

[Billing Code 4710-25]

DEPARTMENT OF STATE

22 CFR Part 121

RIN 1400-AC96

Public Notice: [7673]

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

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 VIII (aircraft and related articles) of the U.S. Munitions List (USML) to describe more precisely the military aircraft and related defense articles 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 VIII.
- Internet: At www.regulations.gov, search for this notice by using this rule’s RIN (1400-AC96).

Comments received after that date will be considered if feasible, but consideration cannot be assured. 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) 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.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.

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 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 reexport 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 VIII

This proposed rule revises USML Category VIII, covering aircraft and related articles, to establish a clearer line between the USML and the CCL regarding controls over military aircraft and related articles. The proposed revision narrows the types of aircraft and related items controlled on the USML to only those that warrant control under the stringent requirements of the Arms Export Control Act. Changes include moving similar articles currently controlled in multiple categories into a single category or subcategory (e.g., inertial navigations systems for aircraft formerly controlled under Category VIII(e) will likely be moved to controls either in Category XII or the CCL in future proposed rules and, as noted in proposed Category VIII(b), 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). Other former Category VIII subcategories have been “reserved” because the Department is proposing to change the jurisdictional status of the items covered therein so that they would become subject to the EAR, most likely under ECCN 9A610 or 9A619.

This proposed rule also revises §121.3 to more clearly define “aircraft” for purposes of the revised USML Category VIII.

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, with one principal exception, a positive list of specific types of parts, components, accessories, and attachments that continue to warrant control on the USML. The exception pertains to parts, components, accessories, and attachments “specially designed” for the following U.S.-origin aircraft that have low observable features or characteristics: B-1B, B-2, F-15SE, F/A18E/F/G, F-22, F-35 (and variants thereof), F-117, or United States Government technology demonstrators.

All other parts, components, accessories, and attachments “specially designed” for a military aircraft and other articles now subject to USML Category VIII would become subject to the new 600 series controls in Category 9 of the CCL to 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 change 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 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. 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 10 (ML 10). To that end, the public is asked to identify any potential lack of coverage brought about by the proposed rules for Category VIII contained in this FRN and the new Category 9 ECCNs published separately by the Department of Commerce when reviewed together.

2) While many of the aircraft controlled in paragraph (a) of Category VIII are defined based on objective parameters, some are not. For example, unmanned aerial vehicles controlled under (a)(6) are simply described as “military.” This is to differentiate those unmanned aerial vehicles currently controlled under Category VIII from those currently controlled, and will remain so controlled, under ECCN 9A012. The public is asked to provide input on regulatory language that would control those with an objective description that precludes removal from the USML and does not inadvertently designate as “defense articles” aircraft currently subject to the EAR.

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 accepted comments for 60 days.

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 Parts 120 and 121

Arms and munitions, Exports

Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, parts 120 and 121 are proposed to be amended as follows:

PART 120 – PURPOSE AND DEFINITIONS

1. Section Contents is revised to read as follows:

* * * * *

§§120.33-120.36 [Reserved]

§120.37 Foreign ownership and foreign control.

§120.38 [Reserved]

§120.39 Regular employee.

§120.40 [Reserved]

PART 121 – THE UNITED STATES MUNITIONS LIST

2. 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.

3. Section 121.1 is amended by revising U.S. Munitions List Category VIII to read as follows:

§121.1 General. The United States Munitions List.

* * * * *

VIII—Aircraft and Related Articles

(a) Aircraft (see §121.3 of this subchapter) as follows:

* (1) Bombers;

* (2) Fighters, fighter bombers, and fixed-wing attack aircraft;

* (3) Jet-powered trainers used to train pilots for fighter, attack, or bomber aircraft;

* (4) Attack helicopters;

* (5) Unarmed military unmanned aerial vehicles (UAVs);

- * (6) Armed unmanned aerial vehicles;
- * (7) Military intelligence, surveillance, and reconnaissance aircraft;
- * (8) Electronic warfare, airborne warning and control aircraft;
- (9) Air refueling aircraft and Strategic airlift aircraft;
- (10) Target drones;
- (11) Aircraft equipped with any mission systems controlled under this subchapter; or
- (12) Aircraft capable of being refueled in flight including hover-in-flight refueling (HIFR).
- (b) [Reserved - for items formerly controlled under this subcategory see Category XIX and an ECCN to be determined]
- (c) [Reserved]
- (d) Launching and recovery equipment “specially designed” for defense articles described in paragraph (a) of this category.
- (e) [Reserved]
- (f) Developmental aircraft and “specially designed” parts, components, accessories, and attachments therefor developed under a contract with the U.S. Department of Defense.
- (g) [Reserved]
- (h) Aircraft components, parts, accessories, attachments, and associated equipment as follows:
 - (1) Components, parts, accessories, attachments, and equipment “specially designed” for the following U.S.-origin aircraft: B-1B, B-2, F-15SE, F/A18E/F/G, F-22, F-35 (and variants thereof), F-117, or United States Government technology demonstrators. Components, parts, accessories, attachments, and equipment of the F-15SE, and F/A-18 E/F/G that are common to earlier models of these aircraft, unless listed below, are subject

to the jurisdiction of the Export Administration Regulations;

