International Trade Alert

Proposed Rule Would Transfer Certain Military Vehicles and Parts from the U.S. Munitions List to the Commerce Control List

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On July 15, 2011, the U.S. Department of Commerce Bureau of Industry and Security (BIS) issued a draft of proposed new regulations (the “Proposed Rule,” available here) that would: (1) transfer an initial set of export-controlled products from the United States Munitions List (USML) to the less restrictive Commerce Control List (CCL), in accordance with the president’s determination that certain items no longer warrant control on the USML; (2) establish a framework by which items removed from the USML will be migrated to the CCL; and (3) amend the CCL and the Export Administration Regulations (EAR) to facilitate this process. The pilot group of items to be transferred from the USML to the CCL is a subset of USML Category VII (Tanks and Military Vehicles) that would include older military vehicles, unarmored vehicles, certain engines and a variety of specially designed parts, components, and accessories and attachments. The rule also defines several key terms within the CCL, including “specially designed,” “parts,” “components,” and “accessories and attachments.” It also creates a series of miscellaneous new Export Control Classification Numbers (ECCNs), sets guidelines for determining the eligibility of transferred items for certain License Exceptions, and expands the scope of the de minimis rule.

Although the Proposed Rule has the greatest impact on exporters of ground vehicles and parts, it is also relevant to all other exporters as it provides the first glimpse of how the agencies intend to implement the transfer of items from the USML to the CCL as part of the president’s export control reform initiative. Comments on the Proposed Rule are due to BIS no later than September 13, 2011.

IMPACT ON EXPORTERS OF GROUND VEHICLES AND PARTS

• Several older military vehicles, unarmored vehicles, certain engines, and all specially designed parts, components, accessories and attachments not specifically retained in Category VII of the USML (after it is revised)1 would move to the CCL. (see Section I)

• Exporting these items would become easier through a variety of license exceptions and varying levels of control available under the CCL. (see Section II)

• New definitions and classifications are intended to reduce confusion regarding whether a product is controlled under the USML or the CCL. However, the new definition of “specially designed” might result in increased confusion. (see Sections III-IV)

1 On December 10, 2010, the U.S. Department of State issued a Proposed Rule revising Category VII of the USML. A copy of that Proposed Rule is available here.
BACKGROUND AND CURRENT RULES

To date, “military type armed or armored vehicles” are classified under USML Category VII, along with “all specifically designed or modified components, parts, accessories, attachments, and associated equipment” for the vehicles.

On the other hand, “ground transport vehicles designed or modified for non-combat military use” are classified under CCL, along with “unarmed all-wheel drive vehicles capable of off-road use which have been manufactured or fitted with materials to provide ballistic protection,” and all “parts and components therefor.”

OVERVIEW OF THE PROPOSED RULE

I. NEW “600” SERIES WITHIN THE COMMERCE CONTROL LIST

The most significant change is the introduction of a new CCL category dedicated specifically to items formerly on the USML. The “600 series,” so called because its members uniquely contain a “6” at the third ECCN character (e.g., “0A606”), would effectively create a “Commerce Munitions List” comprising distinct ECCNs that allows for identification of items transferred from the USML.

The proposed 600 series remains mostly unpopulated under the Proposed Rule. BIS will populate the series more actively once the Department of State issues its own proposed rules containing revisions to the USML. In the meantime, BIS’ rule proposes a small pilot set of commodities to transfer into the 600 series. This pilot group consists of commodities currently controlled under USML Category VII (Tanks and Military Vehicles). Thus, exporters of ground transport vehicles should take particular note of the transfer. The rule proposes to migrate the following items from USML to CCL.

Overview of ECCN 0A606

Many of these commodities have generated confusion in the past as to their status under the USML. Thus, the Proposed Rule seeks to clarify the export control system by bringing them explicitly within the CCL. The items are listed below alongside their paragraph number under the proposed new ECCN 0A606.

- Paragraph a. controls construction equipment built to military specifications, including equipment “specially designed” for airborne transport; and crew protection kits used as protective cabs.

- Paragraph b. controls “other equipment,” which generally includes older or antiquated equipment and unarmored vehicles:
  - Older or antiquated equipment:
    - b.1. Tanks manufactured in or prior to 1955* (unless weapon is functional);
    - b.2. Armored combat vehicles manufactured in or prior to 1955* (unless weapon is functional);
    - b.3. Armored combat support vehicles manufactured in or prior to 1955;2
  - Unarmored vehicles:
    - b.6. Military railway trains, except those “designed or modified” for missile launch;

2 Vehicles would be considered manufactured after 1955 if, at any time after 1955, any of the following changes occurred: (i) propulsion upgrade to a formerly gasoline-powered armored vehicle with either diesel or multi-fuel capability; (ii) armor upgrade to employ reactive armor; (iii) fire control upgrade with a digital control system; (iv) addition of laser designator or laser rangefinder; (v) addition of autoloader or similar assisted loading/round selection; (vi) increase of gun bore to larger than 90 mm; or (vi) conversion to unmanned operation.
b.7. Unarmored military recovery vehicles;
b.8. Unarmored military amphibious vehicles;
b.9. Unarmored vehicles with mounts or hard points for firearms of .50 Cal. or less.

