



[Billing Code 4710-25]

DEPARTMENT OF STATE

22 CFR Part 121

RIN 1400-AD13

[Public Notice: 7883]

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

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 XIII (materials and miscellaneous articles) of the U.S. Munitions List (USML) to describe more precisely the materials 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 XIII."
- Internet: At www.regulations.gov, search for this notice by using this rule's RIN (1400-AD13).

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.pmdtcc.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: Ms. Candace M. J. Goforth, Acting Director, Office of Defense Trade Controls Policy, Department of State, telephone (202) 663-2792; e-mail *DDTCResponseTeam@state.gov*. ATTN: Regulatory Change, USML Category XIII.

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 (CCL) in Supplement No. 1 to 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 U.S. allies, enhancing the 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 NATO allies 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 XIII

This proposed rule revises USML Category XIII, re-titled "Materials and Miscellaneous Articles," to advance the national security objectives set forth above and to more accurately describe the articles within the category, in order to establish a "bright line" between the USML and the CCL for the control of such articles.

Paragraph (a) is removed and placed in reserve; the articles currently controlled there (*i.e.*, cameras and specialized processing equipment) are to be controlled in revised Category XII or the CCL, which will be the subject of a separate notice. Photointerpretation, stereoscopic plotting, and photogrammetry equipment "specially designed" for military use will be controlled under ECCN 0A617.e. Paragraph (c) is removed and placed in reserve; the articles currently controlled there (*i.e.*, self-contained diving and underwater breathing apparatus) are to be controlled in ECCN 8A620.f. Paragraphs (d), (e), (g), and (h) are reorganized and expanded to better describe the articles controlled therein. Paragraph (f) is re-designated to cover articles that are classified. The articles in the current paragraph (f)

(*i.e.*, structural materials) are to be controlled in proposed CCL ECCN 0C617 and in revised USML Categories VII, VIII, and XIII. Paragraph (i) is re-designated to control signature reduction software, with embrittling agents (currently controlled in paragraph (i)) moving to the CCL under ECCN 0A617.f. Paragraph (m) is amended to reflect the revisions made throughout this category.

Finally, articles common to the Missile Technology Control Regime (MTCR) Annex and the USML are to be identified on the USML with the parenthetical “(MT)” at the end of each section containing such articles. A future proposed rule will address the sections in the ITAR that include MTCR definitions.

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 1 (WA-ML17). To that end, the public is asked to identify any potential lack of coverage brought about by the proposed rules for Category XIII contained in this notice and the new Category 0 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 these materials. The public is asked to provide specific examples of materials and miscellaneous articles 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 (APA). 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 the Department is of the opinion that this rule is exempt from the rulemaking provisions of 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 preempt 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 XIII to read as follows:

§121.1 General. The United States Munitions List.

* * * * *

Category XIII— Materials and Miscellaneous Articles

(a) [Reserved]

(b) Information security/information assurance systems and equipment, cryptographic devices, software, and components “specially designed” for military applications (*e.g.*, command, control and, communications (C³), and government intelligence applications), as follows:

(1) military cryptographic (including key management) systems, equipment assemblies, modules, integrated circuits, components, and software (*e.g.*, cryptographic interfaces) capable of maintaining secrecy or confidentiality of information or information systems, including equipment and software for tracking, telemetry, and control (TT&C) encryption and decryption;

(2) military cryptographic (including key management) systems, equipment, assemblies, modules, integrated circuits, components, and software (*e.g.*, cryptographic interfaces) capable of generating spreading or hopping codes for spread spectrum systems or equipment;

(3) military cryptanalytic systems, equipment, assemblies, modules, integrated circuits, components and software;

(4) military systems, equipment, assemblies, modules, integrated circuits, components, and software that provide certified or certifiable multi-level security, user isolation, or control of the exchange of or access to information between or among systems operating at different classification levels, and software to certify such systems, equipment, or software; or

(5) ancillary equipment “specially designed” for the articles in paragraphs (b)(1)-(b)(4) of this category.

(c) [Reserved]

(d) Ablative materials, as follows (MT):

- * (1) ablative materials fabricated or semi-fabricated from advanced composites (*e.g.*, silica, graphite, carbon, carbon/carbon, and boron filaments) “specially designed” for the articles in Category IV; or
- (2) carbon/carbon billets and preforms which are reinforced with continuous unidirectional fibers, tows, tapes, or woven cloths in three or more dimensional planes.

Note to paragraph (d)(2): This does not control carbon/carbon billets and preforms where reinforcement in the third dimension is limited to interlocking of adjacent layers only.

(e) Armor (*e.g.*, organic, ceramic, metallic), active armor or reactive armor, and armor materials, as follows:

- (1) developmental armor developed under a contract with the U.S. Department of Defense;
- (2) spaced armor with E_m greater than 1.4 and meeting NIJ Level III or better;
- (3) transparent armor having E_m greater than or equal to 1.3 or having E_m less than 1.3 and meeting NIJ Level III standards with areal density less than or equal to 40 pounds per square foot;
- (4) transparent ceramic plate greater than ¼ inch-thick and larger than 8 inches x 8 inches, excluding glass, for transparent armor;
- (5) non-transparent ceramic plate or blanks, greater than 1/4 inches thick and larger than 8 inches x 8 inches for transparent armor. This includes spinel and aluminum oxynitride (ALON);
- (6) composite armor with E_m greater than 1.4 and meeting NIJ Level III or better; or

(7) metal Laminate Armor with E_m greater than 1.4 and meeting NIJ Level III or better.

(f) Any material that:

(1) is classified;

(2) is manufactured using classified production data; or

(3) 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.

