



Long-awaited changes to export controls for firearms and ammunition have arrived

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On January 23, 2020, the US Department of State, Directorate of Defense Trade Controls (DDTC) and the US Department of Commerce, Bureau of Industry and Security (BIS) each issued revisions to their respective regulations¹ to transfer export control authority over certain firearms and ammunition.

Effective March 9, 2020, the firearms and ammunition described below will be transitioned from the International Traffic in Arms Regulations (ITAR) to the Export Administration Regulations (EAR) under new Export Control Classification Numbers (ECCNs), resulting in several important changes for industry and exporters. In addition to this highly anticipated transition, which has been in the works since 2011, these new revisions add controls over “additive manufacturing” of firearms, also known as 3-D printing. Importantly, export control licensing obligations for firearms, ammunition, and accessories to most destinations will remain – making it critical to stay vigilant with respect to export control compliance.

As BIS and DDTC have acknowledged, the application of a new regulatory scheme to these products will create a transition burden on industry in the form of re-training employees, re-classifying products, and adapting current compliance systems and policies, but it will result in more flexible regulatory obligations overall.

A. OVERVIEW OF REGULATORY CHANGES

The DDTC and BIS revisions to their regulations simultaneously remove from ITAR control and add to EAR control most firearms and ammunition listed under Categories I, II, and III of the United States Munitions List (USML). BIS has created 17 new ECCNs on the Commerce Control List (CCL) of the EAR to house these items. BIS also has revised the definition of “published” in the EAR to retain control over 3-D printing of firearms. The brokering provisions of the ITAR remain unchanged and are not impacted by the changes to USML Categories I, II, and III.

Here is a summary of the key changes and takeaways:

1. USML Category I – Firearms and Related Articles

Category I of the USML, which covers most firearms and accessories, will be amended to retain only those firearms and related articles that have an inherently military application and are not otherwise widely available for commercial sale. For example, semi-automatic and non-automatic firearms up to .50 caliber (12.7 mm) and most related parts and components will become subject to the EAR and included in ECCN 0A501. Short and long barreled shotguns will be subject to the EAR under ECCN 0A502, and optical sighting devices such as holographic sights will be subject to the EAR under ECCN 0A504.

Among other new ECCNs for accessories, related test and production equipment, technology, and certain software, these new ECCNs are part of the more restrictive “500 Series” ECCNs, which place more stringent licensing obligations on potential exporters. Certain firearms and other defense articles will remain subject to the ITAR under USML Category I, including fully automatic firearms, high-capacity magazines (over 50 rounds), sound suppressers and silencers, caseless ammunition, automatic tracking and firing systems, and automatic stabilizers, among other items.

2. USML Category II – Guns and Armament

Category II of the USML includes mostly larger weaponry, such as mortars, grenade launchers, and artillery, which will remain subject to the stricter controls of the ITAR. Some less sensitive accessories and components, including for example, some tooling, test and evaluation equipment, are being transferred to the EAR. Also moving to the EAR are World War I-era artillery built between 1890 and 1919 and certain military flame throwers under ECCN 0A602, among other weapons deemed less sensitive. BIS will add new ECCNs under the “600 Series” to accommodate these items, consistent with past practices for items of a military nature. 600 Series items generally are subject to the most rigorous licensing restrictions under the EAR.

3. USML Category III – Ammunition and Ordnance

Instead of the current broadly described categories of items, Category III of the USML will be revised to enumerate the specific defense articles that it controls. The types of ammunition that will remain subject to the ITAR, for example, will include ammunition preassembled into links or belts, tracers, and certain low-weight non-metallic ammunition casings, but unlinked 5.56 mm ammunition will be subject to the EAR under ECCN 0A505.

4. 3-D Printing

Among the more controversial issues in the revised regulations is the addition of controls for software and technology used for additive manufacturing of firearms, known colloquially as 3-D printing. Under the current EAR, unclassified technology and software that is “published” on the Internet for unrestricted public dissemination generally is not subject to export controls. The new rule adds a paragraph to Section 734.7 of the EAR ensuring that publishing software or technology for the production of a firearm, firearm frame, or receiver controlled under ECCN 0A501 remains subject to the EAR.

Notably, these controls do not prevent the sharing of such software or technology between US persons within the United States and apply only to exports, which also includes the release of such software or technology to foreign nationals within the United States. Effectively, then, the online publication of 3-D printing schematics for firearms will require an export license from BIS.

5. Brokering

DDTC will retain jurisdiction over brokering activities relating to the export and import of defense articles and services. Brokering activities include actions to facilitate the manufacture, export, permanent import, transfer,

reexport, or retransfer of a US or foreign defense article or defense service, regardless of its origin, such as financing, insuring, contracting, or transporting such defense articles. DDTC requires brokers to register and obtain certain approvals for brokering activities related to items on the USML and items listed on the US Munitions Import List (USMIL).

Although the transfer of certain items from the USML to the CCL will remove some items from brokering controls under the ITAR, those same items are largely duplicated on the USMIL and will remain subject to DDTC's brokering controls. To avoid a double licensing requirement by BIS and DDTC, brokering activities related solely to the export or manufacture in the United States of items subject to the EAR will not require a DDTC brokering registration.

B. CERTAIN REGULATORY ADVANTAGES

Of the regulatory differences between the ITAR and the EAR, one that many in industry will welcome is the absence of a registration requirement under the EAR. Manufacturers, exporters, and brokers of ITAR items must maintain an annual registration with DDTC regardless of their export activity, which includes a fee and imposes the regulatory cost associated with that process. Although manufacturers with purely domestic sales will benefit the most from this relief, all parties dealing only in the newly-transitioned firearms, ammunition or accessories will benefit by the elimination of the ITAR registration burden.

Another notable difference from the ITAR is the *de minimis* concept in the EAR. Under the ITAR, a foreign-made product that contains *any* ITAR content is subject to the ITAR and all the significant regulatory restrictions that come with that status. Under the EAR, however, foreign made products that contain a *de minimis* amount of controlled US origin content – typically 25 percent or less – may not be subject to the EAR. This will come as welcome news to US manufacturers seeking to maintain a competitive edge in global sales.

A further significant advantage is that, even if controlled for export, these former USML items may be eligible for license exceptions under the EAR. For example, License Exception TMP for temporary exports, License Exception STA for exports to certain countries that are strategic allies, and License Exception LVS for certain low-value shipments all may be applicable. If a license exception does not apply, then, unlike ITAR license applications, there are no fees to apply for an export license with BIS and application requirements are typically less burdensome. Notably, however, items subject to the EAR that are to be used in or with a defense article, (eg, .x ECCNs) may still require a license from DDTC.

Despite these potential advantages to these regulatory changes, the structure and application of export controls remains complicated. Exporters, manufacturers, and brokers should consider carefully any compliance program changes as a result of these new rules to avoid potential pitfalls.

Learn more about this development by contacting any of the authors.

¹ ITAR Final Rule; BIS Final Rule

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