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DEPARTMENT OF STATE

22 CFR Part 121

RIN 1400-AC99

[Public Notice: 7736]

Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category VI.

AGENCY: Department of State.

ACTION: Proposed Rule.

SUMMARY: As part of the President's Export Control Reform effort, the Department of State proposes to amend the International Traffic in Arms Regulations (ITAR) to revise Category VI (surface vessels of war and special naval equipment) of the U.S. Munitions List (USML) to describe more precisely the combatant vessels and other naval equipment warranting control on the USML.

DATES: The Department of State will accept comments on this proposed rule until [insert date 45 days from date of publication in the *Federal Register*].

ADDRESSES:

Interested parties may submit comments within 45 days of the date of publication by one of the following methods:

- E-mail: DDTCResponseTeam@state.gov with the subject line, "ITAR Amendment – Category VI."
- Internet: At www.regulations.gov, search for this notice by using this rule's RIN (1400-AC99).

Comments received after that date will be considered if feasible, but consideration cannot be assured. Those submitting comments should not

include any personally identifying information they do not desire to be made public or information for which a claim of confidentiality is asserted because those comments and/or transmittal e-mails will be made available for public inspection and copying after the close of the comment period via the Directorate of Defense Trade Controls website at *www.pmdtdc.state.gov*. Parties who wish to comment anonymously may do so by submitting their comments via *www.regulations.gov*, leaving the fields that would identify the commenter blank and including no identifying information in the comment itself. Comments submitted via *www.regulations.gov* are immediately available for public inspection.

FOR FURTHER INFORMATION CONTACT: Director Charles B. Shotwell, Office of Defense Trade Controls Policy, Department of State, telephone (202) 663-2792; e-mail *DDTCResponseTeam@state.gov*. ATTN: Regulatory Change, USML Category VI.

SUPPLEMENTARY INFORMATION: The Directorate of Defense Trade Controls (DDTC), U.S. Department of State, administers the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120-130). The items subject to the jurisdiction of the ITAR, i.e., “defense articles,” are identified on the ITAR’s U.S. Munitions List (USML) (22 CFR 121.1). With few exceptions, items not subject to the export control jurisdiction of the ITAR are subject to the jurisdiction of the Export Administration Regulations (“EAR,” 15 CFR parts 730-774, which includes the Commerce Control List in part 774), administered by the Bureau of Industry and Security (BIS), U.S. Department of Commerce. Both the ITAR and the EAR impose license requirements on exports and reexports. Items not subject to the ITAR or to the exclusive licensing jurisdiction of any other set of regulations are subject to the EAR.

Export Control Reform Update

The Departments of State and Commerce described in their respective Advanced Notices of Proposed Rulemaking (ANPRM) in December 2010 the Administration's plan to make the USML and the CCL positive, tiered, and aligned so that eventually they can be combined into a single control list (see "Commerce Control List: Revising Descriptions of Items and Foreign Availability," 75 FR 76664 (December 9, 2010) and "Revision to the United States Munitions List," 75 FR 76935 (December 10, 2010)). The notices also called for the establishment of a "bright line" between the USML and the CCL to reduce government and industry uncertainty regarding export jurisdiction by clarifying whether particular items are subject to the jurisdiction of the ITAR or the EAR. While these remain the Administration's ultimate Export Control Reform objectives, their concurrent implementation would be problematic in the near term. In order to more quickly reach the national security objectives of greater interoperability with our allies, enhancing our defense industrial base, and permitting the U.S. Government to focus its resources on controlling and monitoring the export and reexport of more significant items to destinations, end uses, and end users of greater concern than our NATO and other multi-regime partners, the Administration has decided, as an interim step, to propose and implement revisions to both the USML and the CCL that are more positive, but not yet tiered.

Specifically, based in part on a review of the comments received in response to the December 2010 notices, the Administration has determined that fundamentally altering the structure of the USML by tiering and aligning it on a category-by-category basis would significantly disrupt the export control compliance systems and procedures of exporters and

reexporters. For example, until the entire USML was revised and became final, some USML categories would follow the legacy numbering and control structures while the newly revised categories would follow a completely different numbering structure. In order to allow for the national security benefits to flow from re-aligning the jurisdictional status of defense articles that no longer warrant control on the USML on a category-by-category basis while minimizing the impact on exporters' internal control and jurisdictional and classification marking systems, the Administration plans to proceed with building positive lists now and afterward return to structural changes.

Revision of Category VI

This proposed rule revises USML Category VI, covering surface vessels of war and special naval equipment, to establish a clear “bright line” between the USML and the CCL for the control of these articles. The proposed revision narrows the types of surface vessels of war and special naval equipment controlled on the USML to only those that warrant control under the stringent requirements of the Arms Export Control Act. It will remove from control of the USML harbor entrance detection devices formerly controlled under Category VI(d) and will no longer include submarines, which will be controlled in Category XX.

