As part of the Export Control Reform Initiative, the State Department’s Directorate of Defense Trade Controls (DDTC) and the Commerce Department’s Bureau of Industry and Security (BIS) are requesting comments on their respective proposed rules published on May 5, 2015, with respect to items controlled under U.S. Munitions List (USML) Category XII. The proposed rules specifically focus on fire control, range finder, optical and guidance and control equipment (including night vision and thermal imaging devices and cameras, among others). The proposed rules identify items that will remain on the USML, as well as those items that will be transferred to the Commerce Control List (CCL) as they no longer warrant control under the International Traffic in Arms Regulations (ITAR). The BIS and DDTC are requesting that interested parties submit comments by July 6, 2015, that:

1) Identify where there are any gaps in coverage provided by the proposed rules;

2) Provide examples of control criteria that do not establish a bright line between the USML and CCL, or between the 600-series Export Control Classification Numbers (ECCNs) and the rest of the CCL;

3) Provide examples of items that would be controlled by USML Category XII or new 600-series ECCNs that are now in normal commercial use;

4) Assess the use of the phrase “permanent encapsulated sensor assembly”;

5) Discuss the impact of the new license requirements for exports to Canada of items in the BIS rule; and

6) Discuss the expansion of licensing requirements and removal of license exception applicability on items that are currently exportable under the EAR without a license or under an exception.
The following describes the proposed rules in greater detail.

**Export Control Reform Initiative**

By way of background, the Export Control Reform Initiative, which began in 2009, has resulted in significant revisions to the ITAR and the Export Administration Regulations (EAR). The overall objective of the Export Control Reform Initiative is to enhance U.S. national security by improving the interoperability of U.S. military forces with allied countries, strengthen the U.S. industrial base by reducing incentives for foreign manufacturers to design out and avoid U.S.-origin content and services, and allow export enforcement agencies to focus their resources on only those activities that pose the greatest risks to national security.

As part of the reform process, the DDTC and the Department of Defense have begun reviewing the various USML categories with an eye toward shifting jurisdiction of items that no longer warrant controls under the ITAR to the EAR. Items selected to remain subject to the ITAR are those that are either: (1) inherently military and otherwise warrant control on the USML; or (2) possess parameters or characteristics that provide a critical military or intelligence advantage to the United States and that are almost exclusively available from the United States (even if they are of a type common to non-military equipment). The BIS has taken steps to revise the EAR in order to accommodate those items that will shift from the USML to the CCL. Further, both the BIS and the DDTC have been working to harmonize their respective regulations and to create a bright line between those items controlled under the ITAR and those subject to the EAR.

**DDTC Proposed Rule**

Under the DDTC’s proposed rule, USML Category XII would control items such as:

- Fire control systems, equipment and their specially designed parts and components, including weapons sights, aiming and imaging systems, certain helmet display (HMD) systems, etc. in Category XII(a);
- Certain lasers, systems and equipment including target designators, coded target markers, aiming or illumination systems, rangefinders, LIDAR and LADAR range-gated systems, semiconductor lasers, stacked arrays, etc. in Category XII(b);
- Certain infrared focal plane arrays (IRFPAs), image intensifier tubes (IITs), night vision cameras and systems, binoculars, monoculars, goggles or head and helmet-mounted imaging systems, near-to-eye display systems, etc. in Category XII(c);
- Certain guidance, navigation and control systems and equipment, etc. in Category XII(d);
- Certain parts, components, accessories, attachments and equipment of the foregoing in Category XII(e); and
- Technical data and defense services relating to the foregoing in Category XII(f).

It should be noted that where IRFPAs and permanent encapsulated sensor assemblies are incorporated into a camera core, monocular or binocular or other higher order system, that system will be subject to the EAR (not the ITAR) unless it is specifically enumerated on the USML. This portion of the rule reflects the DDTC’s initial commitment as part of the reform process to move away from its so-called “see-through” rule.

However, the technical data and defense services relating to IITs, IRFPAs, IDCAs, related wafers and readout integrated circuits (ROICs) will remain controlled under the ITAR in Category XII even where the associated defense articles themselves are part of a system that is controlled...
under the EAR. Nevertheless, the proposed rule provides examples of technical data that would not be controlled under the ITAR, such as information directly related to basic operating instructions, testing results, the incorporation or integration of IRFPAs into higher level packaged assemblies not enumerated on the USML, or external interface control documentation for such assemblies that are subject to the EAR provided that the information does not include design methodology, engineering analysis or manufacturing know-how for an ITAR-controlled IRFPA.

