

# Watch this Space



Space industry manufacturers should pay great attention to the imminent changes to the USML and CCL, write Scott Cowperthwait and Alfredo Fernandez.

**O**n 13 May 2014, the U.S. Department of State's Directorate of Defense Trade Controls ('DDTC') published an interim final rule authorising the transition of many commercial and scientific satellites, and their parts and components, from the U.S. State Department's United States Munitions List ('USML') to the U.S. Commerce Department's Commerce Control List ('CCL').

This jurisdictional change relating to satellites is the latest in a string of significant U.S. export control changes under the Obama administration's Export Control Reform initiative ('ECR'). Generally, 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 purview of the International Traffic in Arms Regulations ('ITAR') to that of the Export Administration Regulations ('EAR'). Manufacturers and service providers should be aware that the transition of certain satellites, parts and components to the EAR does not equal de-control; rather, it is intended to address inefficiencies and redundancies in the export control system and curb the level of control over less sensitive articles and technology. Export licences are still required in many cases as discussed in further detail below.

The U.S. Commerce Department's Bureau of Industry and Security ('BIS'), which administers and enforces the EAR, also published a corresponding rule on the same day. Both rules were published as 'interim final rules', indicating that the agencies believe that national security will benefit from timely changes to spacecraft controls and acknowledge that additional analysis of, and public feedback on, certain thresholds may drive further changes to the rule. Industry members may submit comments on certain paragraphs before 27 July 2014.

## Revision of USML Category XV

For the last 15 years, the U.S. has tightly controlled the exports of satellites, as well as their components and technology under USML Category XV, regardless of their status as military or commercial articles. With this rule, DDTC revised Category XV to control fewer types of satellites and to enumerate the items that remain under its control and continue to require DDTC authorisation. Items will remain on the USML if they (1) are inherently military and otherwise warrant control on the USML, or (2) possess

### *The transition of certain satellites, parts and components to the EAR does not equal de-control.*

characteristics that provide a critical military or intelligence advantage to the U.S. and that are generally available only through a U.S. entity.

One example of an item that remains under DDTC's jurisdiction is human-rated spacecraft. Conversely, DDTC has removed the following from the USML: communication satellites that do not contain classified components; remote sensing satellites with certain performance parameters; any spacecraft parts, components, accessories, attachments, equipment or systems that are not specifically identified in the new Category XV; and most radiation-hardened microcircuits.

All other satellite parts, components, accessories, attachments, equipment or systems that are not specifically enumerated and that do not meet the definition of 'specially designed', have been transitioned off the USML and will be subject to the new '500 series' controls in Category 9 of the CCL (Propulsion Systems, Space Vehicles, and Related Equipment) (see box 'Establishment of 500 series'). Licences from BIS are required to export and re-

export most 500 series articles worldwide, unless an EAR licence exception is available. The new controls on the affected radiation-hardened microcircuits take effect on 27 June 2014 and the controls on the remaining articles take effect on 10 November 2014.

## Effect on global spacecraft market

In February 2014, BIS published the *U.S. Space Industry 'Deep Dive' Assessment: Impact of U.S. Export Controls on the Space Industrial Base* (the 'Assessment'). The Assessment reported the findings of a thorough survey effort focused on the impact of the ITAR and the EAR on U.S. businesses in the space industry. One highlight of the Assessment is that many surveyed companies indicated that the U.S. export control system has adversely impacted their organisation's health and competitiveness, due to lost export sales opportunities and an increase in direct competition by non-U.S. companies offering 'ITAR-free' products.

The respondents voiced concern that international transactions governed by the ITAR – rather than the EAR – were much more complicated, at times prohibitively so, due to the complexity of the regulations and hesitation on the part of foreign customers to purchase ITAR-controlled products and services. Many respondents also reported their struggles to compete in the international commercial satellite marketplace because some non-U.S. companies refuse to purchase ITAR-controlled technology due to the enhanced limitations on exports and re-exports of the commodities and technology. In light of these concerns, the Assessment noted that ECR, once fully implemented, would likely have a positive impact on the competitiveness of the U.S. space industrial base.

Aerospace industry groups applauded the rules and the upcoming changes. The Aerospace Industries

## Establishment of 500 series

When effective, the transitioned articles will be controlled by a newly created group of export classification control numbers ('ECCN') in Category 9 of the CCL, referred to as the '500 series'. The 500 series largely parallels the '600 series' of earlier ECR amendments. In general, items controlled in the 500 series require a BIS export licence to countries other than Canada. However, 500 series items are eligible for several licence exceptions, such as the Strategic Trade Authorisation ('STA') exception, which permits U.S. companies to export without a licence to certain agencies or governments of specific allied nations, such as those in the North Atlantic Treaty Organisation ('NATO'). Applicability of exceptions should be addressed on a case-by-case basis to ensure compliance, and companies should exercise caution in determining whether a particular licence exception applies.

Association ('AIA') believes the changes will help level the global playing field. AIA projects that the

international market outside of the United States for satellite manufacturing and launch services is over \$130 billion through the next seven years. AIA expects the largest market growth to come from South America and the Middle East. Likewise, the Satellite Industry Association ('SIA') praised the sweeping changes and believes the modernised regulations will help American businesses more effectively compete in the global marketplace.

### Conclusion

In response to the announced changes, Under Secretary of Commerce Eric L. Hirschhorn stated that the changes to the satellite export controls will improve 'the ability to focus the government's limited resources on the technologies and destinations of greatest concern, an increase in the competitiveness of the U.S. satellite industry, and a reduction in the licensing burden on U.S. exporters'. However, companies should expect to experience some inefficiencies at the onset as their compliance programmes and staff adjust to a changing regulatory scheme.

The amendments to Category XV and the creation of the CCL's '500 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, including potentially relevant licence exceptions, in advance of their implementation.

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