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On July 15, 2011, the Bureau of Industry and Security ("BIS") published an important proposed rule regarding its plans for implementing the Export Control Reform Initiative. The proposed rule introduces the following:

- A structure to the CCL that will facilitate the transfer of items currently controlled under the United States Munitions List ("USML") to the Commerce Control List ("CCL");
- A method for applying the new license exception STA, or Strategic Trade Authorization, to USML items that are transferred to the CCL;
- A miscellaneous ECCN classification to handle new technology and items transferred to the CCL from the USML until the proper CCL classification can be determined;
- A harmonized definition of "specially designed" to accommodate the transition of items from the USML to the CCL as well as to clarify the term as used in the CCL; and
- The transfer of some USML Category VII items to the CCL as a pilot of the new structure.

BIS is very interested in receiving public comment regarding this proposal.

Background

In 2009, President Obama directed the administration to conduct a broad based review of the export control systems of the United States. As a result of this review, the Departments of State and Commerce have proposed to review and revise the United States Munitions List ("USML") and the Commerce Control List ("CCL") into an aligned, positive and tiered structure with the goal of combining the two into a single control list. This notice proposes certain changes to the CCL that are needed to achieve the goals of the Export Control Reform Initiative.

1) Establishment of a New Classification "Reason for Control Group" for items transferred from USML to CCL

The Export Control Classification Number ("ECCN") consists of several elements. The first digit (current values 0-9) corresponds with one of 10 "categories"; the second digit (current values A-E) is product "grouping"; the third digit (current values 0-3, 9) is associated with the reason for control.

- The notice proposes to add a new value (6) as a possible third digit creating an "xY6zz" control series within each category/grouping, collectively referred

to as "600 series" items. Items that are transferred to the CCL from the USML as well as Wassenaar Arrangement Munitions List ("WAML") items that are currently on the CCL are proposed to be classified in the appropriate "600 series" entry.

- The notice suggests that "600 series" ECCNs will generally be controlled for National Security 1 ("NS1") reasons. For example, a license will be required to export or re-export to all countries except Canada unless a license exception is available.
- At the time of license application, an exporter can request that its "600 series" item be considered eligible for the new license exception "STA."

2) Mechanism for Authorizing the Use of the STA Exception to Items Transferred From USML To CCL

In June 2011, BIS published a final rule establishing the STA license exception, which authorizes the export, re-export and transfer (in-country) of specified items to destinations that pose relatively low risk of unauthorized uses or diversion.

- The current notice establishes a mechanism for requesting that specific "600 series" end items (as opposed to parts, components, accessories or attachments) be eligible for the STA license exception.
- Requests for License Exception STA eligibility should be submitted to BIS as part of the license application submitted for an export, re-export or transfer (in-country) for a "600 series" end item.
- The notice explains that eligibility for License Exception STA will be determined by an interagency consensus among the Departments of Commerce, Defense and State, and that their conclusions shall serve as an unappealable foreign policy decision.
- STA authorizations will be published on BIS' website and in Federal Register notices.

3) New Temporary "Holding" ECCN

- The notice creates a CCL category, ECCN 0Y521, to serve in a manner similar to that of USML Category XXI (Miscellaneous Articles) and to function as a temporary "holding" category.
- The notice elaborates that ECCN 0Y521 will control (i) transferred items not elsewhere classified on the CCL for which the government is determining appropriate control and (ii) items that warrant control but are not yet controlled (e.g., as with emerging technologies).
- ECCN 0Y521 items will be subject to nearly worldwide licensing requirements.

4) New Definition of "Specially Designed"

A core element of the positive USML review is to avoid using design-intent based control, but BIS recognizes that this may not be possible in all situations. Accordingly, BIS proposes to define a "specially designed" item (other than a part or component) to be one "that is enumerated on the CCL and, as the result of "development," has properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions of the referenced item identified in the CCL." The proposed definition includes several refining

characteristics. This new definition is used with the goal of:

- Precluding multiple and overlapping controls of similar items;
- Being easily understood;
- Being consistent with international export control regimes;
- Not including items that are specifically enumerated on the USML or the CCL;
- Excluding from control simple or multi-use parts;
- Being applicable to both end items and parts and components;
- Being applicable to materials and software; and
- Not increasing a current level of control.

5) Transfers an Initial Tranche of Items From USML Category VII to CCL

- The notice revises Interpretation 8: Ground Vehicles in § 770.2 (Item interpretations), clarifying which ground vehicles are subject to ITAR and which are subject to EAR so as to reflect the “positive” Category VII (tanks and military vehicles) of USML.
- The items to be transferred from the USML will be moved to ECCNs items 0A606, 0B606, 0C606, 0D606 and 0E606.

Those interested in commenting on BIS’ proposed rule may submit written comments by September 13, 2011.

For more information as to how BIS’ proposed rule could affect your business or regarding the Export Control Reform Initiative in general, please contact a member of the Thompson Coburn Transportation and International Commerce Practice Group.

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