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DEPARTMENT OF STATE

22 CFR Parts 120, 121, and 123

RIN 1400-AD37

[Public Notice: 8269]

Amendment to the International Traffic in Arms Regulations: Initial Implementation of Export Control Reform.

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: As part of the President's Export Control Reform (ECR) effort, the Department of State is amending the International Traffic in Arms Regulations (ITAR) to revise four U.S Munitions List (USML) categories and provide new definitions and other changes. Additionally, policies and procedures regarding the licensing of items moving from the export jurisdiction of the Department of State to the Department of Commerce are provided. The revisions contained in this rule are part of the Department of State's retrospective plan under E.O. 13563 completed on August 17, 2011.

DATES: This rule is effective [insert date 180 days after date of publication in the *Federal Register*].

ADDRESSES: The Department of State's full plan can be accessed at http://www.state.gov/documents/organization/181028.pdf.

FOR FURTHER INFORMATION CONTACT: Ms. Candace M. J. Goforth, Director, Office of Defense Trade Controls Policy, Department of State, telephone (202)

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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" and "defense services," 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, reexports, and retransfers. Items not subject to the ITAR or to the exclusive licensing jurisdiction of any other set of regulations are subject to the EAR.

All references to the USML in this rule are to the list of defense articles controlled for the purpose of export or temporary import pursuant to the ITAR, and not to the defense articles on the USML that are controlled by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) for the purpose of permanent import under its regulations. *See* 27 CFR part 447. Pursuant to section 38(a)(1) of the Arms Export Control Act (AECA), all defense articles controlled for export or import are part of the USML under the AECA. For the sake of clarity, the list of defense articles controlled by ATF for the purpose of permanent import is the U.S. Munitions Import List (USMIL). The transfer of defense articles from the ITAR's USML to the EAR's CCL for the

purpose of export control does not affect the list of defense articles controlled on the USMIL under the AECA for the purpose of permanent import.

Export Control Reform Update

Pursuant to the President's Export Control Reform (ECR) initiative, the Department has published proposed revisions to twelve USML categories to create a more positive control list and eliminate where possible "catch all" controls. The Department, along with the Departments of Commerce and Defense, reviewed the public comments the Department received on the proposed rules and has, where appropriate, revised the rules. A discussion of the comments is included later on in this notice. The Department continues to review the remaining USML categories and will publish them as proposed rules in the coming months.

The Department intends to publish final rules implementing the revised USML categories and related ITAR amendments periodically, beginning with this rule.

Pursuant to ECR, the Department of Commerce, at the same time, has been publishing revisions to the EAR, including various revisions to the CCL. Revision of the USML and CCL are coordinated so there is uninterrupted regulatory coverage for items moving from the jurisdiction of the Department of State to that of the Department of Commerce. For the Department of Commerce's companion to this rule, please see, "Revisions to the Export Administration Regulations: Initial Implementation of Export Control Reform," elsewhere in this edition of the *Federal Register.*

Changes in this Rule

The following changes are made to the ITAR with this final rule: (i) revision of USML Categories VIII (Aircraft and Related Articles), XVII (Classified Articles,

Technical Data, and Defense Services Not Otherwise Enumerated), and XXI (Articles, Technical Data, and Defense Services Not Otherwise Enumerated); (ii) addition of USML Category XIX (Gas Turbines Engines and Associated Equipment); (iii) establishment of definitions for the terms "specially designed" and "subject to the EAR"; (iv) creation of a new licensing procedure for the export of items subject to the EAR that are to be exported with defense articles; and (v) related amendments to other ITAR sections.

Revision of USML Category VIII

This final rule revises USML Category VIII, covering aircraft and related articles, to establish a clearer line between the USML and the CCL regarding controls over these articles. The revised USML Category VIII narrows the types of aircraft and related articles controlled on the USML to only those that warrant control under the requirements of the AECA. Changes include moving similar articles controlled in multiple categories into a single category, including moving gas turbine engines for articles controlled in this category to the newly established USML Category XIX, described elsewhere in this notice, and CCL Export Control Classification Numbers (ECCNs) in the 9Y619 format, in a rule published separately by the Department of Commerce (*see* elsewhere in this issue of the *Federal Register*). In addition, articles common to the Missile Technology Control Regime (MTCR) Annex and articles in this category are identified with the parenthetical "(MT)" at the end of each section containing such articles.

The revised USML Category VIII does not contain controls on all generic parts, components, accessories, and attachments 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" (*see* definition of this term in this rule) for the following U.S.-origin aircraft that have low observable features or characteristics: the B-1B, B-2, F-15SE, F/A-18 E/F/G, F-22, F-35, and future variants thereof; or the F-117 or U.S. Government technology demonstrators. All other parts, components, accessories, and attachments specially designed for a military aircraft and related articles are subject to the new "600 series" controls in Category 9 of the CCL.

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

This revision of USML Category VIII was first published as a proposed rule (RIN 1400-AC96) on November 7, 2011, for public comment (*see* 76 FR 68694). The comment period ended December 22, 2011. Thirty-one parties filed comments recommending changes, which were reviewed and considered by the Department and other agencies. The Department's evaluation of the written comments and recommendations follows.

The Department received numerous proposals for alternative definitions for aircraft and alternative phrasing for other sections of USML Category VIII and ITAR §121.3. The Department has reviewed these recommendations with the objective of realizing the intent of the President's ECR Initiative. In certain instances, the regulation was amended or otherwise edited for fidelity to ECR objectives and for clarity.

Two commenting parties stated that referencing the ITAR §121.3 definition of "aircraft" in USML Category VIII(a) while not doing so for USML Category VIII(h) is inconsistent and potentially confusing to the exporter. The Department notes that paragraph (h) is to control parts, components, accessories, attachments, and associated equipment regardless of whether the aircraft is controlled on the USML or the CCL. Therefore, a reference to ITAR §121.3 in paragraph (h) would be inappropriate.

Two commenting parties recommended removing references to specific aircraft in USML Category VIII(h), as referencing specific aircraft would control parts and components common to other unlisted aircraft. The Department believes proper application of the definition for specially designed will avoid this occurrence, and therefore did not accept this recommendation.

Three commenting parties recommended removing the sections providing USML coverage for parts, components, etc., manufactured or developed using classified information, with the rationale that use of this type of information in these stages of production should not automatically designate these articles as defense articles. Upon review, the Department revised this section, but for different reasons. The Department removed the section regarding the use of classified information during manufacture because this information would not be readily available to exporters and other parties. The Department, however, did not remove the section regarding development of such articles using classified information because such information would be available to developers. Additionally, prudence dictates that the development stage of production using classified information be USML controlled, without prejudice to the eventual jurisdictional designation of the article once it enters production.

To address the concerns of two commenting parties that including "strategic airlift aircraft" in the definition of "aircraft" in ITAR §121.3 would control on the USML aircraft more appropriately controlled on the CCL, the Department has added the phrase "with a roll-on/roll-off ramp" to further focus the control on military critical capabilities.

One commenting party recommended enumerating "tilt rotor aircraft" in USML Category VIII(a) and providing corresponding descriptive and defining text in ITAR §121.3. The Department notes that this type aircraft is effectively covered in USML Category VIII(a)(11), and therefore did not amend the regulation to enumerate tilt rotor aircraft.

One commenting party noted that not all items in Wassenaar Munitions List Category 10, which covers aircraft and related items, seem to be specifically enumerated in the new regulations. The Department has reviewed this matter and concludes that all of Wassenaar Munitions List Category 10 is captured on the USML and the CCL. The Department notes, however, that there will not be a one-for-one accounting of all entries between the Wassenaar Munitions List and the USML and CCL, as the lists are constructed differently.

One commenting party recommended the term "armed," as found in ITAR §121.3(a)(3), be defined, to avoid ambiguity and regulatory overreach. Examples provided of articles potentially captured, but which the Department surely would not have intended to be captured, are aircraft "armed" with water cannons or paintball guns. While the term "armed" is gainfully employed in many contexts, it is the Department's opinion that in the context of defense trade, "armed" can be understood in its plain English meaning. One dictionary consulted by the Department defined "armed" as

"furnished with weapons." Another dictionary provides "having weapons" as the primary meaning. Yet another defined it as "equipped with weapons." The Department notes the consensus on the meaning of "armed," and has no quibble or concern with it.

One commenting party recommended the word "equipped" be removed from USML Category VIII(a)(11), and the terms "incorporated" and "integrated" be used in its place, on the grounds that "equipped" is "overly expansive" and inconsistent with terminology used elsewhere in the rule. The Department accepts this comment and has replaced "equipped" with "incorporates," the term used in ITAR §121.3(a)(6).

One commenting party recommended that Optionally Piloted Vehicles (OPV) without avionics and software installed that would allow the aircraft to be flown unmanned should be considered manned for purposes of the USML. The Department has clarified the control for OPVs at USML Category VIII(a)(13) and ITAR §121.3(a)(7).

One commenting party voiced concern over the potential "chilling effect" of controlling on the USML the products of Department of Defense-funded fundamental research. USML Category VIII(f) provides for the control of developmental aircraft and specially designed parts, components, accessories, and attachments therefor developed under a contract with the Department of Defense. For the final rule, the Department has added a note to USML Category VIII(f) providing for developmental aircraft to be "subject to the EAR" (*see* definition of this term in this rule) if a commodity jurisdiction request leads to such a determination or if the relevant Department of Defense contract stipulates the aircraft is being developed for both civil and military applications. The Department draws a distinction between developmental aircraft developed under a contract funded by the Department of Defense and the conduct of fundamental research.

"Fundamental research" is defined at ITAR §120.11(a)(8). Pursuant to that section, research is not "fundamental research" if the results are restricted for proprietary reasons or specific U.S. Government access and dissemination controls, the researchers accept other restrictions on publication of information resulting from the activity, or the research is funded by the U.S. Government and specific access and dissemination controls protecting information resulting from the research are applicable. Fundamental research – *i.e.,* research without the aforementioned restrictions – is in the public domain, even if funded by the U.S. Government. A few other commenting parties voiced concerns with the scope of this control; the Department intends the answer provided here to address those concerns.

The Department did not accept the recommendation of three commenting parties to retain the note to USML Category VIII(h) (the "17(c)" note), which discussed jurisdiction of certain aircraft parts and components, because application of the specially designed definition will serve that purpose for the exporter.

One commenting party recommended that wing folding systems not be controlled on the USML, as such a system has been developed (but not sold) for commercial use and therefore is not inherently a military item. Similarly, one commenting party recommended the removal of short take-off, vertical landing (STOVL) technology from the USML, as it has commercial benefits. The Department notes these systems and technology have military application, but no demonstrated commercial application. Therefore, the Department did not accept these recommendations.

In response to several comments regarding the scope of the control in USML Category VIII(h)(16), covering computer systems, the Department has revised it to

specifically capture such systems that perform a purely military function (*e.g.,* fire control computers) or are specially designed for aircraft controlled in USML Category VIII or ECCN 9A610.

Three commenting parties recommended the defining criteria of "aircraft" in ITAR §121.3 be included in USML Category VIII. The Department notes Category VIII and ITAR §121.3 serve different purposes, with the former providing the control parameters and the latter providing the definition of the main articles controlled in Category VIII. Therefore, the Department did not accept this recommendation.

One commenting party, noting the developing market for civil application of unmanned aerial vehicles (UAVs), recommended additional specifications for their control in USML Category VIII. A second commenting party recommended criteria be provided to establish a "bright line" between UAVs controlled on the USML and those controlled on the CCL. Two other commenting parties recommended control on the CCL of UAVs specially designed for a military application but which do not have a specially designed capability controlled on the USML. While a few commenting parties did respond to the Department's request for input on the provision of criteria for the establishment of export jurisdiction that would not result in the removal from the USML of UAVs that should be covered by it, none of them was acceptable. In addition, it is the Department's assessment that the technical capabilities of UAVs specially designed for a military application are such as to render ineffective any means of differentiating between critical and any non-critical military systems. Therefore, the Department is publishing the UAV controls as first proposed. The CCL's ECCN 9A012 specifies those UAVs for export under the Department of Commerce's jurisdiction; in conjunction with USML

Categories VIII(a)(5) and (a)(6), the Department believes the controls for UAVs meet the needs of U.S. foreign policy and national security.

The Department accepted the recommendation of three commenting parties to revise USML Category VIII(h)(6) to exclude coverage of external stores support systems that do not have a military application by adding the words "for ordnance or weapons."