### BIS Proposed Rule

The companion BIS proposed rule would move transitioning USML items to new 600-series ECCNs in Commerce Control List (CCL) Category 6, to revised existing ECCNs in CCL Category 7, and to other existing ECCNs that cover dual-use items controlled under the Wassenaar Arrangement. Thus, USML transitioning items would be classified on the CCL as follows:

| New 600-Series ECCNs in Category 6: | Military fire control, range finder and optical items (6A615); |
| | Test, inspection and production equipment for the above items (6B615); |
| | Software for the development, production, operation or maintenance of 6A615 or 6B615 items (6D615); and |
| | Technology for the development, production, operation, installation, maintenance, repair, overhaul or refurbishing of items controlled above (6E615). |

| Revised 600-Series ECCNs in Category 7: | Military guidance and control systems, inertial measurement units, inertial reference units or attitude and heading reference systems, certain accelerometers, gyros, certain gravity meters (7A611); |
| | Test, inspection and production equipment for 7A611 items (7B611); |
| | Software for the development, production, operation or maintenance of the above-reference Category 7 items (7D611); and |
| | Technology for the development, production, operation, installation, maintenance, repair, overhaul or refurbishing of the above-referenced Category 7 items (7E611). |

| Existing ECCNs controlled under the Wassenaar Arrangement: | Optical sighting devices for firearms (0A987); |
| | Concealed object detection equipment (2A984); |
| | Optical equipment and components (6A004); |
| | Lasers, components and optical equipment (6A005); |
| | Gravity meters/gravity gradiometers (6A007 and 6A107); |
| | Radar systems, equipment and assemblies (6A008); |
| | Accelerometers (7A001 and 7A101); |
| | GNSS receiving equipment (7A002); and |
| | Gyros and or angular sensors (7A002 and 7A102). |
The BIS proposed rule would also put new worldwide Regional Stability controls into place for: optical sensors and equipment in 6A002, related software and technology; ROICs and related technology in 6A990; software classified as ECCNs 6D003.c, 6D991, 6D994; and technology classified as ECCNs 0E987, 6E001, 6E002, 6E990 and 6E994. This means that licenses will be required to export or reexport these items to all destinations including Canada.

There will be no de minimis treatment for foreign-made military commodities classified in ECCN 6A003. Similarly, there will be no de minimis treatment for foreign-made items classified in any 600-series ECCNs that are destined for countries that are currently subject to a U.S. arms embargo; however, there is a 25 percent de minimis rule for the export or reexport of other foreign-made 600-series items destined for all other countries.

The production technology for IITs, certain FPAs, and ROICs will not be eligible for any EAR license exceptions because of the potential use of these items in night vision devices. In addition, license exception APR (“Additional Permissive Reexports” in Part 740.16 of the EAR)\(^1\) will not be available for items classified in ECCNs 6A002, 6A003 (except for cameras) or 6A990. Similarly, optical sighting devices for firearms classified as ECCN 0A987 will also not be eligible for license exception APR because of the night vision capability of those devices.

License exception STA (“Strategic Trade Authorization” per Part 740.20 of the EAR)\(^2\) is also not available for newly proposed technology controlled under 0E987, all items controlled under 6A002 and 6A990, 6D002 software (for use of commodities in 6A002.b), software controlled under 6D003.c, 6D991 software (for the development, production or use of items in 6A002, 6A003 or 6A990), software controlled under new 6D994, and technology controlled under 6E001, 6E002, 6E990 and 6E994.

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For More Information

For more information, please contact one of the authors, a member of Polsinelli’s International Trade practice, or your Polsinelli attorney.

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\(^1\) License exception APR permits the reexport without a license from the BIS for certain items from countries identified in Country Group A:1, and reexports to and among other specified countries. See Part 740.16 of the EAR.

\(^2\) License Exception STA permits the export or reexport of 38 specified ECCNs to the designated Tier 1 most trusted countries without a license from the BIS. It also permits the export or reexport of items subject only to national security (NS) controls to Tier 2 lower risk countries without a BIS license. See Part 740.20 of the EAR.
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