

Export Reform

A Simple, Easy to Understand Methodology for Transforming the USML into a Positive List

Creation of a revised U.S. Munitions List (“USML”) based on positive criteria is critical to the success of the reform effort. Recognizably this is a large and complex project, and we greatly appreciate the opportunity to provide recommendations for consideration. The proper development of the positive criteria is a key factor that must be critically analyzed to ensure articles currently subject to commerce jurisdiction are not inadvertently captured on the USML and to limit jurisdictional ambiguity that exists within the present USML.

Clearly defined positive criteria will help eliminate the current misnomer where every nut, bolt, and screw for a defense article is itself controlled as a defense article simply because it has been “specifically designed,” without regard to whether the “specific design” contributes to the military capability of the end item or not. The result of this current approach is the U.S. Government export license system is saturated with applications that could be eliminated with a more prescriptive USML, which would allow the government significantly more time to focus on defense articles truly material to our national security and foreign policy objectives. Additionally, this approach has negatively impacted the U.S. defense industrial base by limiting its ability to compete against foreign entities operating under commercial export laws and increasing supply chain costs associated with ITAR compliance that has ultimately had a reciprocal negative impact on U.S. national security.

In creating a new U.S. Munitions List (USML) with positive criteria, the positive criteria put forth should be based on the unique military capabilities of an end-item, which is essentially their ability to operate in unique ways in hostile environments. Once defined, the end-item positive criteria would become the positive criteria for determining the level of control for lower level items included in the complete defense article. Accordingly, the controls for every component, piece, part, software, or technology cited for control should have traceability through the positive criteria directly to the capabilities listed in the end-item as the reason for control. For example, a tank might list the ability to target objects as one of its positive criteria. The weapon system (the gun and the firing computer) in that tank would be controlled on the USML, citing similar positive criteria, the ability to target objects. In the firing computer, the software might be the lone component that performs the targeting objects function, regardless of the computer hardware. Thus, the software would also be listed for control on the USML with the positive criteria that it can make the gun system and the tank perform targeting and the computer itself would not be included in the USML because it alone cannot target objects.

A positive list should be void of the jurisdictional ambiguity that stems from the use of the term “specially designed.” If there are no definitive, identifiable positive criteria directly traceable from a part or component to the unique military capability and end item, then those items should not be subject to control under the International Traffic in Arms Regulations (“ITAR”). Subjective catch all phrases such as “specially designed” are counter to the definition of a positive criteria list and exacerbate the lack of clarity that already exists within the USML.

In developing a positive list, one can either start from scratch, with a clean sheet of paper or, utilize the existing USML. The blank sheet of paper approach has some pitfalls as it can easily lead to the above deficiencies due to the difficulty of trying to ensure identification of every uniquely military article at the end of the task. A much simpler and logical approach is to start with the existing USML and identify the defense articles to retain.

Starting with the current top level articles within the USML, the only deficiency is the lack of positive criteria for those end items. Once the end item positive criteria are identified, the criteria will determine the components, parts and accessories that are then also USML controlled. The parts, components, accessories, etc to which the positive criteria applies would then further define the sub-components for USML control. This process can be repeated throughout the supply chain until reaching the end of the components that contribute directly to the unique military capability of the top level defense articles. This exercise would complete sub-category A for any USML category, the end items, parts, and components.

Once the end item hardware and parts and components to be controlled are defined, determining the production, materials, software, etc to be controlled should be fairly easy. To identify these positive criteria it is important that the items directly contribute to the end item performing its unique military function/mission.

The phrase “directly contribute” is very important in developing the positive criteria and the list. This keeps the list focused on those items that are the core items of defense articles. For example, the Apache helicopter may contribute to missiles being able to be fired on a target, but it is the weapon systems and weapons integrated onto the Apache that directly contribute to putting the missiles on target. The weapons systems and weapons could be integrated onto any helicopter, which could then put weapons on a target. Accordingly, the weapons and weapons systems become the positive criteria rather than the helicopter itself.

An example of this approach is Category VII of the USML, Tanks and Military Vehicles. An M-1 tank (Category VII(b)) is definitely a defense article as there are certain things the tank does that are unique to the military that should be defined as the positive criteria. For example, the tank has a large gun on the front of it and it has special armor, beyond just thick steel that increases the ability to withstand military attack. However, not everything that makes up that tank enables the tank to perform its uniquely military mission. If you remove the gun system, the special armor, and the special defense attachments that help it to defeat missiles, the remainder is a large, mobile hunk of steel. Although things such as the very thick steel turret or the hybrid-electric drive engine might appear to be candidates for inclusion on the positive criteria list, they actually do not directly contribute to the unique military aspects of the M-1 tank. Very thick steel is not unique to the military or to tanks, and different tanks have differing levels of steel thickness. The thickness of the steel is immaterial; it is the type of steel, which has already been called out above (the “special” armor). As for the turret itself, it moves left to right to allow the targeting system to aim the gun, but the turret does not aim the gun nor is the turret the gun itself. If you could not move the turret you would aim the gun by moving the tank itself. This same argument can be made regarding the drive system on the tank. Tanks started out with gasoline engines, then diesel engines, and now are progressing to hybrid electric drives.

The important point is that the tank has a drive system, any drive system. The exact type of drive system is immaterial as it is not unique to the tank. Again, it is the special armor and the gun system in this example that directly contribute to its designation as a defense article. Add the armor and gun system to any commercial vehicle and a tank is created subject to the control of the ITAR. Conversely, the turret or drive system does not directly contribute to defining the vehicle as a tank.

Prior to release of a newly defined list, it must be compared with commercially available items in the world market. An example of this can be found in infrared cameras. Single-band cooled and uncooled focal plane arrays are used in military weapons targeting devices and directly contribute to those devices performing in their military role. However, cooled and uncooled focal plane arrays are also available commercially world-wide. It is the differences built around the focal plane arrays that allow them to enhance the performance of military systems and justify the need for control of some focal plane arrays under the ITAR.

The export reform initiative is very much needed and transforming the USML to a positive list is a critical step in this effort. A clearly defined USML with positive criteria will significantly improve our overall national security. On the export control front, it will remove many of the unnecessary export license submissions to the State Department that are currently choking that system, and will allow both State and Defense to focus on items which clearly fit the definition of defense articles. On the defense industrial base front, it will permit companies with truly commercial products to compete in the global market and could help lower overall costs associated with developing and manufacturing products destined for the U.S. government. The end goal is to enable the U.S. government to focus more attention on articles critical to national security and allow the U.S. defense industrial base to remain healthy and viable in its continued efforts to develop leading edge systems for our war fighters. The above methodology will help to create a positive USML that will effectively support both government and industry while enhancing national security.