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DEPARTMENT OF STATE

22 CFR Part 121

RIN 1400-AC77

[Public Notice 7702]

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

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 VII (ground vehicles) of the U.S. Munitions List (USML) to describe more precisely the military ground vehicles 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 Amendments – Category VII."
- Internet: At www.regulations.gov, search for this notice by using this rule's RIN (1400-AC77).

Comments received after that date will be considered if feasible, but consideration cannot be assured. We will make all comments (including any personally identifying information or information for which a claim of

confidentiality is asserted in those comments or their transmittal e-mails) available for public inspection and copying after the close of the comment period via the Directorate of Defense Trade Controls website at www.pmddtc.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 ADDITIONAL INFORMATION CONTACT: Director Charles B. Shotwell, Office of Defense Trade Controls Policy, Department of State, telephone (202) 663-2792, or email DDTCResponseTeam@state.gov.
ATTN: Regulatory Change, USML Category VII.

SUPPLEMENTARY INFORMATION:

On December 10, 2010, the Department published as a proposed rule a revised Category VII that included tiering (75 FR 76930). As discussed below, the tiering of the categories has been postponed. In this regard, this revision differs from the earlier one. Because the differences between the two proposed versions of Category VII are considerable, the Department will not provide an assessment of public comments received from the first proposed rule, but welcomes comments on this proposed rule from all parties. If you submitted comments in response to the December 2010 rulemaking, please re-submit your comments, if they are still appropriate.

Background

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 (Dec. 9, 2010) and “Revision to the United States Munitions List,” 75 FR 76935 (Dec. 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 re-export 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 them 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 VII

This proposed rule revises USML Category VII, Ground Vehicles, to establish a clear “bright line” between the USML and the CCL for the control of military ground vehicles. The proposed revision narrows the types of ground vehicle controlled on the USML to only those that warrant control under the stringent requirements of the Arms Export Control Act. Changes include the removal of most unarmored and unarmed military vehicles, trucks, trailers, and trains (unless “specially designed” as firing platforms for weapons above .50 caliber), and armored vehicles (either

unarmed or with inoperable weapons) manufactured before 1956. Also, this revision removes gas turbine engines designed for ground vehicles from inclusion in this category. Gas turbine engines for articles controlled in this category will likely be included in proposed Category XIX, which will be the subject of a separate notice.

This proposed rule also would remove from reserved status §121.4 and define therein “ground vehicles” for purposes of the revised USML Category VII.

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 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 0 of the CCL that we anticipate will 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 of this proposed rule 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 definitions have been proposed 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 obligations, 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, but based on a preliminary evaluation of the comments and other considerations, 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. For the purpose of evaluation of this proposed rule, reviewers should use the definition provided in the December 2010 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 6 (ML 6). To that end, the public is asked to identify any potential lack of coverage brought about by the proposed rules for Category VII contained in this FRN and the new Category 0 ECCNs published separately by the Department of Commerce, when reviewed together.

2) This amendment removes from the USML unarmed but armored military vehicles manufactured prior to 1956. The rationale is to discontinue controlling on the USML vehicles of almost no military significance. Armored military vehicles manufactured after 1955 would be maintained on the USML. We ask the public to comment on the efficacy of splitting jurisdiction for these vehicles between the USML and the CCL.

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 a related Notice of Proposed Rulemaking (RIN 1400-AC77), and accepted comments for 60 days in response to both notices.

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 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, the requirement of Executive Order 13175 does not apply to this rulemaking.

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.

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 22 CFR 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 VII to read as follows:

§121.1 General. The United States Munitions List.

* * * * *

Category VII—Ground Vehicles

*(a) Armored combat ground vehicles (see §121.4 of this subchapter) as follows:

(1) tanks; or

(2) infantry fighting vehicles.

*(b) Ground vehicles (not enumerated in paragraph (a) of this category) and trailers that are armed or are “specially designed” to serve as a firing or launch platform (see §121.4 of this subchapter).

(c) Ground vehicles and trailers equipped with any mission systems controlled under this subchapter (see §121.4 of this subchapter).

(d) [Reserved]

*(e) Armored support ground vehicles (see §121.4 of this subchapter).

*(f) [Reserved - for articles formerly controlled under this paragraph see Category XIX and ECCN 0A606.]

(g) Ground vehicle components, parts, accessories, attachments, and associated equipment as follows:

- (1) armored hulls, armored turrets, and turret rings;
- (2) 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 vehicle) and parts and components “specially designed” therefor;
- (3) composite armor parts and components “specially designed” for the vehicles in this category;
- (4) spaced armor components and parts, including slat armor components and parts “specially designed” for the vehicles in this category;
- (5) reactive armor parts and components;
- (6) electromagnetic armor parts and components, including pulsed power parts and components “specially designed” therefor;
- (7) built in test equipment (BITE) to evaluate the condition of weapons or other mission systems for vehicles identified in this Category. This does not include BITE that provides diagnostics solely for a subsystem or component for the basic operation of the vehicle.
- (8) gun mount, stabilization, turret drive, and automatic elevating systems, and parts and components “specially designed” therefor;
- (9) self-launching bridge components rated class 60 or above for deployment by vehicles enumerated in this category;
- (10) suspension components as follows:

- (i) rotary shock absorbers “specially designed” for the vehicles weighing more than 30 tons in this category; or
- (ii) torsion bars “specially designed” for the vehicles weighing more than 50 tons in this category;

(11) kits “specially designed” to convert a vehicle enumerated in this category into either an unmanned or a driver-optional vehicle. For a kit to be controlled by this paragraph, it must, at a minimum, include equipment for:

- (i) remote or autonomous steering;
- (ii) acceleration and braking; and
- (iii) a control system;

(12) fire control computers, mission computers, vehicle management computers, integrated core processors, stores management systems, armaments control processors, vehicle-weapon interface units and computers;

(13) test or calibration equipment for the mission systems of the vehicles controlled in this category, except those enumerated elsewhere; or

*(14) 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: Parts, components, accessories, and attachments “specially designed” for vehicles enumerated in this category but not listed in Category VII(g) are subject to the EAR under ECCN 0A606.

(h) 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 (g) of this category (see §125.4 of this subchapter for exemptions).

* * * * *

3. Section 121.4 is added to read as follows:

121.4 Ground vehicles.

(a) In Category VII, “Ground Vehicles” means developmental, production, or inventory ground vehicles, whether manned or unmanned, that:

(1) 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 rockets, firing missiles, firing mortars, firing artillery rounds, or firing other ammunition greater than .50 caliber);

(2) are armored support vehicles capable of off-road or amphibious use “specially designed” to transport or deploy personnel or materiel, or to move with other vehicles over land in close support of combat vehicles or troops (e.g., personnel carriers, resupply vehicles, combat engineer vehicles, recovery vehicles, reconnaissance vehicles, bridge launching vehicles, ambulances, and command and control vehicles); or

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

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

Note: “Armored” ground vehicles, for purposes of paragraph (a) of this section, (i) are ground vehicles that have integrated, fully armored hulls or cabs, or (ii) are ground vehicles on which add-on armor has been installed to provide ballistic protection to level III (National Institute of Justice Standard 0108.01, September 1985) or better. “Armored” vehicles do not include those that are merely capable of being equipped with add-on armor.

(b) Ground Vehicles “specially designed” for military applications that are not identified in (a) of this section are subject to the EAR under ECCN 0A606, including any unarmed ground vehicles, regardless of origin or designation, manufactured prior to 1956 and unmodified since 1955.

Modifications made to incorporate safety features required by law, are cosmetic (e.g. different paint, repositioning of bolt holes), or that add parts or components otherwise available prior to 1956 are considered

“unmodified” for the purposes of this subparagraph. ECCN 0A606 also includes unarmed vehicles derived from otherwise EAR99 civilian vehicles that have been modified or otherwise fitted with materials to provide ballistic protection, including protection to level III (National Institute of Justice Standard 0108.01, September 1985) or better and that do not have reactive or electromagnetic armor.

28 November 2011

(Date)

Ellen O. Tauscher,
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Department of State.

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