

It's time for ground vehicle and related commodities manufacturers to embrace export control reform



The transfer of certain ground vehicles and related commodities from the USML to the less strictly controlled new 600 Series on the CCL presents a great opportunity for exporting manufacturers, writes Jeffrey G. Richardson in this review of the recent reforms.

'While there is still more work to be done, taken together, these reforms will focus our resources on the threats that matter most, and help us work more effectively with our allies in the field. They'll bring transparency and coherence to a field of regulation which has long been lacking both. And by enhancing the competitiveness of our manufacturing and technology sectors, they'll help us not just increase exports and create jobs, but strengthen our national security as well.'

President Obama,
Department of Commerce Annual
Export Controls Update Conference,
30 August 2010

The Arms Export Control Act ('AECA') requires the President of the United States to periodically review controls set for munitions on the United States Munitions List ('USML'). If the controls no longer remain warranted, the President must notify Congress to transfer controlled munitions from the USML to the Commerce Control List ('CCL'). The regulatory framework for Export Control Reform ('ECR') began with the President making these initial notifications to Congress, leading to the first set of final rules being published on 16 April 2013. These final rules coined a new '600 Series' export control classification number ('ECCN') for munitions transferred from the USML to the CCL. Although the 600 Series items are munitions, the Administration determined these items no longer require the strict control under the International Traffic in Arms Regulations ('ITAR'), but rather

warrant lesser control through an enhanced Export Administration Regulation ('EAR').

ECR's goal is to place higher fences around items deserving the greatest protection, while permitting the export

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of less sensitive items to less sensitive destinations without restriction. The goal is not to decontrol items, but rather to transfer less sensitive items to the more flexible CCL, permitting administration under the EAR. The ECR oversight committee has yet to publish the final steps, including a

vision for the singular licensing agency. However, the Administration has made great strides, and these final, undetermined pieces of the ECR puzzle, dictated by the 'four singularities' vision of a single control list, a single information technology system, a single enforcement coordination capability, and a single licensing agency, remain the logical next steps.

On 8 July 2013, the Department of Commerce's Bureau of Industry and Security ('BIS') and the Department of State's Directorate of Defense Trade Controls ('DDTC') published final rules authorising the transfer of items from the USML Category VII for ground vehicles to the 600 Series of the CCL ('Final Rules'). This transfer marks six USML categories now impacted by ECR. The 8 July 2013 Final Rules, effective on 6 January 2014, include amendments to Category VI for surface vehicles of war and special naval vehicles; Category XIII for materials



and miscellaneous articles; and Category XX for submersible vessels and related articles. These transfers follow on the heels of reforms to USML Category VIII for aircraft and related articles and Category XIX for gas turbine engines, effective 15 October 2013.

Migration of ground vehicles and related commodities from the USML to CCL

Two coordinated Final Rules provide for the transfer of lesser-controlled ground vehicles from USML Category VII to ECCN 0A606 ground vehicles and related commodities. The DDTC's Final Rule amends the ITAR by removing lesser-controlled items from the USML and no longer subjecting them to the ITAR's strict regime of export controls; the BIS's Final Rule then incorporates these lesser-controlled items into the new 600 Series on the CCL. Specifically, as to lesser-controlled ground vehicles, ECCN 0A606 for ground vehicles and related commodities serves to receive the transfer of items and implements the familiar ECCN structure, with 0B606 covering related test, inspection and production equipment; 0C606 covering related materials; 0D606 covering related software; and 0E606 covering related technology. In sum, the Final Rules combine to reclassify many lesser-controlled items previously covered under USML Category VII ground vehicles onto the CCL.

Manufacturers of USML Category VII ground vehicle items now have until 6 January 2014 to determine whether items in their products, technology and services portfolio will be reclassified onto the CCL, and adjust to the new licence requirements under the EAR.

Immediate benefits to manufacturers of ground vehicles and related commodities in adapting to the Final Rules

Manufacturers of components for lesser-controlled munitions items for ground vehicles and related commodities should review the new positively enumerated (listed) 600 Series .y items on the CCL, which are subject only to anti-terrorism ('AT') controls. Specifically, the .y items under ECCN 0A606.y ground vehicles

and related commodities lessen export controls for the following items:

- Brake system components (e.g., discs, rotors, shoes, drums);
- Alternators and generators;
- Axles;
- Batteries;
- Bearings (e.g., ball, roller, wheel);
- Cables, cable assemblies, and connectors;
- Cooling system hoses;
- Hydraulic, fuel, oil, and air filters;
- Gaskets and o-rings;
- Hydraulic system hoses;
- Latches and hinges;
- Lighting systems, fuses, and components;
- Pneumatic hoses;
- Seats and seat assemblies;
- Tyres except run flat; and
- Windows, except those for armoured vehicles.