- Paragraphs c. and d. control certain engines, as follows:
  
  c. Air-cooled diesel engines and engine blocks for armored combat vehicles over 40-tons.
  d. Fully automatic continuously variable transmission for tracked combat vehicles.

- Paragraphs x. and y. control specially designed parts, components, accessories and attachments of items controlled under either ECCN 0A606 or USML Category VII. Thus, the new rule would migrate to the CCL several parts, components, accessories and attachments that are currently controlled under USML Category VII, paragraph g. Only those items specifically retained on the revised USML will not be transferred to the CCL. The new ECCN 0A606 would contain two categories of “specially designed” “parts,” “components,” and “accessories or attachments,” as follows:

  - Paragraph x. is a broad, catchall category of parts, components, accessories and attachments, not specifically retained in the revised USML, that are specially designed for a commodity subject to control in ECCN 0A606—or a defense article in USML Category VII—and not specifically enumerated in paragraph y.
  
  - Paragraph y. is a list of specifically enumerated parts, components, and accessories “which have little or no military significance,” and that were previously controlled under ECCN 9A018 or USML Category VII(g). This paragraph is subject to the lowest level of control (AT), as explained in Section II, below. The following is the list of items controlled under 0A606.y:

    y.1. Brake system components (discs, rotors, shoes, drums, springs, cylinders, lines, hoses);
y.2. Alternators or generators;
y.3. Axles;
y.4. Batteries;
y.5. Bearings (ball, roller, wheel);
y.6. Blackout lights;
y.7. Cables/cable assembles/connectors;
y.8. Cooling system hoses;
y.9. Filters (hydraulic, fuel, oil, air);
y.10. Gaskets and o-rings;
y.11. Hydraulic system hoses, fittings, couplings, adapters, and valves;
y.12. Latches and hinges;
y.13. Lighting systems, fuses and components;
y.14. Pneumatic hoses, fittings, adapters, couplings and valves;
y.15. Seats, seat assemblies, seat supports, harnesses;
y.16. Tires, except run flat;
y.17. Windows, except those for armored vehicles.

Other “0x606” ECCNs

In addition to transferring commodities from USML to CCL, the rules also propose renumbering certain commodities that are already listed in the CCL to bring them within the 600 series. Primarily, these are items on the Wassenaar Arrangements Munitions List. For example, as indicated above, items currently controlled under ECCN 9A018.b (Wassenaar-listed ground transport vehicles for noncombat military use) would be moved to ECCN 0A606 (under paragraphs b.4 and b.5).

As well, armor plate drilling machines, armor plate planing machines, armor plate quenching presses, and tank turret bearing grinding machines—all of which are already present in the CCL at ECCN 2B018—will be migrated to a new
ECCN 0B606. 0B606 would cover “test, inspection and production equipment” associated with items under 0A606.” In similar fashion, 0C606, 0D606, and 0E606 would cover, respectively, certain “material,” “software,” and “technology” associated with items under 0A606.

Application of the De minimis Rule

This rule proposes expanding the scope of the de minimis rule for items in the 600 series. Most reexports of foreign-made commodities are subject to a 25 percent de minimis rule that generally imposes U.S. export controls on foreign-made commodities containing more than 25 percent U.S.-origin content. However, 600 series items would be subject to a stricter 10 percent de minimis rule for U.S.-origin content rather than the 25 percent de minimis rule. Accordingly, foreign-made 600-series items are subject to U.S. export controls if they contain more than 10 percent U.S.-origin content.

II. REASONS FOR CONTROL AND LICENSING REQUIREMENTS

While the Proposed Rule suggests that 600-series ECCNs will be controlled for National Security Column 1 (NS1) reasons, ECCNs of the form “0x606” (where “x” denotes a letter A-E) are more tightly controlled. With the exception of paragraph y., items controlled under 0x606 ECCNs are also subject to Regional Stability, Anti-Terrorism, and United Nations Embargo reasons for control. These reasons for control impose a licensing requirement on the export of such items to several destinations. Paragraph y. items, on the other hand, are controlled only for Anti-Terrorism reasons, and thus, with limited exceptions, can be exported without a license to any destination except Cuba, Iran, North Korea, Sudan, or Syria. Note, however, that even for items subject to only AT controls, 15 C.F.R. § 744.21 restricts certain exports to China destined for a military end-user or a military end-use.