This proposed rule also revises §121.15 to more clearly define “surface vessels of war and special naval equipment” for purposes of the revised USML Category VI.

The most significant aspect of this more positive, but not yet tiered, proposed USML category is that it does not contain controls on all generic parts, components, accessories, and attachments that are in any way specifically designed or modified for a defense article, regardless of their

significance to maintaining a military advantage for the United States. Rather, it contains a positive list of specific types of parts, components, accessories, and attachments that continue to warrant control on the USML. All other parts, components, accessories, and attachments will become subject to the new 600 series controls in Category 8 of the CCL to be published separately by the Department of Commerce. The Administration has also proposed revisions to the jurisdictional status of certain militarily less significant end items that do not warrant USML control, but the primary impact will be with respect to current USML controls on parts, components, accessories, and attachments that no longer warrant USML control.

Definition for Specially Designed

Although one of the goals of the export control reform initiative is to describe USML controls without using design intent criteria, a few of the controls in the proposed revision nonetheless use the term “specially designed.” It is, therefore, necessary for the Department to define the term. Two proposed definitions have been published to date.

The Department first provided a draft definition for “specially designed” in the December 2010 ANPRM (75 FR 76935) and noted the term would be used minimally in the USML, and then only to remain consistent with the Wassenaar Arrangement or other multilateral regime obligation or when no other reasonable option exists to describe the control without using the term. The draft definition provided at that time is as follows: “For the purposes of this Subchapter, the term “specially designed” means that the end-item, equipment, accessory, attachment, system, component, or part (see ITAR §121.8) has properties that (i) distinguish it for certain predetermined purposes, (ii) are directly related to the functioning of a defense article, and

(iii) are used exclusively or predominantly in or with a defense article identified on the USML.”

The Department of Commerce subsequently published on July 15, 2011, for public comment, the Administration’s proposed definition of “specially designed” that would be common to the CCL and the USML. The public provided more than 40 comments on that proposed definition on or before the September 13 deadline for comments. The Departments of State, Commerce, and Defense are now reviewing those comments and related issues, and the Departments of State and Commerce plan to publish for public comment another proposed rule on a definition of “specially designed” that would be common to the USML and the CCL. In the interim, and for the purpose of evaluation of this proposed rule, reviewers should use the definition provided in the December ANPRM.

Request for Comments

As the U.S. Government works through the proposed revisions to the USML, some solutions have been adopted that were determined to be the best of available options. With the thought that multiple perspectives would be beneficial to the USML revision process, the Department welcomes the assistance of users of the lists and requests input on the following:

1) A key goal of this rulemaking is to ensure the USML and the CCL together control all the items that meet Wassenaar Arrangement commitments embodied in Munitions List Category 9 (ML9). To that end, the public is asked to identify any potential lack of coverage brought about by the proposed rules for Category VI contained in this FRN and the new Category 8 ECCNs published separately by the Department of Commerce when reviewed together.

2) The key goal of this rulemaking is to establish a “bright line” between the USML and the CCL for the control of surface vessels. The public is asked to provide specific examples of vessels whose jurisdiction would be in doubt based on this revision.

REGULATORY ANALYSIS AND NOTICES

Administrative Procedure Act

The Department of State is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules implementing this function are exempt from §553 (Rulemaking) and §554 (Adjudications) of the Administrative Procedure Act. Although the Department is of the opinion that this rule is exempt from the rulemaking provisions of the APA, the Department is publishing this rule with a 45-day provision for public comment and without prejudice to its determination that controlling the import and export of defense services is a foreign affairs function. As noted above, and also without prejudice to the Department position that this rulemaking is not subject to the APA, the Department previously published a related Advance Notice of Proposed Rulemaking (RIN 1400-AC78), and accepted comments for 60 days.

Regulatory Flexibility Act

Since this proposed amendment is not subject to 5 U.S.C. 553, it does not require analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This proposed amendment does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions

were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This proposed amendment has been found not to be a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

Executive Orders 12372 and 13132

This proposed amendment will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this proposed amendment does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this proposed amendment.

Executive Order 12866

The Department is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States Government and that rules governing the conduct of this function are exempt from the requirements of Executive Order 12866. However, the Department has reviewed the proposed rule to ensure its consistency with the regulatory philosophy and principles set forth in the Executive Order.

Executive Order 13563

The Department of State has considered this rule in light of Executive Order 13563, dated January 18, 2011, and affirms that this regulation is consistent with the guidance therein.

Executive Order 12988

The Department of State has reviewed the proposed amendment in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, Executive Order 13175 does not apply to this rulemaking.

Paperwork Reduction Act

This proposed amendment does not impose any new reporting or recordkeeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects in Part 121

Arms and munitions, Exports

Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, part 121 is proposed to be amended as follows:

PART 121 – THE UNITED STATES MUNITIONS LIST

1. The authority citation for part 121 continues to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); E.O. 11958, 42 FR 4311; 3 CFR, 1977 Comp. p. 79; 22 U.S.C. 2651a; Pub. L. 105–261, 112 Stat. 1920.