If your business manufactures .y items on the EAR's CCL that were previously controlled by the ITAR, the benefits of ECR should be immediately apparent. Previously, manufacturing utilitarian items within paragraph .y required compliance with all the regulations of the ITAR, while ECR provides that the .y items are only subject to the lighter AT export controls under the EAR. If a licence is required for a .y item, it can be acquired through the less onerous EAR system. Now, many of these utilitarian .y items can be freely sold to any country that is not subject to AT controls or an arms embargo.

Additional benefits to manufacturers of lesser-controlled ground vehicles and related commodities within the 600 Series

The ground vehicles remaining in USML Category VII include (a) armoured combat ground vehicles, (b) infantry fighting vehicles, (c) ground vehicles with USML-controlled mission systems, and (d) armoured support ground vehicles, as well as (e) listed parts, components, accessories, attachments, associated equipment, and systems for these items. These listed parts include items such as armoured hulls, reactive armour parts, and kits specially designed to convert a vehicle into a USML Category VII ground vehicle. Thus, any potential review of the 600 Series begins with a

review of the corresponding USML category to first determine whether the ITAR controls the items. If the ITAR does not control the items, then a review of the corresponding 600 Series is appropriate.

In paragraphs .a - .w for each ECCN within the 600 Series, the 600 Series positively lists specific parts, components, accessories, and attachments moved from the USML to the CCL. For example, 0A606.c classifies air-cooled diesel engines and engine blocks for armoured vehicles (ground vehicles) that weigh more than 40 tons. Although not next alphabetically, paragraph .y is the next step for review, after a review of paragraphs .a - .w has been conducted. Again, paragraph .y controls listed parts, components, accessories, and attachments for ground vehicles, even if these items are specially designed for use on ground vehicles that constitute defence articles listed on the ITAR's USML. These items warrant no more than light AT export controls. For example, 0A606.y.1 covers brake system components, 0A606.y.2 covers alternators and generators, 0A606.y.3 covers axles, 0A606.y.4 covers batteries, and 0A606.y.5 covers bearings, for use with ground vehicles listed on USML Category VII or lesser-controlled ground vehicles listed on ECCN 0A606.

If an item is not listed in paragraphs .a-.w or .y of a 600 Series ECCN, then the paragraph .x (catch-all) of the ECCN requires review. This paragraph .x includes those parts, components, accessories and attachments not listed in the new positive series of the USML or the 600 Series of the CCL. Rather, these .x items are caught because (although not specifically listed elsewhere) they are still 'specially designed' for an item controlled under the USML or the 600 Series of the CCL. For example, note 1 to 0A606.x provides that the following ground vehicle commodities are 'specially designed', and thus, still warrant export control: 'forgings, castings and other unfinished products such as extrusions and machined bodies that have reached a stage in manufacture where they are clearly identifiable by mechanical properties, material composition, geometry, or function as commodities controlled by ECCN 0A606.x are controlled by ECCN 0A606.x.'

To summarise the 600 Series structure, a - .w are ECCN designations for listed items with stricter licence requirements, and .x is a catch-all for those items 'specially designed', with licence requirements equally as strict as .a - .w. The classifications .a - .w and .x are subject to the following reasons for control: national security, regional security, AT, and United Nations controls. Then, .y is a positive list of items identified as 'specially designed' for the USML or 600 Series; however, these utilitarian .y items are intentionally set aside for less restrictive export controls, subject only to the lighter AT export controls.

The process for identifying 'specially designed' items subject to paragraph .x

Paragraphs .a - .w and .y provide a list of positive controlled items. However, if the item is not positively listed in .a - .w or .y, then the exporter must consider whether the item is 'specially designed' and, in the case of ground vehicles, captured under ECCN 0A606.x. If the item is classified as 'specially designed' under .x, the item

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remains subject to stricter export requirements than .y items. On the other hand, if the item is neither positively listed in .a - .w or .y, nor 'specially designed' under .x, then the item is released from the 600 Series controls and subject to the remainder of the EAR whether classified elsewhere on the CCL or EAR99. The differences between the released .x items and .y items, as compared to the remainder of the 600 Series, are the differences immediately beneficial to U.S. exporters and re-exporters, since the released .x items and .y items are not subject to the licensing requirements imposed on the remainder of the 600 Series.

