



DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 742

[Docket No. 201214-0341]

RIN 0694-AI13

Change to the License Review Policy for Unmanned Aerial Systems (UAS) to Reflect Revised United States UAS Export Policy

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: Consistent with President Donald J. Trump's July 24, 2020 announcement of a change in U.S. policy regarding the export of Unmanned Aerial Systems (UAS), the Bureau of Industry and Security (BIS) is amending the Export Administration Regulations (EAR) licensing review policy with respect to certain UAS that are controlled for Missile Technology (MT) reasons. UAS that have a range and payload capability equal to or greater than 300 kilometers (km)/500 kilograms (kg) are identified on the Missile Technology Control Regime (MTCR) Annex as Category I items. Pursuant to this amendment, BIS will review export and reexport license applications involving UAS that fall within these parameters and a maximum true airspeed of less than 800 km/hour (hr) for export licensing review purposes on a case-by-case basis under the more flexible review policy generally applied to MTCR Category II items under the EAR. BIS will also review MT items for the design, development, production, or use in such UAS on a case-by-case basis. This policy change reflects a reasonable approach to technological change and the protection of the national security and economic interests of the United States, while simultaneously remaining committed to the MTCR and its core nonproliferation objectives.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

Background

The Missile Technology Control Regime (MTCR or Regime) is an export control arrangement among 35 nations, including most of the world's suppliers of advanced missiles and missile-related equipment, materials, software and technology. The Regime establishes a common list of controlled items and a common export control policy that member countries implement in accordance with their national export controls. The MTCR seeks to limit the risk of proliferation of weapons of mass destruction (WMD) by controlling exports of goods and technologies that could make a contribution to delivery systems (other than manned aircraft) for such weapons. The United States became a member at the Regime's founding in 1987.

In 1993, the MTCR's original focus on missiles for nuclear weapons delivery was expanded to include the proliferation of missiles for the delivery of all types of WMD, *i.e.*, nuclear, chemical, and biological weapons. Such proliferation has been identified as a threat to international peace and security. One way to address this threat is to maintain vigilance over the transfer of missile equipment, material, and related technologies usable for systems capable of delivering WMD. MTCR members voluntarily pledge to adopt the Regime's Guidelines for Sensitive Missile-Relevant Transfers (MTCR Guidelines) and to restrict the transfer of items contained in the Regime's Equipment, Software, and Technology Annex. The Annex consists of Category I and Category II items, with Category I including items of greatest sensitivity.

Category I items include rocket systems and unmanned aerial vehicle systems with a range capability of 300 km and greater and a payload capability of 500 kg and greater, and production facilities and major sub-systems for such items. Category II items include rocket systems and unmanned aerial vehicle systems with a range of 300 km or greater but below a payload capability of 500 kg. Category II also includes a wide range of equipment, material, and technologies, most of which have uses other than for systems capable of delivering WMD.

Pursuant to the MTCR Guidelines, transfers (including exports and reexports) of Category I items are subject to a “strong presumption of denial.” *See* MTCR Guidelines, Paragraph 2. Transfers of Category II Items are subject to a more flexible case-by-case review policy.

The MTCR Guidelines are implemented through the national export control laws, regulations and policies of Regime members. The United States has implemented in § 742.5 of the EAR missile technology controls and policies that are consistent with the MTCR Guidelines, including by imposing licensing requirements that apply to MTCR Category I and Category II items. As a Regime member, the United States exercises sovereign national discretion in making implementing decisions.

Background on the Revised U.S. UAS Policy

The U.S. Government remains committed to the goals of the MTCR, including the objective of limiting the proliferation of unmanned delivery systems for WMD. At the same time, the U.S. Government is cognizant of rapid advances in the uses of Unmanned Aerial Systems (UAS), including growing commercial uses for UAS that meet the MTCR Category I control criteria, as well as the need to protect U.S. national security and economic security interests. An inflexible approach to implementing the MTCR’s strong presumption of denial that applies to Category I items creates a competitive disadvantage for the United States and other MTCR partners by restraining industry globally from fully participating in the expanding commercial UAS market, which increasingly includes suppliers outside of the

MTCR. Additionally, the U.S. Government recognizes the need to enhance security relationships with countries that wish to collaborate on counter-terrorism, border control, and other mutual security interests. Accordingly, the U.S. Government has recognized the need to update its treatment of UAS that meet the 300 km/500 kg threshold as MTCR Category I items for the implementation of the MTCR's strong presumption of denial and export licensing review purposes to ensure U.S. economic, national security, and foreign policy interests are appropriately addressed.

The United States has been working with its MTCR partners on this issue since 2017, in the interest of updating UAS controls to address the ongoing revolution in both UAS technology and its applications. At the MTCR October 2019 Plenary in Auckland, New Zealand the United States put forward a revised proposal to increase flexibility for export control purposes on a certain subset of MTCR Category I UAS, based primarily on a speed value, and thus not subject their transfer to the Regime's strong presumption of denial. However, the MTCR partners have not achieved consensus on this proposal.

