

International Trade Alert

February 14, 2018

Key Points

- DDTC and BIS have published concurrent NOIs (available [here](#) and [here](#), respectively) requesting public comments on the controls over the export and reexport of **explosives, personal protective equipment, and military and intelligence electronics**. (By volume and value, the electronics categories are, by far, the most significant.)
- If you believe that there should be changes to these controls, you should prepare comments with your suggestions and submit them to BIS and/or DDTC by April 13, 2018.
- Kevin Wolf, former Assistant Secretary of Commerce for Export Administration and now an Akin Gump Strauss Hauer & Feld LLP partner, will hold a conference call at 1:00 p.m. EST on Wednesday, February 21, 2018, to answer questions about the requests, the process, and how to prepare comments that are effective and useful. Should you have any questions for Mr. Wolf, please [submit them in advance](#) of the call.



DDTC and BIS Solicit Comments Regarding Controls over Explosives, Personal Protective Equipment, and Military and Intelligence Electronics

On February 12, 2018, the Directorate of Defense Trade Controls (DDTC) and the Bureau of Industry and Security (BIS) published Notices of Inquiry (NOI) (available [here](#) and [here](#), respectively) requesting comments on Categories V, X and XI of the U.S. Munitions List (USML) under the International Traffic in Arms Regulations (ITAR) and the corresponding “600 series” controls on the Commerce Control List (CCL) of the Export Administration Regulations (EAR). These categories control (i) explosives and energetic materials, propellants, incendiary agents and their constituents; (ii) personal protective equipment; and (iii) military and intelligence electronics. BIS also seeks comments on its controls over cryogenic and superconducting equipment.

These NOIs continue the process of asking for suggestions about how to improve and update categories amended or created as a result of the Export Control Reform (ECR) effort. The information requested in these NOIs is essentially the same as that which the Obama administration sought in its NOIs. This means that, although you may comment on any aspect of the categories, you are particularly encouraged to do so if you can answer “yes” to any of the following questions:

- Do you have suggestions for how the controls could be written more clearly?
- Have you noticed errors in any of the categories?
- Do any of the controls describe items that are now, or will in the next five years be, in normal commercial use?
- Do you have suggestions for how to make the USML Category XI(b) control over equipment and software “specially designed for intelligence purposes” more clear and objective?
- Are there emerging or other technologies in these areas that should be added to the categories for national security or foreign policy reasons?

Export control personnel read all public comments and take them into account when preparing proposed rules to revise the categories. Thus, if you have suggestions for how to improve the categories, now is the best time to make them. The higher the quality of the comments and supporting documentation, the more likely your suggestions are to be taken seriously as part of future revision efforts.

Background

U.S. controls over the export and reexport of military items are divided between the ITAR, administered by the DDTC, and the “600 series” entries of the EAR, administered by BIS. The “600 series” items were once subject to the ITAR, but were determined during the Obama administration’s ECR effort to not warrant ITAR control. The ITAR generally requires a license to export or reexport defense articles to all countries. The EAR also generally requires a license to export or reexport 600 series items to all countries (except Canada), although some license exceptions are available, particularly if the item is destined to, and for the ultimate end use by a government in, one of 36 allied countries. The ITAR and the EAR have identical and equally strict prohibitions with respect to exports and reexports of military items to countries subject to arms embargoes, such as China.

One of the ECR goals was to describe the controls more clearly in a more positive and objective way (i.e., without using broad catch-all or subjective descriptions). As described in the NOIs, a consequence of these revisions is that the lists need to “be regularly revised and updated to account for technological developments, practical application issues identified by exporters and reexporters, and changes in the military and commercial applications of items affected by the list.”

Notices of Inquiry

In its NOI, DDTC specifically requests comment on the following topics:

- emerging and new technologies that are appropriately controlled by one of the referenced categories, but that are not currently described in subject categories or not described with sufficient clarity
- defense articles that are described in subject categories, but that have entered into normal commercial use since the most recent revisions to the category at issue; DDTC asks commenters to include documentation to support claims that defense articles have entered into normal commercial use

- defense articles for which commercial use is proposed, intended or anticipated in the next five years
- drafting or other technical issues in the text of all of the referenced categories
- potential cost savings to private entities from shifting control over commercial items to jurisdiction of the EAR from that of the ITAR; DDTC asks commenters to quantify the cost of compliance with USML control of commercial items, to include the time saved, the reduction in paperwork and any other cost savings for a particular change.

DDTC also specifically requested comments on USML Category XI(b), which is a category that became broader in scope as a result of ECR, but not more positive or objective. Specifically, it controls:

Electronic systems, equipment **or software**, not elsewhere enumerated in this subchapter, specially designed for intelligence purposes that collect, survey, monitor, or exploit, **or analyze and produce information from**, the electromagnetic spectrum (regardless of transmission medium), or for counteracting such activities.

The words in **bold** were added during the last revision to the category.

In its NOI, BIS independently solicits comments on the clarity, usability and any other matters related to implementation of the corresponding “600 series” Export Control Classification Numbers (ECCNs), which are:

- Energetic Materials (ECCNs 1B608, 1C608, 1D608, and 1E608)
- Armored and Protective “Equipment” (ECCNs 1A613, 1B613, 1D613 and 1E613)
- Military Electronics (ECCNs 3A611, 3B611, 3D611 and 3E611)
- Cryogenic and Superconducting Equipment (ECCNs 9A620, 9B620, 9D620 and 9E620).

BIS is also seeking comments on the potential cost savings to private entities from shifting control of commercial items to the jurisdiction of the EAR from that of the ITAR.

BIS will make any changes to the CCL that it determines are necessary to complement revisions to the USML.

Conference Call with Kevin Wolf to Answer Questions About How to Prepare Public Comments

U.S. government export control personnel read all public comments when deciding which changes to propose to the categories at issue. Thus, preparing well-supported, thoughtful comments that further the national security and foreign policy objectives of the controls will have the highest chance of having a positive impact on the drafting process. Kevin Wolf, former Assistant Secretary of Commerce for Export Administration and now an Akin Gump partner, was a leader of, and had significant involvement in, every category revision effort during his time in the Obama administration. He will host a conference call on Wednesday, February 21, 2018 at 1:00 p.m. EST to answer whatever questions you have on the

comment process or the categories at issue. Should you have any questions for Mr. Wolf, please [submit them in advance](#) of the call. He will also provide recommendations for how to prepare quality, well-supported public comments. If you are interested in participating in the call, please call (833) 879-6178 (toll free) or (844) 785-2726. If you will be calling from outside the United States, please [contact us](#). To download a calendar appointment, please click [here](#) .

Contact Information

If you have any questions concerning this alert, please contact:

Kevin J. Wolf

kwolf@akingump.com

202.887.4051

Washington, D.C.

Andrew R. Schlossberg

aschlossberg@akingump.com

202.887.4314

Washington, D.C.