A goal of ECR is to remove design intent and the broad, loosely defined

Arms embargoes and new *de minimis* calculus applied to 600 Series items

Generally, under the EAR, foreign-made items incorporating a below *de minimis* level of controlled U.S. content are not subject to the EAR. However, in keeping with the ITAR §126.1 arms embargo, a zero percent *de minimis* rule applies to the ground vehicles and related commodities 600 Series items destined for Country Group D:5. By drawing from the constituents for the EAR's Country Group D:5 applicable to the 600 Series from the prohibited country list of the ITAR in §126.1, the Final Rules maintain the ITAR status quo by continuing to enforce the embargo in place under the ITAR. This permits the transfer of the ground vehicle 600 Series items to the CCL without compromising the State Department identified arms embargoes. Retaining the spirit of the ITAR arms embargo means in effect that when a ground vehicle 600 Series 'specially designed' windshield wiper controlled under paragraph .x attaches to a non-controlled vehicle, the entire vehicle is prohibited from export to a D:5 country. Correspondingly, the ITAR continues to maintain a zero percent *de minimis* 'see-through' rule for all defence articles on the USML.

Consistent with the longstanding State Department enforced arms embargoes, no licence exceptions are available under the EAR for the matching D:5 Country Group, except GOV. In the case of ground vehicle 600 Series items, the GOV exception provides a narrow exception for personnel and agencies of the U.S. government.

categories as means for classifying items under the ITAR's USML. To achieve this goal, the definition of 'specially designed' in Part 772 of the EAR adopts a 'catch and release' approach to the items transferred from the USML to the 600 Series. The first part of the 'catch' analysis for determining 'specially designed' items identifies captured items that 'as a result of development ha[ve] properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions in the relevant ECCN or U.S. Munitions List ('USML') paragraph'. The second part of 'catch' analysis for determining 'specially designed' serves to capture any remaining .x items including a part, component, accessory, attachment or software for use with a commodity otherwise described on the CCL or the USML.

The Administration purposefully designed the catch analysis for breadth, providing the highest level of 600 Series restrictions to .x items. Correspondingly, the ECR policy affecting the related commodities for 600 Series ground vehicles is designed to permit increased free trade of the least controlled .y items, while retaining control over all other 600 Series items through the available licence exceptions, including paragraph .x items. Conversely, in the policy spirit supporting .y items, the

released .x items not caught by the 'specially designed' definition, are not subject to the 600 Series controls. This treatment aligns with ECR policy goals of lower fences for less significant items.

Six available methods of release for caught 'specially designed' items

Once a 'specially designed' item is caught under the 'catch' analysis of paragraph .x, then the 'specially designed' definition provides six methods for its release from export control:

- *The Grandfather Release:* The ECCN paragraph to which the item belongs does not contain specially designed as a control parameter, or the item was classified as EAR 99 through a commodity jurisdiction or inter-agency cleared commodity classification ('CCATS').
- *The Bolt, Nut and Screw Release:* The item is merely a fastener, washer, spacer, insulator, grommet, bushing, spring, wire, or solder. A fastener can be a bolt, nut, nut plate, stud, insert, clip, rivet, or pin.
- *The Commercial Production Release:* A release for items with the same function as an item already in production, which is EAR 99 or in an ECCN controlled only for AT reasons.

- *The Commercial Development Release:* A release for items with common commercial applications that are being developed with knowledge that the item will be used with an EAR 99 item or in an ECCN controlled only for AT reasons.
- *The General Purpose Release:* The item is developed as a general purpose commodity or software, with no knowledge that it will be used in a particular commodity (such as a M1 Abrams) or type of commodity (such as a tank).
- *EAR 99 or AT Controls Only Release:* The item is developed with knowledge that it will be used with an EAR 99 item or in an ECCN controlled only for AT reasons.

