

## E-ALERT | International Trade Controls

May 23, 2014

### STATE AND COMMERCE DEPARTMENTS PUBLISH INTERIM FINAL RULES IMPLEMENTING SATELLITE EXPORT CONTROL REFORM

On May 13, 2014, the U.S. State Department's Directorate of Defense Trade Controls ("DDTC") and the U.S. Commerce Department's Bureau of Industry and Security ("BIS") published interim final rules ([79 Fed. Reg. 27180](#) and [79 Fed. Reg. 27418](#), respectively) transferring certain commercial communications and remote sensing satellites and related items from the jurisdiction of the International Traffic in Arms Regulations ("ITAR"), which are administered by DDTC, to the jurisdiction of the Export Administration Regulations ("EAR"), which are administered by BIS. The interim final rules were issued as part of the Obama Administration's broader export control reform initiative, and are designed to enhance the competitiveness of U.S. industry in the global commercial satellite marketplace while maintaining tight controls over sensitive satellites and related items vital to U.S. national security interests.

Most of the transfers will take effect on November 10, 2014, but changes to controls on certain microelectronic circuits will become effective on June 27, 2014. DDTC and BIS will accept comments on most aspects of the rules until November 10, 2014. Comments are due to DDTC by June 27, 2014 for (i) spacecraft that have certain electro-optical remote sensing capabilities (U.S. Munitions List ("USML") Category XV(a)(7)); (ii) space-based nuclear reactors, radioisotope-based power systems, or nuclear thermal propulsion systems (USML Category XV(e)(11)); and (iii) special export controls for space launches (ITAR § 124.15).

#### BACKGROUND ON COMMERCIAL SATELLITE EXPORT CONTROLS

The new rules were issued under the authority vested in the President by the National Defense Authorization Act for Fiscal Year 2013 ("FY 2013 NDAA"), which was signed into law in January 2013. As we discussed in our [e-alert](#) of January 4, 2013, Section 1261(a) of this NDAA returned authority to the President to determine whether satellites and related items should be controlled by the ITAR or made subject to the EAR. The FY 2013 NDAA accomplished this by repealing a provision of the Strom Thurmond NDAA for Fiscal Year 1999 ("Thurmond NDAA") that had previously mandated ITAR control over such items.

The Thurmond NDAA was passed in 1998 in the wake of U.S. government investigations into controversial transfers by U.S. satellite manufacturers of satellite launch-analysis technology to Chinese parties in 1995 and 1996. The transfers allegedly damaged U.S. national security by putting China in possession of technology that could be used to improve the accuracy and reliability of its ballistic missile guidance systems.

In a 2012 [report](#) to Congress, however, the Departments of State and Defense found that the controls imposed by the Thurmond NDAA were overbroad, and that certain commercial satellites and related components could be safely transitioned to EAR control without damaging national security. In recent years, it also became apparent that these controls were contributing to the erosion of the competitiveness of the U.S. satellite industry, since other countries impose fewer export controls on

commercial satellites. In fact, a [study](#) by the Aerospace Industries Association, a trade group, found that the U.S. economy lost \$20.8 billion in satellite manufacturing revenue between 1999 and 2009 due to these controls.

## COMMERCIAL SATELLITES AND RELATED ITEMS TRANSFERRING TO THE EAR

The new rules transfer certain commercial satellites and related items from Category XV of the ITAR's USML to a new "500 series" on the EAR's Commerce Control List ("CCL"), including:

- Commercial communication satellites that do not have specified capabilities or contain classified components or capability;
- Remote sensing satellites with performance parameters below certain thresholds;
- Associated parts, components, accessories, attachments, equipment, or systems that are not specifically identified in the revised USML Category; and
- Radiation-hardened microelectronic circuits.

BIS created the CCL's "500 series" to control the items removed from Category XV, rather than transferring these items to the "600 series" used for other items removed from the USML, because many of the items removed from Category XV have no military or intelligence application. The "600 series" is, by definition, comprised exclusively of "munitions" items.

