visibility into reexports of 0A919 items that incorporate certain dual-use infrared detection content destined for countries outside of Country Group D:5. Affected companies should consider whether this more complex and burdensome *de minimis* treatment is warranted, particularly when this level of control is not required for 0A919 items incorporating content previously subject to the ITAR (i.e., 600 series and 9x515 items).

Restrictions on the Use of License Exception STA

BIS is seeking comments on its proposal to remove License Exception STA eligibility for cameras in 6A003.b.4 that are embedded into a higher-level assembly and that incorporate certain two-dimensional focal plane arrays and have more than 328,000 detector elements. While BIS previously expanded STA restrictions for a number of related items in its October 2016 final rule, the current proposal exceeds even the strictest proposals previously considered for 6A003 cameras. The proposal also adds complexity by basing STA eligibility on end use and removing STA for a group of items that have been STA-eligible since the inception of the License Exception. Affected companies that have relied on STA to export or reexport

the 6A003 cameras in question should consider how this change would affect their operations and their ability to compete with companies in other countries.

Additional License Requirements for 9 Hz Cameras

BIS is seeking comments on adding a new license requirement for 9 Hz cameras in 6A993.a if they incorporate a microbolometer focal plane array with more than 75,000 detector elements and will be exported, reexported or transferred (in-country) to a D:5 country for incorporation into a higher-level assembly. BIS previously added a license requirement in its October 2016 final rule for these cameras when destined to a military end user or incorporated into a military commodity. The agency is now considering whether further requirements are needed to account for the possible use of these items as weapon sights or surveillance components even when intended for civil end users or civil commodities.

Prior public comments on the issue of 9 Hz cameras have pointed out that they are widely available through commercial retail and produced in many countries. Therefore, affected companies should analyze the foreign availability of these cameras in D:5 countries like China, as well as all other countries, to comment on whether this proposed license requirement would be effective in mitigating the incorporation of these cameras into monoculars, weapon sights or unmanned aerial vehicles (UAVs).

Additional License Requirements for Certain 3C001 and 3E001 Items

BIS is seeking comments on adding a Regional Stability (RS) Column 1 control for specific materials in 3C001 that are necessary for the production of focal plane arrays in 6A002, in addition to a similar control for related technology in 3E001. The RS Column 1 control would impose a license requirement for all destinations, except Canada. This proposal would go beyond multilateral controls agreed upon by the Wassenaar Arrangement. Thus, this proposal could create a competitive disadvantage for U.S. companies vis-à-vis companies located in other Wassenaar countries. Affected companies should comment on whether a proposed change to the Wassenaar Arrangement Dual-Use Control List would be a more effective way to address potential concerns regarding materials in 3C001 and related technology in 3E001.

Additional License Requirements for Certain Technology in 6E001, 6E002 and 6E990

Finally, BIS is seeking comments on a worldwide license requirement for certain production and development technology related to the so-called “most sensitive” components in ECCNs 6A002 and 6A990. The proposed revision would add a worldwide RS license requirement for 6E001 or 6E002 technology for certain image intensifier tubes and their components in 6A002 and certain infrared focal plane arrays in 6A002. The proposed revision would also add a worldwide RS control for 6E990 technology for certain readout integrated circuits specially designed for the aforementioned focal plane arrays in 6A002.

The main impact of this proposal would be to require a license for this technology for Canada. The EAR rarely imposes license requirements for Canada, so this represents a departure from normal practice. Companies that transact with Canada on these items should carefully consider the following questions:

- If a license is required for production and development technology, would this proposal make it more difficult for U.S. and Canadian companies to collaborate?
- Would this proposal influence a Canadian company's decision on whether to source its focal plane arrays or readout integrated circuits from the United States?
- Would this proposal harm the U.S. and Canadian industrial bases, as well as security cooperation?

In describing all of the above potential revisions to the EAR, BIS asks for public input on whether these proposals would affect the competitive advantage or technological edge of U.S. companies, influence assembly and integration activities inside and outside of the United States, or apply to items for which there is already foreign availability.

Contact Information

If you have any questions regarding this alert, please contact the Akin Gump Strauss Hauer & Feld LLP lawyer with whom you usually work or::

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