Upon release from being ‘specially designed’ in paragraph .x, the item may still be classified elsewhere on the CCL or as EAR99, but the item will not be classified in paragraph .x of the 600 Series. It should be noted that the ITAR, too, contains a definition for ‘specially designed’; however, in the ITAR, for now, ‘specially designed’ only applies to revised USML categories with transfers to the 600 Series, and does not replace the meaning of specially designed as traditionally used throughout the ITAR.

600 Series EAR licence exceptions for ground vehicles and related commodities

ECR permits six licence exceptions for 600 Series items:

- (1) Government and international organisations (‘GOV’) is available for a small set of 600 Series items authorising receipt by government contractor support personnel, as well as for certain United States government and Department of Defense directed shipments.
- (2) Temporary imports, exports, re-exports, and transfers (‘TMP’) have an expanded scope for exports to the subsidiary, affiliate, or facility abroad of a U.S. person.
- (3) Limited value shipment (‘LVS’) permits shipments up to \$1,500 for most 600 Series items.
- (4) Technology and software unrestricted (‘TSU’) permits the release of technology and source code in the U.S. to full-time regular employees of U.S. universities.
- (5) Servicing and replacement of parts

licence (‘RPL’) permits the export of 600 Series items to repair EAR or ITAR items under certain conditions, including one-for-one replacements.

- (6) ECR expands the strategic trade authorisation (‘STA’) authorising the export of a number of 600 Series items .a - .w and .x to 36 allied countries without a licence, if those items are for end use by a government of those countries.

When using the STA licence exception for any item subject to the EAR (not just the 600 Series), the ECCN must authorise the use of STA and all reasons for control that apply to a given transaction for that transaction to be eligible to use STA.

In particular, applying STA to a ground vehicle 600 Series item requires that (i) non-U.S. parties have prior approval under a State Department or Commerce Department licence, and (ii) the consignee (i.e., item recipient) must provide a consignee statement agreeing to end-user restrictions and the performance of an end-use check. The consignee statement must contain the following five points:

- (1) notice that the item will be shipped under STA;
- (2) notice to the consignee of the ECCN;
- (3) there is no subsequent licence exception per additional permissive re-exports (‘APR’) (a) or (b) shipments;
- (4) consignee agrees not to transfer items shipped per the STA; and,

The effect on trade with China

ECR is not intended to change the export opportunities for prohibited countries listed in ITAR §126.1. The arms embargo with China remains as to the transferred items from the USML to the ground vehicles and related commodities 600 Series of the CCL, which are inherently of a military character and continue to be subject to the arms embargo. Specifically, the revised EAR states in §744.21 that ‘you may not export, reexport, or transfer any “600 Series” item, including .y items described in a “600 Series” ECCN, to the PRC without a license.’ Based upon the arms embargo with China, there is a presumption of denial that any licence would be granted. Again, this enforces the ITAR status quo upon the ground vehicles and related commodities transferred to the 600 Series.

- (5) consignee agrees to provide U.S. government documentation upon request. The exporter has the responsibility to notify the consignee that the shipment is exported under the STA and to obtain the consignee statement.

The expansion of the STA licence exception for ground vehicles and related commodities on the 600 Series items decreases the burden for licensees as to transactions routinely and uniformly previously approved by the DDTC, providing both an easier



mechanism for exporter compliance, and a better use of government resources.

Conclusion

For manufacturers of 600 Series ground vehicles and related commodities items classified .a - .w or in the .x paragraph, the items will require a licence or licence exception for export to all destinations except Canada, representing a less burdensome licensing requirement than previously in place under the ITAR. Under these less burdensome licensing requirements, manufacturers can increase export efficiencies, while accessing eligible markets, resulting in increased, and more profitable, sales than previously under the ITAR.

Manufacturers of .y 600 Series

items may export these items subject only to AT controls and longstanding arms embargoes.

Manufacturers of items previously controlled by the ITAR, including simple fasteners for armed ground vehicles, which are neither captured by .y, nor 'specially designed' and caught by .x, are released from the 600 Series and classified as EAR 99 or captured by a more lenient ECCN in the CCL.

Finally, items transferred from the USML to the CCL caught in .a - .w or specially designed pursuant to .x may be eligible for export under the more lenient EAR 600 Series licence exceptions.

With the implementation of the Final Rules for ground vehicles, manufacturers of ground vehicles and related commodities can seize the

opportunity to use the lessened export controls under the 600 Series of the EAR to increase sales and expand market share in foreign markets.

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