

## NEW EXPORT CONTROL REQUIREMENT FOR ELECTRONICS MANUFACTURERS IN DEFENSE AND AEROSPACE INDUSTRIES

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The State and Commerce Departments recently issued significant new regulations under Export Control Reform affecting the export control requirement for military electronics. These will have a major impact on manufacturers of electronics systems, as well as parts, components, attachments and software, in the defense, aerospace, computer and telecommunications fields. When combined with recent amendments to U.S. Munitions List (“USML”) Category VIII (Aircraft) and Category XV (Satellites/Spacecraft), these will have a major impact on export compliance practices across the electronics industry, including for manufacturers, distributors, exporters and technical services firms.<sup>1</sup>

In a Federal Register Notice dated July 1, 2014, the Directorate of Defense Trade Controls (“DDTC”) within the State Department issued a final rule to amend Category XI of the U.S. Munitions List (“USML”) covering military electronics.<sup>2</sup> Under these amendments, certain items previously covered on the USML are being removed and replaced with more precisely defined defense articles, creating a more “positive list” of controlled items. On the same day, the Bureau of Industry and Security (“BIS”) within the Commerce Department issued a companion rule which is adding items to the Commerce Control List (“CCL”) 600 Series that are transitioning from the USML. In both sets of amendments, special provisions are being adopted for many parts, components, accessories and attachments related to items on both of the lists. The changes under the new Category XI and the corresponding CCL provisions will go into effect for most items on December 30, 2014.

This is a significant event for manufacturers of electronics equipment and parts and components – including second and third- tier suppliers. Certain low level items will be removed completely from licensing requirements. However, a large number of items previously regulated under ITAR will soon become subject to export control requirements at the Commerce Department under the Export Administration Regulations (“EAR”). As part of these amendments, many of the broad open-ended “catch-all” provisions on the USML are being transferred to the CCL. This will result in changes in licensing requirements and compliance practices across the industry. Electronics firms must understand how these amendments will affect their business and be ready for these changes.

### DDTC Amendments To USML Category XI – Military Electronics

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<sup>1</sup> This is one of the recent developments under the Obama Administration’s Export Control Reform initiative. Under Export Control Reform, the Directorate of Defense Trade Controls within the State Department is reviewing the USML to create a more “positive” list of specifically enumerated controlled items. Many of the items previously controlled on the USML are being transferred to the Commerce Control List 600 series administered by the Bureau of Industry and Security within the Commerce Department.

<sup>2</sup> Federal Register Volume 79, No. 126, July 1, 2014, pp 37536 et seq.

Category XI of the USML covers a wide array of military electronics end products, systems, parts, components and software, including many products in the computer, telecommunications, avionics and radar fields. The new amendments impose a broad series of changes to the controls on these products. The newly revised USML Category XI contains a detailed list of specifically enumerated controlled items. Examples of items covered include certain radar systems, electronic sensing equipment, command, control, communications, intelligence and surveillance systems, certain specified computer systems and software, electronic warfare systems, certain underwater hardware and acoustic systems, specified unattended ground sensor (UGS) systems and development electronic equipment funded by the Department of Defense. Items listed on the USML will continue to be subject to export controls under ITAR.

The existing version of Category XI contains many of the so-called “catch-all” provisions that have created significant controversy in the export community in recent years. A “catch-all” provision is a broad, open-ended entry that identifies effectively all products that are designed or modified for a military use or fall within similarly broad parameters.<sup>3</sup> Under the new revisions to Category XI, some of these “catch-all” provisions are being removed from the USML, however a number will continue to be included such as the new Category XI(b):

\* (b) Electronic systems or equipment, not elsewhere enumerated in this subchapter, specially designed for intelligence purposes that collect, survey, monitor, or exploit the electromagnetic spectrum (regardless of transmission medium), or for counteracting such activities.

Similarly, the new Category XI(a)(7) is a broad open-ended subcategory that addresses “developmental electronic equipment”:

(7) Developmental electronic equipment or systems funded by the Department of Defense via contract or other funding authorization.<sup>4</sup>

The revised Category XI also covers certain parts, components, accessories, attachments and associated equipment – the specific parts and components covered are identified in Category XI(c). Thus, many second- and third-tier suppliers of system components,

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<sup>3</sup> One example of this is the current USML Category XI(a) that provides: “Electronic equipment... which is specifically designed, modified or configured for military application.”

