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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR part 774

[Docket No. 180227222-8222-01]

Commerce Control List: Request for Comments Regarding Controls on Certain Spraying or Fogging Systems and “Parts” and “Components” Therefor

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Notice of inquiry.

SUMMARY: The Bureau of Industry and Security (BIS), Department of Commerce, maintains the Export Administration Regulations, including the Commerce Control List (CCL). Certain items identified on the CCL are controlled for chemical/biological (CB) reasons, because they are identified on one of the common control lists maintained by the Australia Group (AG), which is a multilateral forum of countries (plus the European Union) that maintain export controls on specified chemicals, biological agents, and related equipment and technology that could be used in a chemical or biological weapons (CBW) program. Among the items subject to these CB

controls are spraying or fogging systems described in Export Control Classification Number (ECCN) 2B352.i on the CCL. Through this notice, BIS is seeking public comments as part of a review of the effectiveness of its controls on these systems, and “parts” and “components” therefor, to ensure that the descriptions of these items on the CCL are clear, do not inadvertently control items in normal commercial use, accurately reflect CB-related technological capabilities and developments, and are consistent with the principal objective of the AG, which is to ensure that exports of certain chemicals, biological agents, and dual-use chemical and biological manufacturing facilities and equipment, do not contribute to the spread of chemical and biological weapons (CBW). This notice also requests public comments on potential alternatives to the current controls in ECCN 2B352.i.

DATES: Comments must be received by BIS no later than [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments may be submitted via the Federal eRulemaking Portal (<http://www.regulations.gov>). You can find this notice by searching on its regulations.gov docket number, which is BIS-2018-0013. Comments may also be submitted via e-mail to publiccomments@bis.doc.gov or on paper to Regulatory Policy Division, Bureau of Industry and Security, U.S. Department of Commerce, Room 2099B, 14th Street and Pennsylvania Avenue, N.W., Washington, DC 20230. Please refer to RIN 0694-XC042 in all comments and in the subject line of e-mail comments. All comments (including any personally identifying information) will be made available for public inspection and copying.

FOR FURTHER INFORMATION CONTACT: For questions on the CB controls that apply to spraying or fogging systems described in ECCN 2B352.i, contact Richard P. Duncan, Ph.D., Director, Chemical and Biological Controls Division, Office of Nonproliferation and Treaty Compliance, Bureau of Industry and Security, Telephone: (202) 482-3343, E-mail: Richard.Duncan@bis.doc.gov. For questions on the submission of comments in response to this notice of inquiry, contact Willard Fisher, Regulatory Policy Division, Office of Exporter Services, Bureau of Industry and Security, U.S. Department of Commerce, Phone: (202) 482-2440.

SUPPLEMENTARY INFORMATION:

Background

The Bureau of Industry and Security (BIS), Department of Commerce, maintains the Export Administration Regulations (EAR) (15 CFR parts 730-774), including the Commerce Control List (CCL) (Supplement No. 1 to part 774 of the EAR). Through this notice, BIS is seeking public comments as part of a review of the effectiveness of its controls on spraying or fogging systems, and “parts” and “components” therefor, that are described in paragraph (i) of Export Control Classification Number (ECCN) 2B352 on the CCL. The items controlled by ECCN 2B352.i are subject to chemical/biological (CB) controls on the CCL, because they are identified on one of the common control lists maintained by the Australia Group (AG), specifically, the AG “Control List of Dual-Use Biological Equipment and Related Technology and Software.” The AG is a multilateral forum consisting of 42 participating countries and the European Union that

maintain export controls on specified chemicals, biological agents, and related equipment and technology that could be used in a chemical or biological weapons program.