The Department accepted the recommendation of ten commenting parties regarding the broad control of lithium-ion batteries in USML Category VIII(h)(13) and has limited coverage to such batteries that provide greater than 28 VDC nominal.

The Department accepted the recommendation of one commenting party to provide a definition for the term "equipment." A proposed definition has been published by the Department (*see "*Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XI and Definition for 'Equipment,'" 77 FR 70958).

The Department does not believe the issuance of a patent for thrust vectoring on commercial aircraft is sufficient justification to change the regulation regarding non-surface-based flight control systems and effectors. Therefore, the Department did not accept this recommendation.

Several commenting parties noted changes to USML Category VIII entailing the addition of articles previously covered in other USML categories. Generally, the main intent of these changes is to group articles in a sensible manner. So, for example, the Department believes it is sensible to control as aircraft components computer systems specially designed for aircraft.

One commenting party requested clarification of the jurisdictional scope of the term "jet powered" as used in USML Category VIII(a)(3). The Department has replaced that term with "turbofan- or turbojet-powered" to more precisely describe the intent of the control.

One commenting party recommended retention of the following sentence in USML Category VIII(d): "Fixed land-based arresting gear is not included in this paragraph." As this is the intent of the regulation, and including the sentence would provide clarity to the control, the Department accepted this recommendation.

One commenting party recommended extending the definition of "classified" in USML Category VIII(h) to include designations made by "other collective defense organization[s]." The Department has revised the definition to include such designations made by "international organizations."

One commenting party recommended the Department allow for public comment on a revised USML Category VIII again once a final definition of specially designed is published because analysis of and concerns with USML Category VIII were premised on the definition of specially designed as provided in the proposed rule. Three other commenting parties expressed similar concerns. The Department disagrees with this argument. The extent to which articles are controlled on the USML pursuant to application of the specially designed definition is reflective of the definition itself, and not the controls as provided in USML Category VIII, or any of the other USML categories. Therefore, the Department did not accept this recommendation.

Because of staggered implementation of revised USML categories and the inter-category movement of some articles, the Department has found it necessary to establish

temporary USML entries to avoid lack of appropriate controls during the transition. For example, although reserved in the proposed rule, USML Category VIII(e) has been removed from reserved status in the final rule. The articles controlled therein are to be covered in revised USML Category XII. Similarly, USML Categories VIII(h)(21) through (h)(26) have been added.

As described in greater detail in the section of this notice addressing the transition plan, a new "(x) paragraph" has been added to USML Category VIII, allowing ITAR licensing for commodities, software, and technical data subject to the EAR provided those commodities, software, and technical data are to be used in or with defense articles controlled in USML Category VIII *and* are described in the purchase documentation submitted with the application. This same construct will be incorporated in other USML categories (to include new USML Category XIX in this rule).

In response to public comments on the transition plan, the Department has added a note to USML Category VIII to address USML controlled systems, parts, components, accessories, and attachments incorporated into 600 series items.

Establishment of USML Category XIX for Gas Turbine Engines and Associated Equipment

This rule establishes USML Category XIX to cover gas turbine engines and associated equipment formerly covered in USML Categories IV, VI, VII, and VIII. The intent of this change is to make clear that gas turbine engines for cruise missiles, surface vessels, vehicles, and aircraft meeting certain objective parameters are controlled on the USML. Articles common to the Missile Technology Control Regime (MTCR) Annex

and articles in this category are identified with the parenthetical "(MT)" at the end of each section containing such articles.

Because of the staggered implementation of revised USML categories, it would seem that USML Category XIX controls gas turbine engines still covered in USML Categories IV, VI, and VII. However, the new Category XIX does in fact supersede the controls under USML Categories IV, VI, and VII.

The establishment of USML Category XIX (RIN 1400-AC98) was first published as a proposed rule on December 6, 2011, for public comment (*see* 76 FR 76097). The comment period ended January 20, 2012. Ten parties filed comments recommending changes, which were reviewed and considered by the Department and other agencies. The Department's evaluation of the written comments and recommendations follows.

Several commenting parties recommended including the term "military" in the category heading to avoid controlling on the ITAR engines developed for civil application. The controls are intended to capture articles on the basis of their capabilities, and not their intended end-use *per se*. Therefore, the Department did not accept this recommendation. The Department has, however, in response to recommendations in public comments, revised the category, in particular paragraphs (a) and (b), to better focus the control on those engines of military significance.

Two commenting parties stated the creation of a separate category for engines, rather than controlling them under the categories that cover systems in which they are placed, adds unnecessary complexity to the regulations and would be costly for industry to implement in its licensing and compliance programs. The Department understands that revision of the categories controlling gas turbine engines, as well as the larger ECR

effort to revise the USML and the CCL, would require industry to update its licensing and compliance programs, but believes the eventual benefits to national security of the new ITAR and EAR controls will justify any burdens imposed on industry to transition to the new structure.

Three commenting parties recommended removal of the phrase, "whether in development, production, or inventory," from USML Categories XIX(a), (b), and (c), as it may have the unintended effect of not controlling certain engines (*e.g.*, those engines temporarily removed from active service). The Department accepted this recommendation, and has removed the phrase from the final rule.

One commenting party noted potential confusion between USML Categories IV and XIX regarding engine controls, and the need to update ITAR §121.16 to account for changes in those controls. In line with a major goal of ECR, the Department is revising the categories to make clearer which articles they control. USML Category IV will, to use examples provided by the commenting party, control ramjets and scramjets. In addition, the Department will discontinue identifying those articles common to the USML and the Missile Technology Control Regime Annex in ITAR §121.16, and instead identify those articles with the parenthetical "(MT)" at the end of each USML category section containing such articles.

One commenting party requested clarification of the controls for printed circuit boards designed for USML articles, and their related designs or digital data. Printed circuit boards "specially designed" (*see* definition of this term in this rule) for articles in USML Category XIX, as well as for articles in all other USML categories, are controlled in USML Category XI and their related designs or digital data are controlled as technical

data, per ITAR §120.10. However, the Department does not consider printed circuit boards themselves to be technical data. The Department notes that printed circuit boards are to be enumerated in the revised USML Category XI. In the meantime, as noted elsewhere in this notice, USML Category VIII and Category XIX contain a temporary enumeration of printed circuit boards.

Noting that the phrase "or capable of" introduces into the regulation a criterion not descriptive of the actual article, four commenting parties recommended its removal. The Department has accepted this recommendation, and has revised those sections accordingly, replacing "capable of" with "specially designed."

Five commenting parties disagreed with a number of the parameters used in USML Categories XIX(a) and (b) to distinguish military from commercial capabilities, saying commercial articles routinely or increasingly have those performance criteria. The Department has reviewed the criteria and has revised some to better describe articles requiring control on the USML. Changes include increasing the altitude threshold for the high altitude extraction parameter from 40,000 feet to 50,000 feet and removing cooled pressure turbines from the control. In addition, proposed paragraph (a)(6), for thrust reversers, has been revised and moved to USML Category VIII as paragraph (h)(19).

Three commenting parties recommended revising USML Category XIX(d) to describe the technologies of concern and not list specific engine families in the regulation because, over time, the listing would capture obsolete engines or not include engines that merit control as defense articles. The Department deems it appropriate to enumerate these engines, as they are used specifically in USML-controlled platforms or share critical technologies with such engines. The Department will amend the regulations as

necessary to keep the category updated, and therefore did not accept this recommendation.

One commenting party recommended the inclusion of a definition for digital engine controls, the subject of USML Category XIX(e). The Department has included a note to paragraph (e) describing "digital electronic control systems for gas turbine engines."

Six commenting parties noted that proposed USML Category XIX(f)(2) would expand the description of "hot section" components, and thereby expand controls on these articles. The Department has revised paragraph (f)(2) for the final rule, and added new paragraph (f)(3) and (f)(4) without Significant Military Equipment designations, to address this matter.

Four commenting parties recommended removal of engine monitoring systems from USML Category XIX(f) because such systems used for commercial engines would also be covered. The Department believes appropriate application of the specially designed definition would preclude this occurrence, and therefore did not accept this recommendation. The Department believes there are engine monitoring systems specially designed for USML Category XIX engines and therefore did not accept one commenting party's recommendation to control all such systems on the CCL. And, regarding the comment by one party that undefined terms in that section would lead to overregulation, the Department believes appropriate application of the specially designed definition will preclude this occurrence.

Pursuant to a recommendation from one commenting party, the Department corrected its omission of an asterisk denoting the designation of Significant Military Equipment for classified articles controlled in USML Category XIX(f)(6).

Two commenting parties recommended revising USML Category XIX(g) to control only technical data and defense services directly related to the "military functionality" of a defense article, for otherwise data and services common to commercial engines would be captured. The Department believes the ITAR definitions for "technical data" and "defense service" would preclude this occurrence, and therefore did not accept these recommendations.

Definition for "Specially Designed"

Although one of the goals of the ECR initiative is to describe USML controls without using design intent criteria, certain sections in the revised categories nonetheless use the term "specially designed." It is, therefore, necessary for the Department to define the term.

The specially designed definition provided in this notice has a two-paragraph structure. Paragraph (a) identifies which commodities and software are specially designed" and paragraph (b) identifies which parts, components, accessories, attachments, and software are excluded from specially designed.

Paragraph (a) begins with the phrase, "Except for commodities described in (b), a commodity is 'specially designed' if it [is within the scope of any one of two subparagraphs discussed below]." It is the beginning of the "catch" in the "catch and release" structure of the definition. For USML sections containing the term "specially

designed," a defense article is "caught" – it is "specially designed" – if any of the two elements of paragraph (a) applies and none of the elements of paragraph (b) applies.

Paragraph (a)(1) is limited by the phrase, "if, as a result of development." The definition also includes a note to paragraph (b)(3) that contains the following definition of "development" for purposes of the specially designed definition: "'Development' is related to all stages prior to serial production, such as: design, design research, design analyses, design concepts, assembly and testing of prototypes, pilot production schemes, design data, process of transforming design data into a product, configuration design, integration design, layouts." Therefore, a defense article is caught by the threshold requirement of paragraph (a) only if someone is engaged in any of these "development" activities with respect to the article at issue. Thus one may ask the following to determine if a defense article is within the scope of paragraph (a)(1): Does the commodity or software, as a result of development, have properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions described in the relevant USML paragraph? If the answer is "no," then the commodity or software is not specially designed and further analysis pursuant to paragraph (b) is not necessary. If the answer is "yes," then the exporter or reexporter must determine whether any one of the five exclusions in paragraph (b) of the definition applies. If any one of the five paragraph (b) exclusions applies, then the commodity or software is not specially designed. If none does, then the commodity or software is specially designed.

Paragraph (a)(1) captures a commodity or software if it, as a result of "development," "has properties peculiarly responsible for achieving or exceeding the

controlled performance levels, characteristics, or functions described in the relevant U.S. Munitions List paragraph." So, even if a commodity or software is capable of use with a defense article, it is not captured by paragraph (a)(1) unless someone did something during the commodity's development for it to achieve or exceed the performance levels, characteristics, or functions described in a referenced USML paragraph.

Paragraph (a)(2) has been revised to incorporate the proposed paragraph (a)(3) as follows: "(2) is a part (*see* §121.8(d) of this subchapter), component (*see* §121.8(b) of this subchapter), accessory (*see* §121.8(c) of this subchapter), attachment (*see* §121.8(c) of this subchapter), or software for use in or with a defense article." The Department realizes this element is similar to paragraph (a)(1), but believes it needs to be listed separately because not all descriptions of parts and components on the USML include performance levels, characteristics, or functions as a basis for control. Thus one may ask the following to determine if a defense article is within the scope of paragraph (a)(2): Is the part, component, accessory, attachment, or software for use in or with a defense article? If the answer is "no," then the commodity or software is not specially designed and further analysis pursuant to paragraph (b) is not necessary. If the answer is "yes," then the exporter or reexporter must determine whether any one of the five exclusions in paragraph (b) of the definition applies. If any one does apply, then the commodity or software is not specially designed. If none does, then the commodity or software is specially designed.

Paragraph (a)(2) is broad enough to capture all the defense articles that would be potentially specially designed, but in practice would capture a larger set of parts, components, accessories, attachments, and software than is intended. Paragraph (b)

works to release from inclusion under specially designed specific and non-specific parts, components, accessories, attachments, and software consistent with existing U.S. export control and international commitments. Specifically, any part, component, accessory, attachment, or software described in an exclusion paragraph under (b)(1), (b)(2), (b)(3), (b)(4), or (b)(5), would *not* be controlled by a USML "catch-all" paragraph. In this way, paragraphs (a) and (b) are inextricably linked and are intended to work together to identify the parts, components, accessories, attachments, and software that need to be treated as specially designed for purposes of the "catch-all" provisions on the USML.