<sup>4</sup> The following Notes are also included in the newly revised Category XI(a)(7):

Note 1 to paragraph (a)(7): This paragraph does not control electronic systems or equipment (a) in production, (b) determined to be subject to the EAR via a commodity jurisdiction determination (see § 120.4 of this subchapter), or (c) identified in the relevant Department of Defense contract or other funding authorization as being developed for both civil and military applications.

Note 2 to paragraph (a)(7): Note 1 does not apply to defense articles enumerated on the USML, whether in production or development.

Note 3 to paragraph (a)(7): This paragraph is applicable only to those contracts and funding authorizations that are dated July 1, 2015, or later.

subassemblies and other electronics parts used in defense products will continue to be regulated under ITAR. (*But see* the discussion of parts and components under the CCL 600 Series below.)

#### Companion BIS Regulation Adding Military Electronics to CCL

On the same day that DDTC issued its amendment to Category XI, BIS issued a final regulation revising the Export Administration Regulations to add controls for items removed from the USML (the “BIS Rule”).<sup>5</sup> Under this amendment, a significant number of electronics items that were previously listed on the USML are being added to the Commerce Control List “600 Series.” The 600 Series items are subject to a higher level of regulation than other items on the CCL and contain many of the controls imposed under ITAR.<sup>6</sup> Consequently electronics firms must be aware that most electronics items previously regulated under ITAR will continue to be regulated and subject to broad export licensing requirements under the EAR.

The BIS Rule adds a new ECCN 3A611 that covers military electronic equipment, end items and systems, and related ECCN’s covering software (3D611), test, inspection and production equipment (3B611) and technology (3E611).

Perhaps the most significant changes under the BIS Rule involve the “catch-all” provisions for military electronics. While a number of catch-all provisions were removed from the USML, these were not decontrolled but rather transferred to the CCL 600 Series. Consequently, the “catch-all” provisions are still alive and well, just under Commerce Department jurisdiction. One significant example of this new “catch-all” provision under the revised CCL is the new ECCN 3A611.a which reads as follows:

#### **3A611 Military electronics, as follows (see List of Items Controlled).**

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a. Electronic “equipment,” “end items,” and “systems” “specially designed” for a military application that are not enumerated or otherwise described in either a USML category or another “600 series” ECCN.

Note to 3A611.a: ECCN 3A611.a includes any radar, telecommunications, acoustic or computer equipment, end items, or systems “specially designed” for military application that are not enumerated or otherwise described in any USML category or controlled by another “600 series” ECCN (emphasis added).

Similar “catch-all” provisions have been added elsewhere in the BIS Rule such as 3D611 for software:

#### **3D611 “Software” “specially designed” for military electronics, as follows (see List**

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<sup>5</sup> Federal Register Volume 79, No. 126, July 1, 2014, pp 37551 et seq.

<sup>6</sup> Such controls include the requirement to obtain export licenses for all destinations except Canada, the policy of denial for license applications for exports to the arms embargo countries listed at 22 CFR § 126.1, no provision for “de minimis” treatment of foreign made items that incorporate U.S. components for 22 CFR § 126.1 countries, and other requirements.

**of Items Controlled).**

- a. “Software” “specially designed” for the “development,” “production,” operation, or maintenance of commodities controlled by ECCN 3A611 (other than 3A611.y) and 3B611.
- b. “Software” “specially designed” for the “development,” “production,” operation or maintenance of technology in ECCN 3E611.b.