Current EAR Controls on Spraying or Fogging Systems

Currently, ECCN 2B352.i controls complete spraying or fogging systems, spray booms, and arrays of aerosol generating units that are: (1) “specially designed” or modified for fitting to aircraft, “lighter than air vehicles,” or “unmanned aerial vehicles” (“UAVs”); and (2) capable of delivering, from a liquid suspension, an initial droplet volume median diameter (‘VMD’) of less than 50 microns at a flow rate of greater than 2 liters per minute. This ECCN also controls aerosol generating units that are “specially designed” for fitting to the aforementioned equipment.

The Technical Notes immediately following ECCN 2B352.i clarify the scope of these controls and provide guidance on how to evaluate certain characteristics (e.g., droplet size) to determine whether specific equipment is controlled under this ECCN. ***Technical Note 1*** states that aerosol generating units, for purposes of the controls in ECCN 2B352.i, are devices “specially designed” or modified for fitting to “aircraft” and include nozzles, rotary drum atomizers and similar devices. ***Technical Note 2*** clarifies the scope of ECCN 2B352 by indicating that this ECCN does not control spraying or fogging systems and “parts” and “components” therefor, as described in 2B352.i, that are demonstrated not to be capable of delivering biological agents in the form of infectious aerosols. ***Technical Note 3*** provides guidance on how to measure ‘VMD’ for droplets produced by spray equipment or nozzles “specially designed” for use on “aircraft” or

“UAVs,” indicating that, pending the adoption of internationally accepted standards, ‘VMD’ should be measured using either of the following methods: (1) doppler “laser” method; or (2) forward “laser” diffraction method.

The control text in ECCN 2B352.i, as described above, is consistent with the corresponding controls described in the AG “Control List of Dual-Use Biological Equipment and Related Technology and Software,” which were established to address a very specific threat, i.e., the dissemination of biological agents from the air.

Proposed Alternatives to the Current Controls in ECCN 2B352.i

As part of its review of the ECCN 2B352.i controls on spraying or fogging systems, and “parts” and “components” therefor, BIS is considering expanding the scope of these controls to include: (1) systems for the dissemination of chemicals controlled by ECCN 1C350 or 1C355 (currently, CB controls apply only to systems for the dissemination of biological agents controlled by ECCN 1C351); and (2) ground-based systems (currently, CB controls apply only to airborne systems). These changes are being considered because potential chemical/biological warfare (CBW) threats are likely to include the dissemination of chemical agents, as well as the dissemination of biological agents, and may well involve ground-based methods of dissemination, as well as airborne means of dissemination.

Consequently, BIS is considering one or more of the following options with respect to the EAR controls on spraying or fogging systems, and “parts” and “components” therefor.

(1) Removing the criterion in ECCN 2B352.i that currently limits CB controls to those systems that are “specially designed” or modified for fitting to “aircraft,” “lighter than air vehicles,” or “UAVs.” The rationale for this change is that the ability of such systems to produce an aerosol is not determined by whether the systems are ground-based or airborne.

(2) Removing the criterion in ECCN 2B352.i based on initial droplet size (i.e., an initial droplet ‘VMD’ of less than 50 microns). The rationale for this change is that initial droplet size is not necessarily a feature that is measured (or otherwise addressed) by all manufacturers of these systems. In addition, the initial droplet size currently indicated in ECCN 2B352.i is based solely on the airborne dissemination of biological agents (i.e., those controlled by ECCN 1C351) and would not necessarily apply to systems for the airborne dissemination of chemicals (i.e., those controlled by ECCN 1C350 or 1C355) or the ground-based dissemination of such chemicals or biological agents.

(3) Lowering the flow rate at which spraying or fogging systems are controlled under ECCN 2B352.i. Currently, ECCN 2B352.i specifies a flow rate of “greater than 2 liters per minute.” However, BIS acknowledges that this change would involve determining a lower flow rate that would not catch typical commercial systems (e.g., systems designed for agricultural use), except when deemed necessary to ensure the continued effectiveness of CB controls on spraying or fogging systems.