Paragraph (b) codifies the principle in ITAR §120.3 that, in general, a commodity should not be ITAR controlled if it has a predominant civil application or has performance equivalent (defined by form, fit, and function) to a commodity used for civil applications. If such a commodity warrants control under the ITAR because it provides the United States with a critical military or intelligence advantage or for another reason, then it is or should be enumerated on the USML.

Paragraph (a) creates more objective tests for what defense articles are specially designed based on the criteria identified in (a)(1) or (a)(2). Paragraph (b) creates more objective tests for which parts, components, accessories, attachments, and software are excluded from specially designed under the exclusion criteria identified in (b)(1), (b)(2), (b)(3), (b)(4) or (b)(5). The objective criteria identified in paragraph (a), working with the objective exclusion criteria identified in paragraph (b), allow this specially designed definition to achieve the nine objectives for the definition (*see* "Proposed Revisions to the Export Administration Regulations (EAR): Control of Items the President Determines

No Longer Warrant Control under the United States Munitions List (USML)," 76 FR 41958).

The definition for specially designed was first published as a proposed rule (RIN 1400-AD22) on June 19, 2012, for public comment (*see* 77 FR 36428). The comment period ended August 3, 2012. Twenty-eight parties filed comments during the established comment period recommending changes. The Department's evaluation of the written comments and recommendations follows.

Many of the commenting parties submitted recommendations and proposals for the specific wording of the specially designed definition, and provided analysis of the text of the definition provided by the Department. The Department carefully reviewed these submissions with the objective of clarifying and improving the definition. In many instances, it has accepted these recommendations, as is reflected in the definition in this rule. Selections of these comments are discussed in the following paragraphs.

One commenting party expressed concern with the concurrent existence of the terms "specifically designed" with "specially designed" in the USML, given that the revision of the USML will occur in stages. The Department notes that where the concept is to be retained, the term "specifically designed" will be replaced with "specially designed" throughout the USML and ITAR, and the Department understands that in the process of revising the USML, application of both concepts will not be ideal.

Six commenting parties expressed concern about the relation of specially designed with the current text in ITAR §120.3. The commenting parties recommended revising ITAR §120.3 to be consistent with the definition of specially designed and the

revision of the USML into a positive list. The Department accepted this recommendation and provides a revised ITAR §120.3 as part of this final rule.

Two commenting parties recommended the text and definitions regarding "development" be correlated to the Defense Department's acquisition milestones in terms of technology development phases. The commenting parties noted this will improve the clarity for defense contractors already familiar with Defense Department terminology. The Department did not accept this recommendation as "development" is already defined in the multilateral regimes and the EAR.

One commenting party requested confirmation of the intention to remove any perceived obligation on the part of a manufacturer to monitor post-release sales, and to confirm that a first sale to or predominant use by military end-users will not confer specially designed status on an article. The Department confirms this intention and has revised ITAR §120.3 accordingly. In addition, the Department believes that appropriate application of the specially designed definition will not capture those articles that do not warrant USML control.

One commenting party recommended ITAR §120.41(a) should specify what type of commodity (*i.e.*, part, component, or end-item) should be considered specially designed if it is "in development." The Department accepted this recommendation and revised ITAR §120.41(a) accordingly.

One commenting party recommended reconsideration of limiting the term "development" (and thus "specially designed") to the phase prior to serial production, noting a manufacturer could theoretically design a lesser capability item and then institute a post-production design change to avoid an article being defined as specially designed.

This recommendation was accepted in part. The revised Note 3 to ITAR §120.41(b)(3) addresses this concern.

Two commenting parties requested clarification of the Department's policy objective for software and the applicability of specially designed to it. The Department confirms the control of software is directly related to its applicability to defense articles on the USML, and the Department has added the term to the definition. In addition, the Department confirms that only materials specifically enumerated on the USML are controlled by the ITAR.

One commenting party recommended the definition of "commodity" should include software as well as hardware, to parallel the Department of Commerce's definition. The Department did not accept this recommendation. Software is distinct from the definition of commodity in the EAR and is controlled separately.

One commenting party recommended the adoption of specially designed should be made concurrently with the transition policy to avoid jurisdictional ambiguity. The Department accepted this recommendation. The transition guidance is provided in this final rule.

One commenting party recommended a final extended comment period for specially designed should be permitted following publication of all "critical elements" of ECR. The Department did not accept this recommendation. The regulations, to include the definition of specially designed, can be amended if necessary.

Four commenting parties requested confirmation that application of specially designed will not reverse existing commodity jurisdiction (CJ) determinations and

recommended revision of the definition to so stipulate. The Department accepted this recommendation and has revised ITAR §120.41(b)(1) accordingly.

One commenting party recommended adding the words "tooling and test and support equipment" to both Note 2 and the lead-in sentence to paragraph (b) to exclude simple tooling and equipment (*e.g.*, wrenches, winches, dollies). The Department did not accept this recommendation. Tooling and test and support equipment are only controlled if specifically enumerated on the USML. The B group of the new 600 series (*e.g.,* ECCN 9B610) on the CCL should be reviewed for potential controls on tooling and test and support equipment.

In response to the query of one commenting party, the Department confirms that, as is noted in Note 1 to the definition, if a commodity is enumerated on the USML it is ITAR-controlled even if it described on the CCL.

One commenting party requested there be a mechanism by which industry can provide input for determining whether an item is specially designed without the need to notify Congress or change the definition itself. The Department concurs that industry may submit a request in order to clarify the applicability of specially designed. The appropriate mechanism would be a CJ request through which the Department will determine the proper notification requirement.

One commenting party was concerned with the potential inadvertent application of specially designed to aircraft engines not covered by USML Category XIX. The Department confirms that the export jurisdiction of a part specially designed for an engine is determined by the export jurisdiction of the engine for which it is specially designed, and not the jurisdictional status of the aircraft on which it is installed.

One commenting party expressed concern that the proposed definition will require exporters and original equipment manufacturers to engage in extensive analyses of the jurisdictional and classification status of their parts and components, which could result in different exporters coming to different determinations of the same items and a significant increase the number of CJ determination requests due to the unintended consequences of misclassification of items. The Department acknowledges this concern, but believes the long-term benefits of reforming the regulations will outweigh the short-term burdens of adjustment that inevitably accompany such reforms.

One commenting party recommended that after promulgation of the specially designed definition, the agencies continue to provide advisories that include examples of end-items, parts, components, accessories, and attachments that meet or do not meet the standards of the definition. The Department accepts this recommendation, and will provide further guidance and conduct outreach efforts as necessary.

One commenting party noted the application of the "as a result of 'development'" standard in the proposed definition is limited by the principle that it will only apply to enumerated items. For this reason, it is essential for Government and the private sector to understand how the "as a result of development" standard works when applied to the 600 series in subparagraph ".y." The Department agrees with this comment and revised ITAR §120.41(a) to apply the "as a result of development" standard to ITAR §120.41(a)(1) and not the broader "catch-all" in ITAR §120.41(a)(2).

One commenting party discussed its interpretation of the impact the specially designed definition will have on the control of forgings, castings, machined bodies, etc.,

destined for aircraft or other defense articles. ITAR §121.10 continues to apply in determining the appropriate controls for these articles.

One commenting party expressed concern that ITAR §120.41(a) (and its "as a result of 'development'" standard) and ITAR §120.41(b)(3) of the definition, when taken together, appear to mean that only commercial off the shelf ("COTS") items with no changes in form or fit are released from the definition of specially designed. The Department revised the paragraphs in question to address this concern because the Department did not intend such a conclusion to be an implication of the definition.

Two commenting parties recommended the Department use the phrasing provided in the note to paragraph (b) that identifies a "catch all" paragraph in all instances of their occurrence in USML categories. The Department accepts this recommendation, and notes that not all USML categories will contain "catch-all" control paragraphs.

One commenting party noted the definition still reflects an underlying focus on design intent rather than a focus solely on national security interests and the military functionality of the item. The commenting party also noted regulatory interpretation and compliance would be facilitated if the definition moved further from the concept of design intent towards an analysis of the unique characteristics of the item that imbue it with its military functionality. As noted in the opening of this section, the Department acknowledges that it has not completely ended the practice of determining export jurisdiction based on the item's design intent rather than its performance levels, characteristics, or functions, but it has endeavored to keep it to a minimum.

One commenting party requested clarification on the order of review for USML jurisdiction determination using existing criteria and the specially designed definition.

The Department accepted this recommendation and has moved the guidance in the preamble to the specially designed definition provided in the proposed rule to a revised ITAR §121.1, which is included in this final rule. This revised section also provides guidance on the composition of a category and order of review.

Three commenting parties recommended the word "commodity" in ITAR §120.41(a)(1) refer to the same universe of items as the word "item" in the same section of the Department of Commerce's definition for specially designed. The commenting parties further requested the term "commodity" explicitly include technology, technical data and assistance, and software. The Department accepted this recommendation in part by including the term "software" in ITAR §120.41(a).

One commenting party recommended the addition of a note to ITAR §120.41(a)(1) that would include examples of when an item is not covered. The Department did not accept this recommendation. The Department believes the revised, more "positive," USML categories is the appropriate starting point for determining whether an article is covered by the USML. The provisions of examples in the negative would negate the purpose of a positive list.

One commenting party recommended that changes in dimension, material, coatings, or lubricants to an otherwise excluded item (aircraft fasteners in particular) that do not result in low-observable capability should remain excluded. The Department did not accept this comment. The revisions to ITAR §120.41(b)(2) and (b)(3) should provide the necessary clarification.

The Department has revised ITAR §120.41(b) and added an additional note to ITAR §120.41(b)(3) in response to several commenting parties' recommendations to

more specifically address the issue of minor modifications to a commodity. The concerns centered on changes to "fit" and "form" that have no bearing on changes to the "function" of a commodity. The Department added the term "equivalent" to ITAR §120.41(b)(3) to account for a commodity whose form was modified solely for fit purposes.

One commenting party noted that limiting ITAR §120.41(b)(2) to single, unassembled parts will result in continued ITAR licensing of minor components that do not meet the requirements for exclusion. The commenting party recommended including in ITAR §120.41(b)(2) "small assemblies and components of a type commonly used in multiple types of commodities." The Department did not accept this recommendation because the proposed change would make the "release" too broad and would create the potential for multiple interpretations of the same set of facts.

One commenting party recommended removing as a criterion in ITAR §120.41(b)(3) the issue of whether a part, component, accessory, or attachment is in production. The Department did not accept this recommendation. Whether a commodity is in development or production is an important factor. The inclusion of this criterion is meant to implement the purpose of ITAR §120.3 but without imposing the "predominant" standard, which is difficult or impossible for many exporters to know or to stay current with as military and civil markets change over the lifecycle of a product.

One commenting party recommended clarification of the terms "form" and "fit." The Department accepted this recommendation, and includes a revised ITAR §120.4 addressing this matter in this final rule.

The Department did not accept the recommendation of one commenting party to remove the term "serial production" in Note 1 to ITAR §120.41(b)(3) because this term is not expressly used in that paragraph. The definition of "production" in Note 1 is the EAR definition, which includes the concept of "serial production." "Production" is not defined in the ITAR therefore the Department is providing the EAR definition for the purposes of consistency between the USML and CCL versions of the term specially designed.

One commenting party recommended the definitions for the terms "production" and "development" in Notes 1 and 2 to ITAR §120.41(b)(3) apply to the entire ITAR and not just to the specially designed definition. The Department did not accept this recommendation. While the adoption of the specially designed definition necessitated the defining of the terms "production" and "development," the adoption of the definitions for those terms outside of the specially designed definition was beyond the scope of this review.

One commenting party stated that discriminating between the classifications of "production" and "development" for commodities in "production" that are undergoing "development" was unclear, as described in Note 3 to ITAR §120.41(b)(3), and requested clarification. The Department has accepted this recommendation and has revised Note 3.

One commenting party requested clarification that the intent of ITAR §120.41(b)(3) is to provide the same function as the note to USML Category VIII (the "Section 17(c) rule") and that its scope extends beyond USML Category VIII. The Department confirms this understanding.