Unilateral Modification to U.S. Licensing Policy for UAS

To address the national security and economic security concerns described above, on July 24, 2020, President Trump announced a change in the policy of the United States regarding exports of UAS (July 24, 2020 Revised UAS Export Policy). In this final rule, consistent with this revised policy, the U.S. Government is amending the licensing policy of the United States to allow greater flexibility in the export or reexport of certain MTCR Category I UAS subject to the Export Administration Regulations (EAR). Pursuant to this revision, the United States will invoke its national discretion on the implementation of the MTCR's strong presumption of denial to treat a subset of MTCR Category I UAS, *i.e.*, those that have a range and payload capability equal to or greater than 300 km/500 kg but a maximum true airspeed of less than 800 km/hr, as Category II UAS for export licensing review purposes, which are generally subject to a more

flexible case-by-case review. BIS is accordingly amending § 742.5 (Missile Technology) of the EAR to review license applications involving such UAS, as well as MT items for the design, development, production, or use in such systems, under a case-by-case review policy.

While the updated policy of the United States refers to the term UAS, the MTCR and the EAR use the term “Unmanned Aerial Vehicle (UAV)”. The change in licensing policy set forth in revised § 742.5 of the EAR consequently uses the term UAV.

In making this licensing review policy change, the U.S. Government is exercising its national discretion as a member of the MTCR. This change will strengthen U.S. national security by improving the capabilities of U.S. partners and will increase U.S. economic security by opening the expanding UAS market to U.S. industry. The U.S. Government is implementing the July 24, 2020 Revised UAS Policy as a responsible and reasonable approach to technological change, establishing a systematic framework for implementation of the MTCR’s strong presumption of denial for export licensing review purposes as applied to a particular subset of MTCR Category I UAS. This subset of UAS is widely used in intelligence, surveillance, and reconnaissance (ISR) missions and various commercial and other applications not involving WMD delivery, so a case-by-case license review policy is warranted.

The United States takes seriously both its nonproliferation commitments and its responsibility to ensure that exports and reexports and subsequent use of all U.S.-origin UAS are conducted responsibly, with appropriate end users and for appropriate end uses. To this end, UAS that fall within this subset of Category I UAS will continue to be subject to a strong presumption of denial if they are intended for use as WMD delivery systems, or if they present a risk of diversion to such an end use.

This approach will maintain particular restraint on exports and reexports of those UAS that present higher risk for WMD delivery – such as cruise missiles, hypersonic aerial vehicles, and advanced unmanned combat aerial vehicles – without unduly impeding exports for growing

commercial and conventional military applications. Finally, the United States notes that while all MTCR-related concerns are considered when reviewing a potential export or reexport of all UAS, the decision to approve – or not approve – such an export or reexport is a whole-of-government decision that takes into account all relevant factors and policies, including U.S. national security, nonproliferation, and foreign policy objectives, as well as the recipient country’s capability and willingness to effectively and responsibly use and safeguard U.S.-origin items, including technology, in accordance with U.S. laws and policies.

Amendments to the Export Administration Regulations (EAR)

This final rule revises the EAR’s missile technology controls to reflect the July 24, 2020 Revised UAS Export Policy. Specifically, in § 742.5 of the EAR (Missile technology), this final rule revises paragraph (b)(1) to add a new licensing review policy for UAVs with a specified range, payload, and maximum true airspeed by adding a new Note to paragraph (b)(1). The new Note to paragraph (b)(1) added by this final rule specifies that UAV systems that have a range and payload capability equal to or greater than 300 km/500 kg, but a maximum true airspeed of less than 800 km/hr, and MT items for use in UAV systems that meet these parameters, will not be subject to a policy of denial. Instead, such UAV systems will be reviewed on a case-by-case basis to determine whether the export or reexport will be used in support of WMD activities or military activities contrary to U.S. national security, or whether there is a risk of diversion to such activities. In addition, the same, more flexible, review policy will apply under the new note to MT-controlled “parts” and “components” and other MT items for the design, “development,” “production,” or “use” (see § 772.1 of the EAR (15 CFR part 772 - Definitions of Terms)) of UAV systems that meet these parameters, including foreign-made UAV systems that do so (whether or not the foreign-made systems are or will be subject to the EAR).

BIS estimates that this licensing review policy change will result in an increase of twenty license applications submitted annually to BIS. This increase is anticipated because certain

exporters that previously may have been deterred from applying for a license as a result of the more restrictive license review policy in place prior to this rule may now be motivated to apply for licenses under the new case-by-case license review policy. In addition, in making this estimate, BIS took into account the fact that the current number of commercial U.S. UAVs with the capability described in this final rule is rather small. Consequently, under the new, more flexible license review policy, the anticipated increase in the number of license applications will be minimal.

This final rule also makes a conforming technical change by revising the second sentence in paragraph (b)(1) of § 742.5 to add double quotation marks around the term parts (“part” is a defined term in the EAR) and to add after it the term “components” (“component” is also a defined term in the EAR). These technical edits clarify that the review standard applies to replacement “parts” and “components” for use in the specified applications (*i.e.*, manned aircraft, satellite, land vehicle, or marine vessel).