The new ECCN 3A611 also covers computers, telecommunications equipment, radar, navigation and avionics equipment and acoustic systems that are “specially designed” for military applications. In the BIS introduction to the amendment,<sup>7</sup> BIS explained that it included equipment from all of these areas that were “specially designed” for a military use in a single CCL category rather than in separate categories<sup>8</sup> to be consistent with the USML and simplify the classification process.<sup>9</sup> Thus, these products are all included under ECCN 3A611. To assist readers, BIS is placing notices in CCL Categories 4, 5, 6 and 7 to advise that such products that were “specially designed” for military use are covered under ECCN 3A611.a. For example, Category 4A611 provides the following notice for computers and related parts and components:

4A611 Computers, and “parts,” “components,” “accessories,” and “attachments” “specially designed” therefor, “specially designed” for a military application that are not enumerated in any USML category are controlled by ECCN 3A611.<sup>10</sup>

Similar notices are provided for telecommunication equipment,<sup>11</sup> avionics and navigation systems<sup>12</sup> and radar and acoustic systems<sup>13</sup> which designate that these items will be controlled under ECCN 3A611.

Other items identified under the new ECCN 3A611 include specific types of discrete microwave transistors, certain microwave “monolithic integrated circuits” (MMIC) power amplifiers,<sup>14</sup> high frequency surface wave radar, application specified integrated circuits (ASICs)

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<sup>7</sup> See Federal Register Volume 79, No. 126, July 1, 2014, p 37553.

<sup>8</sup> Such items are normally included in the CCL under separate categories such as: Computers (Category 4), Telecommunications Equipment (Category 5, Part 1), Radar and Acoustic Systems (Category 6), Sensors and Lasers (Category 6), Navigation and Avionics Equipment (Category 7).

<sup>9</sup> To include the military items in each of these Categories would have created 20 new ECCNs – See Federal Register Volume 79, No. 126, July 1, 2014, p. 37553.

<sup>10</sup> See BIS Rule p. 37573.

<sup>11</sup> ECCN 5A611 provides as follows: “Telecommunications equipment, and “parts,” “components,” “accessories,” and “attachments” “specially designed” therefor, “specially designed” for a military application that are not enumerated in any USML category are controlled by ECCN 3A611.”

<sup>12</sup> ECCN 7A611 provides as follows: “Navigation and avionics equipment and, systems and “parts,” “components,” “accessories,” and “attachments” “specially designed” therefor, “specially designed” for a military application that are not enumerated in any USML category or another “600 series” ECCN are controlled by ECCN 3A611.”

<sup>13</sup> ECCN 6A611 provides as follows: “Acoustic systems and equipment, radar, and “parts,” “components,” “accessories,” and “attachments” “specially designed” therefor, “specially designed” for a military application that are not enumerated in any USML category or other ECCN are controlled by ECCN 3A611.”

<sup>14</sup> On July 1, 2014 BIS also issued a Notice of Inquiry With Request For Comments related to Civil Uses of Certain Microwave Monolithic Integrated Circuit (MMIC) Power Amplifiers, Discrete Microwave Transistors and Bi-Static

and programmable logic devices programmed for 600 Series items, certain printed circuit boards and circuit card assemblies and multichip modules.

Thirty five low level components are categorized under the “.y” paragraph in ECCN 3A611 which designates a low level of controls, including electrical connectors, rheostats, solenoids, electric transformers, circuit breakers, fixed resistors and electrical contacts.<sup>15</sup>

A major provision of the new BIS Rule involves parts, components, accessories and attachments that are “specially designed” for items controlled under ECCN 3A611 – these are addressed in ECCN 3A611.x. This opens up the floodgates to the vast array of component parts that are incorporated into military electronic systems that are “specially designed” for use in military applications. The term “specially designed” is defined at EAR Part 772 and requires a meticulous process of review of the component’s physical characteristics, development history and other factors (discussed further below). Certain low level components that fit within the parameters of subsection (b) of the “specially designed” definition are excluded from controls under the relevant ECCN. Special attention should be paid to the Notes that accompany ECCN 3A611.x as follows:

Note 1 to ECCN 3A611.x: ECCN 3A611.x includes “parts,” “components,” “accessories,” and “attachments” “specially designed” for a radar, telecommunications, acoustic system or equipment or computer “specially designed” for military application that are neither controlled in any USML category nor controlled in another “600 series” ECCN.