(4) Developing a control that would apply to spraying or fogging systems “specially designed” for the dissemination or dispersion of chemicals controlled by ECCN 1C350 or 1C355 or biological agents controlled by ECCN 1C351 in a manner likely to cause significant harm to humans or livestock or serious damage to crops.

With respect to option #4 described above, note that paragraph (a)(1) of the definition of “specially designed” in Section 772.1 of the EAR states that an item is “specially designed” if, as a result of “development,” it “has properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions in the relevant ECCN or U.S. Munitions List (USML) paragraph.” Therefore, if the term “specially designed” were used in the control text for spraying or fogging systems in ECCN 2B352.i, the only systems that would be captured by these controls would be those that are peculiarly responsible for achieving the dissemination or dispersion of chemicals controlled by ECCN 1C350 or 1C355 or biological agents controlled by ECCN 1C351 in a manner likely to cause significant harm to humans or livestock or serious damage to crops (i.e., properties that would distinguish these systems from typical commercial systems, such as those designed for agricultural applications). Consequently, under option #4, the controls in ECCN 2B352.i would not apply to spraying or fogging systems designed for commercial use that have performance levels, characteristics, or functions that are capable of, but not peculiarly responsible for, achieving the dissemination or dispersion of chemicals controlled by ECCN 1C350 or 1C355 or biological agents controlled by ECCN 1C351 in the manner described above.

Request for Comments

BIS is publishing this notice of inquiry to obtain public comments as part of a review of the effectiveness of the EAR controls on spraying or fogging systems, and “parts” and “components” therefor, as currently described in ECCN 2B352.i. Specifically, BIS is seeking comments that address whether the descriptions of these items on the CCL: (1) are clear; (2) do not

inadvertently control items in normal commercial use; (3) accurately reflect CB-related technological capabilities and developments; and (4) are consistent with the principal objective of the AG, which is to ensure that exports of certain chemicals, biological agents, and dual-use chemical and biological manufacturing facilities and equipment do not contribute to the spread of chemical and biological weapons (CBW).

The public comments submitted in response to this notice of inquiry should address specific aspects of the current controls in ECCN 2B352.i in relation to the four criteria described above. For example, if the current control text is not sufficiently clear or does not accurately reflect CB-related technological capabilities and developments, please identify the specific aspects in which the current controls fall short with respect to these criteria. In addition, please indicate: (1) the extent to which the existing controls in ECCN 2B352.i would apply to any spraying or fogging systems that are currently being manufactured and/or sold; or (2) if the existing controls do not apply to any current systems, what specific aspects (e.g., flow rate or ‘VMD’) would differentiate such systems from the systems described in ECCN 2B352.i. Also, if applicable, describe the manner in which your company evaluates spraying or fogging equipment, and “parts” and “components” therefor, consistent with *Technical Note 2* to ECCN 2B352 as described above, which states that this ECCN does not control items specified in 2B352.i if they are “demonstrated not to be capable of delivering biological agents in the form of infectious aerosols.”

In addition, BIS encourages the public to submit comments on the aforementioned options to modify the current controls in ECCN 2B352.i. Comments on these options should focus on the

extent to which they would satisfy the four criteria described above and also address the potential impact of these alternative controls on specific types of spraying or fogging systems (including “parts,” “components,” “accessories,” and “attachments” therefor) that are currently being manufactured and/or sold or that are likely to be manufactured and/or sold in the foreseeable future. Comments on option #4 (where the ECCN 2B352.i control text would include the term “specially designed”) should not only address this option with reference to the four criteria described above, but also identify any performance levels, characteristics, or functions that clearly distinguish commercial spraying or fogging systems from those systems having properties that are peculiarly responsible for achieving the dissemination or dispersion of chemicals controlled by ECCN 1C350 or 1C355 or biological agents controlled by ECCN 1C351 in a manner likely to cause significant harm to humans or livestock or serious damage to crops.

Dated: August 6, 2018.

Richard E. Ashooh,

Assistant Secretary

for

Export

Administration.

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