One commenting party requested revision of ITAR §120.41(b)(4) to specifically provide that once an item or commodity is determined to be excluded from a "catch-all" provision, the determination remains effective after the item or commodity has entered the marketplace. Although the Department agrees there is no need to revisit a determination made pursuant to ITAR §120.41(b)(4), it did not revise the regulations in this regard. The Department believes such a revision is unnecessary.

One commenting party noted the difficulty an exporter may have in applying ITAR §120.41(b)(4) because he may not have knowledge of what the original developer's market expectations were at the time of development. The Department notes exporters would generally use ITAR §120.41(b)(3) to determine the applicability of specially designed in such cases because its application does not depend upon knowledge of a developer's intent. Developers and manufacturers would generally be the parties to use ITAR §120.41(b)(4), although (b)(4) would not preclude a developer or manufacturer from informing other exporters of the applicability of the (b)(4) exclusion. In addition, the Department added a new note to ITAR §120.41(b)(4) and (b)(5) regarding "knowledge" to address the underlying concern of the comment.

One commenting party expressed concern with the effect the specially designed definition would have on the control over fundamental research. In particular, the concern was with ITAR §120.41(b)(5), as the commenting party believes it is not reasonable for there to be development of a part, component, accessory, or attachment with no reasonable expectation of use for a particular application. The definition of "fundamental research" contained in ITAR §120.11 is not changed by the definition of specially designed. The Department has revised ITAR §120.41(b)(5) to more accurately

describe the intent of that exclusion. In particular, it has replaced the phrase "reasonable expectation" with "knowledge" and added a definition of "knowledge" to a new note to ITAR §120.41(b)(4) and (b)(5). This addresses the instance when research or other knowledge indicates a potential market for an un-enumerated mechanical function or electronic function but does not indicate whether the future buyers will use the function for a civil application, a military application, or both, which was the concern of another commenting party.

The Department accepted one commenting party's recommendation to remove the note to ITAR §120.41(b)(5), agreeing with the observation that it was redundant.

Transition Plan

With the intention of establishing certain necessary licensing procedures stemming from ECR implementation and mitigating the impact of the changes involved in the revision of the USML and the CCL on U.S. license holders and the defense export industry, the Department implements the following "Transition Plan," which will describe 1) timelines for implementation of changes, 2) certain temporary licensing procedures for items transitioning from the USML to the CCL, and 3) certain permanent licensing procedures pertaining to the export of any item "subject to the EAR" (*see* definition of this term in this rule) to be used in or with defense articles controlled on the USML.

The Department notes the following main points regarding licensing procedure during the transition, and thereafter:

- There will be a 180-day transition period between the publication of the final rule for each revised USML category and the effective date of the transition to the CCL for

items that will undergo a change in export jurisdiction. This period will allow U.S. license holders time to review their current authorizations and prepare for the transition to the new ECCNs.

- A license or authorization issued by the Department will be effective for up to two years from the effective date of the revised USML category if all the items listed on the license or authorization have transitioned to the export jurisdiction of the Department of Commerce.
- A license or authorization issued by the Department will be valid until its expiration if some of the items listed on the license or authorization have transitioned to the export jurisdiction of the Department of Commerce.
- USML categories will have a new (x) paragraph, the purpose of which is to allow for ITAR licensing for commodities, software, and technical data subject to the EAR, provided those commodities, software, and technical data are to be used in or with defense articles controlled on the USML and are described in the purchase documentation submitted with the application.

The Department first presented for public comment its plan for licensing policies and procedures regarding items moving from the export jurisdiction of the Department of State to the Department of Commerce on June 21, 2012 (*see* "Export Control Reform Transition Plan," 77 FR 37346). The comment period ended August 6, 2012. Seventeen parties filed comments during the established comment period recommending changes. The Department's evaluation of the written comments and recommendations follows.

Eight commenting parties stated that the 45-day transition period was insufficient time to accomplish all that was necessary to adapt company systems to the changes and

recommended longer transition periods of varying lengths. The Department has accepted this recommendation and has changed the transition period to 180 days.

In response to the recommendation of several commenting parties for shared licensing authority for items changing export jurisdiction, the Department's transition guidance will provide that, for 180 days following the effective date of a revised USML category, licenses will be accepted by both DDTC and BIS for items moving from the USML to the CCL. In addition, DDTC authorizations that pertain wholly to transitioned items will expire two years after the effective date of the relevant final rule moving the items to the CCL. In addition, licenses that have some items remaining on the USML will be valid for all items covered by the license at the time it was issued until it expires. Applicants should refer to the Department of Commerce's companion to this rule (*see* elsewhere in this issue of the *Federal Register*) for information related to BIS licenses adjudicated during the transition period.

Two commenting parties stated that dual jurisdiction/licensing will create a heavy compliance burden for USML end-item manufacturers with international supply chains, as each of the export authorities has different compliance obligations. It will also create confusion as foreign parties may be party to a USML technical assistance agreement and receive items for the project under a Department of Commerce license or Strategic Trade Authorization (STA) license exception. The Department acknowledges this complexity, but notes that ECR will not create a new context in this regard, as current projects routinely require both defense articles and commercial items for completion. Dual compliance requirements already exist and the Department believes the benefits derived from changes implemented under ECR outweigh these concerns.

Two commenting parties recommended that license applications and agreements submitted after publication date of the final rule revising the relevant USML category, but before the implementation date, should be processed as prepublication applications and agreements: valid for two years, or until amended or returned. The Department accepted this recommendation and revised the guidance accordingly.

One commenting party requested clarification of whether sending to a foreign supplier technical data on a USML end-item to allow installation of a 600 series component is both a USML technical data export and CCL installation technology export, creating dual licensing for most foreign sourced commodities. If the technical data is directly related to a defense article, the technical data will be ITAR controlled. If the technical data is for the production, development, etc., of a 600 series or CCL item to be installed in a defense article, the technical data remains EAR controlled. The jurisdiction of the technical data follows the jurisdiction of the related commodity or item.

Five commenting parties recommended that amendments to licenses and authorizations should be allowed during the transition period. The Department accepted this recommendation and revised the guidance accordingly.

Three commenting parties recommended allowing temporary import and export authorizations to last until expired or returned. As the items temporarily imported or exported are to return to their point of origin, per the requirements of the authorizations, there is no national security risk in maintaining the original authorizations. The Department accepted this recommendation and revised the guidance accordingly.

One commenting party noted that currently approved agreements covering dual/third country national employees of the foreign party will be affected by the need to obtain deemed export licenses, and that two years may not be sufficient time to fulfill this requirement. The Department notes that as long as the currently approved agreement has been amended to provide authority for the transitioned items in accordance with the guidance in this notice, the dual/third country national authority would still apply.

Five commenting parties recommended that existing reexport/retransfer authorizations should be grandfathered without expiration. Foreign parties who purchased transitioned items under authorizations that allowed perpetual foreign sales should not have to reauthorize those sales and the U.S. Government should not re-review the authorizations. The Department accepted this recommendation and revised the guidance accordingly. The three scenarios for which this applies are: 1) reexport/retransfer authority granted through a program status DSP-5; 2) the sales territory of a manufacturing license or warehouse and distribution agreement if the agreement continues to be the export authority; and 3) any stand-alone reexport/retransfer authorization received pursuant to ITAR §123.9(c).

Two commenting parties recommended requiring U.S. exporters to identify ECCNs and prior USML classifications on export documentation for two years following the effective date of transitioned items and mandate prompt responses to requests for ECCNs for legacy items. The Department accepted this recommendation in part. The Department has revised ITAR §123.9(b) to require identification of the license or other approval to the foreign party.

Seven commenting parties recommended that previously issued commodity jurisdiction (CJ) determinations designating items as not subject to the export jurisdiction of the Department remain valid. This will preserve EAR99 status for items previously so designated and would relieve exporters who have obtained CJ determinations from having to reclassify items. The Department accepted this recommendation and clarified the guidance accordingly.

One commenting party inquired what Automated Export System (AES) entry would be required for items that have transitioned to control under the CCL but are to be exported under a legacy DDTC authorization. The AES entry will remain the same as is required now for a DDTC authorization.

In response to one commenting party's inquiry on what effect the transition will have on recordkeeping requirements, the Department notes records must be maintained for five years following the last transaction, regardless of jurisdiction.

After consideration of the comments received, and in furtherance of the principles of ECR, the Department has decided to institute a new permanent licensing procedure that will allow ITAR licensing for commodities, software, and technical data subject to the EAR, provided those commodities, software, and technical data are to be used in or with defense articles controlled on the USML and are described in the purchase documentation submitted with the application. This procedure is to be effected by the exporter by use of "(x) paragraph," added to USML Categories VIII and XIX in this rule, and to be added to other USML categories as they are revised. The Department will begin accepting licenses citing a (x) paragraph entry once the 180-day transition period is effective for the related USML category. The President has provided for this delegation

of authority from the Secretary of Commerce to the Secretary of State, and Executive Order 13222 has been amended accordingly (*see* 78 FR 16129). The Department has revised various sections of, and added certain sections to, the ITAR to accommodate this delegation of authority: ITAR §120.5 to add a new paragraph (b) to address the delegation; the addition of ITAR §120.42 to provide a definition of "subject to the EAR"; ITAR §123.1 to provide guidance on how to use the (x) paragraph; and ITAR §123.9(b) to identify additional requirements when using the (x) paragraph. The Department of Commerce will have the authority to review "pre-positioned" license applications during the 180-day transition period for items transitioning to EAR jurisdiction. This means the Department of Commerce will be able to review and process license applications for transitioning items. However, these Department of Commerce licenses would not be issued until on or after the effective date of the relevant final rule moving items from the USML to the CCL. Further guidance is provided in the Department of Commerce's companion to this rule (*see* "Revision to the Export Administration Regulations: Initial Implementation of Export Control Reform," elsewhere in this edition of the *Federal Register*).

Transition Plan

Transition Period

There will be a 180-day transition period between the publication of the final rule for each revised U.S. Munitions List (USML) category and the effective date of the transition to the Commerce Control List (CCL) for items that will undergo a change in export jurisdiction. During this period, license applications will be accepted by both

DDTC and BIS for items moving from the USML to the CCL, but BIS will not issue approved licenses for such items until on or after the applicable effective date.

DSP-5 Licenses

Licenses for items transitioning to the CCL that are issued prior to the effective date of the final rule for each revised USML category, and that do not include any items that will remain on the USML, will remain valid until expired, returned by the license holder, or for a period of two years from the effective date of the final rule, whichever occurs first, unless otherwise revoked, suspended, or terminated. Licenses containing both transitioning and non-transitioning items (mixed authorizations) will remain valid until expired or returned by the license holder, unless otherwise revoked, suspended, or terminated. Any limitation, proviso, or other requirement imposed on the DDTC authorization will remain in effect if the DDTC authorization is relied upon for export. License amendment requests (DSP-6) received by DDTC during the transition period amending licenses affected by the transition will be adjudicated on a case-by-case basis up until the effective date of the relevant rule.

DSP-61 and DSP-73 Licenses

All temporary licenses that are issued in the period prior to the effective date of the final rule for each revised USML category will remain valid until expired or returned by the license holder, unless otherwise revoked, suspended, or terminated. Any limitation, proviso, or other requirement imposed on the DDTC authorization will remain in effect if the DDTC authorization is relied upon for export. License amendment requests (DSP-62 and DSP-74) received by DDTC during the transition period amending

licenses affected by the transition will be adjudicated on a case-by-case basis until the effective date of the relevant rule.

License Applications Received After the Transition Period

All license applications, including amendments, received after the effective date for items that have transitioned to the CCL that are not identified in a (x) paragraph entry will be Returned Without Action with instructions to contact the Department of Commerce.

Technical Assistance Agreements, Manufacturing License Agreements, Warehouse and Distribution Agreements, and Related Reporting Requirements

Agreements and amendments containing both USML and CCL items will be adjudicated up to the effective date of the relevant final rule. Agreements containing transitioning and non-transitioning items that are issued prior to the effective date of the relevant final rule will remain valid until expired, unless they require an amendment, or for a period of two years from the effective date of the relevant final rule, whichever occurs first, unless otherwise revoked, suspended, or terminated. In order for an agreement to remain valid beyond two years, an amendment must be submitted to authorize the CCL items using the new (x) paragraph from the relevant USML category. Any activity conducted under an agreement will remain subject to all limitations, provisos, and other requirements stipulated in the agreement.

