

PUBLICATION

Update: Export Control Reform – One Year Later

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It has now been over a year since the President's Export Control Reform Initiative kicked off in October 2013 with revisions to four categories of the United States Munitions List (USML). Since then, four more rounds of changes have brought the total number of revised categories to 15, well over half of the total 21 categories contained in the USML. As a result of rounds one through five, the following categories have been revised:

- **IV** – Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs and Mines
- **V** – Explosives and Energetic Materials, Propellants, Incendiary Agents and Their Constituents
- **VI** – Surface Vessels of War and Special Naval Equipment
- **VII** – Ground Vehicles
- **VIII** – Aircraft and Related Articles
- **IX** – Military Training Equipment
- **X** – Personal Protective Equipment
- **XI** – Military Electronics
- **XIII** – Materials and Miscellaneous Articles
- **XV** – Spacecraft and Related Articles
- **XVI** – Nuclear Weapons Related Articles
- **XVII** – Classified Articles, Technical Data and Defense Services
- **XIX** – Gas Turbine Engines and Associated Equipment
- **XX** – Submersible Vessels and Related Articles
- **XXI** – Articles, Technical Data and Defense Services Otherwise Not Enumerated

The two latest rounds of revisions were implemented in the final few months of 2014 and included the transfer of certain items under Categories **XV** – Spacecraft and Related Articles (on November 10) and **XI** – Military Electronics (on December 30) from the USML to the 600 Series of the Commerce Control List (CCL). As was the case with items that were transferred to the 600 Series in previous rounds, the classification change will result in differing controls on those items and consequently will require your company to reclassify items in the newly revised categories to determine whether they remain under the jurisdiction of the State Department's International Traffic In Arms Regulations (ITAR, which apply to USML products) or have been moved to the CCL, which falls under the jurisdiction of the Commerce Department's Export Administrations Regulations (EAR).

It is still unclear when the remaining six categories will be revised as the State Department has still not announced effective dates for changes to these categories, which include **I** – Firearms; **II** – Artillery; **III** – Ammunition; **XII** – Fire Control, Sensors and Night Vision; **XIV** – Toxicological Agents; and **XVII** – Directed Energy Weapons.

Remaining Compliant in This Time of Transition

Practically speaking, the potential classification changes brought about by the category revisions matter to exporters because they may bring about changes in licensing requirements as each department has a distinct set of requirements and a separate license application process. If an item you export may be reclassified as a result of the upcoming changes, it is important to determine if your licensing responsibilities have also changed

so you don't get caught inadvertently exporting with outdated paperwork – something that could stall your delivery and create export violations and penalties. Obviously, the whole point of Export Control Reform has been to simplify the licensing process for exporters by relaxing controls on less sensitive items. But keep in mind that relaxed controls doesn't necessarily mean that your licensing responsibilities will either remain the same or disappear altogether. Rather, these changes may require the implementation of a totally different procedure governed by a different government department.

As a reminder, it is not only items on the USML that are actually being used for military purposes that require a license from the State Department's DDTC to be exported lawfully, but any item that is specifically enumerated in a USML category or included in a category by virtue of the fact that it is deemed to have been specially designed for military use ("specially designed" is the new definition that is now applied to determine if an item that is not directly mentioned is nevertheless included in a revised category). If you know or suspect your item is included in a USML category, be sure to consult the revisions to that category to ensure that your procedures satisfy the new regulatory framework. During this extended time of transition, it is important that companies not only continue to initially classify new products, but review past classifications to ensure they are still accurate once reforms to an applicable category are implemented. (Note that, even apart from the changes brought about by Export Control Reform, best practices require exporters to perform periodic classification reviews to ensure continued compliance.)

If your company cannot "self-classify" a product, you should seek assistance of outside counsel or request a binding ruling from the government regarding classification and/or licensing requirements. Checklists and procedural flow charts can be used, and compliance officers can be consulted when red flags are raised based on the product itself or the destination. The State Department's Export Control Reform website also features free tools that guide you through the classification process and help determine if a particular item is "specially designed" under a particular USML category.

Compliance Training for Employees

To ensure that your employees have the proper tools and information to maintain compliance on a day-to-day basis, consider periodic training across the company. Create position-specific export control training programs that identify the sorts of things that are controlled within a specific product line, focusing on those that are less obvious. For example, companies with any involvement in aviation should highlight the prohibition on exports of night vision equipment and night vision compatible lighting.

Furthermore, written compliance policies and procedures should supplement periodic trainings and careful documentation of due diligence should be preserved to ensure that your business has proof of its efforts in the event an inadvertent violation does occur. As mentioned above, a checklist before a sales transaction is approved is a good methodology. Some companies prepare such checklists for all foreign sales to ensure that there is no transshipment or red flags that could lead to a violation. Finally, the human element should never be neglected: tone at the top is key. Senior management and company policy documents should plainly articulate management's commitment to prioritizing compliance and reiterate that every employee across the organization is expected to comply with applicable laws.

If you have any questions or want to discuss how this could impact your business, contact the author of this alert.