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA) (50 U.S.C. 4801-4852). ECRA provides the legal basis for BIS’s principal authorities and serves as the authority under which BIS issues this rule.

Executive Order Requirements

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and

of promoting flexibility. This final rule has been designated a “significant regulatory action” under Executive Order 12866. Commerce estimates that this rule will result in a minimal increase to the number of license requests submitted to BIS annually.

This rule does not contain policies with federalism implications as that term is defined under E.O. 13132.

For the purposes of E.O. 13771, “Reducing Regulation and Controlling Regulatory Costs,” this rule is issued with respect to a national security function of the United States. The cost-benefit analysis indicates that the rule is intended to improve national security as its primary direct benefit. The U.S. Government is acting to protect U.S. national security interests, which are directly related to U.S. economic security interests. An inflexible approach to implementing the MTCR’s strong presumption of denial for the subset of UAS specified in this rule presents a competitive disadvantage for the United States, and other MTCR partners, by restraining industry from fully participating in the expanding commercial UAS market. Additionally, the U.S. Government needs to meet the growing demand for key tools, and capabilities and the development and enhancement of security relationships from countries that want to work with the U.S. on counter-terrorism, border control, and other mutual security interests. The revised U.S. national policy announced on July 24, 2020, is consistent with U.S. national security interests, as the United States will continue to maintain specific controls on transfers of UAS that present higher risks of use in or support for WMD delivery – such as cruise missiles, hypersonic aerial vehicles, and advanced unmanned combat aerial vehicles – while not unduly impeding exports for growing commercial and conventional military applications. Accordingly, this rule meets the requirements set forth in the April 5, 2017 OMB guidance implementing E.O. 13771 and is exempt from the requirements of E.O. 13771.

Paperwork Reduction Act Requirements

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number.

This rule involves the following OMB approved collections of information subject to the PRA: 0694-0088, “Multi-Purpose Application”, which carries a burden hour estimate of 29.6 minutes for a manual or electronic submission; 0694-0096 “Five Year Records Retention Period”, which carries a burden hour estimate of less than 1 minute; and 0607-0152 “Automated Export System (AES) Program”, which carries a burden hour estimate of 3 minutes per electronic submission. This rule changes the respondent burden by increasing the estimated number of submissions by 20. Specific license application submission estimates are further discussed in the preamble of this rule where the regulatory revision is explained. The additional burden falls within the estimated burden approved by OMB for the information collections 0694-0088, 0694-0096, and 0607-0152.

Any comments regarding these collections of information, including suggestions for reducing the burden, may be submitted online at <https://www.reginfo.gov/public/do/PRAMain>. Find the particular information collection by using the search function and entering either the title of the collection or the OMB Control Number.

Administrative Procedure Act and Regulatory Flexibility Act Requirements

Pursuant to Section 4821 of ECRA, this action is exempt from the Administrative Procedure Act (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation, and delay in effective date.

Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this final rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under the Administrative Procedure Act or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

List of Subjects in 15 CFR Part 742

Exports, Terrorism.

Accordingly, part 742 of the Export Administration Regulations (15 CFR parts 730–774) is amended as follows:

PART 742—[AMENDED]

1. The authority citation for part 742 is revised to read as follows:

Authority: 50 U.S.C. 4801-4852; 50 U.S.C. 4601 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; Sec. 1503, Pub. L. 108-11, 117 Stat. 559; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Presidential Determination 2003-23, 68 FR 26459, 3 CFR, 2004 Comp., p. 320; Notice of November 12, 2020, 85 FR 72897 (November 13, 2020).

2. Section 742.5 is amended by revising paragraph (b)(1) to read as follows:

§ 742.5 Missile technology.

* * * * *

(b) * * *

(1) Applications to export and reexport items identified in ECCNs on the CCL as MT Column No. 1 in the Country Chart column of the “License Requirements” section will be considered on a case-by-case basis to determine whether the export or reexport would make a material contribution to the proliferation of missiles. Applications for exports and reexports of such items contained in Category 7A or described by ECCN 9A101 on the CCL will be considered favorably if such exports or reexports are destined to a manned aircraft, satellite, land vehicle, or marine vessel, in quantities appropriate for replacement “parts” and “components” for such applications. When an export or reexport is deemed to make a material contribution to the proliferation of missiles, the license will be denied.

Note 1 to paragraph (b)(1): Applications to export and reexport an Unmanned Aerial Vehicle (UAV) that has a range and payload capability equal to or greater than 300 km/500 kg but a maximum true airspeed of less than 800 km/hr, and items controlled for Missile Technology reasons for the design, development, production, or use of UAV systems that meet these parameters, will not be subject to a policy of denial but will instead be reviewed on a case-by-case basis to determine whether the export or reexport will be used in support of WMD activities or military activities contrary to U.S. national security, or whether there is a risk of diversion to support such activities.

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