Agreements containing solely transitioning items that are issued prior to the effective date of the final rule will remain valid for a period of two years from the effective date of the relevant USML category, unless revoked, suspended, or terminated. After the two year period ends, any on-going activity must be conducted under the

appropriate Department of Commerce authorization. Agreements and agreement amendments solely for items moving to the CCL which are received after the effective date will be Returned Without Action with instructions to contact the Department of Commerce.

All reporting requirements for Manufacturing License Agreements under ITAR §124.9(a)(6) and Warehouse and Distribution Agreements under ITAR §124.14(c)(6) must be complied with and such reports must be submitted to the Department of State while the agreement is relied upon as an export authorization by the exporter.

ITAR Licensing of Items Subject to the EAR

USML categories will have a new (x) paragraph, to be a permanent feature of ITAR licensing. The purpose of this procedure is to allow for ITAR licensing for commodities, software, and technical data subject to the Export Administration Regulations (EAR) provided those commodities, software, and technical data are to be used in or with defense articles controlled on the USML and are described in the purchase documentation submitted with the application.

Commodity Jurisdiction Determinations

Previously issued commodity jurisdiction (CJ) determinations for items deemed to be subject to the EAR shall remain valid. Previously issued CJ determinations for items deemed to be USML but that are subsequently transitioning to the CCL pursuant to a published final rule will be superseded by the newly revised lists. Exporters are encouraged to review each revised USML category along with its companion CCL category to determine whether the items subject to a CJ have transitioned to the jurisdiction of the Department of Commerce. These CJs are limited to the specific

commodity identified in the final determination letter. Consistent with the recordkeeping requirements of the ITAR and the EAR, licensees and foreign persons subject to licenses must maintain records reflecting their assessments of the proper regulatory jurisdiction over their items. License holders unable to ascertain the proper jurisdiction of their items may request a CJ determination from DDTC through the established procedure.

License holders who are certain their items have transitioned to the CCL are encouraged to review the appropriate Export Control Classification Number (ECCN) to determine the classification of their item. License holders who are unsure of the proper ECCN designation may submit a Commodity Classification Automated Tracking System request (CCATS) to the Department of Commerce. *See* 15 CFR 748.3.

Parties making a classification self-determination or submitting a CCATS are advised that only a CJ determination provides an official and exclusive decision on whether or not an item is a defense article on the USML.

Reexport/Retransfer of USML Items That Have Transitioned to the CCL

Following the effective date of transition, foreign persons (*i.e.*, end-users, foreign consignees, and foreign intermediate consignees) who receive, via a Department of State authorization, an item that they are certain has transitioned to the CCL (*e.g.*, confirmed in writing by manufacturer or supplier), should treat the item as such and submit requests for post-transition reexports or retransfers to the Department of Commerce, as may be required by the EAR.

If reexport or retransfer was previously authorized under a DDTC authorization, then that reexport or retransfer authority remains valid. The three scenarios for which this applies are: 1) reexport/retransfer authority granted through a program status DSP-5;

2) the sales/distribution territory of a manufacturing license or warehouse and distribution agreement if the agreement continues to provide the export authority; or 3) any stand-alone reexport/retransfer authorization received pursuant to ITAR §123.9.

Foreign persons or U.S. persons abroad that have USML items in their inventory at the effective date of transition should review both the USML and the CCL to determine the proper jurisdiction. If the item is controlled by the Department of Commerce, any reexport or retransfer must comply with the requirements of the EAR. If doubt exists on jurisdiction of the items, the foreign person should contact the original exporter or manufacturer.

Regulatory Oversight Responsibilities

For those items transitioning from the USML to the CCL, the Department of Commerce will exercise regulatory oversight, as of the effective date, for the purposes of licensing and enforcement of exports from the United States where no Department of State authorization is being used. The Department of State will continue to exercise regulatory oversight concerning all Department of State licenses, agreements, and other authorizations, including those where exporters, temporary importers, manufacturers, and brokers continue to use previously issued Department of State licenses and agreements, until the activity is covered by a Department of Commerce authorization.

License holders may decide to apply for and use Department of Commerce authorizations for export of the newly transitioned CCL items rather than continue to use previously issued Department of State authorizations. In such cases, license holders must return the Department of State licenses in accordance with ITAR §123.22 after they have obtained the required Department of Commerce authorizations.

Violations and Voluntary Disclosures of Possible Violations

Exporters, temporary importers, manufacturers, and brokers are cautioned to closely monitor ITAR and EAR compliance concerning Department of State licenses and agreements for items transitioning from the USML to the CCL.

On the effective date of each rule that adds an item to the CCL that was previously subject to the ITAR, that item will be subject to the EAR. Authorizations issued by DDTC before the effective date may continue to be used as described above by exporters, temporary importers, manufacturers, and brokers. The violation of a previously issued DDTC authorization (including any condition of a DDTC authorization) that is continued to be used as described above is a violation of the ITAR.

With respect to a transitioned item, persons who discover a possible violation of the ITAR, the EAR, or any license or authorization issued thereunder, are strongly encouraged to disclose this violation to DDTC, BIS, or both offices, as appropriate, pursuant to established procedures for submitting voluntary disclosures.

License holders and foreign persons must obtain Department of State authorization before disposing, reselling, transshipping, or otherwise transferring any item in their possession that remains on the USML.

Registration

Manufacturers, exporters, and brokers are required to register with the Department of State if their activities involve USML defense articles or defense services.

Registered manufacturers, exporters, temporary importers, defense service providers and brokers ("registrants") are reminded of the requirement to notify DDTC in writing when they are no longer in the business of manufacturing, exporting, or brokering

USML defense articles or defense services. Registrants who determine that all of their activities involve articles or services that will transition from the USML to the CCL and therefore are no longer required to register with the Department of State must provide such written notification to the Department of State. Instructions for providing such notification are accessible on the DDTC website (www.pmddtc.state.gov). Note that DDTC will not cancel or revoke those registrations, but will allow the registration to expire. Registrants who determine that all of their activities will be subject to Department of Commerce jurisdiction as a result of the transition from the USML to the CCL must nevertheless maintain registration with the Department of State until the effective date of the applicable final rule transitioning the registrant's items to the CCL.

Registrants who determine they will no longer be required to register with the Department of State after the effective date of the final rule transitioning the registrant's items to the CCL, and who have registration renewal dates that occur after publication of the final rule but before its effective date, may request to have their registration expiration date extended to the effective date of transition and not be charged a registration fee. In those cases, registrants must insert the following statement as the first paragraph in the written notification previously mentioned: *"(insert company name) requests DDTC extend our registration expiration date to the effective date of transition to CCL for USML Category (insert Category number) items and waive the registration fee. (insert company name) certifies that no changes in our eligibility from what is represented in our previously submitted DS-2032 Statement of Registration has occurred (otherwise specify change in eligibility status)."* If a registrant subsequently determines that its registration with the Department of State must instead be renewed, the registration

renewal fee will be recalculated to include any Department of State licenses the registrant received during the period when the registration expiration date was extended.

Registrants that avail themselves of the opportunity to continue using previously issued Department of State authorizations (licenses and agreements) for items that have transitioned to the CCL must maintain current registration with the Department of State, which includes payment of registration fees.

Additional Required Changes

As noted in the responses to the public comments for specially designed and transition guidance, the Department has identified the following ITAR amendments as necessary and beneficial for the implementation of the transition plan and the application of the specially designed definition.

The Department has revised ITAR §120.2 to specify the method by which changes are made to the U.S. Munitions List.

The Department has revised ITAR §120.3 to more accurately describe the policy used in completing the revisions to the USML categories and to account for the definition of specially designed. In concert with this change, the Department also revised ITAR §120.4(d) to reflect the policy and provide instruction on applying the terms "form," "fit," "function," and "performance capability."

Pursuant to amendment to Executive Order 13222 and upon agreement of the Secretaries of State and Commerce, the Department amended ITAR §120.5 to provide for ITAR licensing of items subject to the EAR, provided these items meet certain criteria provided in amended ITAR §123.1. In addition, a definition for the term "subject to the EAR" is established in §120.42.

In the revision of the USML categories, the Department has added specific entries regarding classified articles and data. Section 120.10 and USML Category XVII have been amended to account for classified articles and data not clearly enumerated on the USML.

With the adoption of the new definition of specially designed, the Department has revised USML Category XXI and ITAR §121.8(g) to remove the phrases, "specifically designed, developed, configured, adapted, or modified for military purposes" and "specifically designed, modified or adapted."

The Department has revised ITAR §121.1 to incorporate a portion of the instruction included in the specially designed definition included in the proposed rule in a revised introduction to the USML. The revised introduction also includes further guidance on use of the USML.

The Department has revised ITAR §121.10 for forgings, castings, and machined bodies for consistency with the CCL and the Wassenaar Arrangement.

Sections 120.29 and 121.1(c) are revised to update the information provided on the Missile Technology Control Regime (MTCR) Annex and to introduce the new method of identifying articles common to the MTCR Annex and the USML. Section 121.2 is revised to remove reference to ITAR §121.16. Once all revised USML categories are published as final rules, ITAR §121.16 will be placed in reserve, and the parenthetical "(MT)" will be used at the end of each USML section containing such articles.

Section 123.1 is revised to provide guidance on the use of paragraph (x) in USML categories and other administrative changes.

The Department has revised ITAR §123.9(b) to update the destination control statement to require the inclusion of the license number or exemption citation and clarify the need for all parties to the transaction to obtain this information. As well, it requires applicants using paragraph (x) of the revised USML categories to provide additional information to the foreign parties regarding the jurisdiction of items exported pursuant to paragraph (x). These changes are necessary to ensure industry compliance with the correct licensing authority.

Adoption of Proposed Rules and Other Changes

Having reviewed and evaluated the comments and recommended changes for the USML Category VIII, USML Category XIX, and specially designed proposed rules, the Department has determined that it will, and hereby does, adopt them, with changes noted and other edits, and promulgates them in final form under this rule.

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 sections 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 has published this rule as separate proposed rules identified as 1400-AC96, 1400-AC98, and 1400-AD22, each 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.

Regulatory Flexibility Act

Since the Department is of the opinion that this rule is exempt from the provisions of 5 U.S.C. 553, there is no requirement for an analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This rulemaking 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 rulemaking 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 rulemaking 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 rulemaking 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 rulemaking.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). These executive orders stress the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a "significant regulatory action," although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, this rule has been reviewed by the Office of Management and Budget (OMB).

Executive Order 12988

The Department of State has reviewed this rulemaking 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 provisions of Executive Order 13175 do not apply to this rulemaking.

Paperwork Reduction Act

Following is a listing of approved collections that will be affected by revision, pursuant to the President's Export Control Reform (ECR) initiative, of the U.S. Munitions List (USML) and the Commerce Control List. This final rule begins implementation of ECR. Other final rules will follow. The list of collections and the

description of the manner in which they will be affected pertains to revision of the USML in its entirety, not only to the categories published in this rule:

1) Statement of Registration, DS-2032, OMB No. 1405-0002. The Department estimates that 1,000 of the currently-registered persons will not need to maintain registration following full revision of the USML. This would result in a burden reduction of 1,000 hours annually.

2) Application/License for Permanent Export of Unclassified Defense Articles and Related Unclassified Technical Data, DSP-5, OMB No. 1405-0003. The Department estimates that there will be 35,000 fewer DSP-5 submissions annually following full revision of the USML. This would result in a burden reduction of 35,000 hours annually. In addition, the DSP-5 will allow respondents to select USML Category XIX, a newly-established category, as a description of articles to be exported.

3) Application/License for Temporary Import of Unclassified Defense Articles, DSP-61, OMB No. 1405-0013. The Department estimates that there will be 200 fewer DSP-61 submissions annually following full revision of the USML. This would result in a burden reduction of 100 hours annually. In addition, the DSP-61 will allow respondents to select USML Category XIX, a newly-established category, as a description of articles to be temporarily imported.

4) Application/License for Temporary Export of Unclassified Defense Articles, DSP-73, OMB No. 1405-0023. The Department estimates that there will be 800 fewer DSP-73 submissions annually following full revision of the USML. This would result in a burden reduction of 800 hours annually. In addition, the DSP-73 will allow respondents to select

USML Category XIX, a newly-established category, as a description of articles to be temporarily exported.