Note 2 to ECCN 3A611.x: ECCN 3A611.x controls “parts” and “components” “specially designed” for underwater sensors or projectors controlled by USML Category XI(c)(12) containing single-crystal lead magnesium niobate lead titanate (PMN-PT) based piezoelectrics.

Note 3 to ECCN 3A611.x: Forgings, castings, and other unfinished products, such as extrusions and machined bodies, that have reached a stage in manufacture where they are clearly identifiable by mechanical properties, material composition, geometry, or function as commodities controlled by ECCN 3A611.x are controlled by ECCN 3A611.x.

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and Multi-Static Radar. See Federal Register Volume 79, No. 126, July 1, 2014, p 37548. In this rulemaking BIS requested comments by interested parties to cite specific examples of civil uses of certain MMIC power amplifiers and discrete microwave transistors. BIS is seeking these examples to assess whether it should propose to the Department of State and Defense further amendments to ITAR and EAR related to such products under ECCN 3A611.c.

<sup>15</sup> See ECCN 3A611.y.

### Specially Designed

To assist companies in applying these new controls to parts and components, DDTC and BIS have adopted the term “specially designed” for designating these items referenced throughout the USML and CCL. Companies will most likely be required to apply this definition in many of their classification assessments. In reviewing classification issues, companies should recognize that the term “specially designed” has a detailed definition set out in both ITAR (22 CFR § 120.41) and EAR (EAR Part 772) – companies should review this term carefully, along with the accompanying Notes and agency “decision tree” guidance, in applying the term and making their classification determinations.

### Effective Dates of Amendments

The changes set forth in both the DDTC and BIS amendments become effective for most items on December 30, 2014 (except for the revisions to sections 121.1, Category VIII(H)(4) which became effective on August 15, 2014 and the addition of software and technology for certain wing folding systems to ECCNs 0D521 and 0E521 via Supplement No. 5 to part 774 of the EAR which became effective July 1, 2014).

### Impact On Electronics Manufacturers.

These amendments create a broad array of new export control requirements for electronics manufacturing firms – especially second and third-tier manufacturers and suppliers of parts, components and software. If a company’s products are previously regulated under ITAR, the company must review the amendments to see if its products will continue to be listed on the USML or if they are being transitioned to the CCL 600 Series. Companies will be required to review the export classifications of their products and determine if licensing requirements have changed, and if they have they should plan in advance for changes in compliance procedures that flow from changed classifications.

Export classification is a highly technical process. Parties will be required to apply the newly adopted ITAR “Order of Review” set forth at 22 CFR § 121.1(b) and the CCL “Order of Review” at EAR Part 774 Supplement No. 4. For parts, components, attachments and accessories parties may be required to apply the tests under the definition of “Specially Designed” set forth in ITAR (22 CFR § 120.41) and EAR (EAR Part 772). A detailed list of steps for conducting export classification under ITAR and EAR is attached below as Exhibit A. (See also [Export Classification - The Cornerstone of ITAR Compliance available from the author.](#))

Companies should begin preparation now for the implementation of these amendments. We recommend that companies prepare a plan to manage their export reform changes – steps to be included in this plan include:

- Review the classifications of your company’s products, software and services to determine if the jurisdiction and classification of such items have changed; this

- includes reviewing both the new USML Categories and companion CCL 600 Series entries (See Exhibit A below);
- For parts, components, accessories and attachments, you may be required to apply the “Specially Designed” test for relevant products, if required;
  - If the jurisdiction and/or classification of items are unclear based upon the language of the amended regulations, you can apply for commodity jurisdiction determinations from DDTC or commodity classification requests (CCATS) from BIS;
  - If the jurisdiction/classifications of your products have changed, determine changes in your company’s licensing requirements related to such items, including:
    - Use of Strategic Trade Authorization or other BIS license exceptions?
    - Use of the BIS de minimis rule?
    - Reduced controls on the performance of services and use of TAA’s?
    - Reduced controls on temporary imports?
    - Impact on DDTC registration status?
    - Other?
  - Plan licenses, TAA’s and other authorizations during the transition period in accordance with the DDTC Transition Plan and BIS General Order No. 5, including considering taking advantage of the two-year authorization periods and/or “pre-positioning” license applications with BIS;
  - Amend your company’s export compliance procedures to reflect changes in the law and changes in your company’s export requirements;
  - Conduct training for relevant company employees on changes in your company’s export obligations; and
  - Coordinate with subcontractors, suppliers and other program partners on licensing requirements and export procedures to assure smooth transitions in your supply chain.

