

Status Update on Export Control Reform

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The government has been relatively quiet for nearly a year on issuing final or proposed rule-making in furtherance of Export Control Reform. This is about to change. The proposed revisions to Category XII of the U.S. Munitions List are expected soon. Also, a number of other proposed revisions to the International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR) are anticipated throughout 2015.

This article summarizes the status of the remaining revisions under Export Control Reform.

Proposed Rules Ready for Publication

USML Category XII – Clears White House Review. On February 24, 2015, the Department of State submitted for White House review a proposed amendment to the U.S. Munitions List for revising Category XII and to seek public comments. The proposed rule would amend the ITAR's controls on certain night vision, fire control, and other equipment by turning Category XII into a positive control list. The Department of Commerce also submitted a proposed rule for review to amend the EAR to control items that were previously defense articles. The White House review concluded on April 9, 2015 where some changes to the proposed rules were made during interagency reconciliation.

Proposed Rules in Review for Publication

USML Category XIV – Submitted for White House Review. On April 2, 2015, the Department of State submitted for White House review a proposed amendment to the U.S. Munitions List for revising Category XIV and to seek public comments. The proposed rule would amend the ITAR's control on certain toxicological agents, including chemical agents, biological agents and associated equipment. The

revisions would turn Category XIV into a positive control list.

Notably, a significant proposed change in this rule is the movement of riot control agents from the ITAR to the EAR. The Department of Commerce also submitted a proposed rule to amend the EAR to control items that were previously defense articles. The White House has not yet concluded its review.

A previous attempt to propose revisions to Category XIV under Export Control Reform took place in 2012. It was previously submitted for White House review on January 11, 2012, but it was withdrawn on December 3, 2012.

Revisions to the “By or For” U.S. Government Exemption – Submitted for White House Review. On March 20, 2015, the Department of State submitted for White House review a proposed amendment to the ITAR for revising the exemption on exports made by or for a U.S. government department or agency. The proposed amendment would update and clarify how the exemption in ITAR § 126.4 may be used. In particular:

“The Department determined that the current rules did not adequately explain the situations in which the Department could use the exemption. The proposed rule now clearly distinguishes between temporary imports and exports made by a U.S. Government department or agency and temporary imports and exports made for or on behalf of a U.S. Government department or agency.”

It is expected that the proposed rule will be similar to the changes made to license exception GOV under the EAR.

The White House has not yet concluded its review. A previous attempt to propose revisions to ITAR § 126.4 took place in 2011. It was previously submitted for White House review on October 3, 2011, but it was withdrawn on December 13, 2011.

Proposed Rules Not Yet Reviewed for Publication

Harmonization of Key Definitions – Still in Review. The Department of State and Department of Commerce are currently reviewing the harmonization of key definitions within the ITAR and EAR. As part of this harmonization, it is expected that these definitions would be identical or

substantially similar. The harmonized definitions include technical data, technology, public domain, and fundamental research. It would also cover the electronic transmission and storage of data (cloud computing). There are indications that the Department of State may expressly require prior approval (*i.e.*, a prior restraint) before someone can transmit technical data into the public domain. As of April 22, no proposed rule in furtherance of the harmonized definitions has been submitted.

Defense Services – Still in Review. The Department of State is still reviewing the revised defense services definition. There have been two proposed rules on defense services - in 2011 and in 2013. Some aspects of the proposed definition have already been incorporated into other aspects of the ITAR. For instance, proposed sections (a)(5) and (a)(6) that concerned space related activities were incorporated in Category XV(f) of the U.S. Munitions List. As of April 22, no final or proposed rule involving defense services has been submitted. A third proposed rule for public comment is expected in 2015.

Incorporation (See-Through) Rule – Still in Review. The Department of State issued a proposed rule on March 15, 2011 to expressly state in the ITAR its see-through rule policy under proposed ITAR § 126.19. The proposed rule requested public comments. This proposed rule also would create a license exemption for certain exports of replacement parts and components. The proposed rule came out of the Department of State’s review over its treatment of incorporated defense articles and with a view “to limit ITAR coverage to where diversion of the embedded defense article is a realistic and practical concern.” Proposed ITAR § 126.19 would establish conditions for when the see-through rule would not apply. As of April 22, no final or proposed rule involving the incorporation rule has been submitted.

USML Category I – Review Completed. The Department of State has completed its interagency review of Category I under Export Control Reform. The revised category would create a positive list and it would move some firearms and other associated items to the EAR. Category I was one of the first categories to complete its review for Export Control Reform. It was originally submitted for White House review on January 5, 2012, but it was withdrawn on May 17, 2013 due to domestic political concerns.

USML Category II – Review Completed. The Department of State has completed its interagency review of Category II under Export Control Reform. The revised category would create a positive list and it would move some items to the EAR. Category II was one of the first categories to complete its review for Export Control Reform. It was originally submitted for White House review on January 5, 2012, but it was withdrawn on May 17, 2013 due to domestic political concerns.

USML Category III – Review Completed. The Department of State has completed its interagency review of Category III under Export Control Reform. The revised category would create a positive list – particularly in relation to paragraphs (a) and (d) – and it would move some ammunition, ordnance, and other associated items to the EAR. Category III was one of the first categories to complete its review for Export Control Reform. It was originally submitted for White House review on January 5, 2012, but it was withdrawn on May 17, 2013 due to domestic political concerns.

USML Category XVIII – Still in Review. The Department of State is still reviewing Category XVIII (Directed Energy Weapons) within the interagency review process. The Department of Commerce is likewise reviewing its controls to amend the EAR to place under its jurisdiction those items that were previously defense articles. A proposed rule is expected in 2015 to convert the category into a positive control list, although significant changes are not expected.

Next Steps for Industry

It is important that organizations take the time now to review how it might be affected by the proposed regulatory revisions. When the proposed rule is issued for public review, an organization should carefully analyze its consequences, and to assess whether the proposed provisions are clear. Once the proposed rule is reviewed, feedback should be provided to the government in the form of public comment responses.

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DISCLAIMER: The materials presented in this article are for general information purposes only and do not constitute legal advice or establish an attorney-client relationship.

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