

Initial Implementation of Export Controls Reform: Departments of State and Commerce Issue New Final Rules on Aircraft and Engines

On April 16, 2013, the Departments of State and Commerce issued long-awaited final rules, kicking off the initial implementation of a four-year effort to reform US export controls. This initial round of new rules covers two categories of the US Munitions List (USML), related to aircraft and gas turbine engines. These regulations go into effect on October 15, 2013. The administration has an ambitious schedule to publish final rules related to 17 additional USML Categories by the end of the year, fundamentally restructuring the way the United States regulates defense articles.

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The administration has an ambitious schedule to publish final rules related to 17 additional USML categories by the end of the year, fundamentally restructuring the way the United States regulates defense articles. Future rule changes will impact firearms; guns and armament; ammunition and ordnance; launch vehicles, missiles, torpedoes, bombs and mines; explosives and energetic materials; naval vessels; military vehicles; training and related equipment; protective equipment; electronics; optical and night vision equipment; auxiliary equipment; toxicological agents and associated equipment; spacecraft; nuclear weapons design and testing equipment; directed energy; and submersible vessels.

To illustrate the scope of the April 16 change, which is significant, the International Traffic in Arms Regulations (ITAR) currently control “aircraft...which are specifically designed, modified, or equipped for military purposes.” Instead of this broadly defined “catch-all,” under the new rules the Department of State identifies 13 types of aircraft that are controlled, such as fighters, bombers, and attack helicopters. Certain aircraft previously controlled by the ITAR, including many helicopters, trainers and theater cargo aircraft, are being transferred to the more permissive licensing jurisdiction of the Department of Commerce.

Even more significant changes will happen at the parts and components level. Today, with few exceptions, the ITAR captures most components, parts, accessories, attachments and associated equipment specifically designed or modified for military aircraft. This broad level of control is being significantly rolled back.

The Department of State has determined that blanket capture of such items by the ITAR, without regard to sensitivity, is no longer justified. Once the final rule becomes effective, this broad catch-all control will only apply to parts, components, accessories, attachments and equipment “specially designed” for the B-1B, B-2, F-15SE, F/A-18 E/F/G, F-22, F-35, F-117 or US government technology demonstrators.

For other aircraft controlled by the ITAR, including earlier models of the F-15 SE and F/A-18 E/F/G, “specially designed” parts, components, accessories, attachments and equipment will only be captured by the ITAR if they fall within one of 25 enumerated categories. Licensing jurisdiction for all others will

transfer to the Department of Commerce. Many companies that were previously subject to the ITAR may now find that their operations are subject instead to the Export Administration Regulations (EAR).

This change in licensing jurisdiction creates both risks and opportunities. Care must be used in managing the transition to the EAR to ensure compliance with a different regulatory scheme. For companies newly under Department of Commerce jurisdiction, however, a range of license exceptions may allow license free exports to numerous destinations worldwide.

Manufacturers and exporters must carefully examine their product offerings against the revised control lists, including a review of any previously issued Commodity Jurisdiction determinations, to determine whether their items have transitioned from Department of State to Department of Commerce control. Commodity jurisdiction determinations previously issued by the Department of State may be superseded by the new final rules without specific notice to affected companies.

Companies unable to ascertain the proper jurisdiction of their products and services will need to request commodity jurisdiction determinations from the Department of State. Those who are certain their items have transferred to the Department of Commerce may submit a Commodity Classification Automated Tracking System request (CCATS) to clarify the specific license requirements for their items.

For a copy of the new final rules, or to learn more about export controls reform or Kaye Scholer's National Security/CFIUS practice, please contact us:

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