(2) Face gear gearboxes, split-torque gearboxes, variable speed gearboxes, synchronization shafts, interconnecting drive shafts, and gearboxes with internal pitch line velocities exceeding 15,000 feet per minute and parts and components “specially designed” therefor;

(3) Tail boom, stabilator and automatic rotor blade folding systems and parts and components “specially designed” therefor;

(4) Aircraft wing folding systems and parts and components “specially designed” therefor;

(5) Tail hooks and arresting gear and parts and components “specially designed” therefor;

(6) Bomb racks, missile launchers, missile rails, weapon pylons, pylon-to-launcher adapters, UAV launching systems, and external stores support systems and parts and components “specially designed” therefor;

(7) Damage/failure-adaptive flight control systems;

(8) Threat-adaptive autonomous flight control systems;

(9) Non-surface-based flight control systems and effectors, e.g., thrust vectoring from gas ports other than main engine thrust vector, “specially designed” for aircraft;

(10) Radar altimeters with output power management or signal modulation (i.e., frequency hopping, chirping, direct sequence-spectrum spreading) LPI (low probability of intercept) capabilities;

(11) Air-to-air refueling systems and hover-in-flight refueling (HIFR) systems and parts and components “specially designed” therefor;

(12) UAV flight control systems and vehicle management systems with swarming capability, i.e., UAVs interact with each other to avoid collisions and stay together, or, if weaponized, coordinate targeting;

- (13) Aircraft lithium-ion batteries that provide 28 VDC or 270 VDC;
- (14) Lift fans, clutches, and roll posts for short take-off, vertical landing (STOVL) aircraft and parts and components “specially designed” for such lift fans and roll posts;
- (15) Helmet Mounted Cueing Systems, Joint Helmet Mounted Cueing Systems (JHMCS), Helmet Mounted Displays, Display and Sight Helmets (DASH), and variants thereof;
- (16) Fire control computers, mission computers, vehicle management computers, integrated core processors, stores management systems, armaments control processors, aircraft-weapon interface units and computers (e.g., AGM-88 HARM Aircraft Launcher Interface Computer (ALIC)) “specially designed” for aircraft;
- (17) Radomes “specially designed” for operation in multiple or nonadjacent radar bands or designed to withstand a combined thermal shock greater than $4.184 \times 10^6 \text{ J/m}^2$ accompanied by a peak overpressure of greater than 50 kPa;
- (18) Drive systems and flight control systems “specially designed” to function after impact of a 7.62mm or larger projectile; or
- (19) 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” in this subcategory 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.

(i) 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) of this category. (See §125.4 of this subchapter for exemptions.)

* * * * *

4. Section 121.3 is revised to read as follows:

§121.3 Aircraft and related articles.

(a) In Category VIII, except as described in (b) below, “aircraft” means developmental, production, or inventory aircraft that:

(1) are U.S.-origin aircraft that bear an original military designation of A, B, E, F, K, M, P, R or S;

(2) are foreign-origin aircraft “specially designed” to provide functions equivalent to those of the aircraft listed in (a)(1) of this section;

(3) are armed or are “specially designed” to be used as a platform to deliver munitions or otherwise destroy targets (e.g., firing lasers, launching rockets, firing missiles, dropping bombs, or strafing);

(4) are strategic airlift aircraft capable of airlifting payloads over 35,000 lbs to ranges over 2,000 nm without being refueled in-flight into short or unimproved airfields;

(5) are capable of being refueled in-flight; or

(6) 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 beyond airworthiness, such as by providing military communication, radar, active missile counter measures, target designation, surveillance, or sensor capabilities.

(b) Aircraft “specially designed” for military applications that are not

identified in (a) of this section are subject to the EAR under an ECCN to be determined, including any unarmed military aircraft, regardless of origin or designation, manufactured prior to 1956 and unmodified since manufacture. Modifications made to incorporate safety of flight features or other FAA or NTSB modifications such as transponders and air data recorders are considered “unmodified” for the purposes of this subparagraph.

October 28, 2011
(Date)

Ellen O. Tauscher,
Under Secretary,
Arms Control and International Security,
Department of State.

[FR Doc. 2011-28502 Filed 11/04/2011 at 8:45 am; Publication Date:
11/07/2011]