The export controls on items transferred to the CCL will be loosened in certain ways. For example, many of the license exceptions contained in the EAR will become available for these items. Of particular note, the EAR's Strategic Trade Authorization ("STA") license exception will authorize transfers of these items to allied countries without a BIS-issued license, provided that certain requirements are met.

Nevertheless, the items transitioned to the CCL will remain subject to strict controls. Authorization from BIS in the form of a license or license exception will be required for exports or reexports to all countries except Canada. Further, the FY 2013 NDAA expressly required BIS to adopt a presumption of denial for transfers of transitioned items to countries subject to a U.S. arms embargo, such as China, as well as certain other countries, including North Korea and countries designated as state sponsors of terrorism (currently, Iran, Cuba, Sudan, and Syria). Also, the *de minimis* rule in the EAR, which exempts from EAR control certain foreign-made items with minimal U.S. content, will not apply to transfers of 500-series items to these countries. That means that transfers to these countries of foreign-made commercial satellites that contain *any* U.S.-origin 500-series content will effectively be barred. The normal *de minimis* rule will, however, apply to transfers to all other countries of foreign-made commercial satellites.

As noted above, most provisions of the final rules will take effect on November 10, 2014 (*i.e.*, 180 days following the publication of the rules). However, the transfer to the CCL of radiation-hardened microelectronic circuits and other microelectronic circuits "specifically designed or modified" for spacecraft use will take effect on June 27, 2014 (*i.e.*, 45 days following the publication of the new rules). DDTC and BIS accelerated the transition of microelectronic circuits to the EAR in response to concerns expressed by their manufacturers that the next generation of purely commercial microelectronic circuits could meet or exceed the parameters currently listed in USML Category XV, requiring the manufacturers to register with DDTC and obtain ITAR licenses for the development of these items.

## SPACECRAFT AND OTHER ITEMS THAT WILL REMAIN SUBJECT TO THE ITAR

While the Administration's intent is to avoid controlling under the ITAR satellites and related equipment that are in normal commercial use, some commercial spacecraft with capabilities above specified thresholds will remain controlled on the USML. DDTC expressly rejected recommendations from industry to remove from USML Category XV satellites and related items based solely on potential or actual commercial application, emphasizing that it is revising the USML using the principle of control based on article capability rather than article end-use. Because some commercial satellites and other commercial spacecraft will remain on the USML, it will be important for companies to review the new rules carefully to determine the proper jurisdiction for their products.

In addition, satellites and other spacecraft with certain, specified military functions, such as the ability to conduct signals intelligence, will remain controlled by the ITAR, as will most manned spacecraft; spacecraft equipped with sensors that meet certain performance parameters (even if for commercial end-use); ground control systems or training simulators specially designed for telemetry, tracking, or control of such spacecraft; and a limited, specified list of associated systems, parts, components, accessories, attachments, and equipment. The State Department rule also amends Paragraph (f) of Category XV to clarify that ITAR-controlled defense services include the furnishing of assistance by a U.S. person in the integration of a satellite or spacecraft to a launch vehicle, or in launch failure analysis of a satellite or spacecraft, regardless of whether the satellite or spacecraft is subject to ITAR control, or whether ITAR-controlled technical data is used.

In a departure from the ITAR's standard "see-through" rule, spacecraft and other items described in the CCL's new "500 series" will remain subject to the EAR even if ITAR-controlled defense articles are incorporated into them, except when such incorporation results in a spacecraft described in USML Category XV(a). This shift in policy is designed to limit dual licensing obligations. In addition, similar to other USML categories that have been revised as part of the export control reform initiative, a new "(x) paragraph" will be added to USML Category XV to permit ITAR licensing for commodities, software, and technology subject to the EAR that are used in or with defense articles controlled in USML Category XV.

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We are well-positioned to advise clients regarding the impact that the interim final rules will have on their operations and to assist companies in submitting comments to BIS and DDTC on these or other issues.

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If you have any questions concerning the material discussed in this client alert, please contact the following members of our international trade controls practice group:

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