

U.S. State and Commerce Departments Reform Export Controls Applicable to Satellites and Spacecraft Systems

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On May 13, 2014, the U.S. Department of State's Directorate of Defense Trade Controls (DDTC) and the U.S. Department of Commerce's Bureau of Industry and Security (BIS) published interim final rules to revise the export controls applicable to satellites and spacecraft systems, as well as related parts, components, technology, software, and services.^[1]

The interim final rules, as the latest step in the Administration's Export Control Reform initiative, will loosen the export restrictions that apply to some less-sensitive space-related articles and technologies, by moving them from DDTC's U.S. Munitions List (USML) to BIS' Commerce Control List (CCL). Such articles and technologies will no longer be subject to the International Traffic in Arms Regulations (ITAR), administered by DDTC, and will instead be subject to the less-restrictive Export Administration Regulations (EAR), administered by BIS. These revisions to the export controls regulations, long-awaited by many in the satellite and space industry, should allow for easier export of commercial satellites and other items to many countries.

On November 10, 2014, articles such as most commercial communications satellites, some remote sensing satellites,^[2] planetary rovers, and radiation-hardened chips,^[3] along with related parts, components, and technologies, will be moved from the USML to Category 9 of the CCL.^[4] In addition, data transmitted to or from a satellite or spacecraft, when limited to information about the health, operational status, or function of, or measurements or raw sensor output from, the spacecraft, spacecraft payload, or associated subsystems or components (*i.e.*, "housekeeping data") will now be

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subject to the EAR and designated as EAR99.^[5] In a notable departure from the ITAR's "see-through rule," spacecraft and other items in new ECCN 9A515 generally will remain subject to the EAR even if exported, reexported, or transferred in-country with ITAR-controlled items integrated into and included as integral parts of the EAR-controlled commodity.^[6]

While generally more lenient than the ITAR, satellite and spacecraft-related commodities, software, and technology listed on the CCL will remain subject to end-user, end-use, and country-based export controls under the EAR. For example, all BIS license applications to export CCL-controlled spacecraft and related items to destinations in the EAR's Country Group D:5 will be reviewed consistent with the applicable U.S. arms embargo policy for that destination set forth in section 126.1 of the ITAR. In addition, under the EAR, there is no *de minimis* level for foreign-made items that incorporate U.S.-origin spacecraft and related items being moved to the CCL (classified in paragraphs .a through .x of a 9x515 ECCN) when they are destined for a D:5 country of launch or a D:5 country of control; thus, the EAR's controls will apply, even when these items are incorporated into a foreign-origin product.

Items with space-related military functions, sophisticated sensors, and most types of manned spacecraft will remain within Category XV of the USML and subject to export controls under the ITAR. Notably, assistance, including training, related to the integration of a satellite or spacecraft to a launch vehicle and services related to the launch failure analysis of a satellite or spacecraft will remain ITAR-controlled defense services, even if the satellite or spacecraft itself has moved to the CCL, and regardless of whether any technical data is transferred.^[7]

As many satellite- and spacecraft-related articles and technologies are transferred from ITAR to EAR control, affected manufacturers and exporters must carefully determine where their products fall in the complex and changing regulatory regime. They also may now need to acquaint themselves with the Commerce Department's regulations and licensing practices, which vary significantly from those of DDTC, and update their compliance procedures accordingly.

[1] *Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XV*, 79 Fed. Reg. 27,180 (May 13, 2014) (interim final rule); *Revisions to the Export Administration Regulations (EAR): Control of Spacecraft Systems and Related Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML)*, 79 Fed. Reg. 27,417 (May 13, 2014) (interim final rule with request for comments).

[2] DDTC's interim final rule noted that the agency is "committed to reviewing during the six months after the publication of {the} rule whether further amendments to the USML controls on civil and commercial remote sensing satellites are warranted, and seeks additional public comment on this matter." *Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XV*, 79 Fed. Reg. at 27,182.

[3] Radiation-hardened microelectronic circuits and other microelectronic circuits, and related technology and software, which are "specifically designed or modified" for spacecraft and satellite use, will be moved to the CCL as of June 27, 2014.

[4] The items and technologies being moved to the EAR will fall within four new 9x515 Export Control Classification Numbers (ECCNs).

[5] *Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XV*, 79 Fed. Reg. at 27,188.

[6] *Id.* at 79 Fed. Reg. at 27,187 (noting that an EAR-controlled spacecraft remains subject to such controls even when incorporating an ITAR-controlled hosted payload, but not when incorporating an ITAR-controlled primary or secondary payload); *Revisions to the Export Administration Regulations (EAR): Control of Spacecraft Systems and Related Items the President Determines No Longer Warrant Control Under the United States Munitions List (USML)*, 79 Fed. Reg. at 27,424.

[7] *Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XV*, 79 Fed. Reg. at 27,184.