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Aerospace Manufacturers: Imminent Changes to the U.S. Munitions and Commerce Control Lists Require Attention

On October 15, 2013, the first set of rules in an anticipated series of significant export control changes under President Obama's Export Control Reform ("ECR") initiative will take effect, directly impacting the aerospace industry. Generally, the ECR aims to build "higher walls around fewer items," and maintain strict export controls over more vital and sensitive articles and technology by transitioning relatively less sensitive articles from the United States Munitions List ("USML") to the Commerce Control List ("CCL").

The first set of rules was published on April 16, 2013, when the U.S. Department of State, Directorate of Defense Trade Controls ("DDTC") and the U.S. Department of Commerce, Bureau of Industry and Security ("BIS") issued rules to amend the International Traffic in Arms Regulations ("ITAR") and the Export Administration Regulations ("EAR"), respectively, both to take effect on October 15, 2013. Principal changes include updated definitions in the ITAR and EAR, changes to the USML and CCL, and the creation of a shared export licensing authority between DDTC and BIS.

Among other changes, DDTC's rule amends Category VIII for aircraft and establishes a new Category XIX for aircraft engines. These amendments will have a significant impact on the aerospace industry's manufacturers and exporters in that they result in substantial changes to the jurisdiction and classification processes.

Revision of USML Category VIII

Currently, military aircraft, and many of their parts and components, are controlled under USML Category VIII and require DDTC authorization for export outside of the U.S. DDTC revised USML Category VIII to control fewer types of aircraft and to enumerate the items that remain under its control and continue to require DDTC authorization. All other aircraft, parts, components, accessories, and attachments that are not specifically enumerated and that do not meet the definition of "specially designed," as explained below, have been transitioned off the USML and will be subject to the new "600 series" controls in Category 9 of the CCL. Licenses from BIS are required to export and reexport most 600 series articles worldwide, unless an EAR license exception is available.

Establishment of USML Category XIX

DDTC established USML Category XIX to control exports of certain gas turbine engines and associated parts, components, accessories, and attachments formerly covered under USML Categories IV, VI, VII and VIII. Much like aircraft, military aircraft engines and many of their parts and components currently require DDTC authorization to be exported outside the U.S.

Instead of focusing on the engine's end-use, the new Category XIX primarily focuses on engine flight performance and capabilities, and enumerates the items that fall under its control. Aircraft engines and related articles no longer controlled by the USML are subject to the new "600 series" controls in Category 9 of the CCL, requiring BIS authorization to export and reexport.

"Specially Designed"

ITAR §120.41 introduces the term "specially designed" and its two-paragraph "catch and release" structure. Specifically, a broad Paragraph (a) will "catch" a defense article as "specially designed" if it meets one of two criteria and Paragraph (b) will "release" the defense article (meaning that the article is not "specially designed") if it qualifies for one of five exceptions. Determining if an article is "specially designed" requires a detailed analysis of both the article and the language of §120.41. Exporters must therefore consider Paragraphs (a) and (b) together and be mindful that to rely on certain exceptions in Paragraph (b), exporters must maintain specific documentation described in Paragraph (b). To complement the ITAR, BIS introduces a similar definition for "specially designed" with a similar "catch and release" structure in EAR §772.1.

"Aircraft"

DDTC has clarified the definition of "aircraft" in ITAR §121.3 for purposes of the revised Category VIII. Under the current scheme, aircraft "designed, modified, or equipped for a military purpose" are controlled under Category VIII, along with any aircraft bearing an original military designation, with the exception of some Cargo ("C"), Trainer, ("T") and Utility ("U") aircraft. DDTC has revised the definition of ITAR-controlled aircraft to include only certain military aircraft designations, primarily those used for combat and intelligence purposes. In addition, an aircraft will be considered ITAR-controlled if it meets one of the specific combat mission capability descriptions enumerated in §121.3. Any aircraft not covered by the new definition of aircraft are subject to the new "600 series" controls in Category 9 of the CCL.

License and Agreement Changes

The first set of rules will also affect new and existing export licenses, such as DDTC's DSP-5 export license, and agreements, such as DDTC's Technical Assistance Agreements ("TAA") and Manufacturing License Agreements ("MLA").

DSP-5 Licenses

- Where all items listed on an existing DDTC license or authorization are transitioning to the CCL, the DDTC license or authorization will be valid until it expires or for two years from October 15, 2013, whichever occurs first.
- Where all of the items listed on an existing DDTC license or authorization remain under the jurisdiction of the ITAR, the DDTC license or authorization will be valid until its original expiration date.
- Where some of the items listed on an existing DDTC license or authorization remain under the jurisdiction of the ITAR and some items transition to the CCL, all items will remain covered by the DDTC license or authorization until its expiration date, including those that transitioned to the CCL.



TAAAs and MLAs

- Where all items listed on a DDTC agreement are transitioning to the CCL, and the agreement was issued prior to October 15, 2013, the DDTC agreement will be valid for two years from October 15, 2013. Any ongoing activity after October 15, 2015, must be approved by BIS.
- Where some of the items listed on an existing DDTC agreement remain under the jurisdiction of the ITAR and some items transition to the CCL, the DDTC agreement will be valid until its original expiration date or for two years from October 15, 2013, whichever occurs first. All items will remain covered by the DDTC agreement until its expiration date, even those that transitioned to the CCL.

Conclusion

The amendments to Categories VIII and XIX and the creation of the CCL's "600 series" will significantly impact the way in which aerospace companies conduct international business. For most companies, the jurisdiction and classification processes will change substantially, and in some instances, the appropriate export licensing authority may change completely. Companies should conduct thorough internal analyses to determine which of their products and services will transition from the USML to the CCL and become familiar with the nuances of these new regulations in advance of their October 15, 2013 implementation.

Questions or Assistance?

If you have questions about this alert, please contact any of the International Trade Compliance and Enforcement attorneys listed on page 1 of this alert.

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