The Proposed Rule would lift some of the licensing burden that exporters of controlled vehicles and parts currently face by availing exporters of 600 series items of the following License Exceptions:

- **License exceptions LVS (shipments of limited value), TMP (temporary imports, exports, and reexports), and RPL (servicing and replacement of parts and equipment)** would apply to “end items,” “parts,” “components,” and “accessories and attachments” classified in “xA6xx” entries, as well as items in “xB6xx” or “xC6xx” entries, but not to “xD6xx” software or to “xE6xx” technology.

- **License Exception TSU (technology and software)** would apply to “software” and “technology” classified in an “xD6xx” or “xE6xx” entry, but not to other 600 series items.

- **License Exception STA (strategic trade authorization)** would apply to all 600 series items, except “end items.” For “end items,” exporters must first obtain a determination of eligibility from BIS in accordance with proposed 15 C.F.R. § 740.20(g). This section requires exporters of 600 series “end items” to submit an STA request together with an export license application. The STA request will be reviewed by the departments of Commerce, Defense and State for a determination of whether the item is eligible for this license exception based on an assessment of whether it provides a critical military or intelligence advantage to the United States or is otherwise available in countries that are not regime partners or close allies.

- **License Exception GOV (exports for government agencies and personnel)** would apply to all 0x521 items (explained in Section III, below). Exception GOV also applies to all 600 series items, provided such item is being exported to a country listed in License Exception STA.

III. CREATION OF “MISCELLANEOUS” ECCNS

The rule proposes new ECCNs of the form “0x521” (where “x” denotes a letter A-E) to serve as holding categories in which items that warrant a significant level of control, but are not otherwise classified on the CCL, may be temporarily placed. Equivalent to USML Category XXI - Miscellaneous Articles, these ECCNs are meant to capture innovative technologies or recent developments that have not yet had a chance to establish their military significance. BIS must
reclassify or renew these ECCNs within one year of creation. Items under these ECCNs are subject to heightened restriction and are not eligible for any License Exception except GOV (as explained above).

IV. NEW DEFINITIONS

The Proposed Rule offers a series of definitions for certain terms—some of which were previously undefined in the CCL. These terms include “accessories and attachments,” “components,” “end item,” “equipment,” “facilities,” “material,” “military commodity,” “part,” “serial production,” “specially designed,” and “system.”

Most notable is the long-anticipated definition of “specially designed,” which would play an important role in the 600 series ECCNs. As described above, generic “parts,” “components,” and “accessories and attachments” would be classified under the 600 series “x” and “y” subparagraphs if they were “specially designed” for an end item in that 600 series ECCN or a defense article in a corresponding USML category (not specifically controlled under the USML). Thus, the rule proposes a new, technically complicated definition that, notably, does not apply to the term “specifically designed” as used in the USML.

In general, a “specially designed” item is one that has properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics or functions of the item for which it is “designed.” The term does not apply to a single, unassembled part used in multiple types of civil items; parts or components in mass production that have not been altered for use in another end item with an ECCN; or parts or components that can be exchanged one-for-one with a non-controlled part or component without impairing the function of the part or component. The definition of “specially designed” does not extend control to items simply because they could, in theory, be used with the listed item on the USML or CCL.

Although this definition is intended to clarify the scope of items controlled under particular provisions of the CCL, its length and complexity may ultimately hinder industry understanding of its meaning.

CONCLUSION

In issuing this Proposed Rule, BIS is attempting to increase administrative convenience and national security by aligning two parallel export control systems—one of the key objectives of the president’s export control reform initiatives. The new rule makes classification more objective and distinguishes more effectively between items of greater and lesser significance to national security and foreign policy. Of specific interest to exporters of vehicles for use in military settings, the Proposed Rule relaxes some of the export controls on certain end items and parts previously classified under USML Category VII. The new classifications allow exporters of ground vehicles to apply for special license exceptions, facilitating the shipment and sale of their commodities across international borders.

CONTACT INFORMATION

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

Edward L. Rubinoff
erubinoff@akingump.com
202.887.4026
Washington, D.C.

Mahmoud B. Fadlallah
mfadlallah@akingump.com
202.887.4159
Washington, D.C.

Thomas J. McCarthy
tmccarthy@akingump.com
202.887.4047
Washington, D.C.

Wynn Segall
wsegall@akingump.com
202.887.4573
Washington, D.C.

Hammad Ahmed
hahmed@akingump.com
202.887.4456
Washington, D.C.