2. Section 121.1 is amended by revising U.S. Munitions List Category VI to read as follows:

§121.1 General. The United States Munitions List.

* * * * *

VI—Surface Vessels of War and Special Naval Equipment

*(a) Warships and other combatant vessels (*see* §121.15 of this subchapter).

(b) Other vessels not controlled in paragraph (a) of this section (*see* §121.15 of this subchapter).

(c) Developmental vessels and “specially designed” parts, components, accessories, and attachments therefor, developed under a contract with the U.S. Department of Defense.

(d) [Reserved]

*(e) Naval nuclear propulsion plants, their land prototypes, and special facilities for their construction, support, and maintenance (*see* §123.20 of this subchapter).

(f) Vessel and naval equipment components, parts, accessories, attachments, and associated equipment, as follows:

(1) hulls or superstructures “specially designed” for any vessels controlled in paragraph (a) of this section;

(2) hulls or superstructures having armor, active protection systems, or developmental armor systems;

(3) hulls or superstructures designed to survive 12.5% or greater damage across the length as measured between perpendiculars;

(4) propulsion and supporting auxiliary, control, and monitoring systems that store, create, distribute, conserve, transfer, and use energy outside propulsion system boundaries exceeding 30MJ storage, discharge less than 3 seconds and cycle time under 45 seconds, and parts and components “specially designed” therefor;

(5) shipborne auxiliary systems for Chemical, Biological, Radiological, and Nuclear (CBRN) compartmentalization, over-pressurization and filtration systems, and parts and components “specially designed” therefor;

*(6) control and monitoring systems for autonomous unmanned vessels capable of on-board, autonomous perception and decision-making necessary for the vessel to navigate while avoiding fixed and moving hazards, and obeying rules-of-the road without human intervention;

*(7) any machinery, device, component, or equipment specifically developed, designed, or modified for use in plants or facilities controlled in paragraph (e) of this section (*see* §123.20 of this subchapter);

(8) components, parts, accessories, attachments, and equipment “specially designed” for integration of articles controlled by Categories II, IV, or XVIII or catapults for launching aircraft or arresting gear for recovering aircraft;

(9) shipborne active protection systems (*i.e.*, defensive systems that actively detect and track incoming threats and launch a ballistic, explosive, energy, or electromagnetic countermeasure(s) to neutralize the threat prior to contact with a vessel) and parts and components “specially designed” therefor;

(10) minesweeping and mine hunting equipment (including mine countermeasures equipment deployed by aircraft) and parts and components “specially designed” therefor; or

*(11) any component, part, accessory, attachment, equipment, or system that:

(i) is classified;

(ii) contains classified software;

(iii) is manufactured using classified production data; or

(iv) is being developed using classified information.

“Classified” means classified pursuant to Executive Order 13526, or predecessor order, and a security classification guide developed pursuant thereto or equivalent, or to the corresponding classification rules of another government.

Note 1 to paragraph (f): Parts, components, accessories, and attachments “specially designed” for vessels enumerated in this category but not listed in Category VI(f) are subject to the EAR under ECCN 8A609.

Note 2 to paragraph (f): For controls related to ship signature management, see also Category XIII.

(g) Technical data (as defined in §120.10 of this subchapter) and defense services (as defined in §120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (f) of this category.

* * * * *

3. Section 121.15 is revised to read as follows:

§121.15 Surface vessels of war and special naval equipment.

(a) In Category VI, “surface vessels of war” means developmental, demilitarized, decommissioned, production, or inventory vessels, manned or unmanned, that:

(1) are warships or other combatant vessels (battleships, aircraft carriers, destroyers, frigates, cruisers, corvettes, littoral combat ships, mine sweepers, mine hunters, mine countermeasure ships, dock landing ships, amphibious assault ships), or Coast Guard Cutters (with or equivalent to those with U.S. designations WHEC, WMEC, WMSL, or WPB);

(2) are foreign-origin vessels “specially designed” to provide functions equivalent to those of the vessels listed in (a)(1) of this section;

(3) are high-speed air cushion vessels for transporting cargo and personnel, ship-to-shore and across a beach, with a payload over 25 tons;

(4) are surface vessels integrated with nuclear propulsion systems;

(5) are armed or are “specially designed” to be used as a platform to deliver munitions or otherwise destroy or incapacitate targets (*e.g.*, firing lasers,

launching torpedoes, rockets, or missiles, or firing munitions greater than .50 caliber); or

(6) incorporate any “mission systems” controlled under this subchapter.

“Mission systems” are defined as “systems” (*see* §121.8(g) of this subchapter) that perform specific military functions such as by providing military communication, electronic warfare, target designation, surveillance, target detection, or sensor capabilities.

(b) Vessels “specially designed” for military use that are not identified in (a) of this section are subject to the EAR under ECCN 8A609.

December 16, 2011

(Date)

Ellen O. Tauscher,
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