5) Application for Amendment to License for Export or Import of Classified or Unclassified Defense Articles and Related Technical Data, DSP-6, -62, -74, -119, OMB No. 1405-0092. The Department estimates that there will be 2,000 fewer amendment submissions annually following full revision of the USML. This would result in a burden reduction of 1,000 hours annually. In addition, the amendment forms will allow respondents to select USML Category XIX, a newly-established category, as a description of articles the subject of the amendment request.

6) Request for Approval of Manufacturing License Agreements, Technical Assistance Agreements, and Other Agreements, DSP-5, OMB No. 1405-0093. The Department estimates that there will be 1,000 fewer agreement submissions annually following full revision of the USML. This would result in a burden reduction of 2,000 hours annually. In addition, the DSP-5, the form used for the purposes of electronically submitting agreements, will allow respondents to select USML Category XIX, a newly-established category, as a description of articles to be exported.

7) Maintenance of Records by Registrants, OMB No. 1405-0111. The requirement to actively maintain records pursuant to provisions of the International Traffic in Arms Regulations (ITAR) will decline commensurate to the drop in the number of persons who will be required to register with the Department pursuant to the ITAR. As stated above, the Department estimates that 1,000 of the currently-registered persons will not need to maintain registration following full revision of the USML. This would result in a burden reduction of 20,000 hours annually. The ITAR does provide, though, for the

maintenance of records for a period of five years. Therefore, persons newly relieved of the requirement to register with the Department may still be required to maintain records. 8) Export Declaration of Defense Technical Data or Services, DS-4071, OMB No. 1405-0157. The Department estimates that there will be 2,000 fewer declaration submissions annually following full revision of the USML. This would result in a burden reduction of 1,000 hours annually.

List of Subjects in 22 CFR Parts 120, 121, and 123

Arms and munitions, Exports

Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, parts 120, 121, and 123 are amended as follows:

PART 120 – PURPOSE AND DEFINITIONS

1. The authority citation for part continues to read as follows:

Authority: Sections 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2794; 22 U.S.C. 2651a; Pub. L. 105–261, 112 Stat. 1920; Pub. L. 111–266; Section 1261, Pub. L. 112-239; E.O. 13637, 78 FR 16129.

2. Section 120.2 is revised to read as follows:

§120.2 Designation of defense articles and defense services.

The Arms Export Control Act (22 U.S.C. 2778(a) and 2794(7)) provides that the President shall designate the articles and services deemed to be defense articles and defense services for purposes of import or export controls. The President has delegated to the Secretary of State the authority to control the export and temporary import of defense articles and services. The items designated by the Secretary of State for purposes of export and temporary import control constitute the U.S. Munitions List specified in

part 121 of this subchapter. Defense articles on the U.S. Munitions List specified in part 121 of this subchapter that are also subject to permanent import control by the Attorney General on the U.S. Munitions Import List enumerated in 27 CFR part 447 are subject to temporary import controls administered by the Secretary of State. Designations of defense articles and defense services are made by the Department of State with the concurrence of the Department of Defense. The scope of the U.S. Munitions List shall be changed only by amendments made pursuant to section 38 of the Arms Export Control Act (22 U.S.C. 2778). For a designation or determination on whether a particular item is enumerated on the U.S. Munitions List, *see* §120.4 of this subchapter.

3. Section 120.3 is revised to read as follows:

§120.3 Policy on designating or determining defense articles and services on the U.S. Munitions List.

(a) For purposes of this subchapter, a specific article or service may be designated a defense article (*see* §120.6 of this subchapter) or defense service (*see* §120.9 of this subchapter) if it:

(1) Meets the criteria of a defense article or defense service on the U.S. Munitions List; or

(2) Provides the equivalent performance capabilities of a defense article on the U.S. Munitions List.

(b) For purposes of this subchapter, a specific article or service shall be determined in the future as a defense article or defense service if it provides a critical military or intelligence advantage such that it warrants control under this subchapter.

Note to paragraphs (a) and (b): An article or service determined in the future pursuant to this subchapter as a defense article or defense service, but not currently on the U.S.

Munitions List, will be placed in U.S. Munitions List Category XXI until the appropriate U.S. Munitions List category has been amended to provide the necessary entry.

(c) A specific article or service is not a defense article or defense service for purposes of this subchapter if it:

(1) Is determined to be under the jurisdiction of another department or agency of the U.S. Government (*see* §120.5 of this subchapter) pursuant to a commodity jurisdiction determination (*see* §120.4 of this subchapter) unless superseded by changes to the U.S. Munitions List or by a subsequent commodity jurisdiction determination; or

(2) Meets one of the criteria of §120.41(b) of this subchapter when the article is used in or with a defense article and specially designed is used as a control criteria (*see* §120.41 of this subchapter).

Note to §120.3: The intended use of the article or service after its export (*i.e.*, for a military or civilian purpose), by itself, is not a factor in determining whether the article or service is subject to the controls of this subchapter.

4. Section 120.4 is amended by revising paragraph (d) to read as follows:

§120.4 Commodity jurisdiction.

* * * * *

(d)(1) [Reserved]

(2) A designation that an article or service meets the criteria of a defense article or defense service, or provides the equivalent performance capabilities of a defense article on the U.S. Munitions List set forth in this subchapter, is made on a case-by-case basis by the Department of State, taking into account:

(i) The form and fit of the article; and

(ii) The function and performance capability of the article.

(3) A designation that an article or service has a critical military or intelligence advantage such that it warrants control under this subchapter is made, on a case-by-case basis, by the Department of State, taking into account:

(i) The function and performance capability of the article; and

(ii) The nature of controls imposed by other nations on such items (including the Wassenaar Arrangement and other multilateral controls).

Note 1 to paragraph (d): The *form* of a commodity is defined by its configuration (including the geometrically measured configuration), material, and material properties that uniquely characterize it. The *fit* of a commodity is defined by its ability to physically interface or connect with or become an integral part of another commodity. The *function* of a commodity is the action or actions it is designed to perform. *Performance capability* is the measure of a commodity's effectiveness to perform a designated function in a given environment (*e.g.*, measured in terms of speed, durability, reliability, pressure, accuracy, efficiency).

Note 2 to paragraph (d): For software, the *form* means the design, logic flow, and algorithms. The *fit* is defined by its ability to interface or connect with a defense article. The *function* means the action or actions the software performs directly related to a defense article or as a standalone application.

Performance capability means the measure of the software's effectiveness to perform a designated function.

* * * * *

5. Section 120.5 is revised to read as follows:

§120.5 Relation to regulations of other agencies.

(a) If a defense article or service is covered by the U.S. Munitions List set forth in this subchapter, its export and temporary import is regulated by the Department of State (*see* also §120.2 of this subchapter). The President has delegated the authority to control defense articles and services for purposes of permanent import to the Attorney General. The defense articles and services controlled by the Secretary of State and the Attorney General collectively comprise the U.S. Munitions List under the Arms Export Control Act (AECA). As the Attorney General exercises independent delegated authority to designate defense articles and services for purposes of permanent import controls, the permanent import control list administered by the Department of Justice has been separately labeled the U.S. Munitions Import List (27 CFR part 447) to distinguish it from the list set out in this subchapter. In carrying out the functions delegated to the Attorney General pursuant to the AECA, the Attorney General shall be guided by the views of the Secretary of State on matters affecting world peace and the external security, and foreign policy of the United States. The Department of Commerce regulates the export, reexport, and in-country transfer of items on the Commerce Control List (CCL) and other items subject to its jurisdiction, as well as the provision of certain proliferation activities, under the Export Administration Regulations (EAR) (15 CFR parts 730 through 774). For the relationship of this subchapter to regulations of the Department of Energy and the Nuclear Regulatory Commission, *see* §123.20 of this subchapter.

(b) A license or other approval from the Department of State granted in accordance with this subchapter may also authorize the export of items subject to the EAR (*see* §120.42 of this subchapter). Separate approval from the Department of Commerce is not required

for these items when approved for export under a Department of State license or other approval. Those items subject to the EAR exported pursuant to a Department of State license or other approval would remain under the jurisdiction of the Department of Commerce for any subsequent transactions. The inclusion of items subject to the EAR on a Department of State license or approval does not change the jurisdiction of the items. (*See* §123.1(b) of this subchapter for guidance on identifying items subject to the EAR in a license application to the Department of State.)

6. Section 120.10 is amended by revising paragraphs (a)(2) through (4) and re-designating paragraph (a)(5) as paragraph (b) and revising it to read as follows:

§120.10 Technical data.

(a) * * *

* * * * *

(2) Classified information relating to defense articles and defense services on the U.S. Munitions List and 600-series items controlled by the Commerce Control List;

(3) Information covered by an invention secrecy order; or

(4) Software as defined in §121.8(f) of this subchapter directly related to defense articles.

(b) The definition in paragraph (a) of this section does not include information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or information in the public domain as defined in §120.11. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

7. Section 120.29 is revised to read as follows:

§120.29 Missile Technology Control Regime.

(a) For purposes of this subchapter, *Missile Technology Control Regime (MTCR)* means the policy statement between the United States, the United Kingdom, the Federal Republic of Germany, France, Italy, Canada, and Japan, announced on April 16, 1987, to restrict sensitive missile-relevant transfers based on the MTCR Annex, and any amendments thereto.

(b) The term *MTCR Annex* means the MTCR Guidelines and the Equipment, Software and Technology Annex of the MTCR, and any amendments thereto.

(c) *List of all items on the MTCR Annex.* Section 71(a) of the Arms Export Control Act (22 U.S.C. 2797) refers to the establishment as part of the U.S. Munitions List of a list of all items on the MTCR Annex, the export of which is not controlled under Section 6(1) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(1)), as amended. MTCR Annex items specified in the U.S. Munitions List shall be identified in §121.16 of this subchapter or annotated by the parenthetical "(MT)" at the end of each applicable paragraph.

8. Section 120.41 is added to read as follows:

§120.41 Specially designed.

(a) Except for commodities or software described in paragraph (b) of this section, a commodity or software (*see* §121.8(f) of this subchapter) is "specially designed" if it:

(1) As a result of development, has properties peculiarly responsible for achieving or exceeding the controlled performance levels, characteristics, or functions described in the relevant U.S. Munitions List paragraph; or

(2) Is a part (*see* §121.8(d) of this subchapter), component (*see* §121.8(b) of this subchapter), accessory (*see* §121.8(c) of this subchapter), attachment (*see* §121.8(c) of this subchapter), or software for use in or with a defense article.

(b) A part, component, accessory, attachment, or software is not controlled by a U.S. Munitions List "catch-all" or technical data control paragraph if it:

(1) Is subject to the EAR pursuant to a commodity jurisdiction determination;

(2) Is, regardless of form or fit, a fastener (*e.g.*, screws, bolts, nuts, nut plates, studs, inserts, clips, rivets, pins), washer, spacer, insulator, grommet, bushing, spring, wire, or solder;

(3) Has the same function, performance capabilities, and the same or "equivalent" form and fit as a commodity or software used in or with a commodity that:

(i) Is or was in production (*i.e.,* not in development); and

(ii) Is not enumerated on the U.S. Munitions List;

(4) Was or is being developed with knowledge that it is or would be for use in or with both defense articles enumerated on the U.S. Munitions List and also commodities not on the U.S. Munitions List; or

(5) Was or is being developed as a general purpose commodity or software, *i.e.*, with no knowledge for use in or with a particular commodity (*e.g.*, a F/A-18 or HMMWV) or type of commodity (*e.g.*, an aircraft or machine tool).

Note 1 to paragraph (a): The term "enumerated" refers to any article on the U.S. Munitions List or the Commerce Control List and not in a "catch-all" paragraph.

Note 2 to paragraph (a): The term "commodity" refers to any article, material, or supply, except technology/technical data or software.

Note to paragraph (a)(1): An example of a commodity that as a result of development has properties peculiarly responsible for achieving or exceeding the controlled performance levels, functions, or characteristics in a U.S. Munitions List category would be a swimmer delivery vehicle specially designed to dock with a submarine to provide submerged transport for swimmers or divers from submarines.

Note to paragraph (b): A "catch-all" paragraph is one that does not refer to specific types of parts, components, accessories, or attachments, but rather controls parts, components, accessories, or attachments if they were specially designed for an enumerated item. For the purposes of the U.S. Munitions List, a "catch-all" paragraph is delineated by the phrases "and specially designed parts and components therefor," or "parts, components, accessories, attachments, and associated equipment specially designed for."