**EXHIBIT A****STEPS FOR EXPORT CLASSIFICATION**

The following are a number of steps to consider for conducting export classifications for products (including end-products, systems, parts, components and accessories), technical data, software and defense services<sup>16</sup>:

- Start by determining if the item is listed on the US Munitions List and subject to ITAR. Review the provisions of the USML carefully to see if your item is identified on the list. In addition, review the newly adopted ITAR “Order of Review” set forth at 22 CFR § 121.1(b) and the recently revised legal standard set forth at 22 CFR §§ 120.3 and 120.4.
- For parts, components and accessories you may be required to review whether the item fits within the ITAR version of the definition of “Specially Designed” set forth at 22 CFR § 120.41<sup>17</sup>. When reviewing this definition follow the procedure set forth in 22 CFR § 121.1(d) and also review the “Notes” that accompany the definition as they provide further details regarding the application of the definition, including records to be reviewed. If necessary, review the “Decision Tree” guidance provided by DDTC for both (i) the Order of Review; and (ii) Specially Designed.<sup>18</sup>
- To obtain a written confirmation of whether the item is on the USML and subject to ITAR, apply for a commodity jurisdiction determination from DDTC.
- If the item is not subject to ITAR, assess if it is subject to the EAR or the jurisdiction of other federal agencies (See EAR § 734.3). To assess classification under the EAR, begin by reviewing EAR § 734.3(a) and related provisions, the Commerce Control List and the CCL Order of Review set out at EAR Part 774 Supplement No. 4. Under the EAR Order of Review, 600 Series items and the 9x515 ECCN items are given a higher priority in the classification process than other items on the CCL – review the 600 series and 9x515 ECCN items first, then review the rest of the CCL. Follow the BIS Order of Review to determine the item’s export control classification number (“ECCN”) or if it is EAR99.

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<sup>16</sup> See also [Export Classification - The Cornerstone of ITAR Compliance](#) available from the author.

<sup>17</sup> 22 CFR §121.1(d)(2) provides in pertinent part: “If your commodity or software is not enumerated on the U.S. Munitions, it may be controlled because of a specially designed control parameter. If so, begin any analysis with §120.41(a) and proceed through each subsequent paragraph.... ”

<sup>18</sup> Available on the DDTC website.



- As part of this process you may be required to review the EAR definition of “Specially Designed” set out at EAR Part 772.<sup>19</sup> You should also review the “Notes” included in this definition of Specially Designed as they provide important details in the application of this term. You may also want to review the BIS Decision Tree for Specially Designed.<sup>20</sup>
- If you wish to obtain written confirmation of the classification of the item under the EAR from the Bureau of Industry and Security (“BIS”), you can submit a request to BIS for a Commodity Classification Automated Tracking System (“CCATS”) determination. It should be noted, however, that BIS classification guidance is not binding on the determination of whether an item is subject to ITAR – only the State Department can provide guidance on whether an item is subject to ITAR.
- To assess if the item is subject to the jurisdiction of other federal agencies (for example, the U.S. Nuclear Regulatory Commission or the Department of Energy), refer to EAR §734.3(b) and such other agencies’ regulations as might apply to the specific item in question.
- For all export classifications (including under ITAR, EAR and other regulations), maintain written records of your determination to comply with the export recordkeeping requirements and as a defense if your classifications are ever challenged in the future.

**Please note:** This article contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. For more information, please visit our website at [www.williamsmullen.com](http://www.williamsmullen.com) or contact Thomas B. McVey, 202.293.8118 or [tmcvey@williamsmullen.com](mailto:tmcvey@williamsmullen.com).

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<sup>19</sup> As part of this process you may be required to review “Specially Designed” for the 600 Series items first and then again for the remainder of the CCL.

<sup>20</sup> Available on the BIS website.