(g) Concealment and deception equipment, as follows (MT):

* (1) polymers loaded with carbonyl iron powder, ferrites, iron whiskers, fibers, flakes, or other magnetic additives having a surface resistivity of less than 5000 ohms/square and isotropy of less than 5%;

(2) multi-layer camouflage systems “specially designed” to reduce detection of platforms or equipment in the infrared or ultraviolet frequency spectrums;

* (3) high temperature (greater than 300 deg F operation) ceramic or magnetic radar absorbing material (RAM) “specially designed” for use on defense articles or military items subject to the EAR; or

* (4) broadband (greater than 30% bandwidth) lightweight (less than 2 lbs/sq ft) magnetic radar absorbing material (RAM) “specially designed” for use on defense articles or military items subject to the EAR.

(h) Energy conversion devices, as follows:

(1) fuel cells “specially designed” for platforms or soldier systems specified in this subchapter;

(2) thermal engines “specially designed” for platforms or soldier systems specified in this subchapter;

(3) thermal batteries (MT); or

(4) thermionic generators.

(i) Signature reduction software, technical data, and services, as follows

(MT):

*(1) software associated with the measurement or modification of system signatures;

*(2) software for design of low-observable platforms;

*(3) software for design, analysis, prediction, or optimization of signature management solutions;

*(4) radar cross section or infrared signature measurement or prediction software;

*(5) signature management techniques, codes, and algorithms;

*(6) signature control design methodology;

*(7) processes that use micro-encapsulation or micro-spheres to reduce infrared, radar, or visual detection of platforms or equipment;

*(8) multi-layer camouflage system techniques to reduce detection of platforms or equipment;

*(9) multi-spectral surface treatment techniques to modify infrared, visual or radio frequency signatures of platforms or equipment;

*(10) shaping, active, or passive techniques to modify platform or equipment visual, electro-optical, radiofrequency, electric, magnetic, electromagnetic, or wake signatures (*e.g.*, low probability of intercept (LPI) techniques, methods or applications); or

*(11) shaping, active, or passive techniques to modify defense articles' acoustic signatures.

*(j) Equipment, materials, coatings, and treatments not elsewhere specified, as follows:

(1) Laser eye-safe media including narrow band dyes/coatings and wide band non-linear optical material “specially designed” for goggles, spectacles, or visors that provide narrow band filtering or broad band limiting with optical density greater than 3 that protect against:

- (i) visible (in-band) wavelengths;
- (ii) thermal flashes associated with nuclear detonations; or
- (iii) Near Infrared or Ultra Violet (out-of-band) wavelengths.

Note: See Category X(a)(7).

(2) Specially treated or formulated dyes, coatings, and fabrics used in the design, manufacture, or production of personnel protective clothing, equipment, or face paints designed to protect against or reduce detection by radar, infrared, or other sensors at wavelengths greater than 900 nanometers.

Note: See Category X(a)(2).

(3) Equipment, materials, coatings, and treatments that are “specially designed” to modify the electro-optical, radiofrequency, infrared, electric, laser, magnetic, electromagnetic, acoustic, electro-static, or wake signatures of defense articles or military items subject to the EAR through control of absorption, reflection, or emission.

(k) Tooling and equipment, as follows:

(1) tooling and equipment “specially designed” for production of low observable (LO) components; or

(2) portable platform signature field repair validation equipment (*e.g.*, portable optical interrogator that validates integrity of a repair to a signature reduction structure).

(l) 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 (h), (j), and (k) of this

category. (See also §123.20 of this subchapter.) (MT for technical data and defense services related to articles designated as such.)

(m) The following interpretations explain and amplify terms used in this category and elsewhere in this subchapter:

(1) Composite armor is defined as having more than one layer of different materials or a matrix.

(2) Spaced armors are metallic or non-metallic armors that incorporate an air space or obliquity or discontinuous material path effects as part of the defeat mechanism.

(3) Reactive armor employs explosives, propellants, or other materials between plates for the purpose of enhancing plate motion during a ballistic event or otherwise defeating the penetrator.

(4) Electromagnetic armor (EMA) employs electricity to defeat threats such as shaped charges.

(5) Materials used in composite armor could include layers of metals, plastics, elastomers, fibers, glass, ceramics, ceramic-glass reinforced plastic laminates, encapsulated ceramics in a metallic or non-metallic matrix, functionally gradient ceramic-metal materials, or ceramic balls in a cast metal matrix.

(6) For this Category, a material is considered transparent if it allows 75% or greater transmission of light in the visible spectrum through a 1 mm thick nominal sample.

(7) The material controlled in paragraph (e)(3) of this category has not been treated to reach the 75% transmission level referenced in (m)(6) of this category.

(8) Metal laminate armors are two or more layers of metallic materials which are mechanically or adhesively bonded together to form an armor system.

(9) E_m is the line-of-sight target mass effectiveness ratio and provides a measure of the tested armor's performance to that of rolled homogenous armor, where E_m is defined as follows:

$$E_m = \frac{\rho_{RHA}(Po - Pr)}{AD_{Target}}$$

where:

ρ_{RHA} = density of RHA, (7.85 g/cm³)

Po = Baseline Penetration of RHA, (mm)

Pr = Residual Line of Sight Penetration, either positive or negative (mm RHA equivalent)

AD_{TARGET} = Line-of-Sight Areal Density of Target (kg/m²)

(10) NIJ is the National Institute of Justice and Level III refers to the requirements specified in NIJ standard 0108.01 Ballistic Resistant Protective Materials.

* * * * *

May 10, 2012

(Date)

Rose E. Gottemoeller,
Acting Under Secretary,
Arms Control and International Security,
Department of State.

[FR Doc. 2012-12123 Filed 05/17/2012 at 8:45 am; Publication Date:
05/18/2012]