Note 1 to paragraph (b)(3): For the purpose of this definition, "production" means all production stages, such as product engineering, manufacture, integration, assembly (mounting), inspection, testing, and quality assurance. This includes "serial production" where commodities have passed production readiness testing (*i.e.,* an approved, standardized design ready for large scale production) and have been or are being produced on an assembly line for multiple commodities using the approved, standardized design.

Note 2 to paragraph (b)(3): For the purpose of this definition, "development" is related to all stages prior to serial production, such as: design, design research, design analyses, design concepts, assembly and testing of prototypes, pilot production schemes, design

data, process of transforming design data into a product, configuration design, integration design, layouts.

Note 3 to paragraph (b)(3): Commodities in "production" that are subsequently subject to "development" activities, such as those that would result in enhancements or improvements only in the reliability or maintainability of the commodity (*e.g.*, an increased mean time between failure (MTBF)), including those pertaining to quality improvements, cost reductions, or feature enhancements, remain in "production." However, any new models or versions of such commodities developed from such efforts that change the basic performance or capability of the commodity are in "development" until and unless they enter into "production."

Note 4 to paragraph (b)(3): With respect to a commodity, "equivalent" means its form has been modified solely for fit purposes.

Note 1 to paragraphs (b)(4) and (5): For a defense article not to be specially designed on the basis of paragraph (b)(4) or (5) of this section, documents contemporaneous with its development, in their totality, must establish the elements of paragraph (b)(4) *or* (5). Such documents may include concept design information, marketing plans, declarations in patent applications, or contracts. Absent such documents, the commodity may not be excluded from being specially designed by either paragraph (b)(4) or (5).

Note 2 to paragraphs (b)(4) and (5): For the purpose of this definition, "knowledge" includes not only the positive knowledge a circumstance exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence. Such awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person's willful avoidance of facts.

9. Section 120.42 is added to read as follows:

§120.42 Subject to the Export Administration Regulations (EAR).

Items "subject to the EAR" are those items listed on the Commerce Control List in part 774 of the EAR and all other items that meet the definition of that term in accordance with §734.3 of the EAR. The EAR is found at 15 CFR parts 730 through 774.

PART 121 – THE UNITED STATES MUNITIONS LIST

10. The authority citation for part 121 is revised to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2651a; Pub. L. 105–261, 112 Stat. 1920; Section 1261, Pub. L. 112-239; E.O. 13637, 78 FR 16129.

11. Section 121.1 is amended by revising paragraphs (a) through (c), U.S. Munitions List Category VIII, Category XVII, Category XIX, and Category XXI, and adding paragraphs (d) and (e), to read as follows:

§121.1 General. The United States Munitions List.

(a) The following articles, services, and related technical data are designated as defense articles and defense services pursuant to sections 38 and 47(7) of the Arms Export Control Act. Changes in designations will be published in the *Federal Register*. Information and clarifications on whether specific items are defense articles and services under this subchapter may appear periodically through the Internet website of the Directorate of Defense Trade Controls.

(b)(1) *Order of review.* In order to classify your article on the U.S. Munitions List, you should begin with a review of the general characteristics of your item. This will usually guide you to the appropriate category on the U.S. Munitions List. Once the appropriate

category is identified, you should match the particular characteristics and functions of your article to a specific entry within the appropriate category.

(2) *Composition of an entry.* Within each U.S. Munitions List category, defense articles are enumerated by an alpha paragraph designation. These designations may include subparagraph(s) to further define the enumerated defense article. Each U.S. Munitions List category starts with end-platform designations followed by major systems and equipment, and parts, components, accessories, and attachments. Most U.S. Munitions List categories contain an entry on technical data (*see* §120.10 of this subchapter) and defense services (*see* §120.9 of this subchapter) related to the enumerated defense articles of that U.S. Munitions List category.

(3) *Significant Military Equipment.* An asterisk may precede an entry in a U.S. Munitions List category. The asterisk means the enumerated defense article is deemed to be "Significant Military Equipment" to the extent specified in §120.7 of this subchapter. The asterisk is placed as a convenience to help identify such defense articles. Note that technical data directly related to the manufacture or production of any defense articles enumerated in any category designated as Significant Military Equipment (SME) is also designated as SME.

(c) *Missile Technology Control Regime (MTCR) Annex.* Inclusion in §121.16 of this subchapter, or annotation with the parenthetical "(MT)" at the end of a U.S. Munitions List paragraph, indicates those defense articles and defense services that are on the MTCR Annex. *See* §120.29 of this subchapter.

(d) *Specially Designed.* When applying the definition of specially designed (*see* §120.41 of this subchapter), follow the sequential analysis set forth as follows:

(1) if your commodity or software is controlled for reasons other than having a specially designed control parameter on the U.S. Munitions List, no further review of the definition of specially designed is required.

(2) if your commodity or software is not enumerated on the U.S. Munitions List, 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. If a commodity or software would not be controlled as a result of the application of the standards in §120.41(a), then it is not necessary to work through §120.41(b).

(3) if a commodity or software is controlled as a result of §120.41(a), then it is necessary to continue the analysis and to work through each of the elements of §120.41(b).

(4) commodities or software described in any §120.41(b) subparagraph are not specially designed commodities or software controlled on the U.S. Munitions List, but may be subject to the jurisdiction of another U.S. Government regulatory agency (*see* §120.5 of this subchapter).

(e) *Classified.* For the purpose of this subchapter, "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 or international organization.

* * * * *

Category 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) Turbofan- or turbojet-powered trainers used to train pilots for fighter, attack, or bomber aircraft;

*(4) Attack helicopters;

*(5) Unarmed military unmanned aerial vehicles (UAVs) (MT if the UAV has a "range" equal to or greater than 300km);

*(6) Armed unmanned aerial vehicles (UAVs) (MT if the UAV has a "range" equal to or greater than 300km);

*(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 (MT if the drone has a "range" equal to or greater than 300km);

(11) Aircraft incorporating any mission system controlled under this subchapter;

(12) Aircraft capable of being refueled in flight including hover-in-flight refueling (HIFR); or

*(13) Optionally Piloted Vehicles (OPV) (MT if the OPV has a "range" equal to or greater than 300km).

Note 1 to paragraph (a): "Range" is the maximum distance that the specified aircraft system is capable of traveling in the mode of stable flight as measured by the projection of its trajectory over the surface of the Earth. The maximum capability based on the design characteristics of the system, when fully loaded with fuel or propellant, will be taken into consideration in determining "range." The "range" for aircraft systems will be determined independently of any external factors such as operational restrictions, limitations imposed by telemetry, data links, or other external constraints. For aircraft

systems, the "range" will be determined for a one-way distance using the most fuel-efficient flight profile (*e.g.,* cruise speed and altitude), assuming International Civil Aviation Organization (ICAO) standard atmosphere with zero wind.

(b) [Reserved]

(c) [Reserved]

(d) Ship-based launching and recovery equipment specially designed for defense articles described in paragraph (a) of this category and land-based variants thereof (MT if the ship-based launching and recovery equipment is for an unmanned aerial vehicle, drone, or missile that has a "range" equal to or greater than 300km).

Note to paragraph (d): Fixed land-based arresting gear is not included in this paragraph.

*(e) Inertial navigation systems (INS), aided or hybrid inertial navigation systems, Inertial Measurement Units (IMUs), and Attitude and Heading Reference Systems (AHRS) specially designed for aircraft controlled in this category or controlled in ECCN 9A610 and all specially designed components, parts, and accessories therefor (MT if the INS, IMU, or AHRS is for an unmanned aerial vehicle, drone, or missile that has a "range" equal to or greater than 300 km). For other inertial reference systems and related components refer to USML Category XII(d).

(f) Developmental aircraft and specially designed parts, components, accessories, and attachments therefor funded by the Department of Defense.

Note 1 to paragraph VIII(f): Paragraph VIII(f) does not control developmental aircraft and specially designed parts, components, accessories, and attachments therefor (a) determined to be subject to the EAR via a commodity jurisdiction determination (*see*

§120.4 of this subchapter) or (b) identified in the relevant Department of Defense contract as being developed for both civil and military applications.

Note 2 to paragraph VIII(f): Note 1 does not apply to defense articles enumerated on the U.S. Munitions List, whether in production or development.

(g) [Reserved]

(h) Aircraft parts, components, accessories, attachments, associated equipment and systems, as follows:

(1) Parts, components, accessories, attachments, and equipment specially designed for the following U.S.-origin aircraft: the B-1B, B-2, F-15SE, F/A-18 E/F/G, F-22, F-35 and future variants thereof; or the F-117 or U.S. Government technology demonstrators. Parts, components, 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 in paragraph (h) of this category, are subject to the EAR;

(2) Face gear gearboxes, split-torque gearboxes, variable speed gearboxes, synchronization shafts, interconnecting drive shafts, or rotorcraft gearboxes with internal pitch line velocities exceeding 20,000 feet per minute and able to operate 30 minutes with loss of lubrication and specially designed parts and components therefor;

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

(4) Wing folding systems and specially designed parts and components therefor;

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

(6) Bomb racks, missile launchers, missile rails, weapon pylons, pylon-to-launcher adapters, unmanned aerial vehicle (UAV) launching systems, external stores support

systems for ordnance or weapons, and specially designed parts and components therefor (MT if the bomb rack, missile launcher, missile rail, weapon pylon, pylon-to-launcher adapter, UAV launching system, or external stores support system is for a UAV, drone, or missile that has a "range" equal to or greater than 300 km);

(7) Damage or failure-adaptive flight control systems specially designed for aircraft controlled in this category or controlled in ECCN 9A610;

(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);

(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 (MT if for an unmanned aerial vehicle, drone, or missile that has a "range" equal to or greater than 300 km);

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

(12) Unmanned aerial vehicle (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) (MT if for a UAV, drone or missile that has a "range" equal to or greater than 300 km);

(13) Lithium-ion batteries that provide greater than 28 VDC nominal;

(14) Lift fans, clutches, and roll posts for short take-off, vertical landing (STOVL) aircraft and specially designed parts and components for such lift fans and roll posts;

(15) Integrated helmets incorporating optical sights or slewing devices, which include the ability to aim, launch, track, or manage munitions (*e.g.*, Helmet Mounted Cueing Systems, Joint Helmet Mounted Cueing Systems (JHMCS), Helmet Mounted Displays, Display and Sight Helmets (DASH));

(16) Fire control computers, stores management systems, armaments control processors, aircraft-weapon interface units and computers (*e.g.*, AGM-88 HARM Aircraft Launcher Interface Computer (ALIC));

(17) Mission computers, vehicle management computers, and integrated core processers specially designed for aircraft controlled in this category or controlled in ECCN 9A610;

(18) Drive systems and flight control systems specially designed to function after impact of a 7.62mm or larger projectile;

(19) Thrust reversers specially designed to be deployed in flight for aircraft controlled in this category or controlled in ECCN 9A610;

*(20) Any part, component, accessory, attachment, equipment, or system that:

(i) is classified;

(ii) contains classified software; or

(iii) 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 or international organization;

(21) Printed circuit boards or patterned multichip modules for which the layout is specially designed for defense articles in this category;

(22) Radomes or electromagnetic antenna windows specially designed for aircraft or UAVs that:

(i) incorporate radio frequency selective surfaces;

(ii) operate in multiple or more non-adjacent radar bands;

(iii) incorporate a structure that is specially designed to provide ballistic protection from bullets, shrapnel, or blast;

(iv) have a melting point greater than 1,300^{o}C and maintain a dielectric constant less than 6 at temperatures greater than 500^{o}C;

(v) are manufactured from ceramic materials with a dielectric constant less than 6 at any frequency from 100 MHz to 100 GHz;

(vi) maintain structural integrity at stagnation pressures greater than 6,000 pounds per square foot; or

(vii) withstand a combined thermal shock greater than 4.184 x 10^6 J/m^2 accompanied by a peak overpressure of greater than 50 kPa (MT for radomes meeting this criteria);

(23) Fuel cells specially designed for aircraft controlled in this category or controlled in ECCN 9A610;

(24) Thermal engines specially designed for aircraft controlled in this category or controlled in ECCN 9A610;

(25) Thermal batteries specially designed for aircraft controlled in this category or controlled in ECCN 9A610 (MT if the thermal battery is for an unmanned aerial vehicle, drone, or missile that has a “range” equal to or greater than 300 km); or

(26) Thermionic generators specially designed for aircraft controlled in this category or controlled in ECCN 9A610.

(i) Technical data (*see* §120.10 of this subchapter) and defense services (*see* §120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (h) of this category and classified technical data directly related to items controlled in ECCNs 9A610, 9B610, 9C610, and 9D610 and defense services using classified technical data. (*See* §125.4 of this subchapter for exemptions.) (MT for technical data and defense services related to articles designated as such.)

(j)-(w) [Reserved]

(x) Commodities, software, and technical data subject to the EAR (*see* §120.42 of this subchapter) used in or with defense articles controlled in this category.

Note to paragraph (x): Use of this paragraph is limited to license applications for defense articles controlled in this category where the purchase documentation includes commodities, software, or technical data subject to the EAR (*see* §123.1(b) of this subchapter).

Note: Inertial navigation systems, aided or hybrid inertial navigation systems, Inertial Measurement Units, and Attitude and Heading Reference Systems in paragraph (e) and parts, components, accessories, and attachments in paragraphs (h)(2)-(5), (7), (13), (14), (17)-(19), and (21)-(26) are licensed by the Department of Commerce when incorporated in a military aircraft subject to the EAR and classified under ECCN 9A610. Replacement systems, parts, components, accessories and attachments are subject to the controls of the ITAR.

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Category XVII – Classified Articles, Technical Data, and Defense Services Not Otherwise Enumerated

*(a) All articles, and technical data (*see* §120.10 of this subchapter) and defense services (*see* §120.9 of this subchapter) relating thereto, that are classified in the interests of national security and that are not otherwise enumerated on the U.S. Munitions List.

* * * * *

Category XIX—Gas Turbine Engines and Associated Equipment

*(a) Turbofan and Turbojet engines (including technology demonstrators) capable of 15,000 lbf (66.7 kN) of thrust or greater that have any of the following:

(1) with or specially designed for thrust augmentation (afterburner);

(2) thrust or exhaust nozzle vectoring;

(3) parts or components controlled in paragraph (f)(6) of this category;

(4) specially designed for sustained 30 second inverted flight or negative g maneuver; or

(5) specially designed for high power extraction (greater than 50 percent of engine thrust at altitude) at altitudes greater than 50,000 feet.

*(b) Turboshaft and Turboprop engines (including technology demonstrators) capable of 1500 mechanical shp (1119 kW) or greater and are specially designed with oil sump sealing when the engine is in the vertical position.

*(c) Engines (including technology demonstrators) specially designed for armed or military unmanned aerial vehicle systems, cruise missiles, or target drones (MT if for an engine used in an unmanned aerial vehicle, drone, or missile that has a “range” equal to or greater than 300 km).

*(d) GE38, AGT1500, CTS800, TF40B, T55, TF60, and T700 engines.

*(e) Digital engine control systems (*e.g.*, Full Authority Digital Engine Controls (FADEC) and Digital Electronic Engine Controls (DEEC)) specially designed for gas

turbine engines controlled in this category (MT if the digital engine control system is for an unmanned aerial vehicle, drone, or missile that has a "range" equal to or greater than 300 km).

Note to paragraph (e): Digital electronic control systems autonomously control the engine throughout its whole operating range from demanded engine start until demanded engine shut-down, in both normal and fault conditions.

(f) Parts, components, accessories, attachments, associated equipment, and systems as follows:

(1) Parts, components, accessories, attachments, and equipment specially designed for the following U.S.-origin engines (and military variants thereof): AE1107C, F101, F107, F112, F118, F119, F120, F135, F136, F414, F415, J402, GE38, TF40B, and TF60;

*(2) Hot section components (*i.e.,* combustion chambers and liners; high pressure turbine blades, vanes, disks and related cooled structure; cooled low pressure turbine blades, vanes, disks and related cooled structure; cooled augmenters; and cooled nozzles) specially designed for gas turbine engines controlled in this category;

(3) Uncooled turbine blades, vanes, disks, and tip shrouds specially designed for gas turbine engines controlled in this category;

(4) Combustor cowls, diffusers, domes, and shells specially designed for gas turbine engines controlled in this category;

(5) Engine monitoring systems (*i.e.,* prognostics, diagnostics, and health) specially designed for gas turbine engines and components controlled in this category;

*(6) Any part, component, accessory, attachment, equipment, or system that:

(i) is classified;

(ii) contains classified software; or

(iii) 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 or international organization; or

(7) Printed circuit boards or patterned multichip modules for which the layout is specially designed for defense articles in this category.

(g) Technical data (*see* §120.10 of this subchapter) and defense services (*see* §120.9 of this subchapter) directly related to the defense articles enumerated in paragraphs (a) through (f) of this category and classified technical data directly related to items controlled in ECCNs 9A619, 9B619, 9C619, and 9D619 and defense services using the classified technical data. (*See* §125.4 of this subchapter for exemptions.) (MT for technical data and defense services related to articles designated as such.)

(h)-(w) [Reserved]

(x) Commodities, software, and technical data subject to the EAR (*see* §120.42 of this subchapter) used in or with defense articles controlled in this category.

Note to paragraph (x): Use of this paragraph is limited to license applications for defense articles controlled in this category where the purchase documentation includes commodities, software, or technical data subject to the EAR (*see* §123.1(b) of this subchapter).

* * * * *

Category XXI – Articles, Technical Data, and Defense Services Not Otherwise Enumerated

*(a) Any article not enumerated on the U.S. Munitions List may be included in this category until such time as the appropriate U.S. Munitions List category is amended. The decision on whether any article may be included in this category, and the designation of the defense article as not Significant Military Equipment (*see* §120.7 of this subchapter), shall be made by the Director, Office of Defense Trade Controls Policy.

(b) Technical data (*see* §120.10 of this subchapter) and defense services (*see* §120.9 of this subchapter) directly related to the defense articles covered in paragraph (a) of this category.

12. Section 121.2 is revised to read as follows:

§121.2 Interpretations of the U.S. Munitions List

The following interpretations explain and amplify the terms used in §121.1 of this subchapter. These interpretations have the same force as if they were a part of the U.S. Munitions List category to which they refer.

13. Section 121.3 is revised to read as follows:

§121.3 Aircraft.

(a) In Category VIII, except as described in paragraph (b) below, "aircraft" means 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 paragraph (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 with a roll-on/roll-off ramp and 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;

(6) Incorporate any "mission system" controlled under this subchapter. "Mission system" is defined as a "system" (*see* §121.8(g) of this subchapter) that is a defense article that performs specific military functions beyond airworthiness, such as by providing military communication, radar, active missile counter measures, target designation, surveillance, or sensor capabilities; or

(7) Are Optionally Piloted Vehicles (OPV) (*i.e.,* aircraft specially designed to operate with and without a pilot physically located in the aircraft).

(b) Aircraft specially designed for military applications that are not identified in paragraph (a) of this section are subject to the EAR and classified as ECCN 9A610, 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 paragraph.

14. Section 121.8 is amended by revising the section heading and paragraph (g) to read as follows:

§121.8 End-items, components, accessories, attachments, parts, firmware, software, and systems.

* * * * *

(g) A *system* is a combination of end-items, parts, components, accessories, attachments, firmware, or software that operate together to perform a specialized military function.

15. Section 121.10 is revised to read as follows:

§ 121.10 Forgings, castings, and machined bodies.

The U.S. Munitions List controls as defense articles those forgings, castings, and other unfinished products, such as extrusions and machined bodies, that have reached a stage in manufacturing where they are clearly identifiable by mechanical properties, material composition, geometry, or function as defense articles.

PART 123 – LICENSES FOR THE EXPORT AND TEMPORARY IMPORT OF DEFENSE ARTICLES

16. The authority citation for part 123 is revised to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2753; 22 U.S.C. 2651a; 22 U.S.C. 2776; Pub. L. 105-261, 112 Stat. 1920; Sec. 1205(a), Pub. L. 107-228; Section 1261, Pub. L. 112-239; E.O. 13637, 78 FR 16129.

17. The heading for part 123 is revised to read as set forth above.

18. Section 123.1 is amended by revising paragraphs (a), (b), and (c) to read as follows:

§123.1 Requirement for export or temporary import licenses.

(a) Any person who intends to export or to import temporarily a defense article must obtain the approval of the Directorate of Defense Trade Controls prior to the export or temporary import, unless the export or temporary import qualifies for an exemption under the provisions of this subchapter. The applicant must be registered with the Directorate of Defense Trade Controls pursuant to part 122 of this subchapter prior to submitting an application. Applications for unclassified exports and temporary imports must be submitted electronically. Applications for classified exports and classified temporary imports must be submitted via paper. Further guidance is provided on the Internet website of the Directorate of Defense Trade Controls. The application forms for export or temporary import are as follows:

(1) Unclassified permanent exports must be made on Form DSP–5;

(2) Unclassified temporary exports must be made on Form DSP–73;

(3) Unclassified temporary imports must be made on Form DSP–61; or

(4) Classified exports or temporary imports must be made on Form DSP–85.

(b) Applications for Department of State export or temporary import licenses for proposed exports or temporary imports of defense articles, including technical data, may include commodities, software, and technical data subject to the EAR (*see* §120.42 of this subchapter) if:

(1) The purchase documentation (*e.g.*, purchase order, contract, letter of intent, or other appropriate documentation) includes both defense articles enumerated on the U.S. Munitions List and items on the Commerce Control List;

(2) The commodities, software, and technical data subject to the EAR are for end-use in or with the U.S. Munitions List defense article(s) proposed for export; and

(3) The license application separately enumerates the commodities, software, and technical data subject to the EAR in a U.S. Munitions List "(x)" paragraph entry.

(c) As a condition to the issuance of a license or other approval, the Directorate of Defense Trade Controls may require all pertinent documentation regarding the proposed transaction and proper completion of the application form as follows:

(1) Form DSP–5, DSP–61, DSP–73, and DSP–85 applications must have an entry in each block where space is provided for an entry. All requested information must be provided. Stating "Not Applicable" or "See Attached" is not acceptable. See the Directorate of Defense Trade Controls Internet website for additional guidance on the completion of a license application form;

(2) Attachments and supporting technical data or brochures should be submitted with the license application. All freight forwarders and U.S. consignors must be listed in the license application. See the Directorate of Defense Trade Controls Internet website for instructions and limitations on attaching documentation;

(3) Certification by an empowered official must accompany all application submissions (*see* §126.13 of this subchapter);

(4) An application for a license for the permanent export of defense articles sold commercially must be accompanied by purchase documentation (*e.g.*, purchase order, contract, letter of intent, or other appropriate documentation). In cases involving the Foreign Military Sales program, a copy of the relevant Letter of Offer and Acceptance is required, unless the procedures of §126.4(c) or §126.6 of this subchapter are followed;

(5) Form DSP–83, duly executed, must accompany all license applications for the permanent export of significant military equipment, including classified defense articles or classified technical data (*see* §§123.10 and 125.3 of this subchapter); and

(6) A statement concerning the payment of political contributions, fees, and commissions must accompany a permanent export application if the export involves defense articles or defense services valued in an amount of $500,000 or more and is being sold commercially to or for the use of the armed forces of a foreign country or international organization (*see* part 130 of this subchapter).

* * * * *

19. Section 123.9 is amended by revising paragraph (b) to read as follows:

§123.9 Country of ultimate destination and approval of reexports or retransfers.

* * * * *

(b) The exporter, U.S. or foreign, must inform the end-user and all consignees that the defense articles being exported are subject to U.S. export laws and regulations as follows:

(1) The exporter, U.S. or foreign, must incorporate the following statement as an integral part of the bill of lading, air waybill, or other shipping document, and the purchase documentation or invoice whenever defense articles are to be exported, retransferred, or reexported pursuant to a license or other approval under this subchapter:

"These commodities are authorized by the U.S. Government for export only to [country of ultimate destination] for use by [end-user] under [license or other approval number or exemption citation]. They may not be resold, diverted, transferred, or otherwise be disposed of, to any other country or to any person other than the authorized end-user or consignee(s), either in their original form or after being incorporated into other end-items,

without first obtaining approval from the U.S. Department of State or use of an applicable exemption."; and

(2) When exporting items subject to the EAR (*see* §§120.42 and 123.1(b)) on a Department of State license or other approval, the U.S. exporter must provide to the end-user and consignees in the purchase documentation or other support documentation the appropriate EAR classification information for each item exported pursuant to a U.S. Munitions List "(x)" paragraph. This includes the appropriate ECCN or EAR99 designation.

* * * * *

Rose E. Gottemoeller,

Acting Under Secretary,

Arms Control and